Human Rights and Tobacco Control

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Human Rights and Tobacco Control
Edited by Marie Elske Gispen and Brigit Toebes

Human Rights and Tobacco Control

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ELGAR STUDIES IN HEALTH AND THE LAW

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2020940510

This book is available electronically in the Elgaronline
Law subject collection
http://dx.doi.org/10.4337/9781788974820

ISBN 978 1 78897 481 3 (cased)
ISBN 978 1 78897 482 0 (eBook)

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to health and discussed the role of accountability, a Western concept that has recently been introduced to China, in advancing the right to healthcare in light of China's unique political, legal and social background.

Foreword: Human rights and tobacco control – now more than ever

Smoking represents one of the largest public health crises of our times. The figures on tobacco use are nothing short of alarming. According to the World Health Organization (WHO), tobacco kills over 8 million people each year, while over 8 million people die of diseases related to tobacco use and around 1.2 million people die of diseases related to exposure to second-hand smoke (SHS). It is worrisome that over the years, these numbers have increased rather than declined.

The same WHO figures show that roughly 80 per cent of the 1.1 billion smokers worldwide live in low- and middle-income countries. These countries struggle greatly to counter strong tobacco industry lobbies and their marketing and sales strategies. The tobacco epidemic pushes families lacking household income into poverty. Children are involved in tobacco farming instead of attending school, and may grow up without their parents or other loved ones. And, most importantly, the disability caused and lives lost are preventable.

The WHO Framework Convention on Tobacco Control enshrines minimum standards on tobacco control and provides guideposts for countries to shape their domestic tobacco control policies. However, the death, disability and impoverishment caused by the tobacco epidemic also raises many concerns from a human rights perspective.

Although the tobacco industry has previously claimed human rights to property and freedom of expression to conduct its business, the tide is now turning. Increasingly, and I argue correctly, the emphasis is placed on the vulnerability of individuals when it comes to smoking and exposure to SHS. Scholars, practitioners and policy makers increasingly emphasize that in the context of tobacco, individual human rights, such as the rights to health, life and development, are key.

The question remains as to how these rights come into play precisely in the tobacco context. This is a matter that has thus far remained somewhat under-researched. This book systematically outlines the foundations, international legal architecture and domestic implementation of human rights approaches to tobacco control.

I encourage policy makers, representatives of NGOs or international organizations and academics alike to consult this important work when integrating human rights in their tobacco control plans, strategies and frameworks.

Dainius Puras
UN Special Rapporteur on the Right to Health

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CommEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CommRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
EU	European Union
FCTC	Framework Convention on Tobacco Control
GC	General Comment
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NCD	Non-communicable disease
NGO	Non-governmental organization
SDG	Sustainable Development Goal
SHS	Second-hand smoke
UDHR	United Nations Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNGPs	UN Guiding Principles on Business and Human Rights
UNODC	UN Office on Drugs and Crime
WHO	World Health Organization

1. Introduction[1]

Marie Elske Gispen[2]

1. WHY A COLLECTION ON HUMAN RIGHTS AND TOBACCO CONTROL?

Tobacco use is the largest preventable cause of non-communicable diseases (NCDs) including cancers and respiratory and cardiovascular diseases. If used as intended by the tobacco industry, tobacco kills up to half of its users prematurely.[3] The World Health Organization (WHO) estimates that 8 million people die annually because of tobacco-related illnesses, of which about 890,000 die of diseases associated with tobacco smoke exposure (that is, second-hand smoke).[4] At the same time, people working in tobacco farming and production often work in informal industries under poor labour conditions which may lead to exploitation, underdevelopment and nicotine poisoning, also known as green tobacco sickness, which particularly affects children.[5] Indeed, throughout the entire supply chain, tobacco impairs health, hampers development and leads to significant numbers of premature deaths.

In the Sustainable Development Goals of 2016, the international community committed itself to the task of reducing premature mortality from NCDs by 2030.[6] Evidence-based, effective and legitimate tobacco control interventions are, therefore, of key importance. The WHO Framework Convention on Tobacco Control (FCTC) sets minimum standards States Parties must adhere

[1] This book has been published with the financial support of the Dutch Cancer Society and the editors wish to express their gratitude for this support.

[2] The views expressed in this chapter are those of the author and not necessarily those of the organization to which the author is affiliated. This chapter is part of the author's previous academic work and by no means relates to her current position.

[3] 'Tobacco Factsheet' (*WHO*, 26 July 2019) https://www.who.int/news-room/fact-sheets/detail/tobacco, accessed 6 January 2020.

[4] ibid.

[5] ibid.

[6] 'Goal 3: Ensure healthy lives and promote well-being for all at all ages' (*UN Sustainable Development Goals*) http://www.un.org/sustainabledevelopment/health/, accessed 6 January 2019.

to. While all tobacco control measures are important, a comprehensive package of tobacco control measures is considered most effective. According to the WHO, price and tax measures, (plain) packaging requirements, a comprehensive advertisement and sponsorship ban, smoke-free zones and mass media campaigns are the so-called 'best buys' of tobacco control interventions.[7] Recent research demonstrates that countries make progress in implementing some of the measures included in the FCTC, but that the implementation of other interventions is seriously lacking.[8] This shows that progress is being made but there remain challenges ahead. Human rights law can be a valuable mechanism to ensure accountability and advance implementation and enforcement of tobacco control interventions as included in the FCTC.[9] Moreover, while the FCTC is the central document in international health law to progress tobacco control, it provides little basis to address core human rights concerns. Indeed, tobacco is not just a health law issue, but also a human rights concern. The 'tobacco epidemic', as the harm caused by tobacco is often referred to, also raises questions from a human rights perspective, including the right to health and, for children in particular, the right to life, survival and development. In this context it should be mentioned that – as Taylor and McCarthy address in Chapter 10 – although the FCTC underscores the importance of human rights, it is not a human rights treaty.

We submit that addressing the human rights aspects of tobacco control or advancing tobacco control measures based on human rights requires an in-depth understanding of human rights law in tobacco control. We observe, however, that the role of human rights law in tobacco control remains somewhat under-researched. There is currently no collection on human rights and tobacco control, nor is there a comprehensive analysis of international, regional and specific technical aspects of tobacco control law and policy and human rights protection across all aspects of the tobacco supply chain. Instead, we found that mostly since adoption of the FCTC, human rights are often discussed only in a more fragmented way. In 2004, for example, Crow called for human rights to be used to promote international tobacco control

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[7] WHO, '"Best Buys" and other Recommended Interventions for the Prevention and Control of Noncommunicable Diseases: Tackling NCDs' (2017) 7, https://apps.who.int/iris/handle/10665/259232, accessed 6 January 2019.

[8] Geoffrey T Fong, Janet Chung-Hall and Lorrain Craig, 'Impact Assessment of the WHO FCTC Over Its First Decade: Methodology of the Expert Group' (2018) 28 Tobacco Control s84.

[9] See, for example, Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-based Approach to Tobacco Control' (2012) 21 Tobacco Control 208.

and enforce State responsibility in this respect.[10] In addition, the 2005 Special Supplement to the British Medical Journal's *Tobacco Control* addressed issues including the added value of or potential backfire of (individual) human rights (advocacy) within tobacco control,[11] the right to information,[12] the responsibilities of the tobacco industry and international trade agreements[13] as well as the ethical components of tobacco control[14] and human rights rhetoric.[15] In addition, Dresler and Marks, Dresler and colleagues, and de Silva de Alwis and Daynard have furthered human rights scholarship in the area of tobacco control and reconceptualized and (re)framed (a) human rights approach(es) to tobacco control.[16] Cabrera and Gostin have linked a human rights approach to tobacco control more specifically to the WHO FCTC and have tried to identify reinforcing links within both systems of law.[17] Cabrera and Madrazo have also analysed the potential of human rights law in Latin America, addressing human rights and tobacco control in a specific regional human rights context.[18] Other papers have reinforced the links between human rights and tobacco

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[10] Melissa E Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control' (2004) 29 Yale Journal of International Law 209.

[11] See respectively Brion J Fox and James E Katz, 'Individual and Human Rights in Tobacco Control: Help or Hindrance?' (2005) 14 Tobacco Control (Suppl II) ii1; James E Katz, 'Individual Rights Advocacy in Tobacco Control Policies: An Assessment and Recommendation' (2005) 14 Tobacco Control (Suppl II) ii31.

[12] See respectively Lynn T Kozlowski and Beth Q Edwards, '"Not Safe" is Not Enough: Smokers Have a Right to Know More Than There is No Safe Tobacco Product' (2005) 14 Tobacco Control (Suppl II) ii3; Simon Chapman and Jonathan Liberman, 'Ensuring Smokers Are Adequately Informed: Reflections on Consumer Rights, Manufacturer Responsibilities, and Policy Implications' (2005) 14 Tobacco Control (Suppl II) ii8.

[13] See respectively Melissa E Crow, 'The Human Rights Responsibilities of Multinational Tobacco Companies' (2005) 14 Tobacco Control (Suppl II) ii14; Ellen R Shaffer, Joseph E Brenner and TP Houston, 'International Trade Agreements: A Threat to Tobacco Control Policy' (2005) 14 Tobacco Control (Suppl II) ii19.

[14] Thomas E Novotny and D Carlin, 'Ethical and Legal Aspects of Global Tobacco Control' (2005) 14 Tobacco Control (Suppl II) ii26.

[15] PD Jacobson and A Banerjee, 'Social Movements and Human Rights Rhetoric in Tobacco Control' (2005) 14 Tobacco Control (Suppl II) ii45.

[16] See Dresler and others (n 8); Carolyn Dresler and Stephen P Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599; Rangita de Silva de Alwis and Richard Daynard, 'Reconceptualizing Human Rights to Challenge Tobacco' (2009) Faculty Scholarship Paper 1689.

[17] Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285.

[18] Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52 Salud Pública de México S288.

control,[19] and covered human rights and ethical aspects of tobacco-free generations,[20] children's rights and tobacco control,[21] disability rights and tobacco control,[22] human rights and the WHO's international tobacco control strategy (the MPOWER-Framework),[23] and its links with international economic law in tobacco control disputes.[24]

Alongside its contribution to human rights and tobacco control scholarship this book aims to complement existing general works on tobacco control. For instance, *Regulating Tobacco, Alcohol, and Unhealthy Diets* edited by Voon, Mitchell and Liberman[25] provides a comprehensive analysis of the international, regional and domestic law as relevant to regulating so-called behavioural risk factors. The edited volume includes one chapter on international human rights law but, given its scope, the included human rights angle is limited. Other more general books and scholarship on tobacco control may touch upon human rights issues but do not necessarily address the specific subject of study (for example tobacco farming, tobacco consumption and exposure to environmental tobacco smoke) from a human rights perspective.

All these publications reflect valuable key contributions to the debate on the interface between human rights and tobacco control. However, on their own account they reflect a somewhat fragmented image of the role of human

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[19] Richard A Daynard, 'Allying Tobacco Control with Human Rights: Invited Commentary' (2012) 21 Tobacco Control 213.

[20] Yvette van der Eijk and Gerard Porter, 'Human Rights and Ethical Considerations for a Tobacco-Free Generation' (2013) 24 Tobacco Control 238.

[21] Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment' (2017) 27 Tobacco Control 3; Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 Human Rights Quarterly 340; Esra Uzaslan, 'Editöre Mektup Letter Rights of the Children Against Tobacco (Protect Them Before They are Misled, Educate them Before They Take up the Habit)' (2004) 52 Tüberküloz ve Toraks Dergisi 300.

[22] Yvette van der Eijk, 'The Convention on the Rights of Persons with Disabilities as a Tobacco Control Tool in the Mental Health Setting' (2017) doi: 10.1136/tobaccocontrol-2017-053954; Lainie Rutkow, Jon S Vernick, Gregory J Tung and Joanna E Cohen, 'Creating Smoke-Free Places Through the UN Convention on the Rights of Persons with Disabilities' (2013) 103 American Journal of Public Health 1748.

[23] Mark Spires, 'The World Health Organization's MPOWER Framework and International Human Rights Treaties: An Opportunity to Promote Global Tobacco Control' (2014) 128 Public Health 665.

[24] Ernst-Ulrich Petersmann, 'How to Reconcile Health Law and Economic Law with Human Rights? Administration of Justice in Tobacco Control Disputes' (2015) 10 Asian Journal of WTO and International Health Law and Policy 27.

[25] Tania Voon, Andrew Mitchell and Jonathan Liberman (eds), *Regulating Tobacco, Alcohol, and Unhealthy Diets* (Routledge 2015).

rights in tobacco control. We believe there is a certain gap in the current body of literature as there is no single human rights approach and the interpretation and implementation of rights may vary across legal systems and countries. With this book we aim to fill this gap by providing a comprehensive collected account of human rights and tobacco control in international regional and domestic legal systems. In doing so, we aim to address the full spectrum of human rights across all stages of the tobacco supply chain. The book therefore provides a unique insight by addressing human rights concerns in the production stage (such as tobacco farming), consumption of tobacco products, assistance in cessation, and concerns related to exposure to second-hand smoke. It thus covers a broad spectrum. Notably, the book primarily focuses on individual and collective human rights claims and not on the perspective or interest of the industry in this respect.

The central purpose of this book is to aid in understanding current opportunities, gaps and pitfalls in human rights approaches to tobacco control, and to facilitate a better theoretical and practical understanding of international law in general, and human rights law in particular, in addressing one of the major global health concerns.

If used in its guiding capacity, we hope this book may serve as a basis on which law and policy makers can revisit their international and domestic law and policy actions in relation to tobacco control, better protect the vulnerable position of some sections of society therein and ensure that international, regional and domestic approaches are not just based on scientific evidence, but are also legitimate in terms of human rights standards. This book forms part of the activities of the European Scientific Network on Law and Tobacco (ESNLT).

2. OVERVIEW OF BOOK

This book is divided into three parts. Relying on law as the central discipline, Part I presents normative reflections on the foundations of a human rights approach to tobacco control addressing underlying principles such as dignity, autonomy and vulnerability of the individual in relation to State interference and tobacco control. Hence, the ambition of this part of the book is to expand on those overarching principles in which human rights law is grounded as relevant to tobacco control. These normative reflections include theories of ethics and philosophy as relevant to the human rights framework. In Part II the book extensively portrays the legal framework of relevant international and regional legal (human rights) systems. This part builds on two aims. First, it expands on the human rights standards in international and regional human rights regimes relevant to the entire value chain of tobacco control. In doing so it portrays a wide range of human rights approaches to tobacco control as

based on international human rights norms and regional human rights systems. The second aim is to understand how human rights approaches to tobacco control relate to other fields of international law, including international health law, international economic law and international drug control law. Finally, Part III turns to analysing specific elements of tobacco control law and policy and human rights protection by zooming in on national and local contexts.

2.1 Part I: Normative Reflections

There is no single interpretation of the foundations of a human rights approach. This also applies in the area of tobacco control. The underlying principles vastly determine the normative content of a rights-based approach in a given context. The first part of the book therefore examines ethical and philosophical accounts of a human rights approach to tobacco control. More precisely, how would foundational principles such as human dignity, vulnerability and autonomy conceptualize and justify tobacco control approaches? Moreover, to what extent should States regulate modifiable behavioural risk factors such as smoking? How far does our freedom stretch and what are the criteria for legitimate State interference with that freedom? These questions should be understood in light of both the conditions that make people smoke, which often lead to innate vulnerability to tobacco use, and the nudging and aggressive marketing techniques of the tobacco industry. Are people free to choose to smoke – is that even a decision? Or does human rights protection require these products not to be available in the first place? Since human rights law often portrays open norms instead of fixed categories of law and policy action, it is important to determine the normative benchmarks within which to understand and interpret the open norms included in positive legal norms. Evidently, as 'lifestyle regulation' might infringe upon individual freedoms, a clear normative framework based on principles underlying human rights law is required. Ultimately, such a normative framework based on theories of ethics and philosophy as relevant to human rights law may aid in understanding how to justify tobacco control approaches in policy and practice.

2.2 Part II: International and Regional Human Rights Approaches to Tobacco Control and Their Links to Other Fields of Law

Human rights are embedded in different regional and international frameworks. Critically analysing the interface between human rights and tobacco control thus requires an in-depth analysis of the various frameworks at hand. Central questions are: to what extent and on what legal basis do international and regional human rights norms set specific standards in relation to tobacco

control? Which rights are important and how does human rights law address the specific position of groups such as children, people with low socio-economic status or women? Do different regional regimes portray different human rights approaches to tobacco control? What forms of accountability mechanisms are available and to what extent can a human rights approach to tobacco control also include accountability mechanisms for the tobacco industry?

The various human rights approaches to tobacco control that international and regional human rights systems portray do not exist in isolation. Rather, there are other international and regional legal systems that foster or potentially hamper a human rights approach to tobacco control. This book goes beyond a mere internal reflection of what a human rights approach to tobacco control includes but also studies the multitude of approaches present in relation to other fields of law. Questions that arise include: how would enforcing a human rights approach to tobacco control relate to rights and obligations derived from other fields of international law? Do human rights and other fields of international law reinforce each other in the area of tobacco control or would such interplay lead to inevitable tensions? For instance, what role did human rights play in the adoption of the FCTC? And what is their potential in the current application and strengthening of the FCTC's impact on domestic law and policy? To what extent can international economic law and intellectual property law regimes facilitate human rights approaches to tobacco control or are they a priori obstructive? And what lessons can be learned from the interface of human rights and international drug control norms?

2.3 Part III: Specific Elements of Tobacco Control Law and Policy in Light of Human Rights

Finally, a human rights approach to tobacco control gains meaning in national and local contexts. Merely analysing human rights at the theoretical or international and regional legal levels would be insufficient. This is especially so because the way countries implement their international and regional human rights obligations varies greatly. Similarly, national governments have adopted a wide range of tobacco control measures and have made significantly different progress in this regard.

The aim of this final part of the book is to analyse several specific tobacco control interventions in light of human rights law. Relevant issues to be considered from a human rights perspective include smoking bans in cars, endgame laws and strategies, e-cigarette regulation and plain packaging. Additionally, it looks at what international and regional human rights law can learn from public health interventions at domestic levels in which human rights have played a more remote role. The aim of this section is not to provide a comprehensive geographical overview of domestic tobacco control approaches, but

rather to zoom into specific topical elements of tobacco control in a concrete domestic context. Such overview of specific elements facilitates debate among legal scholars but also appeals to policy makers by demonstrating how human rights relate to tobacco control policies in practice.

We would like to extend our gratitude to the Dutch Cancer Society for funding our research into children's rights and tobacco control, of which this book is one of the key results. We would also like to thank Edward Elgar Publishing for its friendly and swift cooperation in preparing this manuscript, and Nicole Rusli and Erin Jackson for their excellent editorial work. Above all, we thank all authors for their confidence in this project and for their valuable contributions.

PART I

Normative reflections

2. Dignity, vulnerability and human agency in the context of tobacco control

Deryck Beyleveld

1. INTRODUCTION

This chapter outlines 'a concept-theoretic' position on human rights[1] to use in critically evaluating actions taken to regulate and control the use of tobacco with specific reference to the rights of children. A concept-theoretic position is contrasted with a foundational philosophical position on the one hand and a juridical position on the other. A foundational position would aim to assess the justification for the system of human rights that is embedded in current international public law built around the United Nations Universal Declaration of Human Rights 1948 (UDHR), and would not preclude the possibility of rejecting the claim that there are human rights as these are defined in the international human rights system. A juridical approach takes the substantive provisions of the UDHR and its instruments (the various Conventions adopted to give legal effect to its provisions, including decisions and interpretations of human rights courts and commissions associated with these Conventions) as the yardsticks for the assessment of tobacco control actions. Of particular importance for the topic of this book is, of course, the Convention on the Rights of the Child 1989 (CRC). The concept-theoretic position that this chapter presents takes the concept of a human right as it is contained in the UDHR to ground assessment not only of what are legitimate actions to implement human rights instruments, but also of what are legitimate human rights provisions.

[1] This concept-theoretic position is also sketched with application to Directive 98/44/EU on Biotechnological Inventions in Mike Adcock and Deryck Beyleveld, 'Morality in Intellectual Property Law: A Concept-Theoretic Framework' (2016) 4 Intellectual Property Rights 154. The line of reasoning it depends on was first developed (for general application) in Deryck Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2011) 13 Human Rights Review 1, in which its fullest statement is to be found.

It does so on the grounds that the legally binding international human rights instruments purport to give effect to the UDHR, which they cannot do if they contain provisions that are incompatible with the concept of a human right articulated in or presupposed by the UDHR. As such, it claims normative authority over substantive provisions of human rights instruments purporting to implement the UDHR as well as substantive provisions of the UDHR itself. In other words, it purports to identify a principle or principles that anyone who adheres to the existence of human rights as these are defined (as against identified) in the UDHR must accept on pain of denying such adherence.

With this understood, the first part of this chapter (Section 2) argues that, unless the international human rights system abandons the UDHR's concept of a human right, the UDHR (and any instruments that purport to give effect to it) must adopt the Principle of Generic Consistency (PGC) of American philosopher Alan Gewirth, according to which actions are only permissible if they are in accord with the generic rights of all agents.

The terms in which the PGC is expressed are technical ones. An agent is a being who has the capacity and disposition to behave in order to achieve purposes that the being has chosen. Being an agent is defined in this way because it is only beings who have the capacity to behave in this way who are intelligibly held to be addressees of any practical precepts (which include human rights and the duties associated with them). Generic rights are rights to generic conditions of agency (GCAs), which are things that all finite embodied agents, like human agents, need in order to achieve, or to try to achieve, their purposes, whatever their purposes might be, in the sense that absence of a GCA has a negative impact on any human agent's capacity to achieve, or to try to achieve, the agent's chosen purposes, whatever these purposes might be.

Section 3 presents detail about the nature and the form of the generic rights and outlines how the PGC is to be applied to adjudicate actions and regulations. Section 4 specifies duties that human agents have to children and the ways in which children may be considered to have human rights, given that unborn children and very young children do not display the capacities required to be classified as agents. Section 5 outlines ways in which tobacco use can engage the human rights of children. Finally, Section 6 comments on this framework in terms of the significance of concepts of human dignity and vulnerability in relation to the rights of children.

Although this chapter will make reference to tobacco control regulations, its primary purpose is not to evaluate the permissibility of these regulations. To do so would require a much longer analysis. What it aims to do is to put in place a framework that is justified in human rights norms that can be used for such assessment. Consequently, statements it makes about existing tobacco regulations are to be taken as illustrating only how the framework is to be

applied to them rather than as definitive statements about the framework's evaluation of them.

2. THE PGC AS THE SUPREME PRINCIPLE OF HUMAN RIGHTS

According to the Preamble of the UDHR, all 'members of the human family', all 'human beings', and all 'human persons' are equal in inherent dignity and inalienable rights, and Article 1 UDHR proclaims: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

These statements tell us that the UDHR conceives of human rights as inalienable rights, possessed by born human beings simply because they are born human, thus equally possessed by all born humans. What is less clear is how the UDHR conceives of being human. This is because Article 1 (by virtue of its second sentence) appears to state that born human beings have duties to act out of respect for the rights of all born humans, when only beings who have certain capacities are intelligibly held to have duties, and not all born human beings, if 'being human' is defined purely biologically, display these capacities. The necessary capacities are the capacities of reason and understanding necessary to be an agent. Thus, prima facie, the UDHR does not grant human rights to very young children, let alone unborn children. Whether or not this is actually so will be returned to in Section 4.

In any event, if all born human beings are equal in dignity and human rights then all human agents are equal in dignity and inalienable rights, and this is the premise that the concept-theoretic position takes as an axiom.

Now, human rights are claim rights. They are not mere liberties. And no one can have a claim right to do or have anything if no one has a duty to act in accord with that right, and only agents can have duties. Given the starting premise, this means that all human agents have duties to respect the inalienable rights of all other human agents. But they cannot have duties that require them to forfeit their own inalienable rights. If they could have such duties, the rights could not be inalienable.

If we add to this the fact that there are GCAs, it follows that all human agents must be granted inalienable rights to possess the GCAs. This is because GCAs, being needed for all human actions as was outlined in the Introduction, are necessarily needed to carry out all possible human duties. More precisely, the GCAs are needed to enable human agents to exercise their own rights and to carry out their duties to act out of respect for the inalienable rights of others. If we then take all these steps into account, it follows that Article 1 UDHR requires all human agents to be granted equal inalienable rights to possess the GCAs.

However, having established this does not yet mean that it has been established that acceptance of Article 1 UDHR requires acceptance of the PGC. This is because the generic rights of the PGC are rights under the will conception, which is to say that the rights holder may release those who have correlative duties to these rights from these duties if the rights holder is willing to suffer the consequences of doing so. In other words, the right to a GCA is a right to have the GCA in accordance with one's will, which means that when the right holder is willing to forfeit the GCA the right is not waived and remains inalienable. Only the duties correlative to the right are waived. This conception is required because any human agent must accept the Principle of Hypothetical Imperatives (PHI). Indeed, any agent – call her 'Agnes', who can be any human agent – must accept the PHI, according to which, if having or doing X is necessary to pursue or achieve Agnes's chosen purpose E, then Agnes either ought to act for X *or give up E*. However, the PHI is not itself a hypothetical imperative, an imperative that must be accepted as a means to being able to pursue or achieve a purpose. Accepting the PHI is not something that Agnes must do in order to be able to act or to act successfully. She must accept that she ought to accept the PHI in order for it to be intelligible for her to think of herself as acting. If Agnes does not accept the PHI then she misunderstands what it is for her to be an agent, and implicitly denies being an agent. By so doing, Agnes renders it unintelligible for her to think that she has any rights or duties, and this means that the intelligibility of Article 1 UDHR presupposes that the generic rights it must recognize must be interpreted in accordance with the PHI. Given this, Article 1 UDHR presupposes that all human agents must accept that they ought to respect the possession of the GCAs of all agents, unless the recipients of their actions are willing to suffer generic damage to their ability to act, which is to say that Article 1 UDHR is only intelligible on the presupposition that human rights of agents are governed by the PGC.

Thus, on pain of giving up the concept of a human right that it operates with, the UDHR, as well as all instruments that purport to give effect to it, must take the PGC to be the supreme principle governing the content and form of all human rights of agents. Indeed, because the UDHR grants equal rights to all born humans, it must take the PGC as the supreme principle of the human rights of all human agents, to be the supreme principle of all human rights. Not to do so is to subordinate the rights of human agents to the rights of non-agents, which is to contradict that all human beings are equal in dignity and rights. The puzzle as to whether and how this is possible is addressed in Section 4.

3. THE NATURE AND APPLICATION OF THE GENERIC RIGHTS

In order to see how the PGC is to be applied in general, and specifically in relation to tobacco control and children's rights, one first needs a more profound understanding of the GCAs as such and the nature of the generic rights as justified in Section 1 above.

3.1 Content of the GCAs

GCAs are divided into two categories, those that are necessary to even be able to try to act, and those that are necessary to act with any general chances of success. The first category consists of basic GCAs. The second category consists of two sub-classes: non-subtractive GCAs, which are necessary to maintain one's abilities to act, whatever one's purposes; and additive GCAs, which are necessary to improve one's abilities to act, whatever one's purposes. Examples of basic GCAs are life, mental equilibrium sufficient to translate one's desires to achieve one's ends into action, freedom from physical and mental coercion (the latter including freedom of thought), and the necessary means to these such as food, clothing, health and shelter. An example of a non-subtractive GCA is accurate information about how to achieve one's purposes, while an example of an additive GCA is means to better know how to achieve one's purposes.[2] What is meant by saying that these are necessary conditions or means is that the absence of them or interference with them has at least some degree of negative effect on Agnes's ability to act at all or with any general chances of success. The negative effect does not have to be total and it can be subject to degrees of delay, which creates varying degrees of possibility that the effect can be counteracted. For example, being subjected to pain has a negative effect on Agnes's ability to concentrate on what she needs to do (and having this ability is a basic GCA), but only when it reaches a particular level (torture) does it stop her from being able to act at all, leaving her incapable of doing anything other than screaming involuntarily. Furthermore, actions that interfere with the possession of a GCA can vary from agent to agent. Thus, for example, Agnes might be allergic to peanuts whereas peanuts can be a healthy food for another human agent, Brian. Thus, feeding a human agent peanuts in certain circumstances can be a way to respect that agent's possession of the GCA to life, whereas in others it can be a way to threaten it. Then, with relevance to this volume, children may be more susceptible to generic harm by exposure to tobacco than adults. Thus, application of the PGC

[2] See Alan Gewirth, *Reason and Morality* (University of Chicago 1978) 53–5.

requires empirical knowledge about the biological and psychological make-up of human agents and their physical and social environments without this affecting the normative content of the PGC.

3.2 Form of the GRs

Because generic rights are governed by the PHI, and so are rights under the will conception, they can only be possessed by human agents. This is because only agents have the ability to release others from duties owed to them by their possession of the generic rights. It follows from this that various beings, including biological human beings, such as foetuses, very young children, very severely mentally disabled adults and persons in persistent vegetative states, who do not display capacities to act, cannot intelligibly be granted generic rights. However, as will be shown in Section 4, this does not mean that they do not receive the protection of the PGC.

Because the GCAs are instrumental needs, generic rights are both positive and negative, which is to say that they are engaged both by actions that interfere with Agnes's possession of them and by failures to protect her possession of them when she is unable to protect them herself and freely wishes her possession to be protected. However, because all other human agents, like, for example, Brian, have duties to respect Agnes's generic rights and have equal generic rights themselves, Brian can only have duties to assist Agnes when Agnes's generic rights are threatened in circumstances in which Brian's assistance does not endanger Brian's possession of the GCAs and any other human agent's possession of the GCAs in a disproportionate manner against their will. This means that, in application, positive duties very often fall only on collectives, not individuals. This is because, although Brian might be able to save Agnes from starving without threatening starvation of Brian and other human agents against their will, he cannot save all human agents from starvation without starving himself.

3.3 Conflicts Between GCAs

Conflicts between generic rights of different human agents can arise. When these occur, they are to be adjudicated, in the first instance, by the degree to which they are generically necessary. In other words, they are to be adjudicated by the criterion of degree of needfulness or necessity for agency because generic rights are, as already explained, rights to the GCAs.[3] However, balancing in line with the degree of needfulness might not be easy. Basic GCAs

[3] ibid 338–54.

outweigh non-subtractive ones, which outweigh additive ones. But within categories, things are not so simple. Lack of something needed for, for example, life, such as water, will kill Agnes more quickly than lack of solid food. Thus, because Agnes's right to life is a right under the will conception, unless Agnes thinks otherwise (in which case others are released from their correlative duties to her), she should be provided with water before being provided with food when she is in a position where she lacks both, and it is a matter of weeks before both will become available. This is because receiving water rather than food gives her a better chance of survival in these circumstances.

However, the circumstances might be so complicated, and assessment of what is 'more necessary' might not be genuinely capable of clear objective determination. In such cases, the PGC requires decisions to be made indirectly, which is to say by decision procedures that it authorizes (on which some brief comments are made in the next sub-section).

It must also be noted that rights conflicts are to be adjudicated under the PGC in a basically distributive manner. This is to say that if, for example, a basic generic right of Agnes comes into conflict with a non-subtractive generic right of any number of other human agents, then the conflict must be resolved in favour of the basic right of Agnes. It also means that an act that harms the same GCA of multiple human agents is not a greater violation of the PGC than an act that only harms this GCA of one human agent. This, however, is not to say that there can be no other reasons permitted by the PGC to require an act that harms one to be preferred to one that harms many when the choice between them is unavoidable.

3.4 Direct and Indirect Applications of the PGC

The PGC leaves numerous life choices and styles open to the choice of agents, only prohibiting actions and arrangements that impact negatively on other agents' possession of the GCAs. Because the PGC permits agents to release others from duties owed to themselves, it also permits arrangements that do not protect the GCAs of the consenting parties. This leaves an opening not only for agents to engage in dangerous, even life-threatening, activities. It also leaves it open for agents to agree to take on duties not prescribed by the PGC, and to delegate the resolution of problems of interpreting the PGC's requirements that cannot be resolved by clear and simple application of the criterion of degree of needfulness for action. What are appropriate procedures depends on the nature of the problem. There is no space to go into details of this here, but authorized procedures can range from, for example, tossing a coin, consulting scientific experts, trial by jury or by judge or by tribunal or majority decision of those affected, that is constrained by the PGC. The limitation to majority decision follows from the fact that the PGC does not permit the results of

its delegation to violate its clear direct applications. In practice, because the direct applications might be difficult to assess, this means that decisions of majorities – or of other delegated procedures – can be valid if they violate the generic rights of affected agents, but only within the frame of institutional arrangements directed at good faith attempts to act in accord with the direct applications of the PGC.[4]

4. DUTIES TO CHILDREN AND THEIR RIGHTS UNDER THE PGC

We are now in a position to consider what duties agents owe to children, and what rights, including human rights, children have under the PGC.

There are, in principle, five ways in which children can have rights or acquire them:

(1) as agents;
(2) in consequence of being so related to agents that the ways in which they are treated can violate the rights of the agents to whom they are related;
(3) by agents accepting duties to treat them in ways that do not violate the PGC but are not required by it;
(4) as future agents;
(5) as possible agents.

Because human rights under the PGC are inalienable, in being possessed simply by being human agents under the PGC, they are inherent rather than acquired and can owe nothing to any contingencies that might attend or impact upon their existence. This means that rights in categories 2 and 3 cannot be considered to be human rights, even though their existence is justified by the PGC and the human rights that it justifies. Such rights may be recognized in a human rights instrument, but analytically speaking they are not human rights themselves.

Rights in category 2 are correlative to duties owed to other agents by virtue of the rights, including human rights, of human agents other than children. They are vicarious rights as their existence depends on how these other agents happen to be affected by the way in which children are affected. For example, to harm Agnes's child might cause distress to her or other human agents that interferes with their possession of the GCAs. Since they have generic rights against such actions, human agents have duties not to treat Agnes's child in this way. But the duty is to *Agnes* and not to Agnes's *child*.

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[4] See, further, Deryck Beyleveld and Roger Brownsword, 'Principle, Proceduralism and Precaution in a Community of Rights' (2006) 19 Ratio Juris 141.

Rights in category 3 are also not inherent. They are consequences of human agents deciding to accept duties to treat children only in certain ways. Furthermore, as category 3 rights, they are restricted in only holding against agents who have freely consented to this. They may not be held to apply to human agents who have not consented to this, unless there are features that attend their grant that mean that they also fall into one of the other categories. And, here, it is important to note that agents can incur duties to children for more than one reason.

Category 1 rights are straightforward. There is no specific age at which children acquire the capacities that make them agents. And some might never acquire these capacities, just as some (and, eventually, all) will lose them. But, as soon as they become agents they must be granted all generic rights equally. Does this mean that very young persons of advanced mental development must be permitted to, for example vote, a right all human agents must be granted because the PGC requires all who are capable of being negatively directly affected by the avoidable actions of others to have a say in the permissibility of such actions? Not necessarily. A human agent's generic right to do something can be overridden by the need to protect the generic rights of other human agents. A child might have the capacities of agency but not have sufficient experience and knowledge to exercise these capacities responsibly. And even if the child does possess these capacities, any attempt to assess this on a case-by-case basis is likely to create further generic right-threatening scenarios. This is especially likely to be the case in circumstances where there is good reason not to trust those who are to adjudicate the issue, or those who lay down the rules for these adjudicators to follow, something that is, sadly, a very real problem in the societies that we currently inhabit. In such circumstances, it is at least permissible, all generic right-affecting factors considered, to impose an age qualification for voting. Indeed, in such circumstances, it is arguably required not to insist on experience and knowledge requirements for those above this age to vote.[5]

Category 4 rights are also inherent. They are rights that children, even unborn children, have on account of the generic rights they will have when they acquire the capacities of agency. As such, they are not vicarious as long as treating them now in various ways is necessary for them to have avoided generic damage in the process in which they will have become agents. Because the GCAs of human agents do not vary, they are not owed to human agents

[5] For discussion of the problems of applying the PGC in circumstances where institutional arrangements are not in accord with the PGC (which is far from uncommon even in the most enlightened of modern European countries), see Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing 2007) chapter 10.

because of the particular agents that they are, but simply to human agents because they are human agents. All actions have effects that take place only in the future. So, to do something that will generically harm a human agent is to do something that will affect a human agent in the future. Although the facticity of any harm being caused is independent of knowledge or intention of the behaviour of an agent that contributes to the harm, culpability for the harm rests in the intention to harm a human agent, and to knowingly treat an unborn child now in ways that mean the child, when an agent, will be generically damaged, is to intend to harm an agent. This said, these considerations do not protect a potential human agent from such harms if the generic damage is such that the potential human agent will never become an agent. Category 4 rights cannot, for example, be appealed to in order to rule against abortion.[6]

Category 5 rights require more theoretical construction and a change of perspective. While it is customary, and seems entirely natural, to think of beings who display the capacities of agency as agents, in fact only Agnes can know that she is an agent. This is because being an agent requires self-conscious awareness, and Agnes cannot know that any other being has such awareness. The best that Agnes can achieve is knowledge that some others, like Brian, behave as though they have such awareness. In other words, Agnes can only know that Brian appears to be an agent – and thus is an apparent agent – but not that he is an agent. However, this does not mean that Agnes can accept the PGC but avoid its requirements on the grounds that she cannot know that there are any other agents. This is because Agnes cannot accept the PGC as a presupposition of her adherence to rights under the concept of a human right per the UDHR (thus under any instruments purporting to give effect to the UDHR), without accepting that she is categorically bound to act in accord with the PGC. With this in mind, there are two possibilities. Agnes can suppose that Brian, who appears to be an agent, is not an agent and act accordingly; or she can suppose that Brian is an agent and act accordingly. In both cases her supposition could be wrong but Agnes cannot ever know whether or not this is so. However, if Agnes supposes that Brian is not an agent when he – albeit unknowingly to her – happens to be an agent, then she has violated the PGC.

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[6] For discussion of 'futurality' as a basis for granting rights to unborn children, see Deryck Beyleveld, Oliver Quarrell and Stuart Toddington, 'Generic Consistency in the Reproductive Enterprise: Ethical and Legal Implications of Exclusion Testing for Huntington's Disease' (1998) 3 Medical Law International 135. Relevant discussion is also to be found in Deryck Beyleveld, Marcus Düwell and Andreas Spahn, 'Why and How Should We Represent Future Generations in Policymaking?' (2015) 6 Jurisprudence 549; Deryck Beyleveld, 'The Duties We Have to Future Generations: a Gewirthian Approach' in Gerhard Bos and Marcus Düwell (eds), *Human Rights and Sustainability: Moral Responsibilities for the Future* (Routledge 2016) 137.

If, on the other hand, Agnes supposes that Brian is an agent when he happens not to be an agent, then Agnes will have acted contrary to the PGC. This is because, by virtue of the fact that Brian appears to be an agent, it is possible for Agnes to treat him as an agent, and the PGC requires Agnes to act according to the PGC if she can. Therefore, Agnes must treat all apparent human agents as agents.

It must also be recognized that the fact that a being does not display the capacities of agency does not mean that the being is not an agent. Beings that are not apparent agents could still be agents, and must be considered possible agents. However, this does not automatically mean that if Agnes supposes that beings who do not appear to be agents are not agents then she also violates the PGC. This is because Agnes cannot act towards apparent non-agents as though they are agents, simply because they are not apparent agents. Because apparent non-agents do not behave like agents, Agnes cannot rationally impose duties on them or structure any duties she might have to them as correlative to generic rights, which are rights under the will conception. If Agnes can, then they are apparent agents. But this does not mean that the PGC imposes no duties on Agnes to protect their interests. It does if Agnes thinks of an interest of an apparent non-agent as a need it has that would be a GCA if – unknowably by Agnes – it is an agent. And the fact is that all living creatures have such interests, and the number of these interests increases the closer they approach to being apparent agents.

Furthermore, simply being a potential apparent agent makes it more conceivable and thus, in a precautionary sense, more likely that an otherwise apparent non-agent is an agent. On this basis, the PGC might be said to grant inalienable rights that are not generic rights as these are based on a will conception, but interest rights, to even unborn humans, and certainly born children before they become apparent agents. When Article 3 CRC says that agents must act in the best interests of the child, this principle is justified if the interests of the child are interests to possible GCAs, but only if the child is not an apparent agent. Such duties cannot, however, be said to be equal to those of apparent agents in cases of conflict. The weight to be assigned to, for example, an interest right to life is not the same as the weight to be assigned to the generic right to life, simply because precautionary thinking under the PGC requires the precautionary probability of agency – the degree of approach to apparent agency – to be factored in in this weighting. This results in complications that mean, whenever the conflict between an interest right and a generic right is not over the same need, in which case the generic right will prevail, that

there is no algorithm to resolve it, and the adjudication must be on the basis of indirect applications of the PGC.[7]

We are now in a position to look at how tobacco use might affect the human rights of children.

5. ENGAGEMENT OF CHILDREN'S HUMAN RIGHTS BY TOBACCO USE

Tobacco use is capable of causing generic harm in a number of ways. It is well established that it can contribute to various cancers, coronary disease and other life-threatening conditions like emphysema. It can also do so when smoke is inhaled by third parties, and is particularly dangerous for those who suffer from asthma. And it can also cause harm to the unborn child when its mother or those around her smoke.[8] It is also highly addictive, and addictions, by their very nature, interfere with what would otherwise be an ordered pattern of rational thinking to achieve one's goals. Of course, it will be said that, for some, it actually aids their mental equilibrium; but, while this is so, this really only applies to those who are already addicted to it. Because it causes such harms, it also interferes with the rights of other agents who do not smoke by putting demands on health services to treat the diseases and afflictions that it has caused in any country where a national health service is provided. Resources that could be diverted to other health needs are diverted to treat those who have become ill because of tobacco use.

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[7] The idea that agents can have duties to epistemically possible agents that do not behave like agents, and (indeed) this whole framework of interest rights under precautionary reasoning, was first articulated in Deryck Beyleveld and Shaun D Pattinson, 'Precautionary Reasoning as a Link to Moral Action' in Michael Boylan (ed), *Medical Ethics* (Prentice Hall 2000) 39. A critical response to this reasoning is given by Søren Holm and John Coggon, 'A Cautionary Note against "Precautionary Reasoning" in Action Guiding Morality' (2009) 22 Ratio Juris 295, which is replied to in Deryck Beyleveld and Shaun D Pattinson, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon' (2010) 23 Ratio Juris 258. The kind of precautionary reasoning involved is further analysed in Deryck Beyleveld and Roger Brownsword, 'Complex Technology, Complex Calculations: Uses and Abuses of Precautionary Reasoning in Law' in Paul Sollie and Marcus Düwell (eds), *Evaluating New Technologies: Methodological Problems for the Ethical Assessment of Technological Developments* (Springer 2009) 175; Deryck Beyleveld and Roger Brownsword, 'Emerging Technologies, Extreme Uncertainty, and the Principle of Rational Precautionary Reasoning' (2012) 4 Law, Innovation and Technology 35.

[8] 'Fact Sheet – Health Effects of Cigarette Smoking' (*Centers for Disease Control and Prevention*) https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm, accessed 2 May 2019.

Some might think that because the PGC grounds rights under the will conception it permits those who are willing to suffer generic damage to their abilities to act to smoke. However, the PGC only permits them to do so when doing so does not result in generic harms to other agents against their will.

So, how does this engage the rights of children specifically? It does so in at least the following ways.

Unborn children have their rights as future agents engaged by the harms that they can suffer from smoking by their mothers, or by smoke in the environment of their mothers, whether or not this is caused by their mothers' smoking. The rights of born children not yet displaying the capacities of agency can also be harmed in this way.

Unborn children and born children not yet displaying the capacities of agency have their rights engaged by these harms as possible agents because they are not in a position to protect themselves from these harms or to give their consent to them.

Children displaying the capacities to consent have their rights engaged by these harms, but may be in a position to defend themselves from these harms or to consent to them. But their consent will be compromised if they are already addicted. And they are unlikely to be able to give effective voice to their objections. Even if they are able to do so, they face peer pressures,[9] and pressures from active marketing by tobacco companies, that make resistance to them difficult.[10] Consent is only valid when it is free and informed, but a regulatory environment that permits 'glamorous' advertising of smoking in an environment in which there are many addicted persons is one in which the ability of even adult persons of consenting capacity can be severely compromised.

This does not mean that the PGC requires tobacco use to be banned. But it does require it to be regulated in a way that recognizes that there are many addicted persons who cannot easily break their habit, and that they do have a right to smoke if this will not cause harm to others. Certainly this justifies, and, indeed, demands strict controls on advertising of tobacco, and restriction of the places in which those who wish to smoke may do so.[11] It also demands

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[9] Kimberley Kobus, 'Peers and Adolescent Smoking' (2003) 98 Addiction 37.

[10] National Center for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (Centers for Disease Control and Prevention 2012) Chapter 5.

[11] Some readers might have difficulty with the idea that the PGC might allow those who wish to smoke to do so because once they are addicted it could be said that their choices are not free. However, it must be allowed that some might freely choose to become addicted. Furthermore, although addiction exerts a coercive pressure it does not necessarily remove all capacity for free choice.

education drives and support for the addicted. As regards penalties and precise actions, it is not possible to go into this here. Because of the way in which the PGC requires itself to be applied, specific actions need to consider the particular persons involved and their particular circumstances, which requires targeted empirical research guided by the PGC. All that this chapter has attempted to provide is a broad framework and methodology for the assessments required.

6. DIGNITY AND VULNERABILITY UNDER THE PGC

I have chosen in this chapter to keep justification of the PGC as distinct as possible from its application to the use of tobacco in relation to children's rights. There are two reasons for this. The first is that the argument for the PGC I have presented is (given acceptance of the UDHR's concept of a human right) entirely a priori, while application of it requires empirical input, and a priori claims cannot be demonstrated or even illustrated empirically. The second is that the way in which the PGC has been justified means that it applies universally to all agents, regardless of their particular differences. As such, the degree to which various groups are vulnerable is not a separate consideration to be taken into account alongside the PGC. This, however, is not to say that vulnerability is not something that the PGC attends to. With this in mind, this final section attends briefly to how the PGC views vulnerability in relation to its applicability.

According to the Preamble to the UDHR, '[r]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

The Preamble to the United Nations International Covenant on Civil and Political Rights (ICCPR) (which is intended to give legal effect to the UDHR) repeats this statement and adds that the inalienable rights 'derive from the inherent dignity of the human person'.

Thus, human dignity is conceived of as the property that human beings have by virtue of which they have human rights. In the terms that Immanuel Kant would use, possession of human dignity is the *ratio essendi* of the principle that all human beings have human rights. But what is this property?

According to Kant, possession of free will is the *ratio essendi* of the moral law (the law of pure practical reason),[12] which is a natural law for beings who have purely rational wills, wills unaffected by heteronomous incentives. However, human beings do not possess purely rational wills. They are finite,

[12] Immanuel Kant, *Critique of Practical Reason* (first published 1787, Mary Gregor tr, CUP 1997) 4.

embodied creatures, with fallible capacities for reason, subjected to forces and incentives that are heteronomous in being governed by the universal law of causal mechanism. As such, the moral law is for them a categorical imperative, which has two *rationes essendi* – possession of free will and the capacity to be influenced by heteronomous incentives.[13]

Now, the idea that human rights are inalienable is nothing other than the idea that human rights are rights governed by a categorical imperative, an imperative which, by its very idea, all practical precepts and actions must be consistent with. Thus, anyone who believes that there are human rights per the UDHR must believe that the PGC is the categorical imperative, indeed, the sole categorical imperative, as (again by its very idea) there can be only one categorical imperative.[14]

Thus a Kantian who thinks that there are human rights ought to hold that human dignity consists in being a vulnerable (that is finite, embodied, and so on) being with free will (that is a being with the capacity to act for and in accord with the PGC), where this vulnerability includes inherent limitations on their capacities for reason and knowledge.

Though I cannot justify this here, I believe that Kant is right about the *ratio essendi* of any categorical imperative, provided that having free will is not understood as possession of the power to transcend mechanical causation, but in being so constituted that, on account of the limits of pure reason, agents cannot know whether or not they actually have free will or are merely products of mechanical causes, but must concede the possibility of either. Free will, in the applicable sense, is neither the mere capacity to act voluntarily, nor is it a metaphysical property indicating that human beings have an essence that means that they have an existence that transcends their physical existence.[15] Furthermore, I consider that this position is revealed simply by fully understanding the concept of a categorical imperative, and thus fully understanding the concept of a human right as presented by the UDHR.

This means that, at the deepest level, all human agents are vulnerable in two ways. They are vulnerable in needing the GCAs in order to act/act successfully, and they are vulnerable in being limited in their capacities for knowledge and understanding, and it is this vulnerability that means that human agents must accept that apparent non-agents have interest rights as possible agents. While there are voices that urge recognition of vulnerability that is constituted

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[13] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1784, Mary Gregor tr, CUP 1998) 24.

[14] ibid 31.

[15] See Deryck Beyleveld, 'Gewirth versus Kant on Kant's Maxim of Reason: Towards a Gewirthian Philosophical Anthropology' in Per Bauhn (ed), *Gewirthian Perspectives on Human Rights* (Routledge 2016) 13.

by lacking the capacities of agency as a fact that by itself imposes duties on agents, thus constituting a ground for the recognition of human rights independent of considerations of agency, the concept-theoretic position sketched in this chapter maintains that such a position is not only incompatible with the concept of a human right per the UDHR, but incompatible with any position that accepts that there is a categorical imperative. Indeed, I think it is incompatible with the idea that there can be any reasons for action at all. But to argue this I would need to argue that the PGC is the supreme principle, not merely of human rights, or of morality, defined as a system of rules governed by a categorical imperative, but the supreme principle of all practical reasoning. This I have done elsewhere.[16]

[16] See, especially, Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago 1991); Deryck Beyleveld, 'Williams' False Dilemma: How to Give Categorically Binding Impartial reasons to Real Agents' (2103) 10 Journal of Moral Philosophy 204; Deryck Beyleveld, 'Transcendental Arguments for a Categorical Imperative as Arguments from Agential Self-Understanding' in Jens Peter Brune, Robert Stern and Micha H Werner (eds), *Transcendental Arguments in Moral Theory* (De Gruyter 2017) 141.

3. Is there a human right to tobacco control?

Andreas Schmidt[1]

1. INTRODUCTION

Smokers lose around ten years in life expectancy and one in two smokers die of smoking-related conditions, such as chronic obstructive pulmonary disease, cancer and cardiovascular conditions.[2] As mentioned in the Introduction to this book, the magnitude of tobacco as a public health problem is staggering.

If human rights are meant to protect fundamental human interests – and life and health clearly rank among them – we might conclude that individuals should have a human right to be covered by tobacco control, given that tobacco threatens the health and lives of so many people. However, legally and philosophically, human rights are in a category of their own. To claim that it would be good if fewer people smoked is one thing. To say that national sovereignty should be restricted by human rights law to enforce tobacco control is quite another.

In this chapter, I argue that tobacco control should be covered by human rights law and defend this idea against philosophical objections. In Section 2, I draw on Allen Buchanan's theory of human rights and existing legal research to make the case for a right to tobacco control. In Sections 3, 4, 5 and 6, I complete this defence by addressing philosophical objections one might raise to a human right to tobacco control. Section 3 addresses a libertarian objection around the negative/positive rights distinction. Section 4 discusses whether strict tobacco control is compatible with freedom of choice. Section 5 discusses whether strict tobacco control is compatible with respect for individual consent. Section 6 discusses whether human rights legislation would facilitate power relations that unduly restrict national and individual self-determination.

[1] I would like to thank Marie Elske Gispen, Brigit Toebes, Deryck Beyleveld and Adam Etinson for helpful comments and pointers.

[2] Prabhat Jha and others, '21st-Century Hazards of Smoking and Benefits of Cessation in the United States' (2013) 368 New England Journal of Medicine 341.

I argue that concerns with negative rights, freedom of choice, consent and power relations do not speak against a human right to tobacco control. Rather than creating worrying power asymmetries, I argue that human rights legislation might help curb Big Tobacco's power to shape people's environments in deleterious ways. Particularly for people living in low-income countries with weaker public health governance – and other vulnerable groups like children – a human rights approach should be empowering.

Note that when I speak of 'a human right to tobacco control', I use this as a shorthand for the idea that existing human rights, such as a right to health, should be extended to ground claim rights for tobacco control. I do not mean that 'a human right to tobacco control' should itself be added as a fundamental human right to human rights treaties.

2. HUMAN RIGHTS AND TOBACCO CONTROL

2.1 The Philosophy of Human Rights

Among other projects, philosophers writing on human rights are concerned with their justification. Philosophers often distinguish between 'moral rights theories' (or 'orthodox' or 'naturalistic') and 'political' theories of human rights.[3] Moral rights theories seek to justify legal human rights by determining first the fundamental and universal moral rights people have solely in virtue of being human. For example, Alan Gewirth and James Griffin, in different ways, defend human rights as those necessary to protect human agency.[4] Political theories of human rights, in contrast, focus on the practical functions human rights play in international politics. Such theories take their cue from John Rawls in *Law of Peoples*, who focused on the role of human rights to limit

[3] Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018); S Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 Journal of Moral Philosophy 327.

[4] Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1991); Roger Crisp, *Griffin on Human Rights* (Oxford University Press 2014); Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982); James Griffin, *On Human Rights* (Oxford University Press 2009). Also see Beyleveld's chapter in this book, Chapter 2. For other moral rights theories, see Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) pt I and James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987).

sovereignty.[5] Following Rawls, recent defenders of the political view think that what makes human rights 'special' are their functions in international political and legal practice. Unlike Rawls, however, they draw a more varied and nuanced picture of what those functions are.[6]

For the purposes of this chapter – and the more applied focus of this book – I try to sidestep this dichotomy and largely draw on Allan Buchanan's theory of human rights. Buchanan's theory is theoretically flexible – thereby escaping the above distinction between moral and political theories – and seeks to connect relatively closely with the practice of international human rights. Two important planks of his theory are the following.

First, Buchanan distinguishes between a legal human right and a moral human right. Buchanan argues that to justify a legal human right it is neither necessary nor sufficient to identify a corresponding moral right.[7] For example, a corresponding moral right is not always necessary when we seek to justify a legal human right because some human rights are primarily there to enable societal values. For instance, legal human rights are sometimes meant to protect status equality, which can encompass laws against discrimination. Conversely, a corresponding moral right is insufficient to ground a legal human right.[8] For example, if you promise to help me out, then on some moral theories I might have a moral right that you keep your promise. But that does not imply that there ought to be a corresponding legal right.

While Buchanan rejects traditional moral rights theories, his view is not reductionist or 'merely political'. Accordingly, a theory like Buchanan's can allow for moral rights to play a role in the justification of legal human rights.[9] To justify legal human rights, Buchanan favours a *pluralistic justification* that can invoke individual moral rights, instrumental concerns and societal goods.

Second, Buchanan connects normative theorizing about human rights closely to international human rights practice, identifying several properties of this practice.[10] First, like Rawls, Buchanan thinks one important function

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5 John Rawls, *The Law of Peoples. With, The Idea of Public Reason Revisited* (Harvard University Press 2001).

6 Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2011); Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

7 Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013) 9–24, 53–7.

8 ibid 56–7.

9 Allen Buchanan and Gopal Sreenivasan, 'Taking International Legality Seriously' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018).

10 Buchanan (n 7) 86–106.

of international human rights practice is to impose constraints on national sovereignty. Second, international human rights practice seeks not only to list a desirable set of human rights, but also to identify correlative institutional duties and duty-bearers. Third, human rights legislation is in some way 'superior' in status to domestic law, although countries with a dualist legal system that sign up to international human rights must still translate human rights into national law. Fourth, human rights law primarily invokes obligations for States by identifying duties that States have towards the people under their jurisdiction. However, human rights are also increasingly important to non-State actors like private corporations too. Fifth, human rights law needs to protect human well-being. Sixth, human rights law 'exhibits a robust commitment to affirming and protecting the equal basic moral status of all individuals' exemplified by ascribing human rights to all individuals irrespective of gender, race, religion and so on, by demanding anti-discrimination legislation and equality before the law.[11] Finally, human rights law is 'aspirational' in that it can sometimes exercise political influence beyond the strictly legal obligations it imposes. Or as Buchanan puts it: 'international human rights law serves as a moral standard that can be employed for political mobilization to change the behavior of states, corporations and other agents, even in cases where it does not impose clear legal duties on them'.[12]

2.2 Human Rights and Tobacco Control

Let us return to tobacco control. To justify legal human rights to tobacco control, we need to establish that there are fundamental interests to be protected, that such human rights cohere with the existing function and practice of international human rights law, and that we can plausibly identify correlative duties and duty-bearers. The legal case for a human right to tobacco control is relatively well explored in the literature.[13] Let me briefly rehearse its main points.

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[11] ibid 28, emphasis removed.

[12] ibid 26.

[13] Melissa E Crow, 'The Human Rights Responsibilities of Multinational Tobacco Companies' (2005) 14 Tobacco Control ii14; Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599; Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-Based Approach to Tobacco Control' (2012) 21 Tobacco Control 208; Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285; Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment' (2018) 27 Tobacco Control 3. The idea of a human right to tobacco control is also con-

The central human right that speaks for tobacco control rights is a right to health, as outlined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). As mentioned above, tobacco consumption is among the leading causes of death and disease. The ICESCR states in Article 12 that individuals have a right 'to the enjoyment of the highest attainable standards of physical and mental health'.[14] Given just how big a threat tobacco is to life, health and well-being, a failure to protect against its harms is a failure to protect the human right to health.

To specify the nature and scope of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comments. These comments are highly authoritative but not, strictly speaking, legally binding. In General Comment 14 the CESCR specifies that States have obligations 'to provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make'.[15] So, the case is even stronger and more straightforward for protecting children.[16]

However, human rights to tobacco control extend beyond a right to health. Dresler et al list further relevant rights:

> For example, the right to a healthy environment (consider secondhand smoke or protection from nicotine from green tobacco sickness, or exposure to pesticides during tobacco agriculture); right to information (consider knowledge relative to risks of nicotine addiction …); right to education (consider children kept from school for tobacco agriculture); right to a sustainable income (consider indentured servitude or 'company store'); right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (consider use of limited family income to purchase tobacco rather than food).[17]

Going back to Buchanan's identification of central features of international human rights practice, we can now appreciate how those make a human right to tobacco control plausible and attractive. First, such a right protects fundamental human well-being against the grave dangers posed by tobacco. Second, establishing protection against the harms of tobacco as a human right might

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tested by some who argue tobacco control should fall within the remit of human rights but not as a human right to tobacco control.

[14] Cabrera and Gostin (n 13); Crow (n 13).

[15] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 [23].

[16] Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41(2) Human Rights Quarterly 340; Toebes and others (n 13).

[17] Dresler and others (n 13) 209–10.

help constrain or at least better monitor States that fail to protect their citizens. Such a right might open up avenues and instruments for better international reporting, monitoring and enforcement.[18] Third, human rights can empower States when they face powerful tobacco companies. Clearly identifying human rights-based duties to protect citizens might legally empower States and add international power (more on this in Section 6). Fourth, as mentioned earlier, Buchanan argues that the practice of international human rights can help mobilize politically around an issue even beyond existing legal obligations. This could potentially give greater prominence to tobacco's threat to human life and health. Finally, a legal human right to tobacco control need not be based on exactly one moral right only, as the above quotation shows. Multiple reasons can justify such a right, something that is well captured by Buchanan's justificatory pluralism.

So, we have both a good philosophical and legal case for a human right to tobacco control. However, the philosophical case encounters challenges, to which I turn now. Logically, they all revolve around the worry that even if it is valuable for individuals not to smoke, this by itself is insufficient to establish that governments have enforceable duties to pursue tobacco control.

3. A LIBERTARIAN CHALLENGE: NEGATIVE RIGHTS

The first worry stems from the familiar distinction between negative and positive rights. A libertarian might argue that legal human rights can only be negative. A legal human right to tobacco control cannot be universally demanded of States because such a right would imply many positive and not just negative duties. For example, tobacco control is typically thought to include policies like warning labels, public health information campaigns and cessation provision, all of which go beyond a negative duty not to interfere.

However, Henry Shue famously argued that the distinction is untenable. Even traditional, purportedly negative rights involve a rich set of positive duties from States.[19] For example, the 'negative' right to bodily integrity requires 'positive' duties such as policing.[20] Conversely, many purportedly positive rights involve several negative duties. For example, Shue defends a right to subsistence. He argues that the State and private actors can act in

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[18] See Cabrera and Gostin (n 13).

[19] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980). Also see Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 Human Rights Law Review 81.

[20] Shue (n 19) 21.

ways that move people below the subsistence line.[21] A basic right to subsistence implies a negative duty to abstain from such actions. We can easily transfer the argument to tobacco control: a human right to tobacco control is largely about States protecting citizens against actions from companies that threaten human life and health. Accordingly, even purportedly 'positive' rights involve protecting individuals against third parties. Moreover, even if a right appears 'positive' rather than 'negative', this would be no principled argument against it.

Human rights practice now commonly replaces the negative/positive distinction with a threefold distinction. First, States ought themselves to respect human rights and not violate them. Second, States ought to protect rights against those that seek to violate human rights. Third, States and the international community need to develop the necessary infrastructure, monitoring and delivery systems to positively fulfil human rights.[22]

4. A FREEDOM RIGHT TO SMOKE?

A deeper philosophical challenge to public health legislation revolves around individual freedom.[23] Even if cigarettes are bad for individuals, a commitment to personal freedom might severely limit how far governments can regulate the sale, advertising and consumption of harmful products, including cigarettes.[24]

In this section, I use 'freedom of choice' exclusively as being about *external* choice options. I do not discuss the psychology behind an agent's decision

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[21] ibid 2.

[22] See UN CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23; and UN CESCR, 'General Comment No. 14' (n 15); and International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (26 January 1997) http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html, accessed 30 May 2019. Also see Cabrera and Gostin (n 13) 288; Koch (n 19).

[23] Tobacco companies have in recent years adopted the language of freedom rights to push a different objection, claiming that tobacco control interferes with their property rights and freedom of expression. In response, legal scholars have argued that those rights do not apply to tobacco companies the way they claim and, even if they did, proportionality would require that other rights, such as a right to health, carry more weight. See Cabrera and Gostin (n 13).

[24] Philosophers sometimes debate whether there is 'a right to liberty'. For example, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 266; Herbert LA Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Review 175; Douglas N Husak, 'Ronald Dworkin and the Right to Liberty' (1979) 90 Ethics 121. However, on the pluralistic justification picture adopted here, justifying a legal right does not necessitate a corresponding moral right. Plausibly, whatever the 'correct' set of human rights, freedom is among the values such rights should protect.

(which I discuss in Section 5). Freedom of choice is about having 'specific freedoms' to choose from. On so-called negative theories of freedom, I have the specific freedom to do *x*, if and only if no one imposes interpersonal constraints on my doing *x*.[25] Other theories, for example the capability view, hold that not being interfered with is necessary but insufficient for having a specific freedom. I am free to do *x*, if and only if I have the capability to do *x*.[26] How much freedom of choice I have then depends on how many and what kinds of specific freedoms I have.

So, is tobacco control compatible with (external) freedom of choice? The answer, one might be tempted to say, is 'it depends'. Tobacco control can be very hands-off, for example, when the government offers cessation programmes or makes information about health risks available on a government website. At the other extreme, tobacco control might take more invasive forms, such as a ban on cigarettes, as has been put in place in Bhutan. My strategy here is to provide arguments as to why even the most radical proposals are in principle compatible with personal freedom. Given this compatibility, we should then have an easier time justifying less invasive, more standard tobacco control measures, such as taxation, restrictions on smoking in public places, information campaigns, regulation of products, age restrictions and so on. I develop the arguments in much greater detail elsewhere, so I here only rehearse the main argumentative moves.[27]

The first argument builds on a thought experiment. Imagine cigarettes were not yet a consumer product in your society and a company sought to introduce cigarettes as a new product.[28] Imagine a regulator such as the US Food and Drug Administration (FDA) must now decide whether to allow cigarettes. Assume further that the regulator knows what we know about cigarettes'

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[25] Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin (ed), *Four Essays on Liberty* (Oxford University Press 1969); Ian Carter, *A Measure of Freedom* (Oxford University Press 1999); David Miller, 'Constraints on Freedom' (1983) 94 Ethics 66; Hillel Steiner, *An Essay on Rights* (Wiley 1994).

[26] GA Cohen, 'Freedom and Money' in GA Cohen and Michael Otsuka (eds), *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (Oxford University Press 2011); Matthew H Kramer, *The Quality of Freedom* (Oxford University Press 2003); Andreas T Schmidt, 'Abilities and the Sources of Unfreedom' (2016) 127 Ethics 179; Amartya Sen, *Development as Freedom* (1st edn, Knopf 1999).

[27] Andreas T Schmidt, 'Freedom and Tobacco Control' (unpublished manuscript, 2018).

[28] Andreas T Schmidt, 'Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control' (2016) 16 The American Journal of Bioethics 3; Andreas T Schmidt, 'Response to Open Peer Commentaries on "Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control"' (2016) 16 The American Journal of Bioethics W1.

health risks. The regulator would not permit cigarettes, and such a decision might strike us as justified.[29] As Khoo et al write: 'tobacco is such a public health hazard that it is only an historical accident that makes its use lawful'.[30] But if withholding such an option is justified in this hypothetical scenario, should it not also be justified to withdraw such an option when it already exists? As I argue elsewhere, while forceful, this argument is not by itself decisive. Withdrawing an existing freedom might typically require a stronger justification than withholding a new, equivalent freedom. For example, existing options might have entered people's conceptions of the good, or communities might have developed traditions that involve such options. But the overall challenge remains: unless we have strong arguments as to why such reasons should be decisive, withdrawing the freedom to smoke should not be prohibitively harder to justify than withdrawing the option.

A second argument is about intrapersonal freedom or freedom across time. If a person's freedom matters now, her future freedom should also matter. If a young person takes up smoking, she might develop a strong addiction and, as a result, her future health, life expectancy and expected disposable income will be drastically reduced. As a result, her expected future freedom is drastically reduced.[31] Therefore, removing the option to smoke can sometimes increase a person's expected future freedom.[32] Therefore, a concern with freedom of choice can speak for rather than against strict tobacco control.

5. CONSENT

Some readers might worry that my response treats freedom as a good that ought to be promoted. Instead, they might argue, freedom is about respecting individuals in their voluntary decisions: even if cigarette smoking reduces peo-

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[29] Richard Ashcroft, 'Smoking, Health and Ethics' in Angus Dawson (ed), *Public Health Ethics: Key Concepts and Issues in Policy and Practice* (Cambridge University Press 2011) 88; Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge University Press 2013) 169; Robert E Goodin, 'The Ethics of Smoking' (1989) 99 Ethics 574, 611; Deborah Khoo, Yvonne Chiam, Priscilla Ng, AJ Berrick and HN Koong, 'Phasing-out Tobacco: Proposal to Deny Access to Tobacco for Those Born from 2000' (2010) 19 Tobacco Control 355.

[30] Khoo and others (n 29) 356.

[31] The structure of the argument is familiar from John Stuart Mill's argument about voluntary slavery. John Stuart Mill, *On Liberty* (Penguin 1979) 173.

[32] Andreas T Schmidt, 'An Unresolved Problem: Freedom across Lifetimes' (2017) 174 Philosophical Studies 1413; Schmidt (n 27). Also see Kalle Grill and Kristin Voigt, 'The Case for Banning Cigarettes' (2016) 42 Journal of Medical Ethics 293. See Jessica Flanigan, 'Double Standards and Arguments for Tobacco Regulation' (2016) 42 Journal of Medical Ethics 305, 305 for a response.

ple's range of options, it is not the State's responsibility to increase expected freedom, as long as people consent freely. Respecting individuals as free implies letting people make their own decisions, even when those are bad for them.

Of course, respecting consent would leave many tobacco control policies untouched. First, we typically do not consider children sufficiently responsible to freely consent to various drugs, which gives the government much leeway for tobacco control directed at minors. Second, second-hand and third-hand smoke are hard to consent to, which makes protections such as smoking bans in restaurants and pubs easier to justify. Third, providing health information about cigarettes and even graphic warning signs are compatible with consent, as individuals can still decide for themselves whether to smoke or not.

I argue now that a concern with consent does not even rule out more drastic interventions. For this, I first discuss how rational and autonomous people are in their decisions to smoke. Prima facie, how strongly we should value consent as an argument in law and public policy also depends on the extent to which people make decisions autonomously. Being able to consent requires, first, that one is sufficiently autonomous in one's preferences and desires when one decides (volitional autonomy) and, second, that one is sufficiently rational in assessing options (rationality). If those conditions are not fulfilled, then the argument against interference becomes much weaker and other reasons, such as health and well-being, more easily override a concern with consent. Let me start with volitional autonomy.

First, acting autonomously requires acting from desires or preferences that are truly one's own.[33] Consider cases where I lack volitional autonomy: through manipulation, peer pressure, brainwashing or oppression, I might acquire preferences that I would not have chosen for myself had I had the opportunity to develop preferences in a free and non-heteronomous environment. While different theories spell out volitional autonomy differently, the theoretical details should not detain us here. Most theorists agree that tenacious addictions impinge volitional autonomy. And nicotine addiction does so in several ways.

First, most smokers say they wish they had never started, most have tried to stop but failed, and most wish they could stop.[34] Smoking is addictive. One way to capture addiction here is through Harry Frankfurt's classic analysis.

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[33] John Christman, 'Autonomy and Personal History' (1991) 21 Canadian Journal of Philosophy 1; Harry G Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 The Journal of Philosophy 5; Michael Garnett, 'The Autonomous Life: A Pure Social View' (2014) 92 Australasian Journal of Philosophy 143; Marina Oshana, *Personal Autonomy in Society* (Ashgate Publishing Ltd 2006).

[34] Grill and Voigt (n 32).

While addicted smokers desire cigarettes, this first-order desire clashes with a higher-order desire most smokers have, namely the desire not to desire to smoke.[35] Moreover, most smokers likely hold desires whose fulfilment is made difficult or even thwarted by their addiction. For example, along with almost everyone else, most smokers likely prefer to be in good rather than bad health, to live longer rather than shorter lives, and to have disposable income to spend on things other than cigarettes.

Second, most smokers started smoking, either occasionally or daily, before the legal age of consent. For example, 80 per cent of adult US-American smokers had their first cigarette before they were 18 and more than 60 per cent of daily smokers were daily smokers before they were 18.[36] Moreover, if you start early, your brain structure is more malleable, which can intensify your nicotine addiction later.[37] Finally, young people can be subject to peer pressure, which makes their decision to take up smoking look even less like the result of an autonomous preference.[38]

Taken together, these points suggest that smoking itself can reduce people's volitional autonomy and thereby their capacity to consent to using tobacco.

Besides volitional autonomy, competent consent also requires some degree of rational agency. Imagine you are confronted with a choice between many options. Assume you have 'volitionally autonomous' goals and now need to assess which options will best further your goals. In many cases, you might consistently make the wrong choices. For example, imagine you plan to stick to a healthy diet and consistently misjudge what is healthy, miscalculate calorie information and consistently make unhealthy choices. Your inability to make good decisions seriously hampers your ability to lead an autonomous life. Rational agency here requires sufficient information about options and the ability to process such information guided by one's conception of the good. Now, applied to smoking, various arguments suggest that smokers consistently make irrational choices.

First, do people know enough about smoking? In rich countries these days, most people know that smoking is not good for you.[39] However, such informa-

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[35] Frankfurt (n 33).

[36] US Department of Health and Human Services, 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (National Center for Chronic Disease Prevention and Health Office on Smoking and Health 2012) 134–5.

[37] Stephanie R Morain, 'Tobacco 21 Laws: Withdrawing Short-Term Freedom to Enable Long-Term Autonomy' (2016) 16 The American Journal of Bioethics 26, 26–7.

[38] See Grill and Voigt (n 32) for further discussions.

[39] K Michael Cummings, Andrew Hyland, Gary A Giovino, Janice L Hastrup, Joseph E Bauer and Maansi A Bansal, 'Are Smokers Adequately Informed about the Health Risks of Smoking and Medicinal Nicotine?' (2004) 6 Nicotine & Tobacco Research S333; M Siahpush, A McNeill, D Hammond and GT Fong, 'Socioeconomic and

tion dispersion might not be enough. It is not clear everyone can adequately assess the magnitude and extent of the risks. Smokers might know that smoking increases one's cancer risk but are often ill-informed about the other risks, such as cardiovascular and pulmonary conditions. Smokers also often have false beliefs about the relative harmfulness of cigarettes, for example thinking that low-tar, filtered or light cigarettes are less harmful.[40] Moreover, knowledge of health risks strongly varies with socio-economic status, education and across countries. Highly educated people in industrialized countries might know enough about the risks of smoking, but that is not so for most others.[41]

Second, human decision-making is riddled with cognitive biases, which stands in the way of rational decision-making. Philosopher Sarah Conly builds her case for a smoking ban largely around such failures of rationality. Such biases can include optimism bias, the availability heuristic and hyperbolic discounting.[42]

A third reason to add here is that people are not very good at judging the costs and benefits of smoking. Smokers might perceive several benefits: smoking can have an enjoyable social dimension, it might help smokers manage stress, give them something to do when they are bored, or just make them feel cool.[43] There is also the widespread belief that cigarettes help with weight loss.[44] However, most purported benefits are either smaller than believed or wholly non-existent. Smoking overall does not reduce but increases stress, does not help with weight loss, and does not increase but reduces people's reported life satisfaction and happiness.[45]

Country Variations in Knowledge of Health Risks of Tobacco Smoking and Toxic Constituents of Smoke: Results from the 2002 International Tobacco Control (ITC) Four Country Survey' (2006) 15 Tobacco Control iii65.

[40] Cummings and others (n 39).

[41] Siahpush and others (n 39).

[42] Conly (n 29); Grill and Voigt (n 32); Goodin (n 29); Paul Slovic, 'What Does It Mean to Know a Cumulative Risk? Adolescents' Perceptions of Short-Term and Long-Term Consequences of Smoking' (2000) 13 Journal of Behavioral Decision Making 259.

[43] Bonnie L Halpern-Felsher, Michael Biehl, Rhonda Y Kropp and Mark L Rubinstein, 'Perceived Risks and Benefits of Smoking: Differences among Adolescents with Different Smoking Experiences and Intentions' (2004) 39 Preventive Medicine 559.

[44] US Department of Health and Human Services (n 36) ch 2.

[45] Andrew C Parrott, 'Nesbitt's Paradox Resolved? Stress and Arousal Modulation during Cigarette Smoking' (1998) 93 Addiction 27; Robert West and Peter Hajek, 'What Happens to Anxiety Levels on Giving up Smoking?' (1997) 154 The American Journal of Psychiatry 1589; US Department of Health and Human Services (n 36) ch 2; Daniel Kahneman and Angus Deaton, 'High Income Improves Evaluation of Life

Finally, most people are not good at considering and estimating their future preferences and well-being. A person who values smoking highly given her current preferences might think her future self will happily give up some life years to facilitate her former self being able to smoke. However, such reasoning is often misguided. We typically falsely assume that how we are now is our 'real self' and systematically underestimate how much our personality changes over time.[46] We might also be bad at predicting our future well-being. Smoking reduces life expectancy by about ten years.[47] Life years lost tend to come towards the end of one's life. Anecdotally, I have heard smokers say that given that one has a lower quality of life towards the end of one's life, one might rationally want to frontload some of the benefits at the expense of a shorter life. The data, however, seems to bear out a different picture.[48] According to the U-curve of life satisfaction, young people are on average very happy – that is until their 30s – and then their satisfaction drops. Life satisfaction then picks up again in old age (after 60). Accordingly, this gives us reason to be careful about trading off minor benefits now with life years lost at the end of one's life, given that those can potentially be among the happiest of our lives.

Overall then, smokers often act with insufficient volitional autonomy and rational agency. While this does not make consent irrelevant, it means that consent is a relatively weak reason against interference – weak enough to not rule out drastic interference.

However, someone might now accuse me of double standards. We typically do not think irrationality sufficient to justify government interference for other suboptimal decisions. Smokers are not the only ones being irrational. As much behavioural science research shows, we all tend to often act on cognitive biases.[49] Why should we treat smoking differently from other consumption choices?[50] In response, we should grant that cognitive biases and lack of information are not problems uniquely specific to smoking. But we should nonetheless treat smoking differently from many other unhealthy choices. Smoking

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but Not Emotional Well-Being' (2010) 107 Proceedings of the National Academy of Sciences 16489.

[46] Jordi Quoidbach, Daniel T Gilbert and Timothy D Wilson, 'The End of History Illusion' (2013) 339 Science 96.

[47] Jha and others (n 2).

[48] Andrew Steptoe, Angus Deaton and Arthur A Stone, 'Subjective Wellbeing, Health, and Ageing' (2015) 385 The Lancet 640; Arthur A Stone, Joseph E Schwartz, Joan E Broderick and Angus Deaton, 'A Snapshot of the Age Distribution of Psychological Well-Being in the United States' (2010) 107 Proceedings of the National Academy of Sciences 9985.

[49] Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Richard H Thaler and Cass Sunstein, *Nudge* (Yale University Press 2008).

[50] Flanigan (n 32); Grill and Voigt (n 32).

is very addictive and deadly and any benefits, inasmuch as there are any, are marginal. So, smoking is in a different category from many other unhealthy or otherwise suboptimal activities. The government should often let us make mistakes, but only if those do not trap us in dangerous addictions and kill us. Here irrationality need not justify interference. But when irrationality applies to extremely harmful and addictive substances, the case is different.

Together with Section 4, we can thus conclude that concerns around personal freedom and consent do not speak against a human right to tobacco control. In principle, such concerns are even compatible with very severe government interference.[51]

6. HUMAN RIGHTS AND POWER

In this final section, I address issues around power. Human rights legislation changes power structures in various ways.[52] What would be the effects for tobacco control?

Human rights law should protect individuals against illegitimate government interference. But we might now worry that a human right to tobacco control achieves the opposite because it furnishes governments, and international institutions involved with human rights law, with too much power to exercise control over individuals and their consumption choices. We can draw on neo-republicanism to formulate such worries around power. Philip Pettit argues that the central value in normative political philosophy should be non-domination. Non-domination requires being free from uncontrolled power:

> ***Domination****: person A is dominated by person B with respect to A's option x, if and only if B has the power to determine whether A has x or not and such power is not suitably controlled.*[53]

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[51] In principle, I think strict endgame measures are justifiable (if effective), see Grill and Voigt (n 32); Schmidt, 'Withdrawing Versus Withholding Freedoms' (n 28). However, I here do not further this question, as I only defend a human right to tobacco control. And a human right imposes a 'floor constraint' on countries rather than requiring maximal tobacco control.

[52] See Pablo Gilabert, 'Reflections on Human Rights and Power' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018) 376–99 on general issues around human rights and power.

[53] See Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton & Company 2014); Andreas T Schmidt, 'The Power to Nudge' (2017) 111 American Political Science Review 404.

Other people, private companies and groups, and the government dominate me if they can interfere with my options without their power being controlled in such a way that they must track my interests. For example, a slaveholder dominates a slave because they have the power to interfere with the slave's options without their power being controlled by the slave or by anyone acting on behalf of the slave. Note that the slave can remain dominated even if the slaveholder does not exercise their power. Conversely, some forms of interference, say a just government collecting taxes, are not dominating when the power to interfere is suitably controlled, for example through constitutional provisions, democratic decision-making, regular free elections and so on.

Here I think we ought to conclude that even very strict tobacco control need not be a form of government domination. I have above argued that a concern with freedom of choice does not rule out strict tobacco control. So, if interference with people's option to smoke is decided and implemented by institutions that are not dominating, then such an interference is not dominating. For that, it should be exercised by institutions and agents that are institutionally forced to track the relevant interests of citizens through, for example, democratic and transparent decision-making, constitutional protections and so on. Of course, the justificatory stakes for strong tobacco control can be high, seeing that some smokers might be opposed to strong interference. But this raises the stakes for such control to be enacted in a non-dominating way and through non-dominating political and legal institutions. It does not imply that strict tobacco control is a form of government domination.[54]

Note how we can now turn this potential objection around to use non-domination as an argument in favour of strict tobacco control. Besides the government, private companies also exercise power over our lives. Tobacco companies have the power to influence our choice environments. Whether people decide to smoke is often dependent on the choice environment they find themselves in, where this encompasses which options are available, how they are priced, how they are presented, what information is available, what norms exist around smoking, what people in one's peer group do and so on.[55] Domination need not be brute coercion but can also come from uncontrolled power to influence our choice environments in more subtle ways.[56] Tobacco companies have ample strategies to do so. For example, they use marketing strategies and ad campaigns. Such campaigns can be powerful in, among other things, giving consumers systematically false beliefs about the harmfulness

[54] Schmidt, 'Withdrawing Versus Withholding Freedoms' (n 28).

[55] Alberto Alemanno, 'Nudging Smokers The Behavioural Turn of Tobacco Risk Regulation' (2012) 3 European Journal of Risk Regulation 32; US Department of Health and Human Services (n 36) ch 4.

[56] Schmidt (n 53).

of their products (such as so-called 'light' cigarettes).[57] Or they devise clever differentiated pricing strategies, use point-of-scale marketing in stores, use attractive package designs, install cigarette vending machines to make cigarettes more accessible and so on.[58] So, furnishing governments with the power needed for strict tobacco control can reduce domination because it can protect individuals against powerful tobacco companies and their power to shape our choice environments.

Note how this argument has particular force for less powerful groups.

First, people of low socio-economic status (SES) typically already experience more domination than those with a higher SES. Lack of tobacco control might make lower-SES populations more vulnerable to harmful social pressures and the influence of tobacco companies. Smoking has a social gradient, affecting lower-SES populations more strongly and thereby contributing strongly to the social gradient of mortality and morbidity.[59] And financing a nicotine addiction is expensive, which affects lower-SES populations and their disposable income more strongly given their weaker financial positions.

Second, nicotine addiction is more prevalent among people with mental health problems who often find themselves in more vulnerable positions already.[60] Preventing and reducing nicotine addiction can thus be empowering.

Finally, the case is at its strongest at the international level. Around 80 per cent of smokers are from low- and middle-income countries.[61] Weaker regulations, threats by tobacco companies to sue countries if they implement tobacco control measures, less information about the harms of smoking and weaker public health institutions all imply that the protection against Big Tobacco's influence can be weaker in such countries.[62] Strong tobacco control and strong (non-dominating) public health institutions are then less a source of domina-

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[57] Cummings and others (n 39).

[58] US Department of Health and Human Services (n 36) ch 5.

[59] See Michael Marmot, 'Social Determinants of Health Inequalities' (2005) 365 The Lancet 1099 on health inequality in general and Prabhat Jha and others, 'Social Inequalities in Male Mortality, and in Male Mortality from Smoking: Indirect Estimation from National Death Rates in England and Wales, Poland, and North America' (2006) 368 The Lancet 367; Michael Marmot, 'Smoking and Inequalities' (2006) 368 The Lancet 341 on smoking inequalities.

[60] Karen Lasser and others, 'Smoking and Mental Illness: A Population-Based Prevalence Study' (2000) 284 JAMA 2606.

[61] WHO, 'Tobacco (Fact Sheet)' (*WHO*, 29 May 2019) https://www.who.int/news-room/fact-sheets/detail/tobacco, accessed 30 May 2019.

[62] Anna B Gilmore, Gary Fooks, Jeffrey Drope, Stella Aguinaga Bialous and Rachel Rose Jackson, 'Exposing and Addressing Tobacco Industry Conduct in Low and Middle Income Countries' (2015) 385 Lancet 1029.

tion but likely the opposite: they should empower public institutions to curb Big Tobacco's power over individuals and their choice environments.

So, tobacco control can be empowering. Human rights law might here play a dual role. On the one hand, a human right to tobacco control can empower national governments as it might intensify the international community's efforts and support structures to aid national governments in their tobacco control efforts. On the other hand, human rights law constrains national governments: if governments fail to protect against tobacco harms, they might face outside pressures. A core function of human rights law is to protect citizens against bad governments. And in this sense, human rights law is a legitimate form of controlling government power. Forcing governments to protect their populations forces them to at least minimally act in their interests. Note that a human right to tobacco control does not, and should not, impose a maximal and fully determinate tobacco control strategy. Rather, as with most other human rights, it imposes a 'floor constraint' of what kind of protection should exist and gives governments leeway to tailor policies to their specific situation. Moreover, an international framework should not require measures that are very controversial or whose evidence basis is weak.[63] In both ways – empowering and limiting national governments – a human right to tobacco control could help empower individuals and their protection against Big Tobacco's power.

7. CONCLUSIONS

I have argued that the legal and philosophical case for a human right to tobacco control is strong. Individuals ought to have a claim against their government to protect them against tobacco harms. I have also addressed several philosophical worries around such a right. I argued that neither the traditional distinction between negative and positive rights, nor a concern with external freedom of choice or personal consent stand in the way of a human right to tobacco control. I also analysed how a human right might affect power relations, arguing that a human right to tobacco control is a promising avenue to empower governments and individuals to curb the power of big tobacco companies. This argument has particular force in developing countries where governance structures are often less powerful in the face of corporate power. Individual claims to be protected against tobacco harms are so strong that it

[63] For example, tobacco control specialists fervently debate whether e-cigarettes and other Electronic Nicotine Delivery Systems (ENDS) should accompany tobacco harm reduction or whether they instead pose a grave threat. Given strong disagreements, I think it would be a serious mistake if international legal frameworks tried to impose an anti-ENDS approach on countries.

warrants both international support for and limitations on national governments through human rights legislation.

PART II

International and regional human rights approaches to tobacco control and their link to other fields of law

4. Tobacco control in international human rights law

Oscar Cabrera and Andrés Constantin

1. INTRODUCTION

Human rights and tobacco control are mutually reinforcing frameworks.[1] Resort to human rights norms can be powerful to advance tobacco control both at the domestic and the international level. Not only do the right to health and other health-related rights provide the normative basis for the protection of people from the hazards derived from tobacco products, they also contribute to shaping and clarifying the foundations for governmental action and regulation. These rights mandate States to adopt legislative and administrative measures and give people the ability to claim the enforcement and protection of their rights through judicial recourse.[2]

International human rights systems provide promising avenues for monitoring implementation of human rights obligations related to tobacco control.[3] This in turn contributes to developing standards that will ultimately help to interpret tobacco control norms in line with human rights. Tobacco control is a cross-cutting issue that relates to economic, social and cultural rights, and civil and political rights, as well as human rights aimed at protecting population groups (for example, women and children).[4] In this chapter we examine

[1] Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) International Journal of Law in Context 285.

[2] Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599.

[3] Carolyn Dresler, Harry Lando, Nick Schneider, Hitakshi Sehgal, 'Human Rights-based Approach to Tobacco Control' (2012) 21 Tobacco Control 208.

[4] See, for example, Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 Human Rights Quarterly 340 for the protection of children; see Robin Appleberry, 'Breaking the Camel's Back: Bringing Women's Human Rights to Bear on Tobacco Control' (2001) 13 Yale Journal of Law and Feminism 71 for the protection of women. Regarding persons with disabilities,

some of those connections and provide concrete examples of how this intersection between tobacco control and human rights has played out at the domestic and international levels. In particular, the chapter focuses on the obligations of governments under the international human rights law framework in relation to specific aspects of tobacco control.

2. INTERNATIONAL HUMAN RIGHTS LAW

More than 20 years ago, in Vienna, it was understood that 'all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'[5] Understanding the interdependency and interrelatedness of human rights is crucial in order to enable people to live healthy and flourishing lives with dignity. A fundamental tenet of international human rights law is the recognition of States' obligation to respect, protect and fulfil human rights.[6] International human rights law has traditionally been understood as only binding States, whose institutions are obliged to abide by human rights obligations stemming from different sources of international law.

The obligation to respect imposes on States the duty to refrain from taking measures that prevent or interfere with access to the enjoyment of rights, proscribing all kinds of discriminatory practices.[7] For instance, in the context of tobacco control, the obligation to respect requires States not to engage in any conduct that will directly incentivize the consumption of tobacco products. The obligation to protect requires governments to prevent third-party interference with enjoyment of rights. Applied to the right to health, this obligation implies that governments must exercise a range of regulatory functions and adopt measures to safeguard persons within their jurisdiction from infringements of their right to health by third parties.[8] In the context of tobacco control,

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see, for example, Yvette van der Eijk, 'The Convention on the Rights of Persons with Disabilities as a Tobacco Control Tool in the Mental Health Setting' (2018) 27 Tobacco Control 637.

[5] World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (25 June 1993) UN Doc A/CONF.157/23 5.

[6] International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (26 January 1997) http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html, accessed 19 June 2019.

[7] UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4 [34].

[8] UN CESCR, 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24 [19].

this obligation mandates States to take measures to discourage marketing and consumption of tobacco.[9] Much of the work on tobacco control and human rights will be framed around this obligation as it is clear that States need to effectively regulate the tobacco industry to fulfil this obligation. Finally, the obligation to fulfil involves the adoption of laws, policies and programmes at the national level that facilitate the enjoyment of rights for individuals and communities. In the context of tobacco control, this implies that States need to engage in legislative and regulatory reforms to ensure that the negative impacts of tobacco in society are reduced.

3. HUMAN RIGHTS AND TOBACCO CONTROL

Human rights law can be an effective legal framework to influence policy debates when applied to the political discourse, both at the national and international level. The design of tobacco control policies, as in the case of other public health policies, should be carried out in accordance with the fulfilment of international human rights obligations.[10] This link between human rights and tobacco control was strengthened by State Parties of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) in the context of the 2016 Conference of the Parties held in India (COP7). It was also an agenda item for the 2018 COP8 in Geneva as 'the starting point for a wider application of the WHO … as an international treaty to support sustainable development … and defend human rights'.[11]

3.1 The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is currently recognized in a wide array of international and regional human rights instruments and is codified in at least 115 constitutional frameworks.[12]

The right to health provides a relevant legal framework for tobacco control policies. As mentioned above, the obligation to respect, protect and fulfil the

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[9] UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (n 7) [35]; Dresler and Marks (n 2) 631.

[10] See Chapter 10 in this book by Taylor and McCarthy.

[11] WHO FCTC, 'COP8 is Coming Up, with Important Progress to Report' (*WHO Media Centre*, 13 July 2018) http://www.who.int/fctc/mediacentre/news/2018/cop8-coming-up/en/, accessed 8 July 2019. See also, for example, Chapter 10 in this book by Taylor and McCarthy.

[12] UN OHCHR and WHO, *Fact Sheet No. 31: The Right to Health* (UN OHCHR 2008) 10.

right to health obliges States to refrain from spreading the tobacco epidemic. From this perspective, for instance, States should avoid holding ownership of tobacco companies.[13] Moreover, a State's obligation to protect people's right to health from the threat of tobacco also calls for regulation of private activities that constitute a breach of human rights.[14] Some examples of tobacco control strategies oriented towards this goal are: smoking bans in public places; bans on advertising, promotion and sponsorship of tobacco products; and taxation of tobacco products, among others.[15] A State's international commitment to the right to health also implies: adequate implementation of all relevant domestic legislation; measures and budgetary allocation to contribute to effective tobacco control regulation, including the provision of health services for the treatment of diseases stemming from tobacco use; facilitating smokers' access to cessation programs; and prevention campaigns that inform the population about the dangers associated with tobacco use.[16] Finally, regarding the progressive realization of the right to health, it could be argued that in the context of tobacco control States cannot ignore their obligations under the pretext of resource constraints. Most of the tobacco control measures enshrined in the FCTC are not too costly for governments to implement. For the most part they are generally budget neutral, and some of them, such as tobacco taxes, actually generate revenue.

3.2 Children's Rights

The rights of children are also relevant to the context of tobacco control. Ninety per cent of adult smokers begin while in their teens or earlier, and two-thirds become regular, daily smokers before they reach the age of 19.[17] In fact, the tobacco industry usually targets advertisements and marketing towards children and adolescents as the industry considers them to be more likely to become smokers later. This strategy includes, but is not limited to,

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[13] For further discussion, see Scott L Hogg, Sarah E Hill and Jeff Collin, 'State-ownership of Tobacco Industry: A "Fundamental Conflict of Interest" or a "Tremendous Opportunity" for Tobacco Control?' (2016) 25 Tobacco Control 367.

[14] UN CESCR, 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (n 8) [19].

[15] Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52 Salud Publica de Mexico S288.

[16] ibid.

[17] United States Department of Health and Human Services. Substance Abuse and Mental Health Services Administration. Center for Behavioral Health Statistics and Quality, 'National Survey on Drug Use and Health, 2014' (22 March 2016) NSDUH ICPSR36361-v1, http://doi.org/10.3886/ICPSR36361.v1, accessed 8 July 2019.

selling and promotion of cigarettes near schools in flavours attractive to children, and even tobacco company representatives' visits with free cigarettes and promotional materials.[18]

Moreover, there is increasing concern about child labour on tobacco farms[19] as tobacco production has dangerous health consequences for children and exposes them to hazardous working conditions.[20] Immediate health risks for children working on tobacco farms include the dermal absorption of nicotine from the leaves of the tobacco plant and exposure to pesticides, herbicides and other hazardous chemicals.[21]

The Convention on the Rights of the Child (CRC), the most widely endorsed human rights treaty, with 196 State Parties,[22] imposes on governments and third parties the duty to protect and promote children's rights, including children's right to health[23] and the best interests of the child.[24] Furthermore, it should be noted that the FCTC explicitly recalls the CRC stressing 'the right of the child to the enjoyment of the highest attainable standard of health'.[25] The monitoring body of the CRC, the Committee on the Rights of the Child (CommRC), has referred to tobacco control in several of its general comments. In particular, it has explicitly stated that 'States are required to introduce into domestic law, implement and enforce internationally agreed standards concerning children's right to health, including the … World Health Organization Framework Convention on Tobacco Control'.[26] The CommRC has also linked the right of

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[18] See generally, Campaign for Tobacco-Free Kids, 'Big Tobacco: Tiny Targets' (*Take Apart*) http://www.takeapartorg/tiny-targets/, accessed 8 July 2019.

[19] Human Rights Watch, *A Bitter Harvest: Child Labor and Human Rights Abuses on Tobacco Farms in Zimbabwe* (Human Rights Watch 2018); 'Tobacco's Hidden Children: Hazardous Child Labor in United States Tobacco Farming' (*Human Rights Watch*, 13 May 2014) https://www.hrw.org/report/2014/05/13/tobaccos-hidden-children/hazardous-child-labor-united-states-tobacco-farming, accessed 8 July 2019.

[20] Athena K Ramos, 'Child Labor in Global Tobacco Production: A Human Rights Approach to an Enduring Dilemma' (2018) 20 Health & Human Rights Journal 235.

[21] Natacha Lecours, Guilherme EG Almeida, Jumanne M Abdallah and Thomas E Novotny, 'Environmental Health Impacts of Tobacco Farming: A Review of the Literature' (2012) 21 Tobacco Control 191.

[22] 'Convention on the Rights of the Child: Status of Ratification Interactive Dashboard' (*OHCHR*) http://indicators.ohchr.org/, accessed 8 July 2019.

[23] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 24.

[24] ibid, art 3.

[25] WHO, Framework Convention on Tobacco Control (adopted 56th World Health Assembly 19–28 May 2003, entered into force 27 February 2005) 230 UNTS 166, preamble.

[26] See UN CommRC, 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health' (17 April 2013) UN Doc CRC/C/GC/15, art 24. See also UN CommRC, 'General Comment No. 16 on State obli-

children to health-related information in order for them to make informed decisions in relation to their lifestyle, including information addressing the dangers of tobacco.[27] In this context, States should protect children from tobacco and dangerous work on tobacco farms. Governments must regulate advertising, marketing and sale of substances – such as tobacco – that are harmful to children's health, as well as prevent and reduce children's exposure to hazardous chemicals that directly impact their health.[28] In addition to the right to health, the CRC also includes other rights that are relevant in the context of tobacco control, such as the right to life, survival and development (Article 6 CRC), the right to an adequate standard of living (Article 27 CRC), the protection against illicit drug use (Article 33 CRC) and the protection against exploitation (Article 36 CRC). Moreover, and particularly relevant to the context of child labour on tobacco farms, it includes the right 'to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development' (Article 32 CRC), among others.[29]

3.3 Women's Rights

In view of the importance of health for women's dignity and equality, States have assumed the obligation to recognize, protect and guarantee the right to

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gations regarding the impact of the business sector on children's rights' (17 April 2013) UN Doc CRC/C/GC/16.

[27] See UN CommRC, 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health' (n 26) art 24; see also UN CommRC, 'General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration' (29 May 2013) UN Doc CRC/C/GC/14, art 3(1); UN CommRC, 'General Comment No. 4 on Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) UN Doc CRC/GC/2003/4 [26].

[28] See UN CommRC, 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health' (n 26) art 24; see generally, UN CommRC, 'General Comment No. 4 on Adolescent health and development in the context of the Convention on the Rights of the Child' (n 27) [10], [25]; UN CommRC, 'General Comment No. 20 on the implementation of the rights of the child during adolescence' (6 December 2016) UN Doc CRC/C/GC/20 [64].

[29] See generally Gispen and Toebes (n 4); Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to a Tobacco-free Environment' (2018) 27 Tobacco Control 3. Additionally, see the explicit reference to smoke-free housing in UN CommRC, 'General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 [49].

the highest attainable standard of health for women.[30] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) serves as the main legal source for the protection and advancement of women's rights. Regarding the right to health, State Parties to the CEDAW are under an obligation to adopt measures for the inclusion of women's right to health in their national legislation and regulation. In particular, Article 3 CEDAW obliges State Parties to take all appropriate measures to guarantee women their fundamental rights. Moreover, Article 10(h) establishes access to educational information that contributes to ensuring the health and well-being of families, and Article 12(1) requires all parties to take measures to eradicate discrimination against women in the field of healthcare.[31]

Back in 1995, the Beijing Platform for Action acknowledged that 'women throughout the world, especially young women, are increasing their use of tobacco with serious effects on their health and that of their children'.[32] The Platform called for the creation of 'awareness among women, health professionals, policy makers and the general public about the serious but preventable health hazards stemming from tobacco consumption and the need for regulatory and education measures to reduce smoking as important health promotion and disease prevention activities'[33] as a measure that States should adopt to strengthen preventive programmes for the promotion of women's health.

The treaty-monitoring body for the CEDAW, the Committee on the Elimination of Discrimination Against Women (CommEDAW), has addressed the obligation of preventing and sanctioning the behaviour of individuals and organizations that put women's rights in danger. It has thus affirmed that 'the obligation to protect rights relating to women's health requires States parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations'.[34] The regulation of the tobacco industry and a total ban on tobacco advertising, promotion and sponsorship are the ideal ways to eliminate both forms of discrimination. In its General Recommendation No 24 on women and health, the CommEDAW recognizes the existence of societal factors that shape health outcomes for

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[30] See UN CESCR, 'General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22; see also UN CESCR, 'General Comment No. 14, The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 [8].

[31] See Appleberry (n 4).

[32] See Fourth World Conference on Women, 'Beijing Declaration and Platform of Action' (17 October 1995) UN Doc A/CONF.177/20 [100].

[33] ibid [107(o)].

[34] UN CommEDAW, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, chapter I [15].

women and girls.[35] The cause of these factors is not the biological differences between men and women, but rather the political and cultural value that each State assigns to their health and well-being. In this sense, all governments should take preventive and corrective measures if they have evidence that, at the national level, women have worse health than men.

Furthermore, the preamble to the FCTC recalls CEDAW, cautions about the possible increase in women's and girls' tobacco use at the international level and highlights the need for gender-specific tobacco control policies.[36] Expressly, Article 4.2(d) of the FCTC states that parties shall develop and control comprehensive measures to address gender-specific risks when developing tobacco control strategies, acknowledging the fact that women and girls are not only affected differently by the smoking epidemic, but also distinctly targeted by the tobacco industry.[37]

Lastly, in recent years, the CommEDAW has urged State Parties to '[r]atify the World Health Organization Framework Convention on Tobacco Control, reduce the high tobacco consumption among adolescents, in particular girls, and address the health consequences'.[38]

3.4 Obligations of Non-State Actors

Corporations and other non-State actors (NSAs) are not traditionally understood to be legally bound by international human rights obligations. However, in recent decades, globalization and liberalization of commerce have enabled corporations to influence international and domestic law-making while causing detrimental human rights impacts.

In its General Comment No 14 on the right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights (CESCR) recognized that *all* members of society, including private businesses, have responsibilities when it comes to the realization of the right to health.[39] The Committee also recently acknowledged that 'businesses play an important role in the realization of economic, social and cultural rights'.[40]

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35 ibid [6].

36 WHO, Framework Convention on Tobacco Control (n 25) preamble.

37 ibid, art 4.2(d).

38 See for example, UN CommEDAW, 'Concluding Observations on the seventh periodic report of Argentina' (18 November 2016) UN Doc CEDAW/C/ARG/CO/7.

39 UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)' (n 7) [53].

40 UN CESCR, 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (n 8) [1].

In 2005 Professor John Ruggie was appointed by the UN Secretary-General as Special Representative in charge of reporting on the relationship between business and human rights. Professor Ruggie designed the UN 'Protect, Respect and Remedy' framework for business and human rights, which sought to identify the relevant actors' responsibilities and provide a basis for future reflection on the matter (UN Framework).[41] The UN Framework rests on three pillars: the State's duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights; and greater access to effective remedy for victims.[42]

The underlying idea of the corporate responsibility to respect human rights is that virtually all business activities can have an impact on human rights. For that reason, corporations have human rights obligations that differ from those of States.[43] Specifically, the UN Framework establishes that corporations must not only respect human rights, but also practise due diligence by taking steps 'to become aware of, prevent and address adverse human rights impacts'.[44]

By recognizing that actual human rights impacts result from a company's business activities and the relationships connected to these activities,[45] due diligence requires addressing 'potential adverse human rights impacts' through prevention or mitigation.[46] Businesses 'should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization'.[47]

According to the duty of due diligence, the tobacco industry should assess the impact of their business activities on the right to health. In particular, they should assess impact on vulnerable groups, including children, low socio-economic groups and women. The responsibility to mitigate adverse human rights impacts may include reformulating products to reduce harmful

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41 UN HRC, 'The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights: Background' (2010) https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf, accessed 9 July 2019.

42 ibid.

43 UN HRC, 'Eight Session Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5) [52].

44 ibid [56].

45 ibid [72].

46 UN OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN 2011) [17].

47 ibid [18].

ingredients, ceasing advertising and decreasing the availability of tobacco products.[48]

4. HUMAN RIGHTS BODIES AS AVENUES FOR TOBACCO CONTROL

Human rights treaty-based bodies have played a pivotal role in monitoring, interpreting and clarifying tobacco-related human rights obligations. Treaty-based bodies are composed of independent experts elected by States in their individual capacity. Their main functions include monitoring State implementation, interpreting treaty obligations through general comments or recommendations and, in some cases, adjudicating individual complaints against the State.[49]

Under their monitoring function, State Parties to international human rights treaties are required to submit periodic reports to the respective monitoring body detailing relevant information on the efforts made to comply with treaty obligations. As part of this process, advocates and civil society organizations can submit 'shadow reports' with supplementary or alternative information to ensure that a treaty-based body does not rely solely on a State's own account of its compliance with international human rights instruments. The shadow reporting mechanism is meant to highlight and draw attention to critical issues that a State report might seek to minimize or exclude entirely. Moreover, it provides an avenue for greater access to claims and concerns of human rights defenders and other independent groups.

Shadow reports can be a powerful and useful tool to promote change in tobacco control at the domestic and international level. On the one hand, the submission of shadow reports can draw international attention to the issue in question. On the other hand, when the bodies incorporate information from shadow reports in their final recommendations or conclusions, advocates and civil society organizations can use those recommendations to put pressure on the country under review. This can be to modify or amend its laws or to influence the implementation and support the legal defence of tobacco control laws. In other words, shadow reports can contribute to meaningful changes in health policy.

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[48] ibid.

[49] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 926–30.

4.1 The Case of Tobacco Control Shadow Reporting Before the CESCR

In 2009 the O'Neill Institute, together with the Campaign for Tobacco-Free Kids and Brazilian NGO ACT Brazil, filed a shadow report to Brazil's periodic report to the CESCR. The shadow report argued that Brazil's policy of allowing smoking rooms in enclosed public places (FCTC Article 8), and of permitting the advertising, promotion and sponsorship of tobacco products, which inevitably targets youth (FCTC Article 13), violated its obligation to respect, protect and fulfil the right to health under Article 12 of the ICESCR.[50] These points were addressed by the CESCR as it noted concern with respect to tobacco use and promotion in Brazil and the lack of legislation to ensure that all enclosed public environments are completely free of tobacco.

The CESCR Concluding Observations on tobacco control in Brazil were a direct result of the shadow reports submitted to the committee on this issue, which highlighted the impact of tobacco consumption and marketing. The recommendation led Brazil to pass two laws prohibiting tobacco consumption in collective public and private spaces without reserving an area for non-smokers.[51] Both laws were rapidly challenged by the tobacco industry, which claimed the laws violated the principles of individual liberty, free enterprise and proportionality, among others. In those cases, the Federal Prosecutor relied on the CESCR Concluding Observations and expressly referred to them in the documents submitted to the Superior Tribunal of Brazil to support the adoption of both laws.[52]

A similar shadow report submitted to the CESCR during Argentina's period review in 2011 contributed to the CESCR expressing concern in its concluding observations over the high level of tobacco consumption in Argentina. The CESCR recommended specifically that Argentina 'ratify and implement the WHO Framework Convention on Tobacco Control and develop effective

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[50] O'Neill Institute for National and Global Health Law, 'United Nations Committee on Economic, Social and Cultural Rights, Shadow Report to the Periodic Report by the Government of Brazil: Preventing and Reducing Tobacco Use in Brazil: Pending Tasks' (*OHCHR*) http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/ONeillInstitute_CTFK_ACT_Brazil42.pdf, accessed 9 July 2019.

[51] O'Neill Institute for National and Global Health Law & FIC Argentina, 'A guide to tobacco-related shadow reporting before United Nations human rights bodies' 31–32, http://oneill.law.georgetown.edu/media/FIC-ONeill-shadow_reporting_guide_ENG.pdf, accessed 9 July 2019.

[52] Federal Prosecutor's brief submitted on the unconstitutionality of claim Nº 4351 before the Brazilian Superior Tribunal, Confederação Nacional do Turismo – Cntur 17–18.

public awareness and tax and pricing policies to reduce tobacco consumption, in particular targeting women and youth'.[53]

5. TOBACCO CONTROL MEASURES AND HUMAN RIGHTS-BASED LITIGATION

For many years, the tobacco industry 'co-opted' the human rights discourse.[54] In fact, most proactive human rights-based litigation has been initiated by the industry; the public health community has generally been less successful in invoking human rights in court. In the absence of a strong body of case law as of yet, this part of the chapter focuses particularly on industry-led cases.

A human rights approach to tobacco control, in particular in the context of litigation, provides a powerful framing for shifting the tobacco industry use of human rights arguments, such as freedom of speech, as a strategy to protect their interests. It is important, especially in courts, to reclaim and clarify that there is no inherent conflict between tobacco control and human rights law. Furthermore, human rights law has historically had a prominent role in shaping political and policy discourses to the extent that once a relevant societal issue acquires the status of a human right, it has special consideration in public policy.[55] The tobacco industry has often claimed the unconstitutionality and unlawfulness of tobacco control measures based on, among others, the principles of individual liberty or personal autonomy, free enterprise and private property. Some of those arguments are outlined below.

5.1 Commercial Speech

Reacting to comprehensive bans on tobacco advertising, promotion and sponsorship, and other government restrictions on packaging and labelling, the tobacco industry has made extensive use of legal arguments based on constitutional law and international human rights law to affirm the need to protect its freedom of expression.[56] Even though protections based on freedom of expression are traditionally granted to expressions that contribute directly

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[53] UN CESCR, 'Concluding Observations, on its 47th Session, 14 November–2 December 2011' (14 December 2011) UN Doc E/C.12/ARG/CO/3 23.

[54] Peter D Jacobson and Soheil Soliman, 'Co-Opting the Health and Human Rights Movement' (2002) 30 Journal of Law, Medicine & Ethics 705.

[55] Emilio Álvarez Icaza, 'Human Rights as an Effective Way to Produce Social Change' (2014) 11 SUR International Journal on Human Rights 78.

[56] O'Neill Institute for National and Global Health Law, 'Tobacco Industry Strategy in Latin American Courts: A Litigation Guide' 18, http://oneill.law.georgetown.edu/media/2012_OneillTobaccoLitGuide_ENG.pdf, accessed 9 July 2019.

to the functioning of a democratic society, the tobacco industry has resorted to these arguments to uphold their right to promote the consumption of their products or to distinguish their brand from rivals' products.

However, commercial speech is often considered a manifestation of a commercial freedom, not protected by the right to freedom of expression.[57] As such, it is a right that can lawfully be limited by the State in order to protect public health and safety.[58] In other words, the advertisement of commercial products for financial gain deserves considerably less protection than the expression of ideas or opinions. The right to freedom of expression is only intended to ensure that the government does not directly or indirectly restrict personal or community expression by protecting the assertion of concerns, opinions or ideas. In this context, commercial advertisements can allow individuals to meet their needs by gathering information about goods and services, but their publication cannot be compared to either the exchange of ideas, information or communications between more and less informed individuals, or to the communication of social, political or artistic discourse.

Commercial speech derives mainly from the right to economic freedom, a right that can be restricted to a greater degree if it is in the interests of the public.[59] Regarding tobacco, and considering the product's addictive nature, rather than contributing to the realization of the republican ideal of self-government, its public advertisement may actually frustrate this goal by diminishing the autonomy of addicted individuals. By its very nature, tobacco consumption should be regulated by the State since it poses a social risk.[60] As the State has the undisputed power and duty to safeguard the population's health and safety, government institutions must undoubtedly regulate commer-

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[57] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980); Valentine v. Chrestensen, 316 U.S. 52 (1942); Breard v. City of Alexandria, 341 U.S. 622 (1951); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

[58] Lawrence O Gostin and Lindsey F Wiley, *Public Health Law: Power, Duty, Restraint* (3rd edn, University of California Press 2016) 4–9, 40–50.

[59] *Expediente D-8096 - Sentencia C-830/10*, (2010) (Colombian Constitutional Court). See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980); Valentine v. Chrestensen, 316 U.S. 52 (1942); Breard v. City of Alexandria, 341 U.S. 622 (1951); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

[60] *R. v. Mader's Tobacco Store Ltd*., NSPC 29 (2013).

cial speech designed to increase the use of a product that is known to cause suffering, illness and early death.[61]

The tobacco industry's right to commercial speech can be restricted, and more importantly the industry is bound to provide truthful and adequate information to consumers. In particular, promotions that emphasize the link between tobacco and social success, or personal or sexual satisfaction necessarily obscure the risks of tobacco use, which include addiction and death. This has been clearly illustrated by evidence showing that there is no use of tobacco that does not harm the user and those exposed to their tobacco smoke.[62]

For that reason, a comprehensive ban on advertising, promotion and sponsorship, as well as the establishment of packaging and labelling restrictions, seem to be the only way to protect consumers' right to truthful and adequate information.[63] This is even more relevant in countries where consumers' right to accurate information is constitutionally enshrined and contains not only the right to truthful information about ingredients and price of the product, but also the right to full disclosure of its health risks.

5.2 Right to Economic Freedom

The reference to the freedom of expression is just one of several ways in which the tobacco industry has used the wide array of human rights to protect its business. The tobacco industry has invoked provisions related to liberty of industry, commerce and work to argue, for instance, that advertising restrictions and bans, or restrictions and bans on smoking in public places and workplaces, decrease competition and harm the exercise of a lawful economic activity.[64]

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[61] Gostin and Wiley (n 58) 40–50. See also, *Canada (Attorney General) v. JTI-Macdonald Corp. et al.*, (2007) 2 S.C.R. 610 (Supreme Court of Canada).

[62] 'Health Risks of Smoking Tobacco' (stating that '[w]herever smoke touches living cells, it does harm. Even smokers who don't inhale are breathing in large amounts of smoke that comes from their mouths and the lit end of the cigarette, cigar or pipe. They are at risk for lung cancer and other diseases caused by secondhand smoke') (*American Cancer Society*, 15 November 2018) https://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/health-risks-of-smoking-tobacco.html, accessed 9 July 2019; Office of the Surgeon General, 'The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General' (*U.S. Department of Health and Human Services*, 14 May 2019) https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf, accessed 9 July 2019.

[63] *Philip Morris Brands Sarl v. Uruguay*, ICSID Case No ARB/10/7, Award (08 July 2016) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf, accessed 9 July 2019; *British American Tobacco (UK) Limited and Ors v. Secretary of State for Health* [2016] EWHC 1169.

[64] See, for example, *Unconstitutionality Proceedings, 5,000 Citizens Against Article 3 of Law No. 28705 – General Law for the Prevention and Control of Tobacco*

The tobacco industry has consistently argued that legislation that restricts or prohibits advertisement of tobacco thwarts the economic initiative, restricting legal activities and the free circulation of goods, and generating, overall, an environment in which economic development cannot be naturally pursued.[65] However, despite these efforts, courts have held that the right to commerce is not an absolute right and, therefore, the government is free to regulate it, as long as its most essential features are not infringed.[66] The right to commerce and economic freedom must be balanced with citizens' right to health, life, information and security.[67] As such, advertising laws and smoke-free laws do not interfere with the core economic activity itself.

The State, by virtue of its obligation to protect other rights, is entitled to limit the freedom of commerce of the tobacco industry.[68] Tobacco control laws do not inhibit the manufacture, production, distribution or commercialization (with the exception of advertising and marketing restrictions) of tobacco products because their objective is not to regulate those activities. Rather, the objective of tobacco control laws is to regulate tobacco consumption to protect the right to health and life of consumers and non-smokers.

5.3 Right to Property

In accordance with the tobacco industry's stance, tobacco control laws illegitimately interfere with private property. For example, they have claimed that graphic warning laws increasing the warning size[69] or packaging laws requiring plain packaging constitute an expropriation of the tobacco trademarks and intellectual property.[70] Moreover, the tobacco industry often claims that smoke-free laws are unlawful as they limit or ban smoking in private property

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Use Risks No. 00032-2010-PI/TC, 19 July 2011 (Constitutional Court of Peru); *British American Tobacco Panama S.A. et al. s/ nulidad del Decreto Ejecutivo 611 de 2010*, (2016) Corte Suprema de Justicia – Sala en lo Contencioso Administrativo (Supreme Court of Justice – Administrative Chamber).

[65] See, for example, *Philip Morris Norway AS v. The Norwegian State*, Case E-16/10, (2011) (Court of Justice of the European Free Trade Association States (EFTA) Court).

[66] See, for example, *British American Tobacco del Perú S.A.C. v. Congreso De La República*, (2015) Docket: 22881 (Corte Superior De Justicia De Lima, Primera Sala Civil De Lima).

[67] *Cámara de comercio de Guatemala v. Gobierno de Guatemala* (2010) Docket 2158-2009 (Constitutional Court of Guatemala).

[68] See, for example, *Unconstitutionality Proceedings* (n 64).

[69] See, for example, *British American Tobacco Colombia v. Ministry of Health*, (2015) Expediente núm. 2012-00607-01 (Consejo de Estado [State Council]).

[70] See, for example, *British American Tobacco (UK) Limited and Ors v. Secretary of State for Health* [2016] EWHC 1169.

such as workplaces, restaurants, bars and hotels.[71] In their view, it is a right of citizens to be free to do whatever they want on their own property.[72] However, such a strict conception of private property can only be justified for actions within the intimate sphere, which imply a reserved field in which the State has less authority to intervene.

Again, as in the case of the right to commerce, the right to property, although constitutionally protected, is not an absolute right.[73] The most obvious cases that demonstrate this concern laws that regulate the conduct of illegal activities within private property. Moreover, the State often regulates legal activities within the workplace and imposes requirements on employers. For instance, emergency exits and safety regulations requirements are regularly imposed on privately owned workplaces. Additionally, even if we recognize a conflict between the right to private property and the right to health, the application of the balancing test clears up all doubts regarding the possible conflict. By applying the balancing test, it is easy to conclude that the greater interest of protecting the health of workers and the public in general should prevail over the smaller interest of avoiding restrictions on the right to property.

In conclusion, the right to property can be limited based on superior collective interests. The State is in charge of regulating places open to the public, including consumers and employees, considering values such as security, sanitation or health.

6. TOBACCO CONTROL AND HUMAN RIGHTS IN COURTS

The interface between tobacco control and human rights is often addressed by courts when adjudicating cases brought by the tobacco industry or other groups, challenging tobacco control laws and policies. In the following section, we discuss a case as a concrete example to illustrate this link.

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[71] See for example, *British American Tobacco Kenya Ltd. v. Ministry of Health*, (2016) Petition No. 143 of 2015 (High Court of Kenya).

[72] See, for example, *Petition for CM for Judicial Review and Answers for the State Hospitals Board for Scotland*, CSOH 143 (2013).

[73] Catarina Krause, 'The Right to Property' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1st edn, Martinus Nijhoff Publishers 1995).

6.1 The Case of *5,000 Citizens Against Article 3 of Law No 28705* (Peru)

On 19 July 2011 the Constitutional Tribunal of Peru rejected an unconstitutionality challenge presented by 5,000 Peruvian citizens. The Court upheld the constitutionality of the country's reformed Law 28705 – Law for the Prevention and Control of Tobacco Consumption Risks (Law 28705).[74] The claim focused on Article 3 of the law, which prohibits smoking in all health and educational establishments, public institutions, indoor workspaces, enclosed public spaces and any means of public transport, effectively making these areas 100 per cent smoke-free environments. The provision imposing an absolute ban on tobacco consumption in certain areas, the lawsuit argued, violated smokers' right to personal autonomy, as well as the rights to commerce, economic freedom and freedom from discrimination.

In its decision, the Court found that the measures imposed by Law 28705 constituted a legitimate limitation on smokers' right to personal autonomy because allowing smoking would interfere with other individuals' liberty and personal autonomy. While the Court found the rights to commerce and economic freedom were limited by the measure, it stated that the limitation was permissible since it complied with the proportionality principle test and the rights themselves were not absolute. In referring to the suitability and proportionality of the law's measures, the Court quoted an amicus brief submitted by the O'Neill Institute for National and Global Health Law to conclude that 'the legislative measure in question is "not just a constitutionally valid, but also necessary from an International Human Rights Law perspective and the obligation to protect the right to health"'.[75] Moreover, in affirming the constitutionality of the law, the Court linked human rights obligations to the FCTC, presenting the FCTC as a 'human rights treaty, since it seeks to clearly, expressly and directly protect the basic right to health'.[76] According to the principle of progressive realization, it highlighted that 'the legal steps taken to protect health mark a point of no return' and concluded that it is constitutionally prohibited that 'in the future legislative steps or those of any other nature be taken that protect in a lesser degree the fundamental right to health in face of the smoking epidemic in comparison with the way current legislation does so'.[77]

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74 *Unconstitutionality Proceedings* (n 64).
75 ibid [81].
76 ibid [67].
77 ibid [148].

7. CONCLUSIONS

Tobacco control has strong legal foundations in international law. The FCTC and the guidelines approved by the COP provide a clear path for countries on measures aimed at reducing the devastating effects of tobacco consumption. Human rights law not only provides avenues for monitoring compliance with FCTC implementation, but also gives a broader grounding for tobacco control as a human rights issue. In turn, the FCTC gives content to human rights obligations, in particular those related to the right to health. International human rights law, and the use of human rights monitoring mechanisms, provide an avenue for assessing governments' compliance with human rights as they relate to tobacco control. Moreover, domestic incorporation of international human rights standards gives governments more tools to justify domestic tobacco control policies, and domestic courts a clear legal framework to assess tobacco control policies. These are strong and pragmatic considerations but the impact of tobacco use in vulnerable populations, and how it exacerbates inequalities in society, calls for deepening and strengthening these connections. Since the entry into force of the FCTC, countries have made significant progress in tobacco control. Prevalence of tobacco consumption (at the national level) has declined in many countries. However, when data is disaggregated by socio-economic status, we realize that poorer people and people in rural communities continue to smoke at alarmingly high rates. Tobacco control thus should be framed not only as a public health matter but also as a social justice issue. The goal is to continue to make progress in tobacco control and implementation of the FCTC, strongly regulating the tobacco industry while also reducing inequities in society and protecting the rights of all, including vulnerable populations.

5. Accountability, human rights and the responsibilities of the tobacco industry

Lottie Lane

1. INTRODUCTION

Tobacco companies have time and again taken action against laws and regulations that affect their own interests.[1] However, although they take action to further their own interests, the companies often seem unmoved by human rights-based arguments that they should be held accountable for the harms that tobacco causes to individuals and the environment. Although some tobacco companies have embraced a degree of corporate social responsibility, the fact remains that tobacco causes the deaths of over 7 million people each year.[2] The harmful relationship between tobacco and human rights was recognized by the World Health Organization Framework Convention on Tobacco Control (FCTC). The FCTC recalls in its preamble the International Covenant on Economic, Social and Cultural Rights (specifically Article 12 on the right to health), the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child.[3] Human rights issues remain rife in the entire tobacco chain, from the production of tobacco to its marketing and consumption. Affected rights vary, with the rights of those

[1] Such action includes litigation and intimidatory and delaying tactics, among others. See, for example, 'Africa: Investigation reveals tobacco firms allegedly threatening efforts that could save millions from harmful effects of tobacco use; companies comment' (*Business and Human Rights Resource Centre*, 2017) https://www.business-humanrights.org/en/africa-investigation-reveals-tobacco-firms-allegedly-threatening-efforts-that-could-save-millions-from-harmful-effects-of-tobacco-use-companies-comments#c159973, accessed 30 May 2019; Paul Redfern, 'BAT accused yet again of unfair practices in Kenya' (*Business Daily*, 12 July 2017) https://www.businessdailyafrica.com/corporate/companies/BAT-on-the-spot-again-over-business-practices-in-Kenya/4003102-4011490-142d5gx/index.html, accessed 30 May 2019.

[2] WHO, 'Tobacco: Key Facts' (9 March 2018) http://www.who.int/news-room/fact-sheets/detail/tobacco, accessed 30 May 2019.

[3] WHO, Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 116 (FCTC) Preamble.

involved in tobacco production (which is frequently criticized for using child labour)[4] regularly experiencing violations of their right to a sustainable income and of various children's rights, including the right to education, among others.[5] Tobacco marketing and consumption, meanwhile, as well as unwanted exposure to tobacco smoke, often interfere with the rights to life, health and a healthy environment, among others.[6]

The incompatibility between the tobacco industry and human rights is so evident that in 2017 the Global Compact removed the tobacco industry from its initiative, and, after conducting a human rights assessment of Philip Morris International (PMI), the Danish Institute of Human Rights (DIHR) declined to renew its collaboration with the tobacco giant.[7] Vulnerable members of society such as children face particularly heightened risks to their human rights in a world where tobacco companies often have more money and resources than public authorities and use them to undermine State efforts to protect human rights through tobacco control.[8] Such authorities regularly find it difficult to effectively regulate tobacco companies and their effects on human rights, for example through much-needed restrictions on marketing and (enforced) bans on the sale of tobacco to minors. This has led to many non-governmental organizations (NGOs), experts and some international and governmental bodies stepping in to try to hold tobacco companies accountable for their behaviour, with varying degrees of success.[9]

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[4] See, for example, Sarah Boseley, 'Child labour rampant in tobacco industry' (*The Guardian*, 25 June 2018) https://www.theguardian.com/world/2018/jun/25/revealed-child-labor-rampant-in-tobacco-industry, accessed 30 May 2019.

[5] Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-Based Approach to Tobacco Control' (2012) 21 Tobacco Control 209, 210.

[6] ibid 210. See also Kelsey Romeo-Stuppy, 'International Law: Tobacco Marketing: A Violation of Human Rights in Latin America' (2015) 44(2) International Law News 41.

[7] See 'UN Global Compact Integrity Policy Update' (*UN Global Compact*, 13 October 2017) https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/integrity-recommendation-2017.pdf, accessed 30 May 2019; 'Human Rights assessment in Philip Morris International' (*DIHR*, 4 May 2017) https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international, accessed 30 May 2019; and Brigit Toebes, 'Human Rights and the Tobacco Industry: An Unsuitable Alliance' (2018) 7(7) International Journal of Health Policy and Management 667. The irreconcilable conflict of interest between tobacco and public health (and therefore the right to health) is arguably also reflected in Article 5(3) FCTC: 'The Network for Accountability of Tobacco Transnationals' 2 (*Corporate Accountability*) https://www.corporateaccountability.org/wp-content/uploads/2017/09/nattleadership.pdf, accessed 30 May 2019.

[8] See Dresler and others (n 5) 208–209.

[9] Key players include Action on Smoking and Health (and earlier the Human Rights and Tobacco Control Network) and NGOs such as Corporate Accountability.

Accountability for human rights is of paramount importance – it is vital to the successful protection of human rights; 'unless supported by some form of accountability, human rights run the risk of becoming merely window dressing'.[10] In the context of health, in his capacity as Special Rapporteur on the right to health, Paul Hunt repeatedly stressed the necessity of accountability for human rights.[11] As Hunt explains, from the perspective of victims, accountability is crucial because it allows them to understand how responsibility-holders have fulfilled their responsibilities[12] (or perhaps failed to do so). From the perspective of responsibility-holders, accountability provides the opportunity to explain their conduct and the reasoning behind it.[13]

This chapter seeks to scope out the current international human rights accountability of the tobacco industry, including its responsibilities and mechanisms available for holding the industry to account. First, the concept of accountability is introduced and defined (Section 2). The position of the tobacco industry under international human rights law is then explained, including an overview of the human rights standards applicable to tobacco companies under non-binding international human rights standards (Section 3). In Section 4, examples of accountability mechanisms that are used to hold tobacco companies to account, particularly vis-à-vis human rights, are provided. Conclusions are drawn in Section 5.

See, for example, Corporate Accountability, 'About our tobacco campaign', https://www.corporateaccountability.org/tobacco/about-our-tobacco-campaign/, accessed 13 May 2020; and Action on Smoking and Health, https://ash.org, accessed 13 May 2020. See also Section 4.1.1 on litigation against tobacco companies.

[10] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 543.

[11] See, for example, ECOSOC, 'Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt' (13 February 2003) UN Doc E/CN.4/2003/58; UNGA, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt' (31 January 2008) UN Doc A/HRC/7/11, [64]–[65], [99]–[106]. See also Yi Zhang, *Advancing the Right to Healthcare in China: Towards Accountability* (Intersentia 2018) 63. The UN CESCR has also emphasized this. See UN CESCR, 'General Comment No. 9: The domestic application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24; and UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4, cited in Zhang (above) 63.

[12] UNGA, 'Promotion and Protection of all Human Rights' (n 11) [99].

[13] ibid.

2. ACCOUNTABILITY

Accountability is a concept debated in many different disciplines,[14] without a consensus on its definition having been reached. The present chapter adopts a definition of accountability as comprising three elements: (1) responsibility; (2) answerability; and (3) enforcement.[15] Responsibility allows us to identify what an actor can be held accountable for, by discerning which standards of behaviour an actor is expected to follow. Answerability and enforcement, meanwhile, demonstrate how the actor can be held to account.[16] Simply speaking, answerability requires that actors explain and justify their reasons for taking certain decisions and actions both to the public and to bodies conducting oversight of each actor.[17] In addition, mechanisms are needed to gather the information and evaluate the persuasiveness of it. In relation to enforceability, mechanisms also need to be in place to impose consequences on accountable actions, including sanctions, for failing to meet standards for which they are responsible.[18] According to the World Bank, an instrumental organization in the development of 'good governance' (of which accountability is an element), 'enforcement' relates to the ability of oversight bodies to sanction actors for not complying with norms to which they are expected to conform, and to

[14] These include, for example, law, political science, governance studies and international relations.

[15] The two elements of answerability and enforcement are commonly found in definitions of accountability, although scholars disagree as to whether enforcement is a strict prerequisite, for example Mark Bovens, and Carol Harlow and Richard Rawlings: Mark Bovens, Andreas Follesdal and Simon Hix, 'Analysing and Assessing Public Accountability: A Conceptual Framework' (2006) European Governance Papers No C-06-01, http://www.ihs.ac.at/publications/lib/ep7.pdf, accessed 30 May 2019; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 European Law Journal 542, 545. However, due to the links between accountability and the right to an effective remedy, this chapter considers enforcement as a necessary element of accountability. The right to an effective remedy is found in various human rights treaties and is connected to accountability particularly through the mechanisms in place. A complaint against a human rights violation at the national level provides an individual with an avenue for receiving an effective remedy whilst simultaneously providing a mechanism through which to hold the State accountable for violating a right found in the relevant treaty.

[16] See Zhang (n 11) 211.

[17] Answerability is therefore closely connected to and can improve transparency, which is also considered a precondition of good governance. See, for example, Zhang (n 11) 200, citing Andreas Shedler, 'Conceptualizing Accountability' in Andreas Shedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 20.

[18] See Zhang (n 11) 199–200.

provide a remedy for individuals suffering as a result of the non-compliance.[19] However, it is important to point out that enforcement (and accountability more generally) is not about punishment as such.[20] Rather, in order to achieve the full implementation of applicable standards, 'it is a process that helps to identify what [kind of approach and mechanisms] works, so it can be repeated, and what does not, so it can be revised'.[21] Indeed, although some sanctions may be viewed as *ex post facto* punishment, ideally accountability will have *ex ante* effects to prevent harmful decisions and activities from being taken and carried out.[22]

To summarize, accountability can be said to exist 'when there is a relationship between the overseeing actor and the accountable actor, in which the accountable actor is obliged to provide information on, explain and justify their decisions and actions [answerability], while the overseeing actors can question accountable actors, pass judgement and impose consequences on them [enforcement]',[23] according to certain standards to which the accountable actor is held (responsibility).

Although it will not be discussed here, it is also important to note that there are many different kinds of accountability,[24] each using different methods and requiring different mechanisms to be put in place. Not all kinds of accountability and accountability mechanisms are appropriate for the same actors, however, as some kinds of accountability (mechanisms) specifically target public actors.[25] Nevertheless, some forms of accountability and accountability mechanisms are equally amenable to holding non-State actors, such as tobacco

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[19] ibid.

[20] UNGA, 'Promotion and Protection of all Human Rights' (n 11) [99].

[21] ibid.

[22] Zhang (n 11) 202–203.

[23] ibid 207. An 'overseeing actor' is the actor holding another actor to account, whereas the 'accountable actor' is the actor being held to account.

[24] These include legal, political, horizontal, vertical, social and diagonal accountability. See Rick Stapenhurst and Mitchell O'Brien, 'Accountability in Governance' (*World Bank Institute*) https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf, accessed 30 May 2019; Zhang (n 11) 203–208. Due to limited space, the types of accountability will not be discussed here. For a detailed discussion of accountability and its different forms, see Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014).

[25] For example, political and administrative accountability. Political accountability is achieved primarily through the electoral process, whereby voters 'delegate their power to representatives through elections' and hold them to account in the subsequent elections. Administrative accountability refers to internal supervision of the activities of public actors, although as a theory could also be applied to some non-State actors. See Zhang (n 11) 239, 642–643.

companies, accountable. This includes legal accountability, which entails holding actors to account through the adoption of laws enforced by legal mechanisms and courts (that is, judicial accountability mechanisms) as well as quasi-judicial mechanisms.[26] As mentioned above, this is crucial to the enjoyment of human rights. Examples of judicial and quasi-judicial accountability mechanisms applicable to the tobacco industry will be provided in Section 4.

3. THE TOBACCO INDUSTRY AND INTERNATIONAL HUMAN RIGHTS LAW

As explained above, the first element of accountability is responsibility, which details for what actors can be held accountable. While the answer is relatively straightforward for State actors, to whom the corpus of international human rights law (assuming ratification of the relevant treaties) can be readily applied, the answer is more complicated for the tobacco industry. The industry consists of private companies or businesses, which are classified as non-State actors under international law. As such, tobacco companies are not able to ratify international human rights treaties or be held directly responsible at the international level for failing to conform with standards contained therein. The following sections will provide an overview of the human rights standards currently applicable to businesses, and briefly explain how these relate to the activities of tobacco companies.

3.1 Tobacco Companies as Businesses under International Human Rights Law

International human rights law as laid down in international treaties does not apply directly to the tobacco industry. The current framework of international human rights law allows only States, to the exclusion of non-State actors (of which business is one), to ratify international human rights treaties and to be held to binding international human rights law obligations.[27] This rules out

[26] For a more comprehensive definition of legal accountability, see Jeff King, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 126–127.

[27] The lack of direct obligations for businesses at the international level also precludes them from being the direct subject of complaints before the UN human rights treaty monitoring bodies. For more explanation, see Lottie Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (2018) 5(1) European Journal of Comparative Law and Governance 5, 15–16.

the possibility of 'direct horizontal effect', which would allow international human rights law to be directly applied to and enforced against the tobacco industry in legal proceedings. Despite the lack of direct horizontal effect, adjudicatory bodies have been able to apply international human rights standards to businesses indirectly. This is most commonly achieved by relying on States' positive obligations to protect individuals' enjoyment of human rights from interference by third (non-State) actors. The obligation will not be explained in detail here as State obligations vis-à-vis the tobacco industry have been examined by Oscar Cabrera and Andrés Constantin in Chapter 4. It suffices here to note that the obligation to protect has been clearly delineated into several distinct obligations for States – most notably obligations of due diligence and an obligation to regulate private businesses.[28]

Important inroads towards direct human rights obligations for businesses have also been made. Significantly, an intergovernmental working group is currently drafting a binding international human rights treaty 'to regulate … the activities of transnational corporations and other business enterprises'.[29] Despite the focus on business enterprises, the first draft of the treaty, released in July 2018,[30] follows the current framework of international law and only contains obligations directed at States. The draft reaffirms that States are the primary human rights responsibility-holders, even in relation to abuses (directly) caused by business enterprises.[31] In terms of substantive obligations, great focus is placed on due diligence obligations, especially those relating to the prevention of abuse and allowing victims of abuse some access to remedy and justice.[32] The draft places responsibility on States for ensuring

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[28] See ibid. A recent overview of States' obligation to protect regarding businesses is laid out in UN CESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24.

[29] The working group was established in 2014 by UN Human Rights Council Res 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) UN Doc A/HRC/RES/26/9. See also Lottie Lane, 'Private Providers of Essential Public Services and *De Jure* Responsibility for Human Rights' in Marlies Hesselman, Antenor Hallo de Wolf and Brigit Toebes (eds), *Socio-economic Human Rights in Essential Public Service Provision* (Routledge 2017) 139, 152–153, cited in Lane (n 27) 17.

[30] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (*Zero Draft*, 16 July 2018) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf, accessed 30 May 2019.

[31] ibid, art 1.

[32] See ibid, art 9.

that businesses conform to these due diligence obligations, which are couched as obligations to be placed on businesses at the national level.[33] Although the draft is much more specific and requires more positive activity by businesses themselves, the effect of the approach taken in the instrument generally aligns with that of the UN human rights treaty monitoring bodies (as well as regional human rights courts). Over time, these bodies have interpreted human rights treaties as imposing various positive obligations upon States to put measures in place domestically to ensure that non-State actors do not interfere with the enjoyment of human rights.[34] As Doug Cassel notes, the emphasis on State obligations and the fact that no enforcement mechanism is envisaged in the treaty make it more palatable to States, which may therefore be more likely to ratify it.[35] At this early stage in the process, particularly given the remaining issues to be ironed out (such as which companies exactly will fall under the scope of its provisions) and the reliance on ratifications once adopted, it is difficult to assess how effective the treaty will be.[36] What is clearer is that if the treaty enters into force and is properly implemented, as a transnational business enterprise the tobacco industry will, at least in the domestic law of Member States, be legally obliged to fulfil similar (though sometimes broader) due diligence obligations as those found in the UN Guiding Principles on Business and Human Rights (UNGPs),[37] which will be discussed in the following section.

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[33] ibid.

[34] For an analysis of the jurisprudence of the UN human rights monitoring bodies on this, see Lane (n 27). In the context of business enterprises specifically, also see UN CESCR, 'General Comment No. 24' (n 28). The major difference between due diligence under international human rights law generally and under the draft is that the draft has transformed the obligation into one of result, rather than one of conduct, placing a much greater burden on States and a broader scope of State responsibility for the conduct of businesses. See John Ruggie, 'Comments on the "Zero Draft" Treaty on Business and Human Rights' (*Business and Human Rights Resource Centre*, 2018) https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights, accessed 30 May 2019; Lane (n 27).

[35] Doug Cassel, 'At Last: A Draft UN Treaty on Business and Human Rights' (*Letters Blogatory*, 2 August 2018) https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/#more-27105, accessed 30 May 2019.

[36] It is likely to be quite some time before a final version of the treaty has been adopted and gained enough State ratifications to enter into force. Chairmanship of the open-ended intergovernmental working group, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (*UN Human Rights Council*) http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf, accessed 30 May 2019.

[37] UN HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises:

3.2 Non-binding International Human Rights Standards Applicable to Tobacco Companies

The UNGPs constitute a major stepping stone on the path to human rights obligations for businesses. Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs were drafted by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The principles are based on three pillars, one of which is a direct responsibility of businesses to respect human rights.[38] While the UNGPs are considered to be soft law and therefore not legally binding, the inclusion of this responsibility, which encompasses a responsibility to act with due diligence, remains significant.[39] Not only do the principles highlight the importance of businesses taking action to avoid harming human rights, but they have also led to tangible action being taken by both States and businesses. For instance, several States have adopted 'National Action Plans'[40] and national legislation (see below), and businesses have conducted human rights impact assessments, adopted human rights policy statements, and begun human rights reporting and training.[41] The UNGPs pose a significant obstacle to the continued operations of the tobacco industry. In a recent collaboration between PMI and the DIHR, the DIHR examined how

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Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (UNGPs); UN Human Rights Council Res 17/4 (16 June 2011) UN Doc A/HRC/RES/17/4.

[38] The remaining pillars are the State's obligation to protect human rights and access to effective remedy for victims of business-related human rights violations. See ibid Principles 11–24.

[39] ibid Principles 11 and 17.

[40] National Action Plans set out a government's activities and plans for helping businesses improve their respect for human rights. See 'State national action plans' (*UN OHCHR*) www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx, accessed 30 May 2019. See also Claire Methven O'Brien, Amol Mehra, Sara Blackwell and Cathrine Bloch Poulsen-Hansen, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' (2015) 1 Business and Human Rights Journal 117, discussed in Lane (n 27) 18.

[41] For an extensive database detailing the action that has been taken by businesses and States to implement the UNGPs, see 'Type of Steps Taken' (*Business and Human Rights Resource Centre*) www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken, accessed 30 May 2019.

the UNGPs apply to tobacco, and evaluated in particular the company's value chain against the principles. The result was that

> [a]ccording to the UNGPs companies should avoid causing or contributing to adverse impacts on human rights. Where such impacts occur, companies should immediately cease the actions that cause or contribute to the impacts. Tobacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the [United Nations Guiding Principles on Business and Human Rights] therefore require the cessation of the production and marketing of tobacco.[42]

Another significant soft-law initiative that has contributed to the drive for human rights obligations of businesses is the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines).[43] States adhering to the OECD Guidelines are required to establish a 'National Contact Point' (NCP), a 'built-in grievance mechanism' that is unique among initiatives on the human rights responsibilities of businesses.[44] An example of how the mechanism has been used in relation to human rights abuse by tobacco companies will be examined in Section 4.2.1.

As soft-law initiatives, the contribution of the UNGPs and OECD Guidelines to direct horizontal effect vis-à-vis businesses is limited. They have, however, had a significant influence on (binding) national and European legislation.[45]

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[42] This led the DIHR to end its collaboration with the tobacco company. See DIHR (n 7).

[43] Organisation for Economic Co-operation and Development (OECD), 'OECD Guidelines for Multinational Enterprises', 27 June 2000 (revised version 2011) www.oecd.org/corporate/mne/, accessed 30 May 2019 (OECD Guidelines). Unlike the UNGPs, the OECD Guidelines are not solely focused on human rights but on responsible business conduct more generally. See 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (*OECD*, 2014) 2 http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf, accessed 30 May 2019; Lane (n 27) 18–19. The 2011 version of the Guidelines is consistent with the UNGPs and requires business enterprises, inter alia, to respect human rights, avoid causing or contributing to adverse human rights impacts, adopt a human rights policy commitment and carry out human rights due diligence. See OECD, 'OECD Guidelines for Multinational Enterprises' (above) 31.

[44] 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (n 43), discussed in Lane (n 27) 18–19.

[45] Several examples at the regional level are Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330; and Regulation 2017/821/EU laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130. Also see CLT Envirolaw, 'Overview of Key Business & Human Rights Legislation for Companies' (*Business and Human Rights Resource Centre*)

Prominent examples are the United Kingdom's The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 and the Modern Slavery Act 2015. Both statutes require certain businesses to disclose human rights-related information.[46] The Modern Slavery Act, which requires businesses of a certain size to provide information as to 'what action they have taken to ensure there is no modern slavery in their business or supply chains',[47] has interestingly been taken up by British American Tobacco (BAT). The tobacco company has adopted a 'Modern Slavery Statement' in which it details the steps that are taken as part of its broader human rights strategy, 'to prevent modern slavery and human trafficking in its business and supply chains'.[48] Alongside UK legislation, French and US legislation has also been influenced by the UNGPs.[49] The relatively new French 'vigilance' law, for example, imposes obligations on some companies (including some tobacco companies) to adopt 'vigilance plans' which include, for instance, 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms'.[50]

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www.business-humanrights.org/sites/default/files/media/documents/clt_human_rights_legislation-1.pdf, accessed 30 May 2019, cited and discussed in Lane (n 27) 20.

[46] Specified companies are required by The Companies Act 2006, s 414C (7)(b) (Strategic Report and Directors' Report) Regulations 2013 No 1970 to prepare a 'strategic report' containing a review of their operations 'to the extent necessary for an understanding of the development, performance or position of the company's business, include … social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies'. Lane (n 27) 20.

[47] Modern Slavery Act 2015, part 6 s 54(4), quoted and discussed in Lane (n 27) 20.

[48] 'Modern Slavery Act Statement 2017' (*BAT*) http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DOAK8P7C/$FILE/medMDAWUNCY.pdf?openelement, accessed 30 May 2019. Such activities include the adoption of the Supplier Code of Conduct, which in relation to modern slavery requires that 'all suppliers ensure their operations are free from forced, bonded, involuntary, trafficked or unlawful migrant labour'. See also 'Supplier Code of Conduct' (*BAT*) https://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9EAMHQ/$FILE/medMDB4GDSF.pdf?openelement, accessed 30 May 2019.

[49] In the US this comprises State law such as the California Transparency in Supply Chains Act (Civil Code Section 1714.43; Senate Bill 657 (Steinberg) (2009–10)), which requires 'efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale' to be disclosed by certain businesses. For discussion, see Kamala D Harris, 'The California Transparency in Supply Chains Act: A Resource Guide' (*State of California Department of Justice*, 2015) https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf, accessed 30 May 2019. See Lane (n 27) 20.

[50] Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (JO du 28ème mars 2017, no.1) (Law No. 2017-399 on the Duty of Care of Parent Companies and Ordering Companies). For dis-

Now that the responsibility of the tobacco industry has been discussed (that is, what it can be held accountable for), the next section will consider examples of mechanisms in place that allow for the answerability and enforcement of the industry.

4. ACCOUNTABILITY MECHANISMS AND THE TOBACCO INDUSTRY

There are various mechanisms available for holding actors accountable for human rights violations. However, mechanisms within the international human rights law system apply only to States due to the lack of direct human rights obligations for non-State actors at the international level. This means that mechanisms to hold the tobacco industry accountable have necessarily been established or developed outside of the (binding) international human rights law framework or within national law. Indeed, many mechanisms do not actually refer to the responsibilities of the industry as explained above, often relying on standards that concern human rights without mentioning them specifically. Other mechanisms rely on 'human rights' in general, but not the particular standards applicable to the industry. Space does not allow a full overview of accountability mechanisms contributing to human rights accountability of the industry, however examples of a mixture of mechanisms, including judicial, quasi-judicial and social accountability mechanisms, will be discussed below.[51]

4.1 Judicial Accountability Mechanisms

Judicial accountability mechanisms refer to courts that make judicial decisions and adopt binding judgments.[52] Given the framework of international law vis-à-vis businesses (as explained above), the present chapter focuses on domestic courts as a form of judicial accountability mechanism.

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cussion, see Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317. See also Lane (n 27) 20–21.

[51] The chapter deals only with mechanisms aimed at holding the tobacco industry directly accountable – mechanisms that can hold them indirectly responsible, for example through States' human rights obligations, fall outside the scope of this chapter. The possibility of holding the industry indirectly accountable is being investigated by Action on Smoking and Health (ASH). See 'Could tobacco executives/corporations be found guilty of human right violations?' (*ASH*) https://ash.org/human-rights-violations/ accessed 30 May 2019.

[52] This is distinguished here from quasi-judicial mechanisms such as tribunals, institutions and ombudsmen that do not render binding decisions (see Section 4.2).

Courts are capable of achieving accountability in different ways, for example by obliging actors 'to perform certain duties, release information or refrain from acting in a certain way'.[53] This statement was made in the context of public accountability but applies equally to holding private actors to account – courts can require tobacco companies to, for example, provide information regarding the production of tobacco and decision-making processes concerning all aspects of tobacco production and marketing (answerability). Courts also have significant enforcement powers.[54] They could, for example, require the industry to comply with standards found in the State's constitution or applicable (inter-)national health laws and policies that relate to human rights and/or tobacco control,[55] or impose compensation or guarantees of non-repetition of certain behaviour.[56]

4.1.1 Litigation against the tobacco industry

Judicial accountability mechanisms have been used in various countries in an attempt to mitigate the harmful impact of the tobacco industry on individuals, particularly their health.[57] Although cases may not be legally based on human

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[53] Matthew Flinders, 'Mechanisms of Judicial Accountability in British Central Government' (2001) 54(1) Parliamentary Affairs 54, 55.

[54] See Zhang (n 11) 237.

[55] Depending on whether a State's national legal system follows the monist or dualist tradition, courts may be able to directly apply international law, including that related to human rights and tobacco control. The Netherlands, for example, follows the monist tradition and allows international treaties to which the Netherlands is party to be directly applied in national courts. See Article 93 of The Constitution of the Kingdom of the Netherlands (2008).

[56] These types of redress are listed by Helen Potts, who notes that while most of these remedies address the negative impact of a violation on specific rights-holders, guarantees of non-recognition are focused on the institutional or systematic level and address potential negative impacts on unidentified future rights-holders. Helen Potts, 'Accountability and the Right to the Highest Attainable Standard of Health' (*University of Essex Human Rights Centre*, 2008) 28–29 http://repository.essex.ac.uk/9717/1/accountability-right-highest-attainable-standard-health.pdf, accessed 30 May 2019. See also Zhang (n 11) 237.

[57] Unfortunately, as previously mentioned (n 1), the industry itself has also used litigation to fight tobacco control, in particular in low- and middle-income countries such as Uganda and Uruguay and in relation to packaging regulations. See, for example, Celia Olivet and Alberto Villareal, 'Who really won the legal battle between Philip Morris and Uruguay?' (*The Guardian*, 28 July 2016) https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts, accessed 30 May 2019; 'BAT Uganda sues Ugandan Government over the Tobacco Control Act, 2015' (*Center for Tobacco Control in Africa*, 10 May 2017) https://ctc-africa.org/index.php/news/373-bat-uganda-sues-uganda-government-over-the-tobacco-control-act-2015, accessed 30 May 2019. See also the work of the

rights, litigation can require tobacco companies in practice to fulfil some of their human rights responsibilities. Litigation against the tobacco industry is encouraged in Article 19 FCTC, which requires State Parties to 'consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate'.[58]

Cases brought in several countries have succeeded in requiring the industry to act in a certain way. For example, in the case of *Agência Nacional de Vigilância Sanitária (ANVISA) v Philip Morris Brasil Ind Com Ltda* the Regional Federal Court of the 2nd Region required PMI to place warnings of the harms tobacco consumption causes on its packaging.[59] This could contribute to greater accountability for the industry regarding the right to access to information in particular.

In the later Brazilian case of *Claudio Rodrigues Bernhardt v Philip Morris*,[60] the claimant filed a case against the Souza Cruz tobacco company claiming that the company was liable for damages for the death of his spouse, who the claimant argued had been a victim of misleading advertisements of the tobacco products, the consumption of which allegedly led to her death. On appeal, the 8th Civil Chamber of the Court of Justice of Rio de Janeiro based its decision in favour of the claimant on the Brazilian Constitution and a subsequent resolution which protect the rights to health, life, protection in commercial relations and dignity.[61] Although accountability may have been achieved in this particular case, the general human rights accountability is limited here due to the narrow scope of the sanctions placed on the company.

In addition to Brazil, cases have been brought more recently in the US and Canada, as well as other States, to recover health care costs from the tobacco

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Center for Health, Human Rights and Development, a key player in anti-tobacco advocacy in Uganda, available at https://www.cehurd.org/, accessed 30 May 2019.

[58] FCTC, art 19(1). See for discussion 'About our tobacco campaign' (*Corporate Accountability*) https://www.corporateaccountability.org/tobacco/about-our-tobacco-campaign/, accessed 30 May 2019.

[59] *Agência Nacional de Vigilância Sanitária (ANVISA) v Philip Morris Brasil Ind Com Ltda*, No 2009.02.01.006674-2 (2009) Tribunal Regional da 2a Regiao. See Tobacco Control Laws, https://www.tobaccocontrollaws.org/litigation/decisions/br-20090923-agncia-nacional-de-vigilncia-s, accessed 30 May 2019.

[60] *Claudio Rodrigues Bernhardt v Philip Morris* No 0000051-90.2002.8.19.0210 (2011) Oitava Câmara Civil do Tribunal de Justiça do Rio de Janeiro (*Global Health and Human Rights Database*) http://www.globalhealthrights.org/health-topics/claudio-rodrigues-bernhardt-v-philip-morris/, accessed 30 May 2019.

[61] ibid.

industry for those that have been harmed by its products.[62] Significantly, in 2016 a criminal complaint was filed in the Netherlands against four major tobacco companies for 'attempted murder, alternatively attempted manslaughter and/or attempted severe and premeditated physical abuse and/or attempted deliberate and premeditated injuring of health'[63] as well as forgery relating to marketing practices. Dutch public prosecutors declined to take the case further as they saw little chance of the claim succeeding at trial since despite the health risks related to tobacco consumption, the companies operate within the confines of the law.[64] If successful, or even simply heard at trial, such a case would inevitably lead to answerability and perhaps enforcement against the tobacco industry for its interference with the enjoyment of health. This is generally true for litigation against the industry, although the scope of accountability depends on the nature of the complaint in a case, as seen above.

4.2 Quasi-judicial Accountability Mechanisms

Quasi-judicial accountability can be achieved by institutions that are autonomous and independent from the actor being held accountable, and are established by the State.[65] In the context of human rights, quasi-judicial accountability mechanisms often take the form of human rights treaty monitoring bodies at the international level, and human rights institutions, com-

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[62] In the case of *Saskatchewan v Rothmans* SKQB 357 (2013), for example, the Saskatchewan government sought the costs of the healthcare of individuals suffering from tobacco-related diseases. See 'Litigation by Country: Canada' (*Tobacco Control Laws*) https://www.tobaccocontrollaws.org/litigation/decisions/ca-20131001-the-government-of-saskatchewan, accessed 30 May 2019. See also 'Tobacco-Related Litigation in Canada' (*Smoking and Health Action Foundation/Non-Smokers' Rights Association*, 2015) https://nsra-adnf.ca/wp-content/uploads/2016/07/Tobacco-related_Litigation_in_Canada_2015.pdf, accessed 30 May 2019. Regional legislation has also been passed within Canada (among other States) allowing necessary authorities 'to recover health care costs resulting from the industry's negligence and deceptive marketing practices'. The Crown's Right of Recovery Act 2009 was passed in Alberta, Canada. See 'Holding the Tobacco Industry Accountable' (*Action on Smoking and Health*) https://www.ash.ca/holding_the_tobacco_industry_accountable, accessed 30 May 2019.

[63] 'Dutch public prosecutor rejects criminal case against big tobacco firms' (*DutchNews.nl*, 22 February 2018) https://www.dutchnews.nl/news/2018/02/dutch-public-prosecutor-rejects-criminal-case-against-big-tobacco-firms/, accessed 30 May 2019; and Jon Henley, 'Dutch effort to charge tobacco firms with attempted murder fails' (*The Guardian*, 22 February 2018) https://www.theguardian.com/world/2018/feb/22/dutch-attempt-to-take-tobacco-firms-to-court-for-manslaughter-fails, accessed 30 May 2019.

[64] ibid.

[65] Zhang (n 11) 238.

missions and tribunals at the national level.[66] The majority of quasi-judicial accountability mechanisms do not relate directly to businesses but focus on the accountability of State actors. One mechanism that does allow businesses to be held to account is the grievance mechanism established by the OECD Guidelines, explained above.

4.2.1 OECD National Contact Points

In cases of non-compliance with the OECD Guidelines, NCPs 'provide a mediation and conciliation platform for helping to resolve cases'.[67] Although the guidelines do not focus only on human rights, an increasing number of NCP cases deal with human rights, particularly since the 2011 revisions.[68] Significantly for the present context, a case was brought before NCPs on the basis of human rights against tobacco companies before the United Kingdom's NCP. The case, against BAT, was brought by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF). The IUF claimed that the abuse of migrant farm workers in the US could be linked to BAT, which was not fulfilling its obligations to end such abuse or to conduct due diligence. The claim, which referenced the International Covenant on Civil and Political Rights as well as two International Labour Organization Conventions dealing with rights,[69] was brought in 2016. However, despite an initial assessment by the NCP declaring further investigation to be merited, no outcome has yet been reached,[70] leaving the true impact of the guidelines in this instance unclear. At a minimum, the mechanism can result in answerability as investigations would require explanations from the company of its actions and decisions as well as a justification for them.

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[66] This includes, in particular, national human rights institutions, ibid.

[67] 'Cases handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises' (*OECD*) 1 http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf, accessed 30 May 2019, quoted in Lane (n 27) 19.

[68] ibid. A list of human rights-related NCP cases can be found on the OECD's database at http://mneguidelines.oecd.org/database/searchresults/?q=(Theme:(Human%20rights)), accessed 30 May 2019.

[69] Steven Murdoch, Danish Chopra and Liz Napier, 'Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from IUF against BAT' (*UK National Contact Point for the OECD Guidelines for Multinational Enterprises*, August 2016) [20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543808/initial-assessment-complaint-from-iuf-against-bat.pdf, accessed 30 May 2019.

[70] 'British American Tobacco (BAT) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)' (*OECD Specific Instance Database*) http://mneguidelines.oecd.org/database/instances/uk0046.htm, accessed 30 May 2019.

5. CONCLUSION

The above discussions show that accountability, both conceptually and in practice, can be difficult to pin down. Accountability consists of three elements: (1) responsibility (identifying what an actor can be held accountable for); (2) answerability (an actor's explanation and justification of their behaviour); and (3) enforcement (both concerning how an actor can be held accountable). However, in the context of international human rights, and even more so in the specific context of the tobacco industry as a non-State actor, standards setting out what exactly it can be held accountable for are limited. Despite the draft binding treaty on business and human rights, the industry's current international human rights responsibilities are limited to those found in soft-law instruments such as the UNGPs and OECD Guidelines.

This has an impact on the mechanisms available for answerability and enforcement, which in practice sometimes rely on moral standards or more general human rights arguments rather than industry-specific human rights responsibilities. The obvious exception to this is NCPs, but evidence of their use for human rights complaints against tobacco companies is very limited. Quasi-judicial accountability mechanisms, despite allowing answerability, lack strong enforcement powers. Therefore, it appears that currently, although the scope of accountability using purely judicial accountability mechanisms is often narrow, relating to a company's treatment of or effect on single individuals rather than on health more broadly, these mechanisms are the best option for achieving both answerability and enforcement. Judicial accountability mechanisms also exist at the national level. Although such mechanisms' direct reference to human rights is relatively infrequent, some important examples (such as those discussed above) can be found, bolstering the de facto protection of human rights. Nevertheless, in order to achieve accountability of the tobacco industry for international human rights in a more widespread and consistent manner, however challenging, further action must be taken at the international level.

6. Is there a European human rights approach to tobacco control?

Amandine Garde and Brigit Toebes

1. INTRODUCTION

The Regional Office for Europe of the World Health Organization (WHO Europe) estimates that of all WHO regions, Europe has the highest prevalence of tobacco smoking among adults (28 per cent) and some of the highest prevalence of tobacco use by adolescents. As such, tobacco use is responsible for 16 per cent of all deaths in the region (compared to the 12 per cent global average), many of which are premature.[1] WHO Europe also indicates that, overall, smoking is increasing in the region – though in some countries, particularly those that have extensively regulated the tobacco industry and its products, smoking rates are in steady decline[2] – and that in some countries tobacco use among youth is very similar to that of adults.[3] It also projects that overall smoking prevalence by 2025 will rise, with a rate of 31 per cent among

[1] WHO Europe, 'Data and Statistics' (*WHO*) http://www.euro.who.int/en/health-topics/disease-prevention/tobacco/data-and-statistics, accessed 4 October 2019.

[2] See, for example, NHS, 'Statistics on Smoking, England – 2019 [NS] [PAS]' (*NHS Digital*, 2 July 2019) https://digital.nhs.uk/data-and-information/publications/statistical/statistics-on-smoking/statistics-on-smoking-england-2019/part-3-smoking-patterns-in-adults-copy#smoking-prevalence-among-adults, accessed 4 October 2019, which shows the smoking prevalence among adults in England has fallen to 14.4 per cent of adults, in comparison to 14.9 per cent in 2017 and 19.8 per cent in 2011. See also 'Tabagisme en France: 1 million de fumeurs quotidiens en moins' (*Santé Publique France*, 28 May 2018) https://www.santepubliquefrance.fr/les-actualites/2018/tabagisme-en-france-1-million-de-fumeurs-quotidiens-en-moins, accessed 17 July 2019, where it is revealed that there were one million fewer daily smokers in 2017 in France.

[3] See, for example, WHO, 'WHO report on the global tobacco epidemic, 2017: Country profile Lithuania' (*WHO*, 2017) https://www.who.int/tobacco/surveillance/policy/country_profile/ltu.pdf?ua=1, accessed 17 July 2019; WHO, 'Latvia' (*WHO*, 2003) https://www.who.int/tobacco/media/en/Latvia.pdf, accessed 17 July 2019.

males and 16 per cent among females.[4] Smoking therefore remains a major public health concern in the European region, which poses significant questions from the perspective of law, policy and human rights.

The Council of Europe (CoE) does not have an overarching tobacco control strategy. An analysis of the case law of the treaty bodies of the CoE reveals that tobacco use and exposure to second-hand smoke (SHS) are only addressed to a limited extent, except in the decisions of the European Committee of Social Rights (ECSR). Nonetheless, the CoE human rights framework holds much potential for the further identification of a human rights approach to tobacco control in Europe.

By contrast, conscious of the negative impact that risk factors like smoking have on the European population, the European Union (EU) has developed public health strategies in which tobacco control has featured prominently and led to the adoption of EU-wide tobacco control legislation, recommendations and information campaigns. Tobacco control has also been the focus of key judgments of the Court of Justice of the European Union (CJEU).

This chapter critically assesses the ways in which both the CoE and the EU have engaged with the interface between human rights and tobacco control, looking at laws and policies relevant to tobacco use and exposure to SHS. Its overarching objective is to explore whether a human rights approach to tobacco control exists in Europe.

2. TOBACCO CONTROL AND THE COUNCIL OF EUROPE

2.1 The Council of Europe, Human Rights and Tobacco Control

The CoE is an intergovernmental organization whose primary aim is to uphold human rights, democracy and the rule of law in Europe. With 47 Member States, it has a much broader membership than the EU. The two key human rights instruments are the European Convention on Human Rights on civil and political rights (ECHR) and the (Revised) European Social Charter on economic and social rights (ESC). They reflect a dichotomy similar to what we find at the UN level,[5] and like the UN instruments they are complementary

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[4] See WHO Europe (n 1).

[5] After the adoption of the comprehensive Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), two separate treaties were adopted, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

and interdependent.[6] Based on this assumption, this chapter discusses both mechanisms in an integrated fashion.

The CoE has not adopted any tobacco control strategy, law or policy.[7] Nor have its human rights monitoring bodies paid much attention to tobacco control. Nonetheless, the CoE's human rights framework holds much potential for tobacco control in Europe. Many human rights in the ECHR and the ESC are potentially relevant to protect everyone in society from tobacco use and exposure to SHS in Europe. In the ECHR, of specific importance are: the right to life (Article 2), the right to privacy and family life (Article 8) and the prohibition of torture and inhuman and degrading treatment (Article 3). Importantly, the ESC contains the right to the enjoyment of 'the highest possible standard of health attainable' (Article 11), which identifies three State obligations in relation to the realization of the right, which are all relevant in the context of tobacco control.[8] Article 3 ESC on the right to safe and healthy working conditions is also important in the context of tobacco farming, while Articles 7 and 17 stipulate the right of children and young persons to protection,[9] and the right of children and young persons to social, medical and legal assistance.[10]

While the individual complaint mechanism of the European Court of Human Rights (ECtHR) is well known and its case law is very influential at the domestic level, the case law of the ECSR, the treaty body of the ESC, should not be overlooked. Even though tobacco control has not been raised within the framework of its collective complaint mechanism, the Committee has paid ample attention to tobacco control in its State reporting procedure.

2.2 Case Law of the Treaty Bodies of the Council of Europe

This section discusses how tobacco has thus far been addressed by the ECtHR and the ECSR. Two key areas of potential tobacco regulation (and litigation) are identified: exposure to SHS and consumption of tobacco products.[11]

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6 'The European Social Charter' (*Council of Europe*) https://www.coe.int/en/web/turin-european-social-charter/-european-social-charter-and-european-convention-on-human-rights, accessed 4 October 2019.

7 The Council of Europe has developed policies, strategies and programmes in many areas, including in the field of human rights education, racism and intolerance, youth mobility and cybercrime.

8 (1) removing the causes of ill health, (2) providing advisory and educational facilities for the promotion of health and (3) and preventing disease.

9 In particular in the context of labour.

10 Which embraces the right to grow up in an environment, which encourages the full development of their personality and of their physical and mental capacities.

11 For reasons of space tobacco farming is not discussed here.

2.2.1 Exposure to tobacco smoke

The case law of the ECtHR has paid some attention to SHS over the past 20 years. A first recognition of the importance of regulating tobacco came in 1998 with the case of *Wöckel v Germany* before the former European Commission on Human Rights. It dealt with the question of whether Germany was obliged, as the applicant claimed, to enact legislation prohibiting smoking in public with a view to protecting non-smokers.[12] Noting that the German government had already introduced a public information campaign on the health risks of smoking, imposed restrictions on tobacco advertising and prohibited smoking in certain public areas, the Commission held that the applicant's rights to life and respect for private and family life (Articles 2 and 8 ECHR) had not been violated. Balancing the competing interests between non-smokers and smokers, it argued that the absence of a general prohibition on tobacco advertising and on smoking did not amount to a violation of these rights.[13] Although much was left to the discretion of the State, this decision nonetheless affirms that Articles 2 and 8 imply a positive obligation of the State to protect non-smokers.[14]

There are also several ECtHR judgments dealing with the rights of non-smokers and their exposure to SHS during detention.[15] In nearly all of these cases, the Court held that there was a violation of Article 3 ECHR (in particular, prohibition of inhuman and degrading treatment). For example, in *Kalashnikov v Russia* the Court ruled that the combined unhealthy conditions in detention, including exposure to SHS, amounted to a violation of Article 3 ECHR.[16] In its judgment in *Elefteriadis v Romania*, the Court observed that a State was required to take measures to protect a prisoner from the harmful effects of passive smoking where medical examinations and the advice of doctors indicated that this was necessary for health reasons.[17]

Given the parallels between exposure to SHS and air pollution, it is also worth referring to the ECtHR's body of case law on the latter. In *Brincat and others v Malta*, the ECtHR addressed the rights of workers who were exposed to asbestos during their careers as employees in a ship repair yard. The Court

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[12] *Wöckel v Germany* (1998) 93-A DR 82 [8]. See also Melissa E Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control' (2004) 29 Yale Journal of International Law 236.

[13] *Wöckel v Germany* (n 12) [85].

[14] See also Crow (n 12) 236.

[15] Inter alia, *Florea v Romania* App No 37186/03 (ECtHR, 14 September 2010); *Elefteriadis v Romania* App No 38427/05 (ECtHR, 25 January 2011); *Kalashnikov v Russia* App No 47095/99 (ECtHR, 15 October 2002); *Keenan v the United Kingdom* App No 27229/95 (ECtHR, 3 April 2001).

[16] See, for example, *Kalashnikov v Russia* (n 15) [102].

[17] *Elefteriadis v Romania* (n 15).

argued that the government should have been aware that shipyard workers could suffer from exposure to asbestos and that it was inconceivable that there was no access to sources of information on the harmfulness of asbestos.[18] Malta had thus failed to satisfy its positive obligations under Articles 2 and 8 ECHR to legislate or take other practical measures to ensure that the applicants were adequately protected and informed of the risk to their health and lives.[19] As such, and contrary to the cases about exposure to SHS in prisons, the focus was on Articles 2 and 8 ECHR, not on Article 3 ECHR. Given that exposure to asbestos and SHS can both lead to respiratory problems and contribute significantly to lung cancer,[20] future cases may address exposure to SHS in the context of Articles 2 and 8 ECHR.

A specific question concerns exposure to tobacco smoke by the unborn through smoking by the pregnant mother or her exposure to SHS. Based on the case law of the ECtHR, the issue of when the right to life begins falls within the margin of appreciation of State Parties.[21] Yet the Court established in its case law that the unborn child is not regarded as a person directly protected by Article 2 ECHR. The ECtHR has stated that if the unborn child does have a right to life, the mother's rights and interests implicitly limit this right.[22] Nonetheless, the Court has not ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.[23] The scope of application of such relative protection remains unclear. We would argue that safeguards for the unborn child could include consultations with pregnant women on the risks of smoking during pregnancy, as well as public information campaigns informing future parents about such risks.

Turning to the ECSR, no collective complaint has thus far addressed the matter, but the Committee frequently touches on this matter in its reporting procedure.[24] For example, in its Conclusions regarding Greece, it established that the country had by far the highest level of annual per capita cigarette consumption in the EU and the European Economic Area and that the figure

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[18] *Brincat and others v Malta* App Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECHR, 24 July 2014) [104], [106].

[19] ibid.

[20] Among many studies see, for example, Kentaro Inamura and others, 'Combined Effects of Asbestos and Cigarette Smoke on the Development of Lung Adenocarcinoma: Different Carcinogens May Cause Different Genomic Changes' (2014) 32 Oncology Reports 47.

[21] *Vo v France* App No 53924/00 (ECtHR, 8 July 2004) [82].

[22] ibid [80].

[23] ibid with reference to *Bruggeman and Scheuten v Federal Republic of Germany* (1977) 3 EHRR 244 [61].

[24] As based on an analysis of the conclusions of the Committee in its reporting procedure, see 'European Social Charter' (n 6).

had been rising steadily since 1988. Considering that this situation was not in conformity with Article 11(3) ESC, it suggested that the Greek government should toughen its existing legislation, for example 'to prohibit the sale of tobacco to young people and ban smoking in public places, including on public transport, ban on billboard advertising and advertising in newspapers and magazines'.[25] Here, the ECSR clearly suggested that Article 11(3) ESC contains an obligation to regulate exposure to SHS.

2.2.2 Tobacco use

An important governmental tool to curb tobacco use concerns the restriction of tobacco advertising. The policy space that governments have to restrict such advertisements was challenged several times by tobacco firms before the ECtHR and its former Commission. When balancing freedom of (commercial) expression against the need to protect the general interests of the public, the Court tends to grant governments a significant margin of appreciation in deciding whether a certain type of advertising can be restricted.[26] In the cases of *Hachette Filipacchi Presse Automobile et Dupuy v France* and *Société de Conception de Presse et d'Edition et Ponson v France*, which concerned the publication of pictures of Michael Schumacher wearing the colours of a tobacco brand, the Court ruled that restrictions on such advertisements were 'necessary in a democratic society'.[27]

Curbing tobacco use has not yet been addressed in the ECSR's collective complaint mechanism, though the procedure offers potential. In *Interights v Croatia*, which challenged the sexual education in curricula in Croatia, the Committee held that Article 11 ESC mandates governments to provide scientifically accurate and non-discriminatory sex education to youth that does not involve censoring, withholding or intentionally misrepresenting information on issues such as contraception.[28] One could argue that Article 11 ESC more generally embraces the provision of evidence-based and neutral health-related information, including on the harm caused by tobacco use and exposure to SHS.

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[25] European Committee of Social Rights, *Conclusions XV*-2 (Council of Europe 2001) Greece.

[26] *Anheuser-Busch Inc v Portugal* App no 73049/01 (ECtHR, 11 January 2007); *Hachette Filipacchi Presse Automobile and Dupuy v France* App No 13353/05 and *Société de Conception de Presse et d'Edition & Ponson v France* App No 26935/05 (ECtHR, 5 March 2009) [54]. See also the decision of the (former) European Commission on Human Rights in *Osterrechische Schutzgemeinschaft für Nichtraucher and Robert Rockenbauer v Austria* App No 17200/91 (ECHR, 2 December 1991).

[27] *Hachette Filipacchi* (n 26) [54].

[28] *INTERIGHTS v Croatia* No 45/2007 (ECSR, 30 March 2009) [43]–[66].

Tobacco use is frequently addressed within the framework of the ESC's State reporting procedure. For example, in its Conclusions with regard to Bosnia and Herzegovina's compliance with Article 11(3) ESC, the ECSR held that 'to be effective, any prevention policy must restrict the supply of tobacco through controls on production, distribution, advertising and pricing … In particular, the sale of tobacco to young persons must be banned …'.[29] This statement reveals that the Committee is very explicit in its State reporting procedure about the need to monitor and regulate tobacco use.

3. TOBACCO CONTROL AND THE EU

This section focuses more specifically on EU tobacco control policy, bearing in mind that EU Member States are all members of the CoE and that the EU Treaties[30] refer to the case law of the ECtHR as one of the main sources of EU human rights law.[31] The EU has a range of conferred powers to adopt EU-wide harmonizing legislation, which has proven to be a powerful vector of EU integration, particularly in the field of EU tobacco control. After briefly describing EU tobacco control policy (Section 3.1) and the challenges mounted against it (Section 3.2), this section assesses whether, and if so how, EU tobacco control policy protects health-related human rights (3.3).

3.1 The Development of a Comprehensive EU Tobacco Control Policy?

Over the years, the EU has adopted a number of tobacco control rules, incrementally tightening its regional grip on the tobacco industry. In 2005 the EU ratified the WHO Framework Convention on Tobacco Control (FCTC),[32] thus confirming its status as a major actor on the public health scene at the global level.

The two main building blocks of the EU's regulatory tobacco control arsenal are the Tobacco Advertising Directive and the Tobacco Products Directive.

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[29] 'Conclusions with regard to Bosnia and Herzegovina (2017) in relation to Article 11-3 ESC' (European Committee of Social Rights, 24 January 2018) Doc ID 2017/def/ROU/11/3/EN. With reference to Conclusions XVII-2 (2005), Malta; Conclusions 2012, Andorra; and *Conclusions* XV-2 (n 25).

[30] The EU Treaties refer to the Consolidated version of the Treaty on European Union [2012] OJ C326 (TEU) and Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/13 (TFEU).

[31] Article 6(3) TEU.

[32] Council Decision of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control [2004] OJ L213/8.

They both have a long and controversial history.[33] Suffice it to say that the Tobacco Advertising Directive[34] imposes an EU-wide ban on cross-border tobacco advertising and sponsorship in all media.[35] The Tobacco Products Directive,[36] which was revised to adapt its provisions to new scientific developments and ensure compliance with the FCTC, lays down wide-ranging rules governing the manufacture, presentation and sale of tobacco and related products. The EU has also adopted rules establishing minimum excise duties on tobacco products.[37] The paradigm characterizing EU tobacco control increasingly consists in 'nudging' people, particularly young people, away from temptation.[38] As a result of the EU's strong regulatory involvement, this policy area has been at the forefront of a 'federal' experimentation, helping

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[33] On the various methods that the tobacco industry has used against its regulation, particularly in the EU, see 'Tobacco Tactics' (*Tobacco Tactics*) http://www.tobaccotactics.org, accessed 23 September 2019, a database run by the University of Bath. On its opposition to the Tobacco Products Directive more specifically, see S Peeters, Hélia Costa, David Stuckler, Martin McKee and Anna B Gilmore, 'The Revision of the 2014 European Tobacco Products Directive: An Analysis of the Tobacco Industry's Attempts to "Break the Health Silo"' (2016) 25 Tobacco Control 108.

[34] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16, in particular Articles 3 and 4. Only publications intended for professionals in the tobacco trade and publications from non-EU countries which are not principally intended for the EU market are exempt.

[35] Except those such as television and other audiovisual media services, which are covered by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69.

[36] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (Tobacco Products Directive) [2014] OJ L127/1.

[37] Article 113 TFEU allows the EU to adopt common rules harmonizing the laws of the Member States on direct taxation. On the harmonization of excise duties of tobacco products, see Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco [2011] OJ L176/24.

[38] Alberto Alemanno, 'EU Public Health Law and Policy – Tobacco' in Tamara Hervey, Calum Alasdair Young and Louise E Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing 2017). On the EU tobacco control policy, see also Donley Studlar, 'Tobacco Control: The End of Europe's Love Affair with Smoking' in Scott L Greer and Paulette Kurzer (eds), *European Union Public Health Policy: Regional and Global Trends* (Routledge 2013).

delineate the limits of EU competences and the relevance of the principles of subsidiarity and proportionality for EU law and policy-making.[39]

The constitutional set-up of the EU legal order, and the limits placed on the EU's public health competence,[40] prevent the EU from adopting a comprehensive tobacco control policy implementing all the provisions of the FCTC. Even if the scope of EU powers has been interpreted extensively, and the EU has been able to implement several FCTC provisions at regional level, the fact remains that the EU cannot regulate tobacco products and commercial practices comprehensively alone. It is only if Member States regulate tobacco products at national level that the FCTC can be fully implemented in the EU. For example, the EU-wide ban on all forms of cross-border advertising and sponsorship has been complemented by national restrictions on forms of advertising and sponsorship arrangements that the EU cannot regulate itself as a result of limited public health powers.[41]

However, where the EU does not have the conferred powers to adopt harmonizing legislation, it can adopt 'soft law' provisions. The Tobacco Products and the Tobacco Advertising Directives have therefore been complemented by recommendations to Member States[42] and EU-wide anti-smoking campaigns.

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[39] Alberto Alemanno and Amandine Garde, *Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?* (Swedish Institute of European Policy Studies Report 2013) 19 http://www.sieps.se/en/publications/2013/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable-diseases-associated-with-tobacco-alcohol-and-unhealthy-diets-20137/sieps_2013.pdf, accessed 23 September 2019.

[40] Article 168(5) TFEU.

[41] In particular, the CJEU ruled that the EU has no powers to regulate static advertising (for example advertisements in hotels, on billboards, umbrellas, ashtrays and similar items), advertisements screened in cinemas and the sponsorship of events that do not have any cross-border appeal when it annulled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L213/9, often referred to as the First Tobacco Advertising Directive, on the ground that it exceeded the powers granted to the EU under Article 114 TFEU to harmonize the laws of Member States to facilitate the establishment and functioning of the internal market in Case C-376/98 *Germany v Council and the European Parliament (Tobacco Advertising I)* [2000] ECR I-8419. The EU subsequently adopted Directive 2003/33/EC (n 34), the Second Tobacco Advertising Directive, whose validity was upheld by the Court in Case C-380/03 *Germany v Council and the European Parliament (Tobacco Advertising II)* [2006] ECR I-11573.

[42] See, in particular, Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control [2003] OJ L22/31, and Council Recommendation of 30 November 2009 on smoke-free environments [2009] OJ C296/4.

As Member States have regulated tobacco products beyond the implementation of EU rules to different degrees, the picture remains one of diversity.[43] This diversity is exacerbated by the fact that political will has not always been sufficient to ensure the adoption of all the tobacco control measures that the EU would have the necessary powers to adopt under Article 114 TFEU. For example, even though it did not prevent States from imposing the plain packaging of tobacco products, it decided against the adoption of an EU-wide plain packaging scheme.[44]

3.2 The CJEU's Consistent Rejection of Industry-led Challenges to EU Tobacco Control Legislation as Infringing the Fundamental Rights of Tobacco Manufacturers

When fundamental rights were first invoked in the context of EU tobacco control policy, it was primarily as a result of the vigorous and creative litigation strategies tobacco manufacturers developed to protect their economic interests.[45] In particular, tobacco manufacturers have argued, when challenging tobacco control legislation, that EU harmonizing rules regulating the content, presentation or promotion of their products infringes the fundamental rights they derive from EU law. This includes their freedom of (commercial) expression and information, their right to (intellectual) property and their freedom to trade and conduct a business. These claims have never succeeded before the CJEU on the ground that the rights of tobacco manufacturers and related business actors to sell and promote tobacco products are not absolute and can be limited on grounds of public health protection.

3.2.1 Freedom of commercial expression

The tobacco industry has repeatedly claimed before the CJEU that the imposition of tobacco marketing restrictions infringes their right to free expression. In particular, the Court dismissed the challenge that British American Tobacco mounted against the first Tobacco Products Directive, which imposed an EU-wide ban on the use of texts, names, trademarks and figurative or other signs on tobacco products which suggest that a particular tobacco product

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[43] For example, in 2013, the Commission reported that 17 EU States had comprehensive smoke-free legislation in place: Commission Staff Working Document, Report on the implementation of the Council Recommendation of 30 November 2009 on Smoke-free Environments [2013] SWD 56 final/2.

[44] See Article 24 of the Tobacco Products Directive, as interpreted by the CJEU in Case C-547/14 *Philip Morris* ECLI:EU:C:2016:325.

[45] Alemanno and Garde (n 39) 87.

is less harmful than others (for example 'light' or 'mild').[46] The Court noted that these descriptors could mislead consumers, not least because 'the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco products, is liable to encourage smoking' and individuals need to be given objective information concerning the toxicity of tobacco products.[47]

Similarly, when challenged by Germany, the CJEU dismissed the argument that the 2003 Tobacco Advertising Directive, which bans all forms of cross-border advertising and sponsorship, constituted an unlawful interference with freedom of expression.[48] After recalling its settled case law that the EU legislature should be granted a broad margin of discretion in areas entailing political, economic and social choices on its part, and in which it was called upon to undertake complex assessments, the Court concluded that the measures under review were not disproportionate.[49] In its judgment, the Court relied explicitly on the case law of the ECtHR on Article 10 ECHR.[50] After upholding the principle of freedom of expression as a general principle of EU law,[51] the Court noted that the freedom of individuals to promote commercial activities derived not only from their right to engage in economic activities and the general commitment, in the EU context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on any topic, including the merits of the goods or services which they market or purchase.[52] This is all the more

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[46] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26.

[47] Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] ECR I-11453.

[48] Directive 2003/33/EC (n 34).

[49] *Tobacco Advertising II* (n 41).

[50] The CJEU referred to *Markt Intern v Germany* Series (1990) 12 EHRR 161; *Groppera v Switzerland* (1990) 12 EHRR 321; and *Casado Coca v Spain* (1994) 18 EHRR 1.

[51] The CJEU draws upon the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights, on which the Member States have collaborated or to which they are signatories. The ECHR has always had special significance in that respect as is now specifically recognized in Article 6(3) TEU. On the importance of the right to free expression in the EU legal order, see Derrick Wyatt, 'Freedom of Expression in the EU Legal Order and in EU Relations with Third Countries' in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP 2000).

[52] Opinion of Advocate General Fennelly in *Tobacco Advertising II* (n 41) [154].

necessary, the Court noted, as advertising is paramount to the establishment and functioning of the EU internal market in that it allows commercial operators to break down barriers, thus granting more choice to individuals and ensuring that their consumption habits do not crystallize along national lines.[53] Nevertheless, the Court also explicitly stated that commercial expression was a lesser form of expression than political or artistic expression[54] that could therefore be restricted on public health grounds and that the EU legislature should retain a broad margin of discretion in determining what was legitimate and necessary to protect public health. Even though the outcome of these cases is aligned with what a human rights approach to tobacco control mandates, it is regrettable that the Court did not use the opportunity these cases offered to both challenge the information paradigm and to explain why such restrictions were indeed proportionate.[55]

3.2.2 The right to property and the freedom to conduct a business

The right to property and the freedom to conduct a business have often been invoked in tandem. The CJEU has highlighted that neither of those rights constitutes an unfettered prerogative but should be viewed in light of their social function and could be restricted, provided that the restrictions imposed correspond to objectives of general interest pursued by the EU and do not constitute a disproportionate and intolerable interference with the very substance of the rights thus guaranteed.[56]

In its *British American Tobacco* judgment, the CJEU dismissed the argument that the EU had unlawfully interfered with the right to property of tobacco manufacturers and their freedom to pursue a trade or profession by prohibiting the use of trademarks incorporating descriptors such as 'light' or 'mild'. The Court noted that tobacco producers could continue to use other

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[53] This was also and most vividly stated by Advocate General Jacobs in his Opinion in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* [1995] ECR I-179.

[54] Political, journalistic, literary or artistic expression contribute to a larger extent, in a liberal democratic society, to the achievement of social goods such as the enhancement of democratic debate and accountability, or the questioning of current orthodoxies with a view to furthering tolerance or change. By contrast, commercial expression promotes only economic activity.

[55] It hardly engaged in the balancing exercise required under Article 10 ECHR, as interpreted by the ECtHR, limiting itself to upholding the validity of the Directive: Amandine Garde, 'Freedom of Commercial Expression and the Protection of Public Health in Europe' (2010) Cambridge Yearbook of European Legal Studies 225.

[56] See in particular Case 44/79 *Liselotte Hauer* [1979] ECR 3727; Case 52/81 *Werner Faust* [1982] ECR 3745; Case 265/87 *Hermann Schräder* [1989] ECR 2237; Case 5/88 *Wachauf* [1989] ECR 2609; Case C-280/93 *Germany v Council* [1994] ECR I-4973; Case C-293/97 *Standley and Others* [1999] ECR I-2603.

distinctive signs on the packs.[57] 'The fact remains that a manufacturer of tobacco products may continue, notwithstanding the removal of that description from the packaging, to distinguish its product by using other distinctive signs.'[58] As EU institutions enjoy a margin of discretion in the choice of the means required to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained. In particular, no trader should expect that patterns of trade will remain unchanged.

3.2.3 Article 35 EU Charter and the mainstreaming of public health

Following the entry into force of the Lisbon Treaty in December 2009, the CJEU has continued to emphasize the limits to tobacco manufacturers' commercial rights, although it now relies explicitly on the EU Charter, and in particular Article 11 (freedom of expression), Article 16 (freedom to conduct a business) and Article 17 (right to property), rather than on the general principles of EU law.[59]

In its *Philip Morris* decision, the Court rejected the claimants' argument that the revised Tobacco Products Directive infringed their rights under Article 11 of the EU Charter[60] on the ground that 'human health protection … outweighs

[57] Case C-491/01 *British American Tobacco* (n 47) [149]–[150].

[58] ibid [152]. Following this interpretation, it would seem that standardized packaging measures – implemented by 'provisions of public law' – would not breach trademark rights as they do not authorize third parties to exploit tobacco signs, but merely consist of a restriction on right owners' ability to use their own signs. Despite the loss of distinctiveness of tobacco trademarks, rights holders could still exercise the right to prohibit the misappropriation of their signs by unauthorized third parties. On this question, see Court of Appeal decision in *R (British American Tobacco and others) v Secretary of State for Health* [2016] EWCA Civ 1182 (Admin). More generally on the relationship between health and intellectual property rights, see Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar Publishing 2016).

[59] On the balancing of Article 16 (freedom to conduct a business) and Article 17 (right to property) of the EU Charter, see in particular the judgment of the Grand Chamber in Case C-283/11 *Sky Österreich* [2013] ECR I-28, which confirmed that the EU legislature was entitled to give priority, in the necessary balancing of the rights and interests at issue, to overriding requirements of public interests over private economic interests, on the condition that the restriction was proportionate, that is, that a fair balance had been struck between several rights and fundamental freedoms protected by the EU legal order with a view to reconciling them (at [60]). In relation to health more specifically, see Case C-544/10 *Deutsches Weintor* [2012] ECLI:EU:C:2012:526.ECR I-526 and Case C-157/14 *Neptune Distribution* [2015] EU:C:2015:823.

[60] 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

the interests put forward by the claimants in the main proceedings'.[61] Indeed, 'as is apparent from the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities'.[62]

It is notable that the CJEU has relied extensively in its tobacco case law on the duty of the EU to ensure a high level of public health protection in the development and implementation of all its policies. Although the EU does not have unlimited powers to harmonize national tobacco control laws and implement the FCTC comprehensively at regional level, Article 168(1) TFEU requires that '[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'. This 'mainstreaming' obligation can also be found in Article 114(3) TFEU and has been strengthened following the entry into force of the Lisbon Treaty, with Article 9 TFEU and Article 35 EU Charter.

The requirement to ensure that health concerns are accommodated in all policy areas is arguably reflected in the wording of Article 3 TEU, which sets out the broad objectives of the EU. Paragraph 1 states that the Union should promote 'the well-being of its peoples' – of which good health arguably is a precondition. Paragraph 3 calls on the EU to establish an internal market that 'shall work for the *sustainable* development of Europe' and shall 'promote *protection of the rights of the child*' (emphasis added) – bearing in mind that well-being, sustainable development and the rights of the child are all negatively affected by tobacco use.

Health will often be a decisive factor in policy choices. As the CJEU has noted, 'it is perfectly legitimate for the [EU] legislator to pursue simultaneously internal market and public health objectives'.[63] It is arguable that, in balancing the economic interests of tobacco manufacturers against the protection of public health,[64] the EU has indirectly recognized the need to protect the right to the enjoyment of the highest attainable standard of health, which the use of

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61 *Philip Morris* (n 44) [156].

62 ibid [157].

63 Opinion of AG Fennelly in *Tobacco advertising I* (n 41) [149]. On this balancing, see ibid [88]; *Tobacco Advertising II* (n 41) [39]; Joined Cases C-154 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451 [30]; *Philip Morris* (n 44) [60].

64 See, for example, Recital 3 of Directive 2003/33/EC (n 34); Recital 8 of the Tobacco Products Directive, 'Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people'.

tobacco products harms directly (for smokers) or indirectly (for second-hand smokers).

Even if the threshold of what constitutes 'a high level of public health protection' remains undefined, these provisions nonetheless require that the EU should place health concerns at the centre of the policy process and give them significant consideration when balancing them against other interests, not least the economic interests of the tobacco industry. As Advocate General Kokott stated:

> It should be borne in mind, however, that the protection of human health has considerably greater importance in the value system under EU law than such essentially economic interests (see Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU and the second sentence of Article 35 of the Charter of Fundamental Rights), with the result that health protection may justify even substantial negative economic consequences for certain economic operators.[65]

3.3 For a More Explicit and Systematic Rights-based Approach to EU Tobacco Control Policy

The EU is committed to the protection of human rights.[66] Nevertheless, the reference to the FCTC and the EU public health mainstreaming obligation can only constitute, at best, an implicit recognition that human rights underpin EU tobacco control policy. To date, there has been little reflection at EU level on the added value of an explicit reliance on human rights to regulate the tobacco industry and therefore promote better health.

If it is true that the wording of Article 35 of the EU Charter suggests that it may have a more limited scope than the provisions on the right to health in several international human rights instruments,[67] the EU could nonetheless rely more explicitly on human rights as a justification for its tobacco control policy. The very fact that the EU Charter contains a provision dedicated to

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[65] Opinion of AG Kokott in *Philip Morris* (n 44) [179].

[66] Article 6 TEU.

[67] Article 35 EU Charter provides: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.' This wording differs from the language used in several international human rights instruments, which refer to the 'highest attainable standard of health', not least ICESCR, Article 12 and Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), Article 24. On EU Charter, Article 25, see EU Network of Independent Experts on Fundamental Rights, 'Commentary on the Charter of Fundamental Rights of the European Union, Article 35 – Protection de la Santé' (June 2006) 304.

health recognizes that health is indeed an important EU value.[68] The EU should acknowledge the onus that this provision, as complemented by the other health mainstreaming treaty obligations and other relevant provisions of the EU Charter,[69] places on its institutions to ensure that all EU policies do indeed protect the right to health and other rights harmed as a result of tobacco smoke exposure. The key contention is that if the EU has often relied on these provisions to either regulate the tobacco industry or defend itself from industry judicial review challenges, it has not done so systematically when assessing whether or not it should regulate the tobacco industry and, if so, whether the standards it has adopted are indeed sufficiently high to meet its obligations under both the FCTC and international human rights law.

Even if the EU is not itself a party to the International Covenant on Economic, Social and Cultural Rights (ICESR), the Convention on the Rights of the Child (CRC) or other major international human rights treaties, its Member States are. These instruments are therefore used to identify and flesh out the general principles of EU law with which all instruments of secondary law need to comply. For example, the case law of the CJEU,[70] and the European Commission's Communication of 4 July 2006 establishing a long-term EU strategy to effectively promote and safeguard the rights of the child in EU policies and to support Member State's efforts in this field,[71] explicitly refer to the CRC as a reference point in determining how EU institutions and EU Member States should ensure that children's rights are duly protected, in particular that their best interests are upheld as a primary consideration in all EU policies, including EU tobacco control policy.[72]

Mainstreaming is particularly important if the issue at hand is as complex as tobacco control and requires a multisectoral response to the problems tobacco smoke exposure raises. It should help ensure that a given issue is treated

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[68] It is arguable that the EU Charter is much more modern and in keeping with twenty-first-century challenges than the ECHR may be in this respect.

[69] For example, EU Charter, Article 2, 'Everyone has the right to life'.

[70] The CJEU referred to the CRC for the first time in *Council v Parliament (Family Reunification Directive)* in June 2006, where it recognized that the CRC provided a source of the general principles of EU law. See Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

[71] Communication from the Commission: Towards an EU Strategy on the Rights of the Child [2006] 367 final [I.3]. The Commission Communication provides explicitly that the provisions of the Convention must be fully taken into account.

[72] On the gap between EU rhetoric and practice on the regulation of commercial practices and the protection of children's rights, see Amandine Garde, 'Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interest of … Commercial Operators?' (2011) 19 International Journal of Children's Rights 523.

consistently across multiple policy fields, when input from multiple policy fields – and therefore Directorates-General of the European Commission – is required.[73] If the EU has used its internal market powers extensively to regulate the tobacco industry, it has not relied on other available legal bases to ensure that health-related rights are effectively protected and the FCTC more comprehensively implemented. In particular, a more explicit and systematic emphasis on the EU's mandate to protect human rights (within the scope of EU attributed powers) should lead the European Commission to reframe the discussions on the taxation of tobacco products and propose to use EU legislative powers to increase the level of health protection across the EU.[74] Taxes are one of the most effective tools for policy-makers to influence the price of tobacco products.[75] Therefore, as an FCTC party, the EU must 'recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons'[76] and amend its regulatory framework accordingly. It is only if a truly coherent approach is adopted both across EU institutions and within EU institutions that the EU can claim that it has fulfilled its mandate to ensure a high level of public health protection in the development and implementation of *all* its policies.

4. CONCLUSIONS

This chapter has discussed whether there is a human rights approach to tobacco control in Europe. While the CoE has not adopted any tobacco control policy or strategy, the EU has adopted a number of tobacco control rules, in particular the Tobacco Advertising Directive and the Tobacco Products Directive. Both organizations have addressed tobacco consumption and exposure to SHS

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[73] Public health mainstreaming was first seriously addressed at EU level during the Finnish Council Presidency in 2006, with the introduction of Health in All Policies, a strategic initiative that was intended to galvanize policy-makers to consider health determinants controlled in sectors other than health. On the notion of 'Health in All Policies', see Pekka Puska and Timo Stahl, 'Health in All Policies – the Finnish Initiative: Background, Principles, and Current Issues' (2010) 31 Annual Review of Public Health 315; Meri Koivusalo, 'The State of Health in All Policies in the European Union: Potential and Pitfalls' (2010) 64 Journal of Epidemiology and Community Health 500.

[74] Directive 2011/64/EU (n 37).

[75] Guidelines to Article 6, at paragraph 2.

[76] Article 6(1) FCTC. The Guidelines to Article 6 add: 'it is estimated that young people are two to three times more responsive to tax and price changes than older people. Therefore, tobacco tax increases are likely to have a significant effect on reducing tobacco consumption, prevalence and initiation among young people, as well as on reducing the chances of young people moving from experimentation to addiction' (at paragraph 2.1).

from a human rights angle. Even though it is difficult to argue, bearing in mind the differences between the CoE and the EU, that a unified European human rights approach to tobacco control has developed, one should note the commonalities between the approaches of these two organizations. Both the CoE and the EU have systematically rejected human rights claims from the tobacco industry. Specifically, the ECtHR and the CJEU are very reluctant to uphold claims based on freedom of expression when challenges are mounted against tobacco advertising legislation. Furthermore, the ECtHR has clearly recognized that exposure to SHS falls within the remit of Articles 2, 3 and 8 ECHR. The CJEU, along similar lines, sees the protection of public health as a decisive factor, thus implicitly protecting the right to health. Therefore, while there is no comprehensive and unified European human rights approach to tobacco control, there are nonetheless synergies between the two European organizations, which are sympathetic to protecting European citizens from the harms associated with smoking and exposure to SHS.

7. Exploring the role of the ASEAN in fostering human rights approaches to tobacco control in Southeast Asia

Yi Zhang

1. INTRODUCTION

The tobacco pandemic has been widely acknowledged as a major threat to public health. The World Health Organization (WHO) reports that tobacco use kills more than 7 million people each year, with around 890 000 of those deaths being the result of non-smokers being exposed to second-hand smoke (SMS).[1] Currently, there are over 1.3 million adult smokers living in Southeast Asia, accounting for almost 10 per cent of the world's smokers. Apart from use, research also indicates that Southeast Asia is one of the largest tobacco producers in the world.[2]

Many efforts have been made globally to address this public health disaster, including, in particular, the adoption of the WHO Framework Convention on Tobacco Control (FCTC) in 2003. The FCTC was the first global public health treaty developed by countries as a response to the globalization of the tobacco epidemic.[3] As of 2018, there are 181 countries party to the FCTC, making it one of the most widely embraced treaties in the United Nations' (UN) history.[4] The FCTC imposes binding obligations on its States Parties to 'protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco

[1] 'Tobacco: Key Facts' (*WHO*, 9 March 2018) http://www.who.int/news-room/fact-sheets/detail/tobacco, accessed 20 July 2019.

[2] Tan Yen Lian and Ulysses Dorotheo, *The Tobacco Control Atlas: ASEAN Region Third Edition* (Southeast Asia Tobacco Control Alliance 2016) (SEATCA) 2, 12.

[3] 'The WHO Framework Convention on Tobacco Control: An Overview' (*WHO*) http://www.who.int/fctc/WHO_FCTC_summary.pdf, accessed 20 July 2019.

[4] Lawrence Gostin, *Global Health Law* (Harvard University Press 2014) 214.

smoke'.[5] Steady progress has been made in tobacco control since the FCTC entered into force in 2005.[6] Many countries have adopted and implemented tobacco control measures provided in the FCTC to reduce the prevalence of tobacco use and exposure to tobacco smoke.[7]

However, uneven progress has been observed in the implementation of the FCTC between various articles and between parties and regions.[8] As will be discussed further in Section 3, even though there is a high level of ratification of the FCTC in Southeast Asia (all States but one in Southeast Asia are party to the FCTC), there are severe disparities in implementing the FCTC across countries in this region, ranging from the implementation of specific articles to overall implementation.[9]

Moreover, it is worth pointing out that one densely populated country in Southeast Asia – Indonesia – has not yet signed the FCTC.[10] According to the Southeast Asia Tobacco Control Alliance, there are over 65 million adult smokers living in Indonesia, accounting for over half of the adult smokers residing in this region.[11] Even though Indonesia adopted its national tobacco control regulation in 2012, it does not undertake any legal obligation to take tobacco control measures at the regional or international level.[12]

This brings us to an important issue: is there any alternative approach to strengthening tobacco control in Southeast Asia, which could impose obligations on all States in this region to implement tobacco control policies that are in line with the FCTC? Considering the strong connection between tobacco control and human rights,[13] this chapter explores the potential of advancing human rights approaches to tobacco control in the Southeast Asian region. It looks specifically at the role of the Association of Southeast Asian

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[5] Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 116 (FCTC).

[6] 'The WHO Framework Convention on Tobacco Control: An Overview' (n 3).

[7] 'Tobacco Free Initiative (TFI)' (*WHO*) http://www.who.int/tobacco/control/en/, accessed 20 July 2019.

[8] WHO, *2014 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control* (WHO 2014) vii.

[9] Gianna Amul and Tikki Pang, 'The State of Tobacco Control in ASEAN: Framing the Implementation of the FCTC from a Health Systems Perspective' (2018) 5 Asia & the Pacific Policy Studies 47, 49–51.

[10] 'WHO Framework Convention on Tobacco Control' (*United Nations Treaty Collection*) https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=_en, accessed 20 July 2019.

[11] Lian and Dorotheo (n 2) 2.

[12] Amul and Pang (n 9) 55.

[13] Oscar Cabrera and Lawrence Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285, 287.

Nations (ASEAN) as a regional organization in supporting such approaches to strengthening tobacco control.

Established in 1967, ASEAN is a prominent geo-political and economic organization of ten Member States (Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) located in Southeast Asia.[14] Although the original aims of this organization did not encompass the promotion and protection of human rights, human rights have been steadily integrated into the ASEAN framework over the past decade.[15] The ASEAN Charter, which was adopted in 2008, recognizes that human rights are among its values, purposes and principles, along with democracy, the rule of law, good governance and fundamental freedoms.[16] In accordance with Article 14 of the Charter, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009 as an overarching human rights body in this region.[17] In addition to the AICHR, there are two sectoral bodies under the ASEAN Socio-Cultural Community that work on human rights: (1) the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers; and (2) the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children.[18] In spite of their limited mandates, the establishment of these human rights bodies represents the ASEAN's commitment to enhancing regional cooperation on human rights. It also provides an excellent opportunity to integrate human rights approaches to tobacco control in the ASEAN. In particular, considering that the tobacco industry is targeting women and minors in the region (see more details in Section 3),[19] and that all ASEAN Member States (AMS) are parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

[14] All but one (Timor-Leste) countries in Southeast Asia are Member States of ASEAN. 'The ASEAN Tobacco Control Report 2012' (SEATCA) https://seatca.org/dmdocuments/ASEAN%20Tobacco%20Control%20Report%202012.pdf, accessed 20 July 2019.

[15] Policy department of the European Parliament Directorate-General for External Policies, *Development of the ASEAN Human Rights Mechanism* (European Union 2012) 4.

[16] Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) preamble, arts 1–2.

[17] ibid, art 14.

[18] Policy department of the European Parliament Directorate-General for External Policies (n 15) 4.

[19] Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599, 627.

and the Convention on the Rights of the Child (CRC),[20] it is of great necessity to study the potential of these human rights bodies to advance human rights approaches to tobacco control.

This chapter is divided into five sections. Following the introduction, Section 2 briefly explains the connection between tobacco control and human rights, which has been extensively discussed in Chapter 4 of this book. Section 3 moves to identify the progress in and remaining challenges to tobacco control in AMS by examining the current status of the FCTC implementation in this region. Section 4 then examines whether, and if so, how the ASEAN can foster human rights approaches to strengthening tobacco control. It also suggests the future directions for taking such approaches. Finally, some conclusions are drawn in Section 5.

2. THE CONNECTION BETWEEN TOBACCO CONTROL AND HUMAN RIGHTS

The link between human rights and tobacco control is explicitly recognized by the FCTC, which recalls in its preamble the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CEDAW and the CRC.[21] At the recent Conference of the Parties (COP8) held in 2018, the human rights dimension of tobacco control was once again reinforced by parties to the FCTC.[22] Furthermore, as argued by Cabrera and Constantin in this book and by other scholars, there is now a growing consensus that human rights can play a prominent role in advancing tobacco control.[23]

Table 7.1 provides an overview of the ratification status of the three international human rights treaties among AMS. Currently, all countries in the ASEAN are party to the CEDAW and CRC, while most AMS have ratified the ICESCR.

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[20] 'Status of Ratification Interactive Dashboard' (*UN OHCHR*) http://indicators.ohchr.org/, accessed 20 July 2019.

[21] FCTC, preamble.

[22] WHO FCTC, 'Report of the eighth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control' (Conference of the Parties to the WHO FCTC, Eighth Session, Geneva, 1–6 October 2018) www.who.int/fctc/cop/sessions/cop8/Provisional-COP8-Report_EN.pdf, accessed 1 December 2018.

[23] See Cabrera and Constantin in Chapter 4 of this book. See also Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 Human Rights Quarterly 340, 342; Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to A Tobacco-free Environment' (2018) 27 Tobacco Control 3; Dresler and Marks (n 19).

Table 7.1 Ratification status of AMS (as of 2018)

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
ICESCR		√	√	√		√	√		√	√
CEDAW	√	√	√	√	√	√	√	√	√	√
CRC	√	√	√	√	√	√	√	√	√	√

Source: Author's compilation from 'Status of Ratification Interactive Dashboard' (*UN OHCHR*) http://indicators.ohchr.org/, accessed 20 July 2019.

2.1 The Right to Health

The right to health is particularly pertinent to the entire tobacco chain, from production, to marketing and consumption of tobacco. Article 12 of the ICESCR is considered as the central instrument of protection for the right to health.[24] The normative content of the right to health, as well as the specific obligations arising from this right, are further developed by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment (GC) 14.[25]

According to GC 14, the improvement of environmental and industrial hygiene (Article 12.2(b)) comprises 'the prevention and reduction of the population's exposure to harmful substances … that directly or indirectly impact upon human health', among others. It also notes that 'industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment'.[26] In addition, the CESCR considers that Article 12.2(b) 'discourages … the use of tobacco, drugs and other harmful substances'. Apparently, tobacco farmers are exposed to harmful substances inherent in their working environment (for example, pesticides during tobacco agriculture).[27]

Moreover, research has found that SHS is a major cause of disease in adults and children.[28] As noted by the CESCR, people's exposure to harmful substances that have direct or indirect influence on human health should all be prevented or reduced. Therefore, the right to health provides a legal basis for protection from SHS, not only at workplaces, but also in any other public place, as appropriate.

Furthermore, the CESCR noted in its General Comment 24 States' obligations under the ICESCR in the context of business activities, in particular the obligation to regulate private actors.[29] In other words, the State undertakes an obligation to take all necessary measures to regulate tobacco companies if their

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[24] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 12.2(b), (c).

[25] UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C12/2000/4 (GC 14).

[26] CESCR, GC 14 [15].

[27] Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-based Approach to Tobacco Control' (2012) 21 Tobacco Control 208, 209.

[28] Dresler and Marks (n 19) 610.

[29] CESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24.

activities infringe on the right to health. If the State fails to 'discourage production, marketing and consumption of tobacco, narcotics and other harmful substances', it will cause violations of the right to health.[30]

2.2 Children's Rights

The CRC contains several provisions related to tobacco control. The most relevant provision is Article 24, which obliges States Parties to recognize children's right to health.[31] In addition, Article 17 of the CRC concerns children's right to information aimed at the promotion of their social, physical and mental health.[32] The CRC also includes a more general norm (Article 3) that concerns children's best interest.[33]

The Committee on the Rights of the Child (CommRC) also makes clear reference to the FCTC in its General Comment 15. With regard to Article 24 of the CRC, it notes:

> Children require information and education on all aspects of health to enable them to make informed choices in relation to their life style and access to health services. Information and life skills education should address a broad range of health issues, including: … the dangers of alcohol, tobacco and psychoactive substance use.[34]

This means that children and adolescents should be provided with information and education on the health risks of smoke, which allow them to make informed decisions as to whether they want to start smoking.[35] Furthermore, States are obliged to provide a safe and healthy environment for children and adolescents, protect children from tobacco and take appropriate measures to reduce its use among them.[36] In addition, as is also stated in GC 14, when developing policies and programmes aiming at guaranteeing children's right to health, children's best interest should be the primary consideration.[37]

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30 CESCR, GC 14 [51].

31 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 24.

32 CRC, art 17.

33 CRC, art 3.

34 CommRC, 'General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 (GC 15).

35 Gispen and Toebes (n 23) 366, 368.

36 CommRC, GC 15.

37 Toebes and others (n 23) 3.

2.3 Women's Rights

The CEDAW provides for women's 'right to protection of health and to safety in working conditions', especially rural women's access to adequate health care facilities, including information and counselling.[38] On the one hand, as Dresler and Marks observe, few women are aware of the health risks associated with smoking. On the other hand, tobacco companies are targeting girls and women by advertising that smoking is a 'woman thing', or that smoking makes women appear more independent.[39] Therefore, it is very important for States to provide or oblige tobacco companies to provide accurate and true information about the deadly impact of tobacco products that would allow women to make informed decisions related to their health.[40]

It can be concluded from the above that human rights and the FCTC are interrelated and mutually reinforcing.[41]

3. CURRENT STATE OF TOBACCO CONTROL IN ASEAN MEMBER STATES

This section purports to identify the progress towards tobacco control in AMS, as well as the remaining challenges and barriers. It does so by assessing the implementation of relevant articles of the FCTC among AMS. This method is chosen because all parties to the FCTC in the ASEAN have submitted their annual implementation reports to the Conference of the Parties (COP) and all relevant information can be easily accessed in the WHO FCTC implementation database.[42] Notably, although Indonesia is not party to the FCTC, this section applies the same approach so as to provide a comprehensive overview of the state of tobacco control among AMS. In this sense, 'the implementation of relevant articles of the FCTC' only serves as a criterion to assess the state of tobacco control in Indonesia. The information regarding Indonesia is derived from the tobacco control country profile published on the WHO website rather than the FCTC implementation report.[43]

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[38] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, arts 11.1(f), 14.

[39] Dresler and Marks (n 19) 627.

[40] ibid 628.

[41] Cabrera and Gostin (n 13) 287–301.

[42] 'WHO FCTC Implementation Database' (*WHO FCTC Secretariat*) https://untobaccocontrol.org/impldb/, accessed 20 July 2019.

[43] 'Tobacco Free Initiative' (n 7).

Statistics available from the reports of the parties demonstrate that the adoption and application of new legislation for tobacco control, or the strengthening of existing tobacco control legislation, have an overarching impact on tobacco control. Thus, this section first examines whether AMS have strengthened their existing, or adopted new, tobacco control legislation.

3.1 Domestic Tobacco Control Legislation in the ASEAN

Table 7.2 presents a compilation of the ratification status of FCTC and domestic tobacco control legislation in AMS. In general, all AMS but one are party to the FCTC, of which Brunei Darussalam, Myanmar, Singapore, Thailand and Vietnam were among the first 60 countries to ratify the FCTC in 2004.[44] All AMS have implemented tobacco control measures in the form of domestic laws, regulations and administrative decisions. Even though Indonesia has not signed the FCTC, it has steadily adopted various tobacco control laws and regulations.

3.2 Tobacco Control in the ASEAN – Progress and Challenges

As Table 7.2 illustrates, AMS have made substantial achievements in taking legislative measures to address the tobacco epidemic. However, differences among AMS in implementing FCTC-related legislation are also observed, ranging from the implementation of substantive articles to comprehensive tobacco control measures.[45] Scholars have conducted extensive studies on tracking the progress towards the implementation of the FCTC among AMS.[46] Due to space constraints, this section does not intend to provide an in-depth examination of the implementation of all 16 substantive FCTC articles in the ASEAN. It suffices here to examine the implementation of Articles 5.3, 8, 11, 13, 16 and 18.[47] These articles were chosen because of their relevance to the human rights discussion in Section 2. In addition, as stated above, they only serve as criteria to assess the state of tobacco control among AMS, including Indonesia, which is not party to the FCTC yet. The findings are summarized in Table 7.2.

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[44] 'WHO Framework Convention on Tobacco Control' (n 10).
[45] Amul and Pang (n 9) 51.
[46] See for example, Lian and Dorotheo (n 2); Amul and Pang (n 9); SEATCA (n 14).
[47] SEATCA (n 14) 24.

Table 7.2 Status of the FCTC and domestic tobacco control legislation

Country	Status of the FCTC[a]	Domestic tobacco control legislation[b]
Brunei Darussalam[c]	ratified (2004)	Tobacco Order, 2005 Tobacco (Labelling) Regulations, 2007 Tobacco (Composition of Offences) Regulations, 2007
Cambodia[d]	ratified (2005)	National Tobacco Control Law, 2015
Indonesia[e]	has not signed	Law No 36 of 2009 Concerning Health Government Regulation (PP) No 109 of 2012 Ministry of Health Regulation No 28 of 2013 Ministry of Health Regulation No 50 of 2016 Ministry of Health Regulation No 56 of 2017
Lao PDR[f]	ratified (2006)	Tobacco Control Law, 2009 Regulations on Health Warning on Cigarettes Packages and Cartons, 2014
Malaysia[g]	ratified (2005)	Control of Tobacco Products Regulation 2004 under the Food Act 1983; Control of Tobacco Product (Amendment) Regulations (annual amendment from 2008 to 2017)
Myanmar[h]	ratified (2004)	The Control of Smoking and Consumption of Tobacco Product, 2006
Philippines[i]	ratified (2005)	Republic Act No 9211, 2003 (Tobacco Regulation Act) Rules and Regulations Implementing Republic Act No 9211, 2003 Republic Act No 10351, 2012 Republic Act No 10643, 2014 Rules and Regulations Implementing Republic Act No 10643, 2016
Singapore[j]	ratified (2004)	Smoking (Prohibition in Certain Places) Act, Chapter 310, 2002 Tobacco (Control of Advertisements and Sale) Act, Chapter 309, 2011 Control of Advertisements and Sale of Tobacco Regulations, 2010 (licensing of importers, wholesalers and retailers); 2012 (labelling); 2014 (prohibited tobacco products)
Thailand[k]	ratified (2004)	Tobacco Products Control Act BE 2560, 2017
Vietnam[l]	ratified (2004)	Law on Prevention and Control of Tobacco Harms, 2012

Notes:
[a] The FCTC status is drawn from 'WHO Framework Convention on Tobacco Control' (n 10).
[b] The overview of domestic tobacco control laws is mainly based on the ASEAN Tobacco Control Report 2012 and the ASEAN Tobacco Control Atlas, and supplemented by the information published on the ASEAN Tobacco Control Resource Center and AMS government websites. SEATCA (n 14) 4; Lian and Dorotheo (n 2) 28; 'Current Tobacco Control Laws in ASEAN' (SEATCA), https://seatca.org/?p=6006, accessed 20 July 2019.

[c] 'Acts and Regulations' (*Ministry of Health of Brunei Darussalam*) http://www.moh.gov.bn/SitePages/Acts%20and%20Regulations.aspx, accessed 20 July 2019.
[d] Cambodia has also adopted a number of sub-decrees, circulars, directives and *prakases* in terms of tobacco control. Due to space constraints, these legal documents are not listed in Table 7.1. 'Cambodia: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1514, accessed 20 July 2019.
[e] Lian and Dorotheo (n 2) 28; 'Indonesia: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1531, accessed 20 July 2019.
[f] There are three tobacco control decrees that are not listed in Table 7.1 due to the limited space. Lian and Dorotheo (n 2) 28; 'Lao PDR: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1521, accessed 20 July 2019.
[g] Lian and Dorotheo (n 2) 28; 'Malaysia: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1527, accessed 20 July 2019.
[h] Lian and Dorotheo (n 2) 28; 'Myanmar: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1525, accessed 20 July 2019.
[i] Lian and Dorotheo (n 2) 28; 'Philippines: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1533, accessed 20 July 2019.
[j] Lian and Dorotheo (n 2) 28; 'Singapore: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1529, accessed 20 July 2019.
[k] The 2017 Tobacco Product Control Act rescinds and replaces the 1992 Tobacco Product Control Act and the 1992 Non-Smokers Health Protection Act. Currently, all ministerial regulations were issued under the 1992 laws. As long as these regulations are not in conflict with the 2017 Act, they could remain in effect, unless otherwise replaced by new regulations. Therefore, the ministerial regulations are not listed in the table. 'Thailand: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1519, accessed 20 July 2019.
[l] In addition to the Law, the government of Vietnam has issued a variety of administrative decisions in relation to tobacco control. Lian and Dorotheo (n 2) 28; 'Vietnam: Tobacco Control Laws' (*SEATCA*) https://seatca.org/?p=1523, accessed 20 July 2019.

Source: Author's compilation from Lian and Dorotheo (n 2) 28; SEATCA (n 14) 4 and 'Current Tobacco Control Laws in ASEAN' (*SEATCA*) https://seatca.org/?p=6006, accessed 20 July 2019.

3.2.1 Article 5.3: protection of public health policies from commercial and other vested interests of the tobacco industry

Tobacco industry interference is a key challenge to tobacco control in the ASEAN region. The tobacco industry has used a variety of tactics and strategies to interfere with the development and implementation of tobacco control policies at all levels. For example, the tobacco industry has participated in policy development to influence the decision-making processes and even undermine some strict tobacco control policies a government may propose. High levels of unnecessary interactions with the tobacco industry were reported in Lao PDR and Vietnam.[48] The tobacco industry also undermines the implementation and enforcement when a policy or legislation is adopted. As was observed in Lao PDR, the implementation date of health warnings on cigarette packages was delayed due to strong tobacco industry interference.[49] Furthermore, the industry intimidates the government with litigation (includ-

[48] Lian and Dorotheo (n 2) 32, 36.
[49] ibid 32, 66.

ing human rights litigation such as freedom of expression) or the threat of litigation,[50] especially when the government adopts bans on tobacco advertising, promotion and sponsorship.

A recent study shows that only four AMS have taken concrete measures (for example, policy or a code of conduct) to protect their public health policies from interference of the tobacco industry. Other AMS are still facing strong industry interference.[51] Therefore, more effort needs to be made to institute concrete measures to prevent tobacco industry interference in AMS.

3.2.2 Article 8: protection from exposure to tobacco smoke

Every year, tobacco kills approximately 890,000 non-smokers that have been exposed to SMS.[52] This harm is so evident that a growing number of countries have made efforts towards creating a 100 per cent smoke-free environment to protect people from the dangers of tobacco smoke. In general, AMS have made good progress in enacting smoke-free legislation prohibiting smoking in eight types of public places: healthcare facilities; educational facilities; universities; government facilities; indoor offices and workplaces; restaurants; cafés, pubs and bars; and public transport.[53]

As of 2016, Brunei Darussalam, Cambodia, Lao PDR and Thailand had enforced complete national smoke-free laws covering all eight public places while Indonesia, Myanmar, Philippines, Singapore and Vietnam had imposed partial bans. However, at the time of writing Malaysia has not adopted any smoke-free laws.[54]

3.2.3 Article 11: packaging and labelling of tobacco products

Pictorial health warnings (PHWs) on tobacco products are considered one of the most cost-effective tools for governments to communicate the health risks of tobacco use.[55] Currently, PHWs on tobacco packages are required in all AMS.[56] Yet it should be noted that the actual application of PHWs in Lao

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[50] ibid 32.
[51] ibid.
[52] 'Tobacco: Key Facts' (n 1).
[53] Lian and Dorotheo (n 2) 56; WHO FCTC, *2016 Global Progress Report on implementation of the WHO Framework Convention on Tobacco Control* (WHO 2016) 25–26.
[54] WHO, *WHO Report on the Global Tobacco Epidemic, 2017: Monitoring tobacco use and prevention policies* (WHO 2017). Individual country profile can be accessed via 'Tobacco control country profiles' (*WHO*) http://www.who.int/tobacco/surveillance/policy/country_profile/en/, accessed 20 July 2019.
[55] Lian and Dorotheo (n 2) 64.
[56] ibid.

PDR, Myanmar and Thailand was delayed due to strong interference from the tobacco industry.[57]

In addition to PHWs, all but one AMS (Brunei Darussalam) have banned false or misleading descriptors while eight AMS require the disclosure of information on relevant constituents and emissions of tobacco products.[58] At the time of writing, Thailand and Singapore are in the process of requiring plain packaging.[59]

3.2.4 Article 13: comprehensive bans on tobacco advertising, promotion and sponsorship

States Parties are required to undertake a comprehensive ban that covers all types of tobacco advertising, promotion and sponsorship (TAPS) and to put this ban into effect within five years after ratifying the FCTC.[60] However, little progress has been made across AMS in implementing comprehensive bans on TAPS. So far, none of the countries have implemented a comprehensive ban on all TAPS. While Brunei Darussalam, Singapore and Thailand have adopted near-total bans, Philippines and Indonesia (which is not party to the FCTC) are lagging behind.[61]

3.2.5 Article 16: prevention of sales to and by minors

Youth smoking remains an unsettled problem in the ASEAN region. On the one hand, perceiving children and young people as a source of future regular customers, tobacco companies continue to employ novel marketing strategies to make tobacco more appealing to youngsters.[62] These strategies include, for example, flavoured cigarettes that target youths, young adults and women, and the sale of single-stick cigarettes and electronic cigarettes, among others.[63] In the ASEAN, although most countries have restricted the sale of flavoured tobacco products, menthol cigarettes are still widely available.[64] In addition, only four AMS have regulated electronic cigarettes.[65] A slightly better development is that more than half of the countries have prohibited the sale of single sticks and kiddie packs of cigarettes (that is, fewer than 20 sticks per pack).[66]

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57 ibid 68.
58 ibid 70–72. Cambodia and Vietnam do not have this requirement.
59 ibid 69.
60 'The WHO Framework Convention on Tobacco Control: An Overview' (n 3) 3.
61 Lian and Dorotheo (n 2) 74.
62 ibid 82.
63 ibid.
64 ibid 101.
65 ibid 82, 83, 101.
66 ibid.

On the other hand, although governments of AMS have set the minimum legal age for the purchase, possession and use of tobacco at 18 years, investigation shows that the percentage of youth who purchased cigarettes in stores is quite high, ranging from 21.9 to 79.4 per cent.[67] One reason for the high percentage is that sellers in most AMS do not request appropriate evidence of having reached full legal age. It is thus not surprising to see that most youth were not refused the purchase of tobacco products because of their age.[68]

3.2.6 Article 18: protection of the environment

All but two AMS (Singapore and Brunei Darussalam) are engaged in tobacco cultivation, among which Indonesia was one of the top ten world leaf producers in 2012.[69] Nevertheless, the ASEAN has made good progress in switching tobacco farming to alternative livelihoods. For example, the total number of tobacco farmers in Malaysia has significantly dropped from 3,204 farmers in 2010 to 26 in 2014. Tobacco farmers in other AMS have also gradually shifted to alternative crops.[70]

To sum up, uneven progress was observed in the implementation of tobacco control measures among AMS. This is partially attributable to the fact that AMS have very different economic and political settings and some of them are still facing strong tobacco industry interference.[71] In particular, given the Indonesian government's close ties with the tobacco industry and the high revenues generated from tobacco taxes, it continuously refuses to become a party to the FCTC.[72]

Another possible reason may be that the FCTC relies largely on periodic reporting by the parties. The FCTC does not provide for any independent mechanism to monitor its implementation. Furthermore, although it is a binding treaty, whether it can be directly applied before domestic courts defers to domestic laws.[73] As Meier explains, the FCTC uses

> hortatory rather than legal statements, soft rather than hard law, denies Article 14 of any self-executing requirements, leaving treaty implementation solely at the discretion of individual states. This lack of mandatory provisions, compounded by

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67 ibid 82, 84.
68 ibid.
69 ibid. 88.
70 ibid.
71 Amul and Pang (n 9) 58–59; Lian and Dorotheo (n 2) 32.
72 Marie Lamy and Kai Hong Phua, 'Southeast Asian Cooperation in Health: A Comparative Perspective on Regional Health Governance in ASEAN and the EU' (2012) 10 Asia Europe Journal 233, 238.
73 Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52 Salud Publica de Mexico 288, 291.

> weak implementation mechanisms and state reporting requirements, provides no incentive for change in state cessation policy.[74]

In general, the ASEAN region is still lagging behind in tobacco control.[75] In addition to scaling up the implementation of the FCTC among AMS, there remains considerable room for taking other approaches to strengthening tobacco control in this region. The following section chooses to explore the potential of human rights approaches as one of the measures to advance tobacco control in the ASEAN.

4. THE ROLE OF THE ASEAN IN FOSTERING HUMAN RIGHTS APPROACHES TO TOBACCO CONTROL

As explained earlier, the ASEAN was created as an intergovernmental organization with aims of silencing political conflicts and improving the lives of its citizens in its Member States.[76] When established in 1967, the founding document of ASEAN – the Bangkok Declaration – did not encompass human rights because the participating governments at that time were more concerned with national security than with human rights.[77] It was not until 1993 that the term 'human rights' was first adopted in the Joint Communique of the 26th ASEAN Ministers Meeting.[78] Since then, the debate on human rights has gradually been integrated into a number of ASEAN official documents.[79]

A significant milestone in advancing human rights in this region is the adoption of the ASEAN Charter in 2008. The Charter formally recognizes that human rights are among its values, along with the principles of democracy, the rule of law, good governance and fundamental freedoms.[80] In particular, Article 14 of this Charter stipulates the establishment of an ASEAN human

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[74] Benjamin Mason Meier, 'Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health' (2005) 5 Yale of Journal of Health, Policy, Law and Ethics 137, 149.

[75] Lamy and Phua (n 72) 238.

[76] Gorawut Numnak, Miklos Romandy and Jonas Trapp, 'The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights' (2009) 14 Friedrich Naumann Foundation for Liberty Background Paper 2.

[77] Yuyun Wahyuningrum, 'The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward' (International Institute for Democracy and Electoral Assistance 2014) 13.

[78] ibid.

[79] ibid; Policy department of the European Parliament Directorate-General for External Policies (n 15) 4.

[80] Charter of the Association of Southeast Asian Nations (n 16) preamble, arts 1–2.

rights body, which shall 'operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting'.[81] Pursuant to this article, the AICHR was created in October 2009 as part of the political development in the ASEAN Political-Security Community.[82]

Alongside the establishment of the AICHR, two sectoral human rights bodies in the ASEAN Socio-Cultural Community (ASCC) that work on the promotion and protection of human rights were established: (1) the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), which was the first human rights body established by the ASEAN; and (2) the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).[83] The mandates of the ACWC follow largely the Terms of Reference (TOR) of the AICHR, which include promoting the implementation of international instruments and advocating on behalf of women and children, among others.[84] In particular, the TOR of the ACWC makes a specific reference to 'promot[ing] the well-being, development, empowerment and participation of women and children in the ASEAN Community building process …'.[85] It is worth noting that all AMS have ratified and are parties to the CEDAW and the CRC. As some scholars observe, 'ASEAN governments seem to feel more comfortable discussing women and children's rights issues'.[86] This offers great opportunities for the ACWC to establish mechanisms for protecting and promoting women's and children's right to health, and restricting tobacco companies' marketing strategies directly targeting women and minors, as discussed in Section 3.[87]

Due to space constraints, this section focuses on exploring the potential role of the AICHR in advancing human rights approach to tobacco control in the ASEAN region. The ACMW and ACWC will not be elaborated further.

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[81] ibid, art 14.

[82] Wahyuningrum (n 77) 6.

[83] Policy department of the European Parliament Directorate-General for External Policies (n 15) 4; Numnak and others (n 76) 4.

[84] ibid.

[85] ASEAN, *ASEAN Commission on the Promotion and Protection of the Rights of Women and Children: Terms of Reference* (ASEAN Secretariat 2010) 2.3.

[86] Numnak and others (n 76) 4.

[87] Policy department of the European Parliament Directorate-General for External Policies (n 15) 12.

4.1 Mandates of the AICHR

The ASEAN Charter paves the way for the establishment of a human rights body in the ASEAN. In operation of Article 14 of the Charter, a High Level Panel was set up by the ASEAN Foreign Ministers to draft the TOR for the ASEAN human rights body in July 2009.[88] This TOR set out the purposes, principles, mandate and functions of the AICHR. The TOR shall be reviewed every five years after its entry into force by the ASEAN Foreign Ministers, with a view to further strengthening mandates of the AICHR and developing mechanisms for both the promotion and protection of human rights in this region.[89]

The central role of the AICHR is to promote and protect human rights. More specifically, the AICHR is mandated to: (1) develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN community; (2) develop an ASEAN Human Rights Declaration for establishing a framework for human rights cooperation; (3) promote capacity building for the effective implementation of international human rights treaty obligations; (4) promote the full implementation of ASEAN instruments related to human rights; and (5) provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request, among others.[90]

4.2 Limitations

There is no doubt that the establishment of the AICHR is a big achievement in promoting and protecting human rights in the ASEAN region. However, the AICHR has long been criticized as a 'toothless' human rights mechanism. Considering the various political settings of AMS, human rights experts and scholars reckon that it is unrealistic to expect such a body to become a powerful mechanism for promoting and protecting human rights within the region.[91] As Wahyuningrum observes, the AICHR's mandates take a 'promotion first,

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[88] Wahyuningrum (n 77) 14.

[89] ASEAN, *ASEAN Intergovernmental Commission on Human Rights: Terms of Reference* (ASEAN Secretariat 2009) 9.6.

[90] ibid 4.

[91] Wahyuningrum (n 77) 14; Numnak and others (n 76) 2; Termsak Chalermpalanupap, 'Promoting and Protecting Human Rights in ASEAN' (*The Nation*, 18 December 2008) 18, http://www.asean.org/uploads/archive/93-14248-HumanRightsArticle.pdf, accessed 20 July 2019; Thomas Fuller, 'ASEAN Inaugurates Human Rights Commission' (*The New York Times*, 23 October 2009) http://www.nytimes.com/2009/10/24/world/asia/24asean.html, accessed 20 July 2019.

protection later' approach.[92] Even though the TOR sets out the AICHR's purpose as being 'to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties', it does not grant the Commission any power to investigate, monitor or enforce the implementation of human rights.[93]

In particular, when compared with regional human rights systems in Europe, Africa and the Americas, there is one significant difference in the ASEAN system. Human rights systems in Europe, Africa and the Americas (for example, the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights) were established under regional human rights treaties.[94] These human rights treaties provide for the range of the rights covered by the treaty, as well as mechanisms (for instance, a regional court of human rights) and procedures for rights-holders to seek redress at the regional level.[95] Several regional courts have already made judicial decisions to advance human rights approaches to tobacco control. For example, the European Court of Human Rights considered the harmful effects of smoking in the *Case of Novoselov v Russia*.[96] In comparison, there is no human rights treaty in the ASEAN region laying down the mechanisms and procedures for individuals to seek remedy at the regional level, especially when there are no remedies at the national level.[97]

4.3 Future Opportunities

Generally speaking, the AICHR is a consultative body that needs to consult and gain consensus between its members when making decisions. Its decisions are not binding.[98] In fact, as noted by Chalermpalanupap, the ASEAN Secretariat's Director of Political and Security Cooperation, the AICHR 'was never intended to be an "independent watchdog"… much less to be anything

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92 ASEAN (n 89) 4.1.

93 Numnak and others (n 76) 5–6; Wahyuningrum (n 77) 14.

94 These regional human rights treaties are: the 1961 European Social Charter (revised), the 1981 African Charter on Human and Peoples' Rights and the 1988 Additional Protocol to the 1969 American Convention on Human Rights.

95 The mechanisms include particularly the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights.

96 Dresler and Marks (n 19) 642.

97 Policy department of the European Parliament Directorate-General for External Policies (n 15) 4.

98 ibid 9; Numnak and others (n 76) 5–6.

with "sharp teeth"'.[99] The establishment of such a weak regional human rights body is probably due to the 'ASEAN way' of regional interaction and cooperation, which insists on equal rights and non-interference with the internal interests and political affairs of its Member States. Not surprisingly, under such an ASEAN way, the role of the AICHR is subject to political compromises, and it is less likely for the Commission to make complaints.[100]

From the above discussion, the AICHR seems to have similar problems as the FCTC: no monitoring and enforcement mechanism. Yet it is too early to conclude that the AICHR has little role to play in advancing human rights approaches to tobacco control in ASEAN. In fact, in spite of its limited mandates, the AICHR seems to be on the right path. Since 2011, the AICHR has focused on drafting a non-binding ASEAN Human Rights Declaration with a view to promoting the ASEAN position on human rights.[101] If the Declaration were to make reference to tobacco control or the FCTC, it would have very important implications for taking human rights approaches to tobacco control in the region.

The AICHR's report on the review of the TOR was also submitted to the 47th ASEAN Ministers Meeting in 2014.[102] Although no revisions have been made yet, the review of the TOR provides excellent opportunities to correct the weaknesses of the AICHR. As discussed earlier, the AICHR is a consultative body. Yet scholars have different interpretations of this consultative nature. Some scholars believe that under the UN protocol, a consultative body is able to deliver oral and written reports, as well as make complaints.[103] As noted by Muntarbhorn, 'what is not prohibited is not forbidden'.[104] Other scholars argue that a consultative body can make recommendations and be consulted.[105] This should be made clear in the revised TOR. Although it is still very unlikely to establish a regional court that makes binding decisions, the AICHR should at least be able to make recommendations. In addition, the AICHR puts more weight on the promotion than the protection of human rights. It also lacks monitoring and enforcement functions. Therefore, when reviewing the TOR,

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[99] Termsak Chalermpalanupap, '10 Facts about ASEAN Human Rights Cooperation', quoted in Numnak and others (n 76) 12.

[100] ibid 5–6.

[101] Policy department of the European Parliament Directorate-General for External Policies (n 15) 11.

[102] Wahyuningrum (n 77) 21.

[103] Numnak and others (n 76) 6.

[104] One of the drafters of the TOR of the AICHR, Vitit Muntabhorn, mentioned this idea in 'Developing an ASEAN Human Rights Regime', The Eighth Workshop on the ASEAN Regional Mechanism on Human Right (2009), quoted in Numnak and others (n 76) 6.

[105] ibid.

the ASEAN Ministers Meeting could include more protection mandates, particularly monitoring and complaints mechanisms. Furthermore, as suggested by some civil society organizations, the TOR should also provide for the State's responsibility and accountability to uphold human rights obligations to the AICHR.[106]

Admittedly, there is a long way to go before the AICHR can function as effectively as other regional human rights systems. Nevertheless, the active role of the AICHR is of utmost importance for taking human rights approaches to tobacco control in the ASEAN region. If the AICHR has broader mandates, it can at least guide or recommend, if not oblige AMS, to take all appropriate measures to strengthen tobacco control in this region. For example, it would become possible for the AICHR to urge Indonesia to take concrete measures to protect its public health policies from commercial and other vested interests of the tobacco industry. More importantly, when AMS fail to undertake their human rights obligations with regard to tobacco control, the AICHR could redress grievances of individuals and impose negative consequences on them if accountability mechanisms have been put in place. To make this possible, much more work needs to be done to raise the awareness in the ASEAN that the human rights framework offers considerable potential in protecting the health and well-being of the people in this region in the context of tobacco control.[107]

5. CONCLUSIONS

AMS have made substantial progress in tobacco control over the past decade, while challenges remain. A critical problem among others is that Indonesia, which has the largest number of adult smokers in the ASEAN region, continuously refuses to become party to the FCTC. This makes the whole region lag behind in tobacco control. Yet the human rights framework, especially the right to health, provides an alternative way to strengthen tobacco control in this region. Human rights provide a normative basis for requiring all ASEAN governments to protect their people from the health risks caused by primary and second-hand smoke, tobacco production or other tobacco use. Nevertheless, the human rights system in the ASEAN, the AICHR, has long been criticized as a toothless paper tiger with no power to monitor and enforce the implementation of human rights at the regional level. The drafting of the ASEAN Human Rights Declaration and the review of the TOR of the AICHR provide excellent opportunities to correct the weaknesses of the AICHR. When it has broader

[106] Wahyuningrum (n 77) 21.
[107] Toebes and others (n 23) 3.

mandates, the AICHR has the potential to become an effective mechanism in promoting and protecting human rights and in advancing tobacco control in the ASEAN region.

8. Tobacco use, exploitation and vulnerability in Africa: a human rights analysis

Obiajulu Nnamuchi

1. INTRODUCTION

Aside from three countries (Morocco, Somalia and South Sudan), the rest of the countries in the World Health Organization (WHO) African region (44 out of 47) are parties to the WHO Framework Convention on Tobacco Control (FCTC)[1] and are therefore bound by its prescriptions and prohibitions. Yet, the number of smokers in the region, including children and women, continues to rise. The danger is that unless urgent action is taken, smoking prevalence in the region will increase by about 39 per cent, which will represent the largest regional increase globally. By 2100,[2] more than a quarter of the world's smokers (26 per cent) will reside in Africa.[3] For a region already suffocating under the stranglehold of underperforming health systems, this data is troubling. It calls for additional measures to be adopted to supplement or catalyse the implementation of the FCTC – precisely the kind envisaged by Article 3 of the FCTC, which encourages parties to implement measures beyond those imposed by the Convention and its protocols. This underscores the need for a human rights-based approach to tobacco control in Africa – with specific focus on the region's human rights instruments, namely the African Charter on

[1] WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC) chapter IX.

[2] 'Smoking both down, and shockingly up, in Africa' (*Southeast Asia Tobacco Control Alliance*) https://seatca.org/?p=5775, accessed 16 August 2019.

[3] Evan Blecher and Hana Ross, 'Tobacco Use in Africa: Tobacco Control through Prevention' (*American Cancer Society*, 2013) https://www.cancer.org/content/dam/cancer-org/cancer-control/en/reports/tobacco-use-in-africa-tobacco-control-through=prevention.pdf, accessed 23 April 2019.

Human and Peoples' Rights,[4] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol)[5] and the African Charter on the Rights and Welfare of the Child (ACRWC).[6]

This chapter consists of five sections. Following this introductory section, Section 2 discusses tobacco industry exploitation and vulnerability across Africa. Section 3 is an analysis of specific human rights endangered by the operation of tobacco businesses. The section sets the stage for holding tobacco companies accountable for human rights infractions. As to how to the operationalize the accountability demands of human rights, Section 4 projects the deployment of human rights implementation mechanism of the African human rights system as a panacea. The conclusion, Section 5, is a summation of the measures that are considered crucial to tackling the scourge of tobacco in Africa.

2. TOBACCO INDUSTRY EXPLOITATION AND VULNERABILITY ACROSS AFRICA

Although vulnerability to the activities of the tobacco industry is not unique to Africa, the situation in the region is starkly different from what is obtainable in other parts of the world. Young people (the most aggressively targeted population), women (there are rising numbers of female smokers in the region), a high illiteracy rate,[7] extreme poverty (ranks worst in the world),[8] the largest proportion of peasant smallholder tobacco farmers (who are exploited), and so forth, set the region apart as being desperately in need of human rights-centred interventions.

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[4] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter).

[5] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (Maputo Protocol).

[6] African Charter on the Rights and Welfare of the Child (entered into force 29 November 1999) CAB/LEG/24.9/49 (ACRWC) art 14.

[7] 'Tobacco Control: Factsheet' (*WHO Regional Office for Africa*) https://afro.who.int/health-topics/tobacco-control, accessed 18 April 2019.

[8] 'The State of the Poor: Where are the Poor and where are they Poorest?' (*The World Bank*) https://www.worldbank.org/content/dam/Worldbank/document/State_of_the_poor_paper_April17.pdf, accessed 18 April 2019. It reports that the proportion of those living in extreme poverty (individuals living on less than $1.25 per day) in sub-Saharan Africa is the highest globally, at 48 per cent.

2.1 Youth/children

Whilst several demographics suffer exploitation at the hands of the tobacco industry, atop the chain are vulnerable underage populations, who are actively targeted through the deployment of a wide array of incentives. Although increased investment in public education and cessation activities have triggered a rise in the number of people quitting smoking, a reduced consumer base also means that tobacco companies must seek new users in order to maintain profitability. This is the reason for the huge amounts of money being spent on marketing campaigns in Africa, aimed at fostering a positive attitude towards smoking and encouraging youth to take up the habit and remain long-term smokers.[9] The result of this massive investment has been phenomenal, as evidenced by an increasing surge in the number of young smokers throughout the world. Approximately 18 per cent (21 per cent boys, 13 per cent girls) in the African region currently use different varieties of tobacco products.[10]

The group Campaign for Tobacco-Free Kids identifies tactics that have been effectively deployed to ensure that children take up smoking: advertising in popular youth-oriented magazines; positioning cigarette advertisements at children's eye-level in shops; sponsoring sports with a large youth fan base such as soccer and cricket; advertising near schools, using large billboards depicting glamorized images of tobacco use; placing tobacco products in prominent movies for a youth audience; and developing counterproductive youth tobacco prevention programmes that actually encourage use.[11]

2.2 Women

Described as 'the next wave of tobacco epidemic',[12] women represent the tobacco industry's second-biggest target,[13] after children. This is underscored by the current low (albeit rising) number of female smokers and rapid changes in socio-economic status of women, which means increasing affordability

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[9] Campaign for Tobacco-Free Kids, 'Tobacco Advertising & Youth: The Essential Facts' (*Tobacco Free Center*, 2008) https://www.tobaccofreekids.org/assets/global/pdfs/en/APS_youth_facts_en.pdf, accessed 18 April 2019.

[10] WHO (African Regional Office), 'The WHO Framework Convention on Tobacco Control: 10 Years of Implementation in the African Region' (2015) 4.

[11] 'Tobacco Advertising & Youth' (n 9).

[12] Amanda Amos and Margaretha Haglund, 'From Social Taboo to "Torch of Freedom": The Marketing of Cigarettes to Women' (2000) 9 Tobacco Control 3.

[13] 'Gender Equality is Good for Health: 10 Facts of Tobacco and Gender' (*WHO*, 2010) http://www.who.int/gender/documents/10facts_gender_tobacco_en.pdf, accessed 18 April 2019.

of cigarettes.[14] The industry spends millions of dollars each year on cleverly crafted marketing campaigns directed specifically at women. Women-specific advertisements are largely successful due to the intensification of feminization and glamorization of smoking. Pictures and posters of attractive women adorned with fashionable clothing and jewellery, which portray smoking as emancipatory and liberating, are often irresistible to the targeted audience. The implication for African women and tobacco use is uncomplicated. Women in Africa increasingly embracing feminist ideals and western lifestyles, coupled with improving economic conditions in the region, creates easier diffusion of the message than would have been the case in the past. This, of course, has disturbingly grave health consequences.

Quite unsurprisingly, the number of women using tobacco, including chewing tobacco and snuff, in Africa is rising and is currently 13 million.[15] This trend is replicated amongst adolescent girls, 13 per cent of whom use tobacco products.[16] Remarkably, unlike previous years, when tobacco use prevalence among girls was lower vis-à-vis boys in Africa, recent studies indicate that the gap has been obliterated, with the prevalence rate among girls (4.6–36.6 per cent) rising to as high as for boys (7.8–36.5 per cent).[17] The end result is that although largely preventable, tobacco-related diseases kill about 22,000 women each year in the African region.[18] In addition, although men and women experience similar tobacco-related health challenges, the harms suffered by women vastly differ from those experienced by men. Female smokers are susceptible to cervical cancer, have a greater likelihood of experiencing infertility and delayed conception, risk premature birth, stillbirth and newborn death, and may experience a reduction in breast milk.[19]

2.3 Farmers and Illiterates

Many of the obnoxious practices of the tobacco industry which have either been banned or significantly curtailed in the western world are brazenly on display in Africa. For instance, organic pesticides such as dichlorodiphenyltrichloroethane (DDT) and others, which have long been outlawed in western countries, are widely available in Africa, despite the environmental hazards to

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14 ibid.
15 'Tobacco Control: Factsheet' (n 7).
16 ibid.
17 ibid.
18 ibid.
19 'Gender Equality is Good for Health' (n 13).

which tobacco-farming communities in the region are exposed.[20] These chemicals are packaged without proper labelling and instructions, thereby denying would-be users access to information about the toxicity of the products as well as necessary safety measures to be adopted[21] – a problem that is compounded by high illiteracy rates among tobacco growers in Africa. The implication is that even where there is proper labelling and other necessary disclosures, these measures would be of little (if any) benefit to farmers in the region, making them more vulnerable to chemical exposure and pesticide poisoning. Aside from tobacco farmers, children, pregnant women and older people who are involved in tobacco production or reside near tobacco-growing fields also suffer health risks associated with chemical exposure.[22]

2.4 The Poor

The last identifiable group put at risk by the exploitative machinery of the tobacco industry is the poor, many of them tobacco farmers. Their victimization has dual dimensions: first, as peasant farmers whose raw products are sold at give-away prices to the tobacco industry, which meanwhile reaps millions of dollars of revenue from sale of the finished product, thereby ensuring continuous impoverishment of the farmers;[23] and second, as a target of marketing campaigns such as the single stick method. The harmful interface between poverty and tobacco use is addressed in the next section and needs no repetition here.

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[20] Natacha Lecours, Guilherme EG Almeida, Jumanne M Abdallah and Thomas E Novotny, 'Environmental Health Impacts of Tobacco Farming: A Review of the Literature' (2012) 21 Tobacco Control 191, citing Campaign for Tobacco Free Kids, 'Golden Leaf, Barren Harvest: The Costs of Tobacco Farming' (*Center for Tobacco Control Research and Education*, 1 November 2001).

[21] Lecours and others (n 20).

[22] ibid; Dilshad A Khan, Saira Shabbir, Mahwish Majid, Tatheer Alam Naqvi and Farooq Ahmed Khan, 'Risk Assessment of Pesticide Exposure on Health of Pakistani Tobacco Farmers' (2010) 20 Journal of Exposure Science and Environmental Epidemiology 571.

[23] Jeffrey Drope and Neil W Schluger, *The Tobacco Atlas: Sixth Edition* (The American Cancer Society 2018). Recent research across major tobacco-growing countries demonstrates that farming tobacco is not prosperous for most smallholder farmers. Many farmers, including many with contracts with oligopolistic leaf-buying companies, pay too much for inputs (for example fertilizers, pesticides and so on), receive very low prices for their leaf and dedicate hundreds of hours to a mostly unprofitable economic pursuit. The opportunity costs of farming tobacco are high, with farmers missing out on human capital development and more lucrative economic opportunities.

3. TOBACCO CONTROL IN AFRICAN HUMAN RIGHTS INSTRUMENTS

Whilst national governments are primarily responsible for the enforcement of international human rights standards, there is an increasing recognition that corporations such as tobacco companies also have important roles to play and are subject to human rights accountability mechanisms.[24] An insightful way to consider this interface might be to undertake an analysis of how the activities of the tobacco industry affect human rights and development in Africa, thereby calling into question their legal obligations.

3.1 Freedom from Poverty

Philosopher and theologian Gustavo Gutiérrez's observation that 'poverty is not caused by fate; [instead] it is caused by the actions of [others] … There are poor because some people are victims of others'[25] accurately sums up the relationship between tobacco use and poverty. This summation resonates quite powerfully with the reality in Africa given the suffocating grip of poverty on the people, currently at 42.3 per cent, the highest globally.[26] Yet, freedom from poverty, resulting from 'exploitation and degradation of [human beings]', is recognized as a human right.[27] Whilst the tobacco industry is not wholly responsible for the stifling hold of poverty on the lives of Africans, tobacco is a major contributor, both at individual and national levels. The poor tend to use tobacco more than others and poor families expend a larger proportion of their resources on tobacco.[28] The poorest households in some African countries spend 15 per cent of disposable income on tobacco[29] and this negatively impacts other dimensions of well-being. Money used on tobacco is not

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[24] 'Corporate Social Responsibility and Human Rights' (*Australian Human Rights Commission*, 2008) https://www.humanrights.gov.au/publications/corporate-social-responsibility-human-rights, accessed 18 April 2019.

[25] Gustavo Gutiérrez, *A Theology of Liberation: History, Politics and Salvation* (Caridad Inda and John Eagleson trs, Orbis Books 1973) 292–293.

[26] Christoph Lakner, 'April 2018 global poverty update from the World Bank' (*World Bank Let's Talk Development*, 30 April 2018) http://blogs.worldbank.org/developmenttalk/april-2018-global-poverty-update-world-bank, accessed 18 April 2019.

[27] African Charter, art 5.

[28] Tobacco Free Initiative, 'Tobacco increases the poverty of individuals and families' (*WHO*, 2004) http://www.who.int/tobacco/communications/events/wntd/2004/tobaccofacts_families/en/, accessed 18 April 2019.

[29] Framework Convention Alliance, 'Tobacco: A Barrier to Sustainable Development' (*FCTC*, March 2015) https://www.fctc.org/wp-content/uploads/2015/

available for spending on vital necessities such as healthcare, food, shelter, education, water and so forth, meaning there is deprivation in key dimensions of sustaining human life. Since tobacco users are at a much higher risk of falling ill and dying prematurely, tobacco use can worsen poverty amongst users and their families by imposing additional expenditure on them in the form of healthcare costs when illness strikes.[30]

Aside from impoverishing its users and their households, tobacco also imposes an enormous cost burden on countries.[31] These include increased healthcare costs, lost productivity due to illness and premature deaths during the productive years of users, drain on the foreign exchange reserve and environmental damage.[32] Regarding the increased cost of providing healthcare, it should be noted that tobacco use causes a wide range of diseases including cancer, cardiovascular diseases, stroke, lung diseases, diabetes and chronic obstructive pulmonary disease (COPD) as well as emphysema and chronic bronchitis, reproductive health diseases in women, infertility and so forth. The cost of caring for victims of these diseases is a heavy burden which nascent and fragile health systems in the African region are unable to meet, meaning skyrocketing cases of tobacco-related morbidity and mortality, and ultimately worsening poverty in the region.

3.2 Freedom from Hunger

Despite recognition of the fundamental right of everyone to be free from hunger by the oldest contemporary human rights instrument,[33] hunger and malnutrition remain a major challenge to people's well-being in Africa. In 2016 nearly 27.4 per cent of Africans were classified as being severely food insecure, almost four times as high as any other region.[34] Not only is the prevalence of undernourishment in Africa the highest in the world (estimated at 20 per cent of the population in 2016),[35] the situation is expected to worsen. The

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03/Tobacco_sustainable_development_190315.pdf, accessed 05 May 2020; Agustin Ciapponi, *Systematic Review of the Link Between Tobacco and Poverty* (WHO 2011).

30 Tobacco Free Initiative (n 28).

31 Tobacco Free Initiative, 'Tobacco increases the poverty of countries' (*WHO*, 2004) http://www.who.int/tobacco/communications/events/wntd/2004/tobaccofacts_nations/en/, accessed 18 April 2019.

32 ibid.

33 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 25.

34 Chelsea Kennard and Hunger Notes, 'Africa Hunger and Poverty Facts' (*World Hunger Education Service*, August 2018) https://www.worldhunger.org/africa-hunger-poverty-facts-2018/, accessed 18 April 2019.

35 ibid.

region has the highest population growth rate worldwide and is expected to account for more than half of the global population growth between now and 2050.[36]

Whilst food insecurity or hunger in Africa is not completely attributable to the tobacco industry, the industry shoulders a significant level of responsibility. Africa's share of production of tobacco leaf has steadily increased, from 440,000 tons or 7.3 per cent of the world production in 2003 to 650,000 tons or 8.7 per cent in 2012.[37] Similarly, African countries recorded an increase of 66 per cent in total area harvested for tobacco and 48 per cent increased output.[38] In 2012, five countries in Africa ranked among the top 20 producers of tobacco leaf in the world, namely Malawi (6th), Tanzania (8th), Zimbabwe (9th), Zambia (16th) and Mozambique (17th).[39] Quite paradoxically, most of these countries are among the world's poorest and, yet, they continue to devote considerable portions of fertile agricultural land to tobacco farming, as opposed to food crops.

Migrating from degraded to fertile land in search of higher tobacco yield is the norm in most of these countries,[40] meaning that more acreage is devoted to tobacco production, translating to less land for food production. Moreover, the allure of steady income from the sale of tobacco leaf incentivizes a shift away from traditional crops such as yam, cassava, rice, wheat, millet and potatoes – the mainstay of food programmes in the region. This is a recipe for disaster in terms of increased hunger and malnutrition in affected communities. Malawi, a country with an undernourishment rate of 20 per cent, allocated 4.5 per cent of arable land to tobacco farming.[41]

3.3 Right to Health

Flowing from the definition of the right to health in Article 16 of the African Charter as the right of everyone to 'enjoy the highest attainable standard of physical and mental health' is the conclusion that anything that obstructs or frustrates the attainment of this objective breaches the right. Tobacco use is illustrative, a reason the FCTC is grounded on the need 'to protect human

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[36] ibid.

[37] Teh-wei Hu and Anita H Lee, 'Tobacco Control and Tobacco Farming in African Countries' (2015) 36 Journal of Public Health Policy 41.

[38] ibid.

[39] ibid.

[40] Lecours and others (n 20) 193; Mwita Marwa Mangora, 'Ecological Impact of Tobacco Farming in Miombo Woodlands of Urambo District, Tanzania' (2006) 43 African Journal of Ecology 385.

[41] Framework Convention Alliance (n 29).

health against the devastating impact of tobacco consumption and exposure to tobacco smoke'.[42] A prime driver of the non-communicable disease (NCD) epidemic, tobacco use is the leading cause of preventable diseases and deaths globally, responsible for over 6 million deaths annually.[43] This is of special significance to Africa given a recent projection by the WHO that over the next ten years, deaths in Africa from NCD, of which tobacco is a major contributor, will increase 27 per cent, second only to Russia.[44] Whilst health systems in other parts of the world have the capacity to provide care for those affected by tobacco-attributable diseases, the same cannot be said of Africa.[45]

The dual dimensions of the right to health, namely healthcare and underlying or social determinants of health, provide an avenue for determining whether the tobacco industry facilitates or harms people's health. Regarding healthcare, tobacco use contributes to frustration of access to healthcare. Tobacco consumption is highest amongst the poor, which, in turn, contributes to worsening poverty as a result of loss of income, loss of productivity, disease and death.[46] On the second prong of the right to health, one has to assess the activities of the tobacco industry from the perspective of their impact on social health determinants such as food, water, shelter, education and so forth. For smokers, the vast majority of whom are poor and uneducated, money spent on tobacco means less funds available for nutritious food, potable water, adequate shelter or quality education, whilst children employed in tobacco production suffer deprivation in terms of opportunities to pursue education.

Furthermore, deforestation and bush burning, both of which are widely employed in tobacco fields, result in the destruction of plants and herbs, many of which are useful in drug production or as timber for the construction of houses. Deforestation as well as use of chemicals in tobacco farming cause environmental damage, including contamination of water sources. Noteworthy in this context is the danger tobacco poses to farming communities in poorer parts of the world, most of them in Africa. Pesticide and growth inhibitors are routinely applied to tobacco plants with hand-held or backpack sprayers, without the use of necessary protective gear, thereby risking the life and health

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[42] FCTC, preamble.

[43] Framework Convention Alliance (n 29).

[44] Tobacco Free Initiative, 'Overview of tobacco control in Africa: Africa is poised to experience a tobacco epidemic' (*WHO*) http://www.who.int/tobacco/control/capacity_building/africa/background/overview/en/, accessed 18 April 2019.

[45] WHO, *The World Health Report 2000: Health Systems: Improving Performance* (WHO 2000), depicting poor performance of health systems in Africa.

[46] WHO, 'Tobacco and Poverty: A Vicious Circle' (*WHO*, 2004) http://www.who.int/tobacco/communications/events/wntd/2004/en/wntd2004_brochure_en.pdf, accessed 18 April 2019.

of farmers.[47] Research shows that poor protection practices in using pesticide sprayers may lead to increased risk of neurological and psychological conditions,[48] including extrapyramidal (parkinsonian) symptoms, anxiety disorders, major depression and suicidal ideation[49]– an affront to the right to health.

3.4 Right to Education

The value of education as a human right lies in its empowering, transformative and life-altering character, a reason key global policy instruments (for instance, Millennium Development Goal (MDG) 2 and Sustainable Development Goal (SDG) 4) as well as human rights instruments (Article 17 African Charter and Article 11 ACRWC) accord recognition to the right. In this sense, deprivation of educational opportunities, particularly of children, is amongst the more serious of the harms arising from employment of child labour in tobacco fields. The link is straightforward – one cannot be in two places at the same time. The time spent working in tobacco fields is also the time that these children ought to be spending in schools, a deprivation that is disempowering and which, in turn, unleashes a cycle of poverty[50] from which the child may never be able to escape. Illiteracy generally nullifies chances of appropriately remunerating opportunities, in the end consigning its victims to poverty, first as children and subsequently as adults.[51]

3.5 Right to a Healthy Environment

The right to a healthy environment is enshrined in Article 24 of the African Charter. This is consistent with the FCTC, which in Article 3 specifies the protection of humanity from the devastating health, social, environmental and

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[47] Lecours and others (n 20) 192; Thomas A Arcury and Sara A Quandt, 'Health and Social Impacts of Tobacco Production' (2006) 11 Journal of Agromedicine 71.

[48] Lecours and others (n 20); Kaoru Kimura and others, 'Effects of Pesticides on the Peripheral and Central Nervous System in Tobacco Farmers in Malaysia: Studies on Peripheral Nerve Conduction, Brain-evoked Potentials and Computerized Posturography' (2005) 43 Industrial Health 285; Rosane Maria Salvi, Diogo R Lara, Eduardo S Ghisolfi, Luis V Portela, Renato D Dias and Diogo O Souza, 'Neuropsychiatric Evaluation in Subjects Chronically Exposed to Organophosphate Pesticides' (2003) 72 Toxicological Sciences 267.

[49] Lecours and others (n 20); Arcury and Quandt (n 47).

[50] Aljazeera, 'Malawi's Children of Tobacco: People & Power investigates the plight of children forced to work in Malawi's tobacco industry' (*People and Power*, 16 January 2014) https://www.aljazeera.com/programmes/peopleandpower/2014/01/malawi-children-tobacco-2014114957377398.html, accessed 18 April 2019.

[51] ibid.

economic consequences of tobacco consumption as a key objective. It further stipulates in Article 18 that operationalization of the Convention should have due regard to the protection of the environment and the health of persons in the course of tobacco production. Yet, a literature review published in 2012 found that tobacco farming, particularly in low-income and middle-income countries (Africa inclusive), is a major contributor to deforestation and soil degradation, resulting from large-scale clearing of forests and bushes.[52] In addition, pollution resulting from pesticides (insecticides, herbicides, fungicides and fumigants), growth regulators (growth inhibitors and ripening agents) and other toxic agents used in growing and curing of tobacco, coupled with deforestation, disrupt the ecosystem, including land resources, biodiversity and food sources.[53]

Remarkably, when compared to other major food and cash crops, tobacco plants absorb more nitrogen, phosphorus and potassium and consequently decrease soil fertility at a faster rate.[54] Tobacco farming also contributes to the depletion of soil nutrients as a result of the practices of 'topping' and 'desuckering', both of which are aimed at attaining high levels of nicotine and high leaf yields.[55] The major effects of these unsustainable agricultural practices are less arable land for planting of food crops and adverse health consequences resulting from pollution of the environment. Additional health hazards are also introduced to the environment by the finished product (cigarettes) in the form of air pollution, affecting not only smokers, but also non-smokers who are exposed to second-hand smoke. In this context, it is significant to note that exposure to second-hand smoke kills 64 per cent of women who work or reside with male smokers in Africa.[56]

3.6 Right to Freedom of Information

An apt starting point of analysis regarding this right in the context of tobacco use is to note Article 12 of the FCTC. The Article requires States to promote access to effective and comprehensive educational and public awareness programmes on the health risks of tobacco consumption and exposure to tobacco smoke as well as public awareness about such risks and the benefits of the cessation of tobacco use and adoption of a tobacco-free lifestyle. Furthermore, Article 4(1) of the FCTC specifies, as one of the principles driving the actualization of the objectives of the Convention, a requirement that everyone should

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52 Lecours and others (n 20) 191.
53 ibid 191–192.
54 ibid; Campaign for Tobacco Free Kids (n 20).
55 ibid.
56 'Gender Equality is Good for Health' (n 13).

be entitled to receive information about the health consequences of tobacco consumption and exposure to tobacco smoke. The genealogy of these somewhat broadly couched obligations is traceable to international human rights law and clearly imposes a corresponding responsibility on non-State actors, namely to refrain from frustrating the effort of the State in discharging its duty. Undoubtedly, the right to freely receive information, as first articulated in Article 19 of the Universal Declaration of Human Rights, implicitly includes the right not to be misled by the information received. Otherwise the right amounts to nothing or, even worse, becomes harmful, which could not have been the intention of the provision. A restatement of this right is found in the African Charter (Article 9), Maputo Protocol (Articles 5(a) and 14(2)(a)) and ACRWC (Article 14(2)(f) and (h)).

The question which arises is, does the tobacco industry respect this right? The response cannot be affirmative. In fact, the maxim 'the more you look, the less you see' is an accurate portrayal of the tobacco industry's 'packaging' of its products and operations vis-à-vis the right to freedom of information. There are three principal avenues through which the tobacco industry infringes the right to freedom of information: concealment, propaganda or disinformation, and deceitful branding or packaging.

3.7 Freedom from Child Labour and Exploitation

In addition to the African Charter (Article 15), which stipulates that the right to work involves employment 'under equitable and satisfactory conditions' free of danger to health and well-being, the ACRWC (Article 15) requires that children 'shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with [their] physical, mental, spiritual, moral, or social development'. Yet, tobacco companies remain intransigent in their employment of child labour and exploitation of children, throughout the different phases of production – planting, manufacturing and marketing of tobacco.

Malawi, an impoverished country in southern Africa, provides a striking illustration. Although ranked amongst the top five producers of tobacco in the world, about half of its population are living below the poverty line ($1.25 per day) and the country has one of the highest numbers of child labourers in Africa, at approximately 1.5 million.[57] Tobacco is the most important foreign exchange earner, accounting for 70 per cent of the country's income and the backbone of its industrial activity. It is thus inevitable that many children (most of them aged between five and 15) will be compelled by poor life

[57] Aljazeera (n 50).

circumstances to work in tobacco fields as a means of supplementing family incomes.[58] This comes at a great risk to their health, safety and future. Aside from the hazardous nature of the job, including physical strain, dangerous environments and long hours, children are often charged with strenuous tasks such as clearing the land, building tobacco drying sheds and weeding and plucking raw tobacco, all of which are performed manually.[59]

3.8 Freedom from Discrimination

Protection from discrimination (the converse of equality guarantees of human rights) in the context of the activities of the tobacco industry is rooted in the vulnerability of the people discriminated against, specifically women, children and the poor. Prohibition of discrimination, set out in Article 2, common to the African Charter, Maputo Protocol and ACRWC, has acquired the status of *jus cogens* – peremptory norms of international law from which no derogation is allowed. As previously discussed, tobacco companies are increasingly designing their marketing campaigns to specifically target women, children and the poor. Regardless of strategy or tactics, the effect is the same. These groups are exposed to harms and risks which others are not, thereby exacerbating their vulnerability, which is contrary to the ideals of human rights. As argued elsewhere, the mission of human rights leans heavily on 'prioritizing the needs and interest of [vulnerable populations] … pragmatism borne out of solidarity with the people whose needs and exposure to diseases and illnesses is greater vis-à-vis the general population'.[60] This mission is decidedly undermined by the philosophical underpinning of the operation of tobacco companies, which is maximization of profit, undeterred by the constraints of human rights.

4. AVENUES FOR PROMOTING TOBACCO CONTROL IN THE AFRICAN HUMAN RIGHTS SYSTEM

There are two principal bodies charged with implementing human rights in the African human rights system, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (ACHPR). A creature of Article 30 of the African Charter, the Commission has important responsibilities in the realm of tobacco control. The primary

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[58] ibid.
[59] ibid.
[60] Obiajulu Nnamuchi, 'Millennium Development Goal 6 and the Trifecta of HIV/AIDS, Malaria and Tuberculosis in Africa: A Human Rights Analysis' (2014) 42 Denver Journal of International Law and Policy 281.

mandate of the Commission is to ensure the compliance of Member States with the obligations they assumed under the Charter. This duty is specified as including the protection of human rights of the Charter and is operationalized through the communication procedure (inter-State as well as individual), friendly settlement of disputes, periodic reports (including consideration of NGO shadow reports), urgent appeals and other activities of special rapporteurs, working groups and missions.[61] Individuals and NGOs are entitled to petition the Commission, even without the express approval of the individual whose rights have been violated. An NGO does not need to acquire observer status with the Commission as a condition for filing a complaint, nor does an individual or NGO need to be a citizen or registered in the State against which the communication was lodged. Such communication, however, may only be heard against a State that has ratified the African Charter.[62]

For individual complaints to be admissible, Article 56 prescribes some conditions to be satisfied, failing which the Commission will not entertain them. Of crucial importance is the requirement that local remedies must be exhausted prior to filing the communication. Strikingly, the jurisprudence of the Commission shows that complaints are admissible even in the absence of exhaustion of local remedies in some circumstances, such as where:

(a) the victims are indigent (*Purohit v The Gambia*);[63]
(b) the complaints involve serious or massive human rights violations (*Free Legal Assistance Group v Zaire*);[64]
(c) domestic legislation ousts the jurisdiction of national courts (*Media Rights Agenda v Nigeria*);[65]
(d) the rights claimed are not guaranteed by domestic laws (*SERAC v Nigeria*);[66]

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[61] African Commission on Human and Peoples' Rights, *Celebrating the African Charter at 30: A Guide to the African Human Rights System* (Pretoria University Law Press 2011) 17.

[62] ibid.

[63] *Purohit and Moore v The Gambia* No 241/01 (2003) African Commission on Human and Peoples' Rights.

[64] *Free Legal Assistance Group and Others v Zaire* Nos 25/89, 47/90, 56/91, 100/93 (1995) African Commission on Human and Peoples' Rights.

[65] *Constitutional Rights Project and Civil Liberties Organisation and Media Rights Agenda v Nigeria* Nos 140/94, 141/94, 145/95 (1999) African Commission on Human and Peoples' Rights.

[66] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* No 155/96 (1995) African Commission on Human and Peoples' Rights.

(e) it is physically dangerous for the complainant to return to the erring State in order to exhaust local remedy (*Jawara v The Gambia*;[67] *Abubarkar v Ghana*);[68]
(f) the complaint involves an 'impractical number' of potential plaintiffs (*African Institute for Human Rights and Development v Guinea)*;[69]
(g) the procedure for obtaining domestic remedy will be unduly prolonged (Article 56(5) of the African Charter); or
(h) it is simply illogical to require exhaustion of local remedy.[70]

These exceptional circumstances are significant, particularly where the State is complicit in the infraction of human rights (such as the kind perpetrated by tobacco companies), as they enable victims to bypass bottlenecks and other artificially constructed obstacles in domestic court systems. Of further relevance to tobacco-related communication is that Article 56(1) of the Charter does not follow traditional orthodoxy regarding *locus standi*; instead, although the person or group submitting the communication must be revealed, '[t]hey do not necessarily have to be the victims of such violations or members of their families'.[71] This wide understanding of competence to petition the Commission for redress reflects the sensitivity of the African Charter 'to the practical difficulties that individuals can face in countries where human rights are violated'[72] – for example, those in which tobacco companies hold sway over the government, especially where the victims are poor, as in the case of smokers or tobacco growers in Africa.

At the conclusion of the hearing of a complaint, the Commission may, if it finds a violation, issue a declaration that the State Party has ran afoul of protecting the human rights in question or issue recommendations regarding necessary actions to be taken by the State Party, including payment of appropriate compensation to the victim.[73] Although the recommendations of

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[67] *Dawda Jawara v The Gambia* Nos 147/95 and 149/96 (2000) African Commission on Human and Peoples' Rights.
[68] *Alhassan Abubakar v Ghana* No 103/93 (1996) African Commission on Human and Peoples' Rights.
[69] *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* No 249/02 (2004) African Commission on Human and Peoples' Rights.
[70] African Commission on Human and Peoples' Rights (n 61) 26.
[71] *Malawi African Association and Others v Mauritania* Nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (2000) African Commission on Human and Peoples' Rights [78].
[72] ibid.
[73] African Commission on Human and Peoples' Rights (n 61) 28.

the Commission are not legally binding,[74] once a decision is issued, States Parties are required to tender a written notice to the Commission within 180 days of the issuance of the decision of all measures being taken to implement the decision.[75] In the event of failure or unwillingness of a State to comply with decisions or provisional measures issued by the Commission, the body will submit the communication to the ACHPR.[76] As a quasi-judicial body, the Commission can only make recommendations; the Court is the only competent organ to issue binding decisions.[77] In this sense, there is a synergistic relationship between the two bodies. The Commission traditionally refers cases to the Court, though in certain circumstances the reverse is the case.[78] Nonetheless, not all cases are referable by the Commission to the Court.

The Commission is entitled to refer any of the cases filed before it as well as massive human rights violations only in respect to States Parties to the Charter that have ratified the Optional Protocol establishing the Court.[79] Individuals who are citizens of States Parties which ratified the Court's Protocol and made the Article 36(4) declaration recognizing the competence of the Court to receive individual complaints may proceed directly to the Court, without reference to the Commission, or they may present their cases to the Commission. Where the State against which the complaint is being brought has ratified the Protocol but not made the declaration, individuals in such States are required to approach the Commission first and the Commission may subsequently refer the case to the Court. In the event that the State in question is not a party to the Protocol, individuals in the State alleging violations of human rights can only seek redress before the Commission.[80]

Although the Commission is yet to entertain complaints regarding tobacco-related human rights violations, extant jurisprudence of the Commission suggests strongly that the competence of the Commission is inclusive of such cases, as its previous decisions affirm. In *SERAC v Nigeria*, for instance, the petitioners claimed that the government of Nigeria had violated, among others, Articles 4 (right to life), 16 (right to health) and 24 (right to clean environment) of the African Charter.[81] The communication alleged

74 ibid 27.
75 ibid 28.
76 ibid 55.
77 'Frequently Asked Questions' (*African Court on Human and Peoples' Rights*) http://en.african-court.org/index.php/basic-documents/31-frequently-asked-questions, accessed 23 April 2019.
78 ibid.
79 African Commission on Human and Peoples' Rights (n 61) 54.
80 ibid.
81 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* No 155/96 (2001) African Commission on Human and Peoples' Rights.

that the oil consortium operating in Nigeria exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing of toxic wastes into the environment and local waterways. It further alleged that in addition to neglecting and/or having failed to maintain its facilities, the consortium caused numerous avoidable spills in the proximity of villages[82] as well as serious illnesses.[83] In concluding that Nigeria acted in violation of the aforementioned rights, the Commission made a statement which is of profound relevance to State accountability regarding the conduct of tobacco companies operating within its jurisdiction:

> Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties … This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments … [W]hen a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens … [T]here [is] an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.[84]

Deducible from this case is the idea that where a State fails or neglects to shield its citizens from the hazardous consequences of tobacco farming, manufacturing, marketing or consumption – for instance, by failing to adopt appropriate legal and policy frameworks or enforce existing ones such as the FCTC – such States will be held accountable. As of April 2019, the Commission has decided 97 cases on merits, covering the three genres of human rights.[85]

Aside from the competence to entertain complaints regarding violation of the provisions of the African Charter, the Commission also contributes to implementing the regional regime through examination of State reports under Article 62 of the Charter. The rules governing periodic reporting by States Parties to the Charter mirror those of other human rights treaties and need no repeating. The Commission's mandate in the realm of human rights-centred missions as well as the special rapporteurs established under it are especially critical. In addition to protective and promotive missions undertaken by the Commission, special rapporteurs also embark upon missions targeting human rights violations within their mandates. Protective missions are of two types, on-site missions and fact-finding missions. On-site missions take the form of

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82 ibid [2].
83 ibid.
84 ibid [57].
85 'Communications' (*African Commission on Human and Peoples' Rights*) http://www.achpr.org/communications/, accessed 23 April 2019.

visitation of a State against which the Commission has received a communication and the goal is to investigate the allegations and explore an amicable resolution.[86] Fact-finding missions are triggered by an allegation of a general nature or widespread reports of human rights violations against a State Party, even without prior communication to the Commission in respect to the violations.[87] Promotional missions, meanwhile, are undertaken by the Commission or its special mechanisms to inform States on the Charter, its associated obligations and the need to observe its procedural and substantive provisions.[88] These two-pronged missions of the Commission can be readily deployed in response to human rights violations arising from the operation of tobacco companies in Africa, especially in light of the broad reach of Article 60, which requires a cosmopolitan interpretation and application of human rights.

Another important role assigned to the African Commission, which can be useful to tobacco control, is specified in Article 45(1)(b) of the Charter, part of its promotive mandate. This provision, which requires the Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights', has been relied upon by the Commission to adopt resolutions on a wide array of human rights issues. These resolutions may be classified into three distinct categories, namely thematic, administrative and country-specific resolutions.[89] Of particular relevance to the subject of this chapter are thematic resolutions, which can be used to elaborate human rights violations related to tobacco farming, production and consumption. In so far as thematic resolutions bear a striking similarity to general comments of UN treaty bodies, this tool affords the African Commission an opportunity to comprehensively address important issues that are relevant to curbing the scourge of tobacco in Africa. Moreover, since the Commission has already issued thematic resolutions covering diverse themes such as the death penalty, indigenous peoples, the situation of women and children, and so on,[90] there is nothing preventing the issuance of one related to tobacco. Country-specific resolutions may also be adopted by the Commission to address widespread tobacco-related human rights violations in the territories of States Parties.[91] This is an avenue worthy of exploration in respect to any of the countries experiencing systemic tobacco-related human rights violations in Africa.

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86 African Commission on Human and Peoples' Rights (n 61) 46.
87 ibid.
88 ibid.
89 ibid [48].
90 ibid.
91 ibid [49].

Next in the chain of human rights enforcement is the ACHPR – a creature of Article 1 of the Protocol to the African Charter.[92] The specific charge of the Court is to complement the protective mandate of the Commission.[93] In contrast to the Commission, the decisions of the Court are final and binding on States Parties to the Protocol. The jurisdiction of the Court is all-encompassing, extending to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol establishing the Court and any other relevant human rights instrument ratified by the States concerned.[94] Aside from adjudicatory functions, the ACHPR is competent to issue advisory opinions on any legal matter relating to the African Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.[95] In other words, the Court has two different types of jurisdiction, contentious and advisory. The Court entertains cases from a wide variety of sources, including: the Commission; the State Party which has lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation; African intergovernmental organizations; NGOs with observer status before the Commission; and individuals, subject to the provisions of Article 34(6) of the Protocol, which requires the State Party against which cases are submitted to have made a declaration recognizing the competence of the Court to receive such cases.[96]

The vast array of potential litigants before the ACHPR means that cases against the tobacco industry may emanate from several sources, government as well as private individuals and organizations. Furthermore, the sources of law to be applied by the Court are quite broad, inclusive of not only the African Charter, but also any other relevant human rights instruments ratified by the States concerned.[97] A finding of violation of human rights by the Court will result in an order to remedy the violation, including payment of fair compensation or reparation.[98] The latest data indicates that nearly half of the States Parties to the African Charter (24 of them) have ratified the Protocol establish-

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[92] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (entered into force 25 January 2004) (Protocol ACHPR).

[93] Protocol ACHPR, art 2.

[94] ibid art 3.

[95] ibid art 4.

[96] ibid art 5.

[97] ibid art 7.

[98] ibid art 27.

ing the Court.[99] Similar to the Commission, the ACHPR has been somewhat active. As of April 2019, the Court had received 202 applications, of which 187 were from individuals, 12 from NGOs and three from the Commission.[100] Out of these, 52 have been finalized, four transferred to the Commission and pending applications stand at 146.[101]

One of the most significant cases handled by the ACHPR is the *African Commission on Human and Peoples' Rights v Republic of Kenya*, decided on 26 May 2017.[102] The case was brought by the Commission on behalf of an indigenous population in Kenya – the Ogiek Community – whose members were forcefully evicted from their ancestral land by the Kenyan government. The Court found that the eviction violated a number of human rights, including the rights to property, freedom from discrimination, religion and development.[103] The Court further held Kenya in breach of Article 1 of the African Charter, which requires States Parties to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the Charter,[104] in that Kenya failed to respect the aforementioned rights of the Charter.[105] The usefulness of this case for tobacco control is that aside from the fact that the operation of tobacco companies infringes several human rights, some of which were enumerated in Section 3 of this chapter, the omnibus provision of Article 1 of the African Charter, buoyed by violations of other provisions of the Charter, provides a useful arsenal to be employed in tobacco-related litigation in Africa.

The foregoing analysis represents the state of human rights implementation in the African regional human rights system prior to the emergence of the African Court of Justice and Human Rights (ACJHR), which was established by Article 2 of the 2008 Protocol on the Statute of the ACJHR.[106] The ACJHR Protocol merged the ACHPR and the Court of Justice of the African Union (established by the Constitutive Act of the African Union, though never oper-

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[99] 'Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights' (*African Commission on Human and Peoples' Rights*) http://www.achpr.org/instruments/court-establishment/ratification/, accessed 23 April 2019.

[100] 'Contentious Matters' (*African Court on Human and Peoples' Rights*) http://en.african-court.org/index.php/cases, accessed 23 April 2019.

[101] ibid.

[102] *African Commission on Human and Peoples Rights v Republic of Kenya* Application No 006/2012 (26 May 2017) African Court on Human and Peoples' Rights.

[103] ibid [131], [146], [169], [190], [211].

[104] ibid [215].

[105] ibid [217].

[106] Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, signed 4 February 2019) (Statute ACJHR).

ational)[107] to form a single court, namely the ACJHR.[108] Article 2(1) of the Protocol on the Statute of the Court designates it as 'the main judicial organ of the African Union'.[109] The Court comprises two chambers or sections, a General Affairs Section and a Human Rights Section.[110] The Human Rights Section entertains all human rights cases involving States Parties to the African Charter and the Protocol. The General Affairs Section hears all cases submitted under Article 28 of the Statute, including those involving the interpretation and application of the Constitutive Act of the African Union, the interpretation of the African Charter as well as other regional treaties and so forth, excluding human rights cases.[111] The Human Rights Section of the ACJHR is mandated to hear cases pending before the ACHPR not concluded before the entry into force of the Protocol establishing the ACJHR, on the understanding that such cases shall be dealt with in accordance with the Protocol on the establishment of the ACHPR.[112]

Similar to the ACHPR, the Statute of the ACJHR empowers it to hear cases from States Parties to the Charter and the African Court of Justice and Human and Peoples' Rights (ACJHR) Protocol, the African Commission, intergovernmental organizations, individuals or NGOs accredited to the African Union or to its organs and so forth.[113] For the Court to accept cases from individuals and NGOs, the State against which redress is being sought must have made the declaration required by Article 8 of the ACJHR Protocol, accepting the competence of the Court to receive such cases.[114] Significantly, the competence of the Court is not restricted to violations of human rights recognized by instruments adopted under the auspices of the African Union but is inclusive of any other relevant human rights instrument ratified by the State concerned.[115] As previously mentioned, a stipulation of this type is critical to tobacco-related litigation as litigants may rely on a wide range of human

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[107] Constitutive Act of the African Union (entered into force 26 May 2001) OAU Doc CAB/LEG/23.15. See Articles 5(1) and 18. See also Article 2(2) of the Protocol of the Court of Justice of the African Union (adopted 1 July 2003, entered into force 11 February 2009), which defines the Court as the 'principal judicial organ of the [African] Union'. The Protocol was adopted by the 2nd Ordinary Session of the Assembly of the African Union on 11 July 2003 at Maputo (Mozambique). Strikingly, this Court never became operational and has been incorporated into the ACJHR.

[108] Statute ACJHR, art 2.

[109] ibid annex, art 2(1).

[110] ibid annex, art 16.

[111] ibid annex, art 17.

[112] ibid, art 5.

[113] ibid annex, arts 29–30.

[114] ibid annex, art 30f.

[115] ibid annex, art 34.

rights-related instruments such as the FCTC and the International Labour Organization (ILO) Conventions to hold tobacco companies and governments accountable in appropriate cases. Moreover, legal aid may be available for individuals such as peasant tobacco farmers and others who are unable to file a case before the Court without assistance.[116] Article 46 of the ACJHR Statute not only makes the decision of the Court final and binding but requires referral of non-complying States to the Assembly of Heads of States of the African Union for necessary sanctions. On 27 June 2014 the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)[117] to replace the existing Protocol on the Statute of the ACJHR. Annexed to the Protocol is the Statute of the African Court of Justice and Human and Peoples' Rights (ACJHPR), which in Article 1(3) redefined 'court' to mean the ACJHPR. The major distinction between the ACJHR and ACJHPR is the addition of a third Chamber, the International Criminal Law Section, to the already existing General Section and Human Rights Section – making a total of three chambers.[118] In so far as no significant changes are made to the operation of the Human Rights Section of the Court, further discussion of the Statute of the ACJHPR is unwarranted.

5. CONCLUSION

An overarching goal of this chapter was to assess the feasibility of deploying the accountability mechanisms of human rights, particularly as obtainable under the African regional human rights system, to the menace of tobacco in Africa. For the deployment to be successful, there must be a coalescence of three critical factors. First, NGOs should be at the forefront of the battle to hold tobacco companies as well as erring governments accountable for their actions, especially given the ever-increasing recognition accorded them by virtually all international and regional human rights-related legal regimes. This includes the FCTC, which explicitly affirms in Article 4(7) that participation of civil society is essential to achieving the objective of the Convention and its protocols. NGOs could be useful by submitting shadow reports to human rights implementation bodies, supplying information to human rights special procedures and litigating tobacco-attributable human rights violations before domestic courts as well as supranational adjudicatory and quasi-adjudicatory

[116] ibid annex, art 52.

[117] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, signed 29 January 2018) https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, accessed 23 April 2019 (Statute ACJHR Amendments).

[118] Statute ACJHR Amendments, arts 6 and 14.

bodies. The roles of NGOs are particularly important in Africa given that most victims of the operations of tobacco companies in the region lack the wherewithal to seek remedy through the available channels.

Equally salient to arresting the scourge of tobacco in Africa is the role of international cooperation and its integration as a key part of national and regional approaches to tobacco control in Africa. As Article 4(3) of the FCTC affirms, international cooperation, particularly transfer of technology, knowledge and financial assistance and provision of related expertise, is crucial to successfully establishing and implementing an effective tobacco control regime. When considered against the background of weak institutional capacity, inept political leadership, kleptocracy, widespread poverty and myriad other challenges confronting Africa, it becomes apparent how international cooperation, properly calibrated, could yield positive dividends in Africa's battle against tobacco insurgency in the region. It is not coincidental that since first enunciated in Articles 1(3), 55 and 56 of the UN Charter and elaborated in Article 23 of the International Covenant on Economic, Social and Cultural Rights and Article 21(3) of the African Charter, international cooperation has assumed centre stage in international relations and human rights. The latest of these iterations are found in MDG 8 and SDG 17, both of which recognize the futility of global development in the absence of assistance from the Global North. This futility was not lost on the drafters of the FCTC, hence the stipulation in Article 22(1), which requires international cooperation in strengthening national capacity to fulfil the obligations arising from the Convention, taking into account the needs of developing economies and those in transition. Many of these economies are in Africa.

Not to be neglected – and this is the third factor – is the role of multisectoralism or a multidimensional approach to human rights challenges, tobacco use included. Article 4(4) of the FCTC recognizes that multisectoral measures and responses to reduce the consumption of tobacco products are essential to preventing incidences of tobacco-attributable diseases, premature disability and mortality. Multisectoralism integrates various sectors of the economy as well as different actors in addressing obstacles to human well-being. In the context of tobacco control, the implication is that whilst the health ministry is primarily tasked with tackling the public health challenges presented by tobacco consumption, other sectors such as agriculture also shoulder some burden, for instance by sourcing alternative crops to tobacco as required by Article 22(1)(b)(iii) of the FCTC. Similarly, the ministries of labour and justice are jointly responsible for ensuring that children are not employed by tobacco farms and so forth. Article 5 of the FCTC uses the term 'multisectoral national tobacco control strategies', which implies that collaboration of State and non-State actors is also required to ensure that actionable data and information

concerning areas of need are promptly made available to the right individuals or authorities.

9. Tobacco control in the Inter-American Human Rights System

Oscar Cabrera and Andrés Constantin

1. INTRODUCTION

Historically, the Inter-American Human Rights System (IAHRS) has played a fundamental role in mainstreaming the human rights discourse in the region. Although not fully explored, the IAHRS offers powerful and unique tools to strengthen the interconnections between tobacco control and human rights in the region.

Tobacco use and exposure to tobacco smoke kills around 1 million people annually in the region. Accordingly, tobacco is responsible for 80 per cent of all deaths and 77 per cent of premature deaths.[1] Tobacco consumption accounts for a substantial proportion of health expenditure in the region, with tobacco-related health problems representing a direct cost to health systems, a cost that in Latin America rises up to US$ 87 billion.[2]

Most of the countries in the region have ratified the World Health Organization Framework Convention on Tobacco Control (FCTC), which imposes binding obligations on States and has essential implications for human rights discourse.[3] State Parties to the FCTC recognize the tobacco epidemic as a major threat to public health and acknowledge 'that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco

[1] Pan American Health Organization and WHO, *Report on Tobacco Control for the Region of the Americas. WHO Framework Convention on Tobacco Control: 10 Years Later* (*Pan American Health Organization*, 2016).

[2] Andres Pichon-Riviere and others, 'Economic Impact of Smoking on Health Systems in Latin America: A Study of Seven Countries and Its Extrapolation to the Regional Level' (2016) 40 Pan American Journal of Public Health 213.

[3] WHO, Framework Convention on Tobacco Control (adopted 56th World Health Assembly 19–28 May 2003, entered into force 27 February 2005) 230 UNTS 166 (FCTC).

smoke cause death, disease and disability'.[4] Yet, most of these countries are failing to comply with the obligations therein.

Besides the FCTC, most of the countries in the region have ratified the American Convention on Human Rights (ACHR), by virtue of which they are part of the IAHRS and are State Parties to most of the major international human rights law treaties. These include the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), among others. Moreover, international human rights treaties have been incorporated in most of the national constitutions in the region and, notably, the right to health – a fundamental right inextricably linked to the FCTC – has been expressly enshrined in most of them.[5]

This chapter provides an overview and examines the potential of the different ways in which the Inter-American System of Human Rights offers avenues that can be used to hold the tobacco industry accountable for human rights violations at the regional level.

2. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

A regional human rights system responsible for monitoring, promoting and protecting human rights in the countries that are members of the Organization of American States (OAS), the IAHRS is composed of two principal bodies: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).

Both entities can hear individual complaints regarding alleged violations of the American Declaration of the Rights and Duties of Man, the ACHR and other regional human rights treaties, and may also issue precautionary measures to prevent irreparable harm. Besides these functions, the IACHR conducts a wide array of human rights monitoring and promotional activities, including drafting thematic reports, monitoring the general human rights situation in the Member States, holding thematic hearings on specific areas of concern, and undertaking *in loco* country visits to investigate specific situations. With regard to the IACtHR, in addition to its adjudicatory jurisdiction, the Court

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[4] FCTC, preamble.

[5] Brigit Toebes, *The Right to Health as a Right in International Law* (Intersentia/Hart 1999).

may issue, at the request of an OAS agency or Member State, advisory opinions concerning the interpretation of the Inter-American instruments.

As of 2018, despite the different avenues that the system provides in terms of claiming human rights violations, the system has not received any tobacco-related petition. Efforts towards developing tobacco-related human rights standards within the IAHRS have nonetheless been initiated. On 5 April 2016, for the very first time, the mechanisms of the system were used to promote the development of human rights standards concerning the intersection of tobacco control and human rights. During the IACHR 157th Period of Sessions, the O'Neill Institute for National and Global Health Law at Georgetown Law, in collaboration with the Fundación InterAmericana del Corazón Argentina (FIC Argentina) and Action on Smoking and Health (ASH), participated in a hearing before the IACHR on the 'Right to Health and Tobacco Use in the Americas'. During the hearing, the organizations noted the impact of tobacco on deaths, disability and illnesses. Moreover, they emphasized the role of tobacco addiction in perpetuating poverty and, hence, hampering States' efforts towards sustainable development. The participating organizations highlighted the tobacco industry's strategies to keep its products on the market and increase earnings, while targeting and focusing their marketing efforts on groups that have historically faced discrimination, such as women, children and adolescents, and lesbian, gay, bisexual and queer (LGBTQ) people. Lastly, the organizations called the States to urgently implement tobacco control measures in order to comply with international human rights obligations.[6]

Following the petitioner's presentation, Commissioner Esmeralda Arosemena de Troitiño stated that 'the weight of the problem is hinged on that link, how to make the tobacco industry have in its organizational structure this force that involves the observance of human rights and the responsibilities they have as members of society'. She indicated 'that's the strong connection that can and must comprise all agencies responsible for the protection of fundamental rights'.[7]

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[6] Inter-American Commission on Human Rights, 'Report on the 157th Session of the IACHR' (*OAS*, 13 June 2016) http://www.oas.org/en/iachr/media_center/preleases/2016/049a.asp, accessed 11 July 2019.

[7] ibid; Jazmin Chávez, 'Right to Health and Tobacco Addiction in the Americas' (*Human Rights Brief*, 10 April 2016) http://hrbrief.org/hearings/right-to-health-and-tobacco-addiction-in-the-americas/, accessed 11 July 2019.

3. OTHER MECHANISMS RELEVANT TO TOBACCO CONTROL WITHIN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

3.1 Special Rapporteur on Economic, Social, Cultural and Environmental Rights

In its commitment to deepen work on economic, social, cultural and environmental rights (ESCER), and considering the numerous demands of civil society organizations and also many States, the IACHR decided to create a Special Rapporteurship on ESCER in 2014. On 5 July 2017, the IACHR appointed Soledad García Muñoz for the position of first Special Rapporteur on Economic, Social, Cultural and Environmental Rights for a period of three years, renewable once. The Special Rapporteurship on ESCER was established as a permanent and autonomous office with its own operating structure and functional independence, which operates with the support of and within the legal framework of the IACHR to stimulate the hemispheric defence of ESCER.

Regarding tobacco control measures, the Special Rapporteur can make use of the following functions:

- prepare thematic reports on ESCER and tobacco control for approval and publication by the IACHR, including sections of the annual report of the Commission;
- support the Commission in litigation before the IACtHR in cases related to tobacco control and ESCER;
- make recommendations to the IACHR regarding urgent situations, such as the tobacco epidemic, that could require the adoption of precautionary measures or a request for adoption of provisional measures before the IACtHR;
- monitor the situation of the impact of tobacco on the enjoyment of ESCER in the region and provide advice and assistance to the Member States of the OAS in the adoption of legislative, judicial, administrative or other measures that are necessary to make effective the exercise of ESCER.

Considering the impact of tobacco consumption and exposure to tobacco smoke in the enjoyment of ESCER, the creation of the Special Rapporteurship on ESCER opens up a great opportunity to better protect people against tobacco harms.

3.2 Inter-American Commission of Women

The Inter-American Commission of Women (CIM), established in 1928, was the first intergovernmental agency established to ensure recognition of women's human rights. The CIM is an Inter-American specialized organization with technical autonomy in the performance of its functions.[8] Among its functions are the power to 'establish cooperative relations with world agencies of the same character in order to coordinate their activities'.[9] This can be of relevance in the context of tobacco control considering the developments and recommendations that the Committee on the Elimination of Discrimination Against Women (CommEDAW) has issued linking tobacco and women's rights.[10]

Other functions of the CIM include reporting to the OAS General Assembly about the state of women's rights in the Americas and issuing thematic reports on compliance of the Convention on the prevention, punishment and eradication of violence against women (Convention of Belém do Pará) by OAS Member States. Moreover, under Article 11 of the Convention of Belém do Pará, the CIM may request advisory opinions on the interpretation of the Convention to the IACtHR. This mechanism has never been used before. Hence, if used for the first time to develop standards on tobacco control and women, it will have the power to call the attention of the entire region as an unprecedented step in the realization of women's rights and the promotion of tobacco control.

Female smoking is predicted to double by 2025.[11] The growing 'feminization' of tobacco use in the region is a major concern since tobacco consumption generates several negative effects on women's health.[12] As a matter of

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[8] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) OAS Treaty Ser No 1-C and 61, art 126.

[9] ibid, art 129.

[10] See, for example, UN CommEDAW, 'Concluding Observations by the CommEDAW: Argentina' (12–30 July 2010) UN Doc CEDAW/C/ARG/CO/6 [8].

[11] Amanda Amos, Lorraine Greaves, Mimi Nichter and Michele Bloch, 'Women and Tobacco: A Call for Including Gender in Tobacco Control Research, Policy and Practice' (2012) Tobacco Control 236. See also Jonathan Samet and Soon-Young Yoon (eds), 'Women and the Tobacco Epidemic: Challenges for the 21st Century' (*WHO*, 2001) http://www.who.int/iris/handle/10665/66799, accessed 11 July 2019.

[12] See generally, WHO, 'Gender, Health and Ageing' (*WHO Department of Gender, Women and Health*, 2003) https://apps.who.int/iris/bitstream/handle/10665/68893/a85586.pdf?sequence=1, accessed 11 July 2019; see also WHO, *WHO Report on the Global Tobacco Epidemic: raising tobacco taxes* (*WHO*, 2015) http://www.who.int/tobacco/global_report/2015/en/, accessed 11 July 2019.

fact, one in three women dies from cardiovascular diseases,[13] and lung cancer has increased among women since 1980 at an annual rate of 1.7 per cent as a consequence of tobacco consumption.[14] In this context, the CIM can constitute an appropriate means to promote women's right to health and underscore the impact of tobacco on women in the region.

Moreover, in 2004, the CIM created, as part of the implementation of the Convention of Belém do Pará, the Follow-up Mechanism to the Convention (MESECVI). Since then, this mechanism has issued two follow-up reports, but none of them addresses the impact of non-communicable diseases (NCDs) on women's health. Not even after adopting, in 2015, the Declaration of Commitment on 'Strengthening prevention and control of noncommunicable diseases (NCDs) through cooperative action of the Inter-American System',[15] issued by the Inter-American Task Force on Noncommunicable diseases, of which the CIM is a member, did the CIM study the impact of tobacco on women.

4. LEGAL OBLIGATIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM RELEVANT TO TOBACCO CONTROL

4.1 Right to Health

Under Chapter III of the American Convention concerning 'Economic, Social, and Cultural Rights', Article 26 stands out as the most important provision that guarantees the right to health, underlining that States have the obligation to progressively achieve, by legislation or other appropriate means, the full realization of said right. The Inter-American Court's jurisprudence established that Article 26 can only be understood by incorporating the standards set forth in the American Declaration and the Charter of the Organization of American States (OAS Charter) as amended by the Protocol of Buenos Aires.[16]

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[13] See, for example, Maria Sosa Liprandi, 'Causes of Death in Women and the Trend Over the Last 23 Years in Argentina' (2006) 74 Argentine Journal of Cardiology 297.

[14] Herman Schargrodsky, 'CARMELA: Assessment of Cardiovascular Risk in Seven Latin American Cities' (2008) 121 American Journal of Medicine 58.

[15] Pan American Health Organization and others, 'Declaration of commitment: strengthening prevention and control of noncommunicable diseases (NCDs) through cooperative action of the Inter-American system' (*Pan American Health Organization*, 17 June 2015) https://www.paho.org/hq/dmdocuments/2015/NCDS-declaration-OF-COMMITMENT-IATF-2015.pdf, accessed 11 July 2019.

[16] Inter-American Court of Human Rights *Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of the Man Within*

For a long time, the justiciability of the Protocol of San Salvador was directly excluded from the jurisdiction of the IACtHR. By virtue of the provisions contained in Article 19 of the Protocol, only instances in which the rights established in paragraph (a) of Article 8 (trade union rights) and in Article 13 (right to education) were violated could be referred to the jurisdictional protection of the Inter-American Court, thus excluding the possibility of demanding the protection of the right to health through the petition mechanism.

However, although the justiciability of ACHR Article 26 had been invoked in separate votes of members of the Inter-American Court since the 1980s, it was only in 2017 that the Inter-American Court declared the direct violation of Article 26 in the *Lagos del Campo* case. Up to this point, the IACtHR had examined the indirect violation of economic, social and cultural rights under provisions of the ACHR that enshrine civil and political rights. This is the case, for example, of the violation of the rights to life (Article 4) and personal integrity (Article 5), in cases of inadequacy or inadequate medical treatment, and the right to property (Article 21), in the face of arbitrary restrictions on social security.

Despite this progress, the *Lagos del Campo* ruling was widely criticized for, among other issues, its lack of clarity and argumentative rigour.[17] Considering this strong criticism, almost seven months after *Lagos del Campo*, the IACtHR had the opportunity to clarify and expand its interpretation of Article 26 in the context of the right to health. In the *Poblete Vilches v Chile* case, the IACtHR issued a judgment on 8 March 2018, unanimously declaring the international responsibility of the Chilean State for not guaranteeing Mr Vinicio Antonio Poblete Vilches his right to health (Article 26). The IACtHR ruled for the first time on the right to health as an autonomous right, as an integral part of ESCER, in accordance with Article 26 of the Convention. Referring to the Committee on Economic, Social and Cultural Rights' General Comment No 14 and the World Health Organization Constitution of 1948, the Court recognized that

> [h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity, and health understood as a state of complete physical, mental and social well-being derived from a lifestyle

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the Framework of Article 64 of the American Convention on Human Rights (14 July 1989) [20], http://www.corteidh.or.cr/docs/opiniones/seriea_10_ing1.pdf, accessed 11 July 2019.

[17] See, for example, Daniel Cerqueira, 'La justiciabilidad de los DESCA bajo la Convención Americana' (*DPLF Blog*, 29 May 2018) https://dplfblog.com/2018/05/29/la-justiciabilidad-de-los-desca-bajo-la-convencion-americana/#_ednref1, accessed 11 July 2019.

> that allows people to reach an integral balance and not merely the absence of disease or infirmity.[18]

In turn, although in the context of the provision of health services, the IACtHR recognized that the operationalization of the State's obligation to guarantee the enjoyment of the right to health begins with the duty to regulate,[19] which may have relevant implications for the adoption of tobacco control measures.

4.2 Right to Life (Dignified Life)

Under Article 4 of the American Convention, States have an obligation to protect the right of their people to a dignified life.[20] The Inter-American Court has interpreted the right to life as having two dimensions: (1) a right of all persons not to be arbitrarily deprived of their life; and (2) a right to be free from conditions that 'impede or obstruct access to a decent existence [or a] dignified life'.[21] Accordingly, under Article 4, States are bound to create minimum conditions for a dignified life. Therefore, one of the obligations that the State must inescapably assume in its position as guarantor, with the aim of protecting and guaranteeing the right to life, is to generate the minimum living conditions compatible with human dignity and not to produce or perpetuate conditions that make it difficult or impossible. In this regard, the State has the duty to adopt positive, concrete measures aimed at satisfying the right to a dignified life.[22]

Of course this will have to be proven on a case-by-case basis, but assuming *arguendo* that a State is not adopting or implementing tobacco control measures, it would be easy to prove a violation of the right to a dignified life. On the one hand, it is widely known and has been sufficiently proven that tobacco consumption and exposure to tobacco smoke create a situation of real and immediate risk, as they cause death, diseases and disabilities.[23] On the other

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[18] Inter-American Court of Human Rights *Poblete Vilches v Chile, Merits, Reparations and Costs*, Ser C No. 349 (2018) [118].

[19] ibid [119].

[20] Inter-American Court of Human Rights *Yakye Axa Indigenous Community v Paraguay, Merits and Reparations*, Ser C No 125 (2005) [161]; see also Inter-American Court of Human Rights *"Juvenile Reeducation Institute" v Paraguay, Preliminary Objections, Merits, Reparations and Costs* Ser C No 112 (2004) [156]; Inter-American Court of Human Rights *Gómez-Paquiyauri Brothers v Peru, Merits, Reparations and Costs* Ser C No 110 (2004) [128].

[21] *Yakye Axa Indigenous Community* (n 20) [161].

[22] See also ibid [162]; Inter-American Court of Human Rights *Xákmok Kásek v Paraguay, Merits, Reparations and Costs*, Ser C No. 214 (2010), para 188.

[23] FCTC, preamble and art 8.1.

hand, it would be hard for a State to justify its failure to take the necessary measures since most of the cost-effective and necessary measures recommended to reduce the consumption and exposure to tobacco – higher taxes and comprehensive bans on tobacco marketing and smoking in public places – are easy to implement.[24]

4.3 Right to a Healthy Environment

Exposure to second-hand smoke (SHS) is deadly.[25] According to the FCTC, scientific evidence has unequivocally established the link between exposure to tobacco smoke and death, disease and disability.[26] The effect of SHS is greater in children, leading ultimately to respiratory diseases, including asthma and in some cases to death. The rights of children are at stake every time they are exposed to SHS at home or in public spaces.[27] Similarly, denial of access to safe and healthy work environments constitutes a violation of the right to a healthy environment of workers. Workers have a right to earn a living without putting their health at risk by inhaling SHS.[28]

Failure to prevent exposure to SHS can negatively impact the right to a healthy environment and other related rights (that is, the right to life and the right to health, among others). The link between the right to a healthy environment and tobacco control is not new. In fact, the Committee on Economic, Social and Cultural Rights (CESCR) in its 2009 concluding observations to Brazil, recommended 'that the state party take measures to ban the promotion of tobacco products and enact legislation to ensure that all enclosed public

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[24] WHO, 'Tobacco Control Economics', http://www.who.int/tobacco/economics/background/en/, accessed 11 July 2019; see also Allison Gilbert and Jaques Cornuz, *Which are the most effective and cost-effective interventions for tobacco control?* (*WHO*, 2003) http://www.euro.who.int/document/e82993.pdf, accessed 11 July 2019.

[25] 'Human Rights & Health: Persons exposed to second-hand tobacco smoke' (*Pan American Health Organization*, 2008) http://iris.paho.org/xmlui/bitstream/handle/123456789/6188/Human-Rights_tool%20box%2010069_Smoker.pdf?sequence=1&isAllowed=y, accessed 11 July 2019.

[26] FCTC, art 8.1.

[27] Yvette van der Eijk, 'Human Rights and Ethical Considerations for a Tobacco-Free Generation' (2015) 24 Tobacco Control 238.

[28] CDC and others, 'Clean Air – a Basic Human Right' (*WHO*) http://www.who.int/tobacco/mpower/publications/en_tfi_mpower_brochure_p.pdf, accessed 11 July 2019.

environments are completely free of tobacco'.[29] Furthermore, in 2001, the Pan American Health Organization (PAHO) urged members to

> protect all nonsmokers, in particular children and pregnant women, from exposure to second-hand smoke through elimination of smoking in government facilities, health care facilities and educational institutions as a priority, and through the creation of smoke-free environments in workplaces and public places as soon as possible, recognizing that smoke-free environments also promote cessation and prevent initiation of tobacco use.[30]

The human right to a healthy environment is a right with both individual and collective connotations. In its collective dimension it constitutes a universal value that is owed to both present and future generations. Meanwhile, due to its individual dimension and its relationship to other rights, such as the right to health, life or personal integrity, its violation may have direct or indirect repercussions on the individual. Environmental degradation may cause irreparable damage to human beings. Therefore, a healthy environment is a fundamental right for the existence of individuals and humankind.

Considering the impact of SHS on children, workers and other non-smoking people, it would not be far-fetched to argue that exposure to SHS affects the right to a healthy environment under the IAHRS. In fact, under the IAHRS, the right to a healthy environment is recognized expressly in Article 11 of the Protocol of San Salvador: '1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment.' This right should also be considered to be included among the economic, social and cultural rights protected by Article 26 of the American Convention,[31] and as such, directly 'justiciable'.[32]

In its recent Advisory Opinion on Human Rights and the Environment, the IACtHR recognized the existence of an irrefutable relationship between the protection of the environment and the realization of other human rights.

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[29] UN CESCR, 'Concluding observations: BRAZIL' (*ICESCR*, 2009) http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW%2ftFdKDkhtvoI%2bRelV2x8DYMuc3wSJ2Ffrs9%2fjeRowxEUefp%2f5smsRcrp6Mib846cZ1GWE73xxbMh0I8ETSobeFTxmMHbG9K1NADQfwMc7D6, accessed 18 September 2019.

[30] Pan American Health Organization, 'Resolution CD 43.R12' (43rd Directing Council, 53rd session of the Regional Committee, 2001).

[31] See Concurring Opinion Vio Grossi and Sierra Porto, Inter-American Court of Human Rights *Lagos del Campo v Peru, Preliminary Objections, Merits, Reparations and Costs*, Ser C No 340 (2017) [57].

[32] See Inter-American Court of Human Rights *Lagos del Campo v Peru, Preliminary Objections, Merits, Reparations and Costs*, Ser C No 340 (2017).

It emphasized the interdependence and indivisibility between human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on a favourable environment.[33] Furthermore, the Court recognized the relation between the right to a healthy environment and other rights, including the right to life, the right to personal integrity, the right to health, the right to privacy, the right to water and the right to adequate housing.[34]

Relevant to the field of tobacco control is the recognition of the Court regarding the obligations to respect, protect and fulfil human rights in the context of the protection of the environment. In that sense, the Court acknowledged that States shall refrain from any activity that denies or restricts access to a decent life. Furthermore, States that knew or should have known of a real or imminent risk to the life of a determined group of people and failed to take reasonable and available measures to prevent or tackle the risk should be held liable when there is a causal link between the violation and the significant damage caused to the environment.[35] In the context of tobacco this is relevant since 'scientific evidence has unequivocally established that … exposure to tobacco smoke cause[s] death, disease and disability [and] that prenatal exposure to tobacco smoke causes adverse health and developmental conditions for children'.[36]

4.4 Right to Freedom of Thought and Expression

Under Article 13 of the ACHR '[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice'. However, as was examined in Chapter 4, commercial speech deserves less protection than the expression of ideas or opinions and, in that vein, the American Convention recognizes limitations on the right to free speech when public health and safety is in danger. Therefore, in no way can the expression

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[33] Inter-American Court of Human Rights, *Obligaciones Estatales en Relacion con el Medio Ambiente en el Marco de la Proteccion y Garantia de los Derechos a la Vida y a la Integridad Personal – Interpretacion y Alcance de los Articulos 4.1 y 5.1 en Relacion con los Articulos 1.1 y 2 de la Convencion Americana Sobre Derechos Humanos*, Advisory Opinion OC-23/17 (2017).

[34] ibid.

[35] ibid [120]. See generally, Giovanny Vega-Barbosa and Lorraine Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights' (*EJIL: Talk!*, 26 February 2018) https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/, accessed 11 July 2019.

[36] FCTC, preamble and art 8.1.

of ideas or opinions be equated to the advertisement of commercial products for financial gain.

In fact, the IACtHR has recognized that although Article 13 of the ACHR protects the right of all individuals to receive information, the State is allowed to restrict access to information in a specific case when it is justified under any of the reasons permitted by the Convention.[37] Such limitations must be in strict accordance with the requirements derived from Article 13.2 of the ACHR. They must be truly exceptional, be established clearly in law, pursue legitimate objectives and be necessary to accomplish the purpose being sought.[38]

Tobacco advertising is specifically designed to market a hazardous product through the dissemination of inaccurate and distorted information. In this context, the right of consumers to truthful, adequate and accurate information requires a comprehensive ban on advertising, promotion and sponsorship as well as packaging and labelling restrictions. On the issue of tobacco, the right to information should be limited to the provision of objective, truthful information such as price and full disclosure of ingredients as well as health risks.

4.5 State Responsibility for Tobacco Industry-related Human Rights Violations

The notion of due diligence arises as a means to establish State responsibility when human rights violations are perpetrated by non-State or private actors. Contrary to the standard rules of attribution, when acts or omissions committed by non-State actors violate human rights, State responsibility may still arise due to the State's failure to take reasonable and adequate measures to prevent or address the violation.[39]

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[37] Inter-American Court of Human Rights *Case of Claude Reyes et al v Chile, Merits, Reparations and Costs, Judgment* Ser C No 151 (2006) [77].

[38] Inter-American Commission of Human Rights, Office of the Special Rapporteur for Freedom of Expression, 'The Inter-American Legal Framework regarding the Right to Access to Information' (Document CIDH/RELE/INF. 1/09, 30 December 2009) [45], http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf, accessed 11 July 2019. See generally Inter-American Commission of Human Rights, 'The right to access to information in the Americas: Inter-American Standards and Comparison of Legal Frameworks' (30 December 2011) OEA/Ser L/V/II.

[39] On the origins and evolution of the due diligence principle under international law, see generally, Jan Arno Hessebruege, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 New York University Journal of International Law & Politics 265; Robert Barnidge, Jr, 'The Due Diligence Principle Under International Law' (2006) 8 International Community Law Review 81.

Almost 30 years ago, the IACtHR adopted the landmark decision of *Velásquez Rodríguez v Honduras*, in which it concluded that Honduras had failed to fulfil its obligations under Article 1(1) of the ACHR and explicitly stated that '[a]n illegal act which violates human rights and which is initially not directly imputable to a State … can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.[40]

In relation to the due diligence duty to prevent, the IACtHR considered that States must 'have an adequate legal framework of protection, with effective application thereof, and with prevention policies and practices that allow acting in an effective manner in the face of complaints'.[41] After the IACtHR *Cotton Field* case, the content of the standard of due diligence was clarified and extended to encompass four elements:

1. there must be a situation of real and immediate risk;
2. this situation must threaten a specific individual or group;
3. the State must know or should have known of the existence of a risk; and
4. the State could have reasonably prevented or avoided the materialization of the risk.[42]

Tobacco-related human rights violations regularly stem from the activities of the tobacco industry. In this context, international human rights law has traditionally been interpreted as requiring States to protect human rights by effectively regulating private entities within their jurisdictions. Within the Inter-American context, the interconnection between corporate activities and human rights is not novel.[43] Notably, the IACHR has held thematic hearings addressing the issue, for instance, in the context of extractive industries and their impact on indigenous peoples,[44] or in the context of the destruction of

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[40] Inter-American Court of Human Rights *Velásquez Rodríguez v Honduras, Merits, Judgment* Ser C No 4 (1988) [172].

[41] Inter-American Court of Human Rights *González et al ("Cotton Field") v Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment* Ser C No 205 (2009) [258].

[42] ibid [283]. See also Víctor Abramovich, 'Responsabilidad Estatal por Violencia de Género: Comentarios sobre el Caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos' (2010) 6 Anuario de Derechos Humanos 167.

[43] See generally, Ana María Mondragón, 'Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice' (2016) 57 Harvard International Law Journal 53.

[44] Inter-American Commission on Human Rights, 'Extractive Industries and Human Rights of the Mapuche People in Chile' (154 Period of Sessions 17 March

cultural heritage due to the development of construction projects.[45] Moreover, the Commission has issued thematic reports[46] and granted precautionary measures on this matter. In the context of tobacco control, as was mentioned before, the IACHR held in 2016 for the first time a hearing on tobacco control in the Americas where the petitioners denounced the influence of the tobacco industry and the impact of tobacco-related activities on human rights.[47]

In 2011, the UN Special Representative John Ruggie presented the Guiding Principles on Business and Human Rights (UNGP),[48] recognizing the duty of States to protect against business-related human rights abuses. In particular, the Commentary to UNGP Principle 25 mentions regional human rights bodies and mechanisms as the foundation of a system that can provide remedial functions. Recourse to the UNGP is not extraordinary for the IAHRS. The UN Guiding Principles have indeed been used by the IACtHR to analyse binding obligations of States with regard to the regulation of corporate activities under the ACHR. In the case of *Kaliña and Lokono Peoples*, the Court noted the UNGP and established that 'businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities' and that States were responsible for protecting against 'human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises'.[49]

The potential of this precedent and its applicability to the context of tobacco control is clear. The IAHRS must follow this path to better clarify State obligations towards the tobacco industry and identify concrete steps to remove legal barriers that prevent corporate-related abuses from being held accountable.

2015); Inter-American Commission on Human Rights, 'Corporations, Human Rights, and Prior Consultation in the Americas' (154 Period of Sessions, 17 March 2015).

[45] Inter-American Commission on Human Rights, 'Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico' (153 Period of Sessions, 17 March 2015).

[46] See, for example, Inter-American Commission on Human Rights, 'Poverty and Human Rights', OEA/Ser L/V/II.164 Doc 147 (7 September 2017); Inter-American Commission on Human Rights, 'Indigenous Peoples Communities of African Descent Extractive Industries', OEA/Ser L/V/II Doc 47/15 (31 December 2015).

[47] Inter-American Commission on Human Rights, 'Right to Health and Tobacco Use in the Americas' (5 April 2016, 157 Period of Sessions) https://www.youtube.com/watch?v=AVlvJmRU6_A, accessed 18 September 2019.

[48] UN HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

[49] Inter-American Court of Human Rights *Case of the Kaliña and Lokono Peoples v Suriname. Judgment, Merits, Reparations and Costs* Ser C No. 309 (2015) [224] (quoting UNGP Principle 1, and referencing UNGP Principles 1, 11, 12, 13, 14, 15, 17, 18, 22, 25).

5. CONCLUSION

This chapter has demonstrated that the IAHRS offers a wide range of avenues and opportunities to promote tobacco control in the region. In particular, the different mechanisms under the IAHRS and the recent developments in terms of the right to health and business and human rights position the system in a unique place to hold States accountable for their human rights violations and to further develop normative standards on tobacco and human rights. The thematic hearing on tobacco control and human rights held by the IACHR in 2016 was a landmark first step. By granting this hearing request, the IACHR sent a clear message that there is a link between tobacco use and human rights, but more importantly, between the tobacco industry and States' human rights obligation to regulate private actors. With the creation of the Special Rapporteurship on ESCER, a clear opportunity emerges for strengthening that connection, in particular because the Rapporteurship will focus its first thematic reports on business and human rights. In conclusion, although so far the concrete outcomes on tobacco control and human rights in the IAHRS are limited, there is strong potential. This is particularly relevant in a region with more than 140 million smokers, half of whom will die from smoking-related diseases.

10. Human rights in the origins of the FCTC

Allyn Taylor and Alisha McCarthy

1. INTRODUCTION

There are natural and manifest synergies between human rights objectives and tobacco control. Perhaps because of those synergies, there is also a common misconception that human rights considerations were a fundamental underpinning of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC or Convention) when it was negotiated in the 1990s. But in fact, there was little explicit consideration of human rights commitments in the initiation or the negotiation of the instrument and, in the end, a human rights framework was not incorporated in the final text of the Convention that was adopted in 2003. This chapter places the development of the FCTC in its historical context and explains how a complex intersection of factors led to the neglect of human rights in the instrument's design.

2. THE ORIGINS OF THE FCTC

In the early 1990s tobacco control emerged as one of the most important global public health issues of the modern era: tobacco use was the single largest cause of preventable death and disease worldwide. According to WHO estimates in the early 2000s, cigarettes and other forms of tobacco use were causing over 4 million deaths per year, with two-thirds of those deaths occurring in high-income States.[1] The epidemic of disease and death from tobacco consumption was also shifting rapidly to low-income and emerging-market States. One WHO study showed that 10 million people would die annually from

[1] WHO, 'Monograph. Advancing Knowledge On Regulating Tobacco Products' (*WHO*, 2000) 10, at https://www.who.int/tobacco/publications/prod_regulation/OsloMonograph.pdf, accessed 4 June 2019.

tobacco-related diseases by 2020, with two-thirds of those deaths occurring in poorer States, if the epidemic was left unchecked.[2]

The analytical seeds for the FCTC were first planted in 1993, when Allyn Taylor, one of the co-authors of this chapter, conceptualized a novel international legal instrument, constructed in the model of a framework convention-protocol approach, to address this pressing global health concern.[3] Specifically, Taylor, urged by Ruth Roemer to apply Taylor's previous research on international health law instruments to tobacco, envisioned a public health treaty grounded in the need for multilateral cooperation and national action to combat the globalization of the tobacco epidemic. This theoretical framing was adopted by a handful of early supporters, who later joined the academics advocating for the instrument in various fora in the mid-1990s. The first formal drafts of the FCTC initially prepared by Taylor in her role as the WHO FCTC legal adviser were structured from that same theoretical perspective.[4]

The treaty ultimately was built upon themes of sovereign interdependence and national economic and public health self-interest, and was not, as some have suggested, an instrument founded upon principles of human rights.[5] While some present-day observers may find this deliberate inattention to human rights surprising, the decision to exclude human rights as part of the treaty dialogue was both deliberate and strategic. Proponents faced an uphill battle in garnering political support for the instrument, and the theoretical perspective conceived by Taylor in the 1990s was intended to minimize resistance among the various stakeholders.

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[2] ibid.

[3] The idea of an international instrument on tobacco first emerged at a lunch between Taylor and Professor Ruth Roemer, at the UCLA faculty club in June 1993. Roemer encouraged Taylor to apply her scholarship on public international law and global health to the evolving global tobacco pandemic. Roemer had long worked on national legislative responses to tobacco control and had authored the WHO's first manuscript on the role of domestic legislation in tobacco control.

[4] Taylor later served as senior legal adviser at the WHO and led the preparation of the 1996 Feasibility Study of a Framework Convention on Tobacco Control, and the 1998 Elements of a Framework Convention on Tobacco Control. See Allyn Taylor and Ruth Roemer, 'An International Strategy for Tobacco Control' (*Research Gate*, 1996) WHO PSA/96/6 https://www.researchgate.net/publication/271766191_International_Strategy_for_Tobacco_Control, accessed 4 June 2019; WHO, 'Elements of a WHO Framework Convention on Tobacco Control' (8 September 1999) WHO Doc A/FCTC/WG.1/6 http://apps.who.int./gb/fctc/PDF/wg1/e1t6.pdf, accessed 4 June 2019.

[5] For an overview of the historical origins of the FCTC see Ruth Roemer, Allyn Taylor and Jean Lariviere, 'Origins of the WHO Framework Convention on Tobacco Control' (2005) 95(6) American Journal of Public Health 936.

3. THE FCTC IN CONTEXT

Historical context is the key to understanding why the FCTC was framed as an instrument grounded in national and global public health and economic interests, and why human rights considerations were largely absent from the negotiation and design of the Convention. First, the landscapes of public health and international law have changed remarkably since the 1990s. Prior to the FCTC there had never been a treaty negotiated under the auspices of the WHO, and there was strong resistance from various stakeholders to the idea of implementing legally binding health obligations under the WHO's purview. To get those stakeholders on board, it was necessary to emphasize State sovereignty and public health interdependence from an economic perspective.

Second, views on the intersection between human rights and tobacco have evolved significantly since the 1990s. Up to that point (and even for some years after), the tobacco industry had co-opted the language of human rights to promote its own interests, specifically portraying tobacco control as an infringement on personal autonomy and economic rights. Countervailing human rights considerations had not yet entered the mainstream dialogue among proponents of tobacco control. Therefore, using human rights as the foundation of the FCTC would, at the time, have made the instrument vulnerable to the industry's biased messaging on human rights and tobacco, and would have required an additional educational and consensus-building effort that could have seriously impaired progress on the instrument.

4. SETTING THE STAGE: THE STATUS OF INTERNATIONAL HEALTH LAW AND THE WHO IN THE MID- TO LATE-1990S

There is no question that serving as a platform for a global health treaty on tobacco control was and is well within the WHO's legal authority. The WHO is the primary specialized agency charged with improving global health conditions. With six regional offices and more than 190 Member States, the WHO is the largest international health agency and one of the largest specialized agencies in the United Nations (UN). Although the WHO is not the only international organization involved in health matters, the UN Charter and the WHO's Constitution endow the WHO with the duty to provide global leadership in international health.[6] As the entity with the primary constitutional directive of acting as the 'directing and co-ordinating authority on international health

[6] See Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 55; see generally Constitution of the

work',[7] the WHO bears the cardinal responsibility for implementing the aims of the UN Charter with respect to health. Furthermore, Article 1 of the WHO's Constitution proclaims that the organization's fundamental objective is the 'attainment by all peoples of the highest possible level of health'.[8] Article 19 gives the Health Assembly, the governing body of the WHO, the authority to adopt conventions or agreements 'with respect to any matter within the competence of the Organization'.[9]

Despite this broad legal mandate, the WHO had never employed its constitutional authority to serve as a platform for any treaty in public health until the FCTC. Prior to the FCTC, the WHO had encouraged the formulation of binding standards only in two very limited and traditional areas of international public health regulation: nomenclature and international infectious disease control.[10]

The WHO's traditional reluctance to engage in lawmaking was, even in the 1990s, rather remarkable. In the 50 years since the founding of the UN, institutional lawmaking had become a central function of a number of UN specialized agencies, ranging from the UN Educational, Scientific and Cultural Organization, to the World Intellectual Property Organization, to the International Labour Organization. But this was not the case at the WHO. Indeed, at that time the WHO was the only UN specialized agency with lawmaking authority that had never served as the platform for the negotiation of a treaty, and the proposed tobacco treaty was a pioneering initiative for this reason alone.

It would not be easy ground to break: there was opposition from many quarters (and not just from the tobacco industry) to the idea of a tobacco control treaty to be negotiated under WHO auspices. On one side, public health was not yet understood in the international legal academy as a central realm of vital international legal or foreign policy concern from the perspective of State

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World Health Organization (signed 22 July 1946, entered into force 7 April 1948) 62 Stat 2679 (WHO Constitution).

7 WHO Constitution, art 2a.

8 ibid, art 1.

9 ibid, art 19.

10 The power to promulgate binding standards in those areas is explicitly established in Article 21 of the WHO Constitution, which gives the WHO's governing body the 'authority to adopt regulations concerning[,]' *inter alia*, 'procedures designed to prevent the international spread of disease' and 'nomenclatures with respect to diseases, causes of death and public health practices', WHO Constitution, art 21. Such regulations automatically come into force for all members that do not provide notice of reservation or rejection within a specified period of time. See ibid, art 22. In contrast, a two-thirds vote of the WHO's governing body is required for adoption of treaties, such as the FCTC, promulgated under the WHO's Article 19 authority. See ibid, art 19.

interests.[11] At that time, the field of public international law was viewed as far narrower than today and there was a distinct concern voiced by some scholars about expanding the corpus of international law to include novel concerns such as health.[12]

On the other side, the concept of a tobacco treaty to be negotiated under WHO auspices lacked support at the initial stages from the public health community, including within the WHO. Within the Organization there was little experience or interest in, or understanding of, international law as a tool for public health action or cooperation in public health circles.[13] There also was institutional scepticism at the WHO regarding the use of legal mechanisms to achieve its objectives, which reflected the cultural predispositions of the WHO.[14] Historically, the medical professionals who constitute the key leadership of the organization had seemed to share a common view that efforts to achieve the organization's health goals should not include a legal component.

There was even opposition to the use of law as a tool for public health within the WHO Secretariat. Indeed, in an effort to draw attention away from the idea of the WHO as a forum for lawmaking, in 1995 the organization commissioned a feasibility study on the idea of a UN non-binding instrument on tobacco control.[15] Although not well known at the time, when the resulting study by Taylor and Roemer reinforced the call for a binding tobacco treaty to be negotiated under WHO auspices, the Secretariat suppressed the release of the study for over a year.[16]

Under these circumstances, the early proponents of the Convention faced a steep challenge. The historic scepticism of the WHO and the global public health community towards the use of legal instruments to achieve public health objectives, and the reticence of the international legal community towards creating legally binding health obligations for nation States, presented a series of barriers to enactment. Given the anticipated resistance from both the public health and international legal communities, the treaty proposal was structured to garner the greatest possible support from all stakeholders, including State and non-State actors. Therefore, the FCTC was presented to stakeholders as

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[11] David Fidler, *International Law and Global Public Health* (Transnational Publishers 1999) 1–3.

[12] ibid 48–51.

[13] ibid.

[14] Allyn Taylor, 'Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health' (1992) 18(4) American Journal of Law and Medicine 301.

[15] Ruth Roemer, Allyn Taylor and Jean Lariviere, 'Origins of the WHO Framework Convention on Tobacco Control' (2005) 95(6) American Journal of Public Health 936.

[16] ibid.

an evidence-based demand-reduction strategy that was in the economic and public interests of all countries.[17] Specifically, the FCTC was designed as a treaty emphasizing sovereign State economic interests, global interdependence and the necessity for intergovernmental cooperation, which were issues of primary concern at the time.[18]

5. STRATEGIC FRAMING OF A FRAMEWORK CONVENTION: LEVERAGING KEY ISSUES OF THE ERA

Although multilateral interdependence in health was not widely recognized in the early 1990s, in the context of the FCTC the case was made that the health of populations in all parts of the world was increasingly being influenced by transnational economic, social, scientific, technological and cultural forces, and that the domestic and international spheres of health policy were becoming more intertwined and inseparable.[19] A new era of global public health policy was needed to address the growing number of health concerns that were bypassing or spilling over national boundaries. Although the protection and promotion of public health had traditionally been viewed as matters of almost exclusive domestic concern, the rapid and widespread influence of globalization created a paradigm shift and called for new frameworks for international collaboration to deal with emerging global threats to health. Therefore, the codification and implementation of binding health norms was becoming increasingly important as international health interdependence accelerated and nations recognized the need to cooperate to solve essential problems.

Numerous areas of tobacco control – including advertising and promotion, product labelling, production regulation and illicit trade – transcended national boundaries and, therefore, were fertile ground for multilateral cooperation. Indeed, the globalization of the epidemic was restricting the capacity of sovereign States to advance tobacco control through domestic regulation alone, making international coordination of policies or cooperation an essential component of tobacco control strategies. While the idea of global economic and public health interdependence is well understood today, it was novel and controversial, but ultimately powerfully persuasive, then.

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[17] For a theoretical overview of the case for a framework convention on tobacco control, see Allyn Taylor, 'An International Regulatory Strategy for Global Tobacco Control' (1996) 21 Yale Journal of International Law 257.

[18] ibid.

[19] Allyn Taylor, 'Governing the Globalization of Public Health' (2004) 32 Journal of Law, Medicine & Ethics 500.

Nation States were also predictably concerned about their economic interests, including whether restrictions on tobacco markets could have detrimental impacts on domestic employment and revenue.[20] The economic argument for the FCTC was strongly buttressed in the late 1990s by the fortuitous and timely publication of a World Bank report on tobacco control.[21] The World Bank report made the point, for the very first time, that, with the exception of Malawi and Zimbabwe, the tobacco epidemic was creating a net economic loss for all nation States. The report spoke powerfully to finance ministries around the world and built concrete support for the treaty.

Finally, the FCTC presented the WHO a unique opportunity to confirm its role as the premier authority on world health matters by serving as the platform for a treaty promoting and guiding government action on multilateral tobacco control. Although the WHO had traditionally eschewed the use of legal strategies to advance its public health goals, the growing complexities of responding to the international burden of disease were testing the organization's capacity to maintain its reputation as the foremost authority on international health. Meanwhile, the previous successes of international agreements in other areas of international concern, particularly the environment, had shown that international agreements could have an impact on policy at the national level, and that scientific evidence could be employed to support the rational development of international law. The FCTC was a way for the WHO to advance its policy objectives and undertake its constitutional responsibilities, while cementing its role in the hierarchy of global health institutions.

6. SPEAKING A COMMON LANGUAGE: THE MUTUAL NEGLECT OF HUMAN RIGHTS CONSIDERATIONS AMONG KEY PLAYERS

The connection between tobacco control and human rights was not a stretch even in the 1990s. However, as described above, the FCTC initially was advanced under the rubric of State sovereignty, multilateral cooperation, and economic interests, in an effort to address head on the most likely areas of political resistance to the treaty, and to appeal to the various stakeholders. Human rights principles were not meaningfully invoked in the early stages of the FCTC.

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[20] Melissa Crow, 'Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control' (2004) 29 Yale Journal of International Law 209, 216.

[21] World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (The World Bank 1999).

If the banner of rights was going to be carried forward, and rights-oriented coalitions in support of the FCTC were going to be expanded, the States and non-State actors championing the treaty-making process could have undertaken that as part of the formal negotiations that took place between 1999 and 2003. As it turned out, during the course of the four-year negotiations, the legal advisers representing high-income States did not, as a general matter, focus on the connection between tobacco and human rights in shaping the instrument. To the extent it was raised, some nations, including the United States, were specifically opposed to the use of the language of rights in connection with tobacco control.

Just as significantly, the national health ministries that dominated the delegations from low- and middle-income countries and the public health NGOs involved in the FCTC negotiations did not have backgrounds in human rights and, therefore, did not meaningfully consider or advance human rights-based approaches during the formal negotiations. Similarly, not a single delegate to the FCTC negotiations or any NGO involved in the process ever raised the banner of human rights in the negotiation process.

This may seem odd from today's perspective, but it makes sense in context: as one author has noted, at the time the FCTC came into being, there was little discussion of human rights in tobacco control circles, or of tobacco control in human rights circles.[22] Indeed, the use of human rights language in discussing tobacco control is a relatively recent development.[23] Nevertheless, the tobacco industry – with its vast global messaging infrastructure – had had some success to that point in co-opting the language of human rights in furtherance of its anti-tobacco control agenda.[24]

Moreover, the FCTC negotiation process illustrated that, at least at that period in history, there remained important distinctions between the practice

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[22] Richard Daynard, Rangita de Silva de Alwis and Mark Gottlieb, 'Allying Tobacco Control With Human Rights' (*Public Health Advocacy Institute*, 2013) https://www.phaionline.org/wp-content/uploads/2013/06/Allying_TCHR.pdf, accessed 4 June 2019; see also Rangita de Silva de Alwis and Richard Daynard, 'Reconceptualizing Human Rights To Challenge Tobacco' (2009) 12 Michigan State Journal of International Law 291 ('The integration of a human rights-based approach to the control of tobacco has begun to gather momentum as an exciting new weapon in the battle against tobacco').

[23] Partial proof of this lies in the work done by scholars after the consummation of the FCTC to advocate for a human rights approach to tobacco control. See, for example, ibid; Oscar Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52 Salud Publica de Mexico S288; Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599.

[24] See below.

and principles of human rights and public health. The critical interconnections between the two realms, such as the role of personal autonomy in advancing the collective good, remained under-appreciated by large segments of the global public health community. For example, during the course of the FCTC negotiations, textual proposals that were potentially highly burdensome on personal autonomy were made by State delegations and, on occasion, by senior WHO officials, on the grounds of protecting public health – without any explicit consideration of their human rights impacts. On several occasions it was requested that the treaty specifically call upon States to protect the foetus from involuntary tobacco smoke. While such a provision was not included in any draft or final text of the Convention, it is notable that there was no meaningful appreciation or discourse on the impact of such a measure from a human rights perspective.

In short, human rights were not a meaningful part of the discourse in the negotiations, and the resulting text does not explicitly bind the parties to human rights obligations. There are, however, some limited references to human rights instruments in the preamble to the FCTC: the preamble refers to the right to health pursuant to the WHO's Constitution, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. These preambular provisions were included in the final text of the Convention – without any discussion amongst State participants – upon the recommendation of the Secretariat's legal team. Notably, the provisions were added in an effort to integrate the new public health treaty into the wider body of international law and health jurisprudence through the preamble, as opposed to making a political or legal statement about the human rights dimensions of tobacco control. For whatever reason it was incorporated, however, the preamble's passing reference to these human rights instruments has indeed been useful from a rights perspective. It provides context for interpretation of the Convention and foreshadows the larger role that human rights would play in tobacco control in years to come.

7. A FUNDAMENTAL 'RIGHT TO SMOKE': THE TOBACCO INDUSTRY'S SUCCESSFUL EFFORTS TO LEVERAGE HUMAN RIGHTS PRINCIPLES IN THE FIGHT AGAINST TOBACCO CONTROL

The neglect of human rights in the design of the FCTC reflects, in part, the tobacco industry's historical success in co-opting the language of human rights in support of its own agenda. While tobacco control advocates generally did not take up the human rights mantle until this century, the tobacco industry has

been invoking human rights principles for decades in its campaigns against tobacco control.

The tobacco industry, of course, has a vested interest in preventing tobacco control, and its vast efforts to interfere in tobacco control are well documented.[25] The industry has recruited various allies across industries, including, for instance: farmers, importers and distributors, and members of third-party industries such as hospitality, advertising, packaging and transport.[26] The industry also has managed to insert itself into and steer education and scientific research through donations and other means, and to gain access and influence to governments through lobbying and political campaign contributions.[27] It has engaged in litigation on multiple continents relating to tobacco control laws.[28] And it helped organize 'smokers' rights groups' (SRGs) – groups dedicated to opposing clean indoor air laws – which remained prevalent into the 2000s.[29]

Control over messaging relating to tobacco has been central to the industry's various efforts,[30] and critical to that messaging has been the theme that tobacco control infringes on individual rights. Indeed, the tobacco industry did not have to stretch to find human rights principles to invoke in favour of unrestricted tobacco consumption. Many such principles are centred in autonomy, including the rights to privacy, liberty and self-determination. For example, government interventions to limit smoking infringe on privacy, both of individuals in their own homes[31] and of private business owners in handling affairs on their own properties.

On a broader level, the tobacco industry asserted principles of property and economic rights, and freedom of expression, in favour of an unrestricted tobacco marketplace. The industry claims that tobacco control laws restrict the rights of private citizens who 'are free to do whatever they want on their own

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25 WHO, *Tobacco Industry Interference with Tobacco Control* (WHO 2008).

26 ibid.

27 ibid.

28 ibid.

29 SRGs appeared to be organized at a grassroots level, which gave them a degree of credibility. Elizabeth Smith and Ruth Malone, '"We Will Speak as the Smoker": The Tobacco Industry's Smokers' Rights Groups' (2006) 17 European Journal of Public Health 306.

30 ibid.

31 In certain cases, courts have enjoined parents from smoking indoors in the presence of their children. Mireille O Butler, 'Parental Autonomy Versus Children's Health Rights: Should Parents Be Prohibited from Smoking in the Presence of Their Children?' (1996) 74 Washington University Law Review 223; Michael S Moorby, 'Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air?' (1995) 12 Pace Environmental Law Review 827.

property'.[32] Further, according to the industry, tobacco advertising and marketing are protected forms of speech, and regulating the means of advertising infringes on the free speech rights of the industry as the speaker, and of the consumers as the recipients of that speech.[33] The tobacco industry similarly has argued that economic and property rights are curtailed by anti-tobacco laws insofar as such laws restrict the marketplace for tobacco products (both in advertising and consumption) and impact hospitality industries.[34]

The rights to liberty and to self-determination have even been said to give rise to a 'right to smoke' free from government interference. Indeed, in the late twentieth century – long before the FCTC was conceived – smoking had been deeply engrained in Western societies for decades, and the idea of a 'right to smoke' had become part of the debate on tobacco control. Barth wrote in 1986: 'Compliance with nonsmokers' wishes by limiting the rights of smokers would logically result in a corresponding curtailment of smokers' personal autonomy. Therefore, in order to fully examine nonsmokers' rights, the converse must also be studied; namely, the right to smoke.'[35]

The 'right to smoke' argument resonated among smokers. In 1998 the *New York Times* published an extreme iteration of the 'right to smoke' argument, in the form of an op-ed in which the author railed against job postings by employers who advertised non-smoking workplaces. Drawing a comparison between discrimination against smokers, on the one hand, and discrimination against black people or women, on the other hand, the author wrote: 'No smoking in the workplace is the latest form of discrimination. Smokers are relegated to the parking lot instead of the back of the bus. Can you imagine an advertisement that, instead of "non-smoking office," dared say "nonfemale office" or "non-black environment"?'[36]

The industry has even managed to weaponize these concepts to portray tobacco control advocates as anti-human rights. For instance, the industry has targeted relatively untapped female demographics in cultures where smoking has traditionally been a male activity, thus positioning the use of tobacco as

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[32] O'Neill Institute for National & Global Health Law, 'Tobacco Industry Strategy in Latin American Courts, A Litigation Guide' (2012) 33, http://oneill.law.georgetown.edu/media/2012_OneillTobaccoLitGuide_ENG.pdf, accessed 11 June 2019.

[33] ibid 19–26.

[34] ibid 30–38.

[35] John Barth, 'The Public Smoking Controversy: Constitutional Protection v. Common Courtesy' (1986) 2 Journal of Contemporary Health Law & Policy 215.

[36] Alice Schultze, 'LONG ISLAND OPINION; An Office Casualty: My Right to Smoke' (*The New York Times*, 27 March 1988) https://www.nytimes.com/1988/03/27/nyregion/long-island-opinion-an-office-casualty-my-right-to-smoke.html, accessed 11 June 2019.

a symbol of women's rights.[37] This 'has placed antitobacco advocates in the position of seeming to resist equal status for women because they support maintaining restrictions on women smoking. Serving women's health has been made to appear as if it opposes their freedom.'[38]

Thus, as Cabrera and Gostin note, 'the tobacco industry has been able to co-opt human rights language by emphasizing state interference with individual rights'.[39] The industry's messaging has been disseminated over decades through the industry's vast global infrastructure, including through public relations firms, which, according to the WHO, 'have often been used to manipulate the media and public opinion about various aspects of tobacco control and to gather the support of persons who oppose government "intrusion" into business and taxation, thus fomenting a generally anti-regulatory, anti-government view'.[40]

As one senior vice president of Phillips Morris stated in a presentation to the board of directors in 1995:

> our goal is to help shape regulatory environments that enable our businesses to achieve their objectives in all locations where we do business. … we are very clear about our objective – an unyielding and aggressive defence of our rights to make and sell our products and our consumers' rights to have a free marketplace so that they can choose and use those products.[41]

8. FIGHTING WHO: THE INDUSTRY'S EMPHASIS ON AUTONOMY AND FREEDOM

The tobacco industry did not hesitate to invoke the human rights principles of freedom and self-determination in opposing the WHO's tobacco control efforts. Representatives of the industry 'repeatedly castigated WHO efforts at tobacco control as paternalistic and intrusive' and 'constantly reiterated [the industry's] basic premise that smoking was a matter of individual choice'.[42] A management consultant emphasized the 'right to smoke' argument in a 1984 memorandum to Philip Morris titled 'The World Health Organization's Campaign on Smoking and Health: Some Thoughts on a Corporate Response'. He wrote: 'There is something patronizing about the WHO approach to

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37 Allan M Brandt, *The Cigarette Century* (Basic Books 2007) 457.

38 ibid.

39 Oscar Cabrera and Lawrence Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285.

40 WHO, *Tobacco Industry Interference with Tobacco Control* (WHO 2008).

41 Smith and Malone (n 29) 306.

42 Brandt (n 37) 468–69.

smoking and health in the third world. WHO assumes that people must be saved from demon tobacco by their governments; that they can't be trusted to make personal decisions about whether or not to smoke.'[43]

The industry also deployed its resources, and its emphasis on freedom and autonomy, in opposing the FCTC.[44] In 2000 British philosopher Roger Scruton – who, it later developed, had been placed on the tobacco industry payroll – criticized the WHO and the FCTC, writing that the WHO had 'been able to classify as a dangerous disease what is in fact, a voluntary activity and a source of pleasure, the risk of which falls entirely on the smoker …'.[45]

This type of messaging, and the tobacco industry's success in harnessing human rights principles in its favour, provide further important context for understanding the relative neglect of human rights in the FCTC. While the synergies between tobacco control and human rights had not yet been meaningfully explored in the 1990s and early 2000s, the tobacco industry had been cynically linking itself and its products to human rights values for decades. The industry, at that point, still had the upper hand in framing tobacco control issues through the lens of human rights.

9. CONCLUSION

Since the adoption of the FCTC there have, fortunately, been extensive efforts by individuals and institutions to bridge the tobacco control and the human rights paradigms.[46] The FCTC was not intended to be the final word on either tobacco control or human rights in that context; rather, it 'establishe[d] only the basic foundation for subsequent efforts' in tobacco control.[47] At this point, it remains difficult to fully understand the significance of these efforts, as it is difficult to understand the lasting significance – if any – of the fact that the

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[43] ibid 469.

[44] See, for example, Mariaelena Gonzalez, Lawrence Green and Stanton Glantz, 'Through Tobacco Industry Eyes: Civil Society and the FCTC Process from Philip Morris and British American Tobacco's Perspectives' (2012) 21 Tobacco Control e1; Stanton Glantz, Hadii Mamudu and Ross Hammond, 'Tobacco Industry Attempts to Counter the World Bank Report *Curbing the Epidemic* and Obstruct the WHO Framework Convention on Tobacco Control' (2008) 67 Social Science & Medicine 1690.

[45] Roger Scruton, *WHO, What and Why? Trans-National Government, Legitimacy and the World Health Organization* (Occasional Paper 2000).

[46] See, for example, Framework Convention Alliance, 'COP8 Policy Briefing: Achieving greater integration of FCTC and human rights norms' (*FCTC*, 2018) https://www.fctc.org/resource-hub/fca-policy-briefing-for-cop8-achieving-greater-integration-of-fctc-and-human-rights-norms/, accessed 11 June 2019.

[47] Brandt (n 37) 481.

FCTC did not include a human rights framework at first instance. Nevertheless, new movements are reshaping the health and human rights and the tobacco control agendas, cementing global alliances for tobacco control, contributing to the evolution of the FCTC and, most importantly, advancing the protection of global public health. Although the FCTC was born of the strategic decision to avoid human rights considerations, many of those involved at the time can now be pleased by the flexibility of the legal instrument they created, and its lasting effects in an area that once seemed out of reach.

11. Human rights and tobacco control: lessons from illicit drugs

Damon Barrett and Julie Hannah

1. INTRODUCTION

This chapter is a reflection on human rights and tobacco control set against the endgame of a 'drug free world'. The elimination of illicit drugs has long been an international policy imperative,[1] sometimes justified on human rights grounds.[2] But the human rights violations that the pursuit of this endgame has produced are now well known.[3] Meanwhile, a compelling human rights case for stronger tobacco control has been well made.[4] It is easy, moreover, to see the health benefits of a 'tobacco free world' and a relatively straightforward step to argue that such a goal helps realize the right to health.[5] But are we sure that pursuit of a tobacco free world aligns with human rights given the clear distance between human rights and the pursuit of a 'drug free world'? Have we properly tried to anticipate potential negative human rights outcomes associated with tobacco control strategies and worked to mitigate them? In asking such questions we do not suggest that tobacco control advocates envisage tobacco control strategies similar to regulatory approaches used for a 'war on

[1] UNODC, 'Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem' (2009) UN Doc E/2009/28-E/CN.7/2009/12.

[2] See, for example, INCB, 'Statement by the International Narcotics Control Board at the high-level segment of the 52nd session of the Commission on Narcotic Drugs on 11 March 2009' (*UNODC*, 2009) https://www.unodc.org/unodc/en/commissions/CND/session/52_Session_2009/CND-52-Session_HLS-Statements-Wed.html, accessed 2 May 2019.

[3] OHCHR, 'Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights' (4 September 2015) UN Doc A/HRC/30/65.

[4] For example, Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599.

[5] Cape Town Declaration on Human Rights and A Tobacco Free World (signed 21 September 2018, adopted at the 17th World Conference on Tobacco or Health on 7–9 March 2018).

drugs' or that tobacco control and drug control are the same. One is a punitive suppression regime with a supply-side focus, while the other is a broader regulatory framework more weighted to the demand side. Nonetheless there are similarities and areas of cross-over with important human rights dimensions, including issues of addiction, restrictions on individual liberties, linkages with broader social policy, controversies around harm reduction and enforcement responses to illicit markets. As tobacco control moves towards stricter controls (including beyond the requirements of the World Health Organization Framework Convention on Tobacco Control (FCTC) in national contexts), as endgame strategies are pursued and as illicit tobacco becomes a greater focus, the resemblances to drug control may become closer.

This chapter begins with an overview of human rights problems in drug control, before introducing the international drug control system. It then discusses the relationship between human rights and drug control, focusing on how that relationship is viewed on the one hand by those who seek drug law reform (based on human rights concerns), and on the other those who favour the current system (based on a view of the complementarity between human rights and drug control). At present, the tobacco and human rights literature is weighted towards the latter perspective, with a focus on complementarities between the two. This is understandable as a response to the damage caused by Big Tobacco and State inaction and an effort to bring human rights to bear upon this problem. However, a focus on complementarities can render other human rights issues less visible.

Some of the excesses of drug policy may seem a remote risk to contemporary tobacco control scholars. The chapter urges caution, however, explaining how drug control was not initially as punitive or as repressive as it ultimately became. The drug control system shows us that, with the passage of time, and in the face of what are seen as exceptional, ever-changing threats, whether this be new substances, new trafficking routes or emerging health harms, States have demonstrated their ability to go too far. It is therefore worth predicting human rights risks in tobacco control moving forward, however similar or different to those in drug policy, and giving them as much weight as identifying a human rights case for stronger controls or a tobacco free world. This, too, is part of a 'human rights-based approach' to tobacco control, one that takes the human rights support for and the human rights risks of any action equally seriously.

The chapter concludes with a call for a move beyond a human right to tobacco control (which we problematize) and an explanation of how human rights law can support specific tobacco control measures (which remains vital), to an increased focus on the more complex linkages between the two, including human rights risks. Based on learning from drug control, it offers a tripartite conceptual framework for the relationship between tobacco control and human

rights to draw attention to the wider intersections, without diminishing important complementarities.

2. HUMAN RIGHTS AND DRUG CONTROL

Despite considerable effort and expense, political consensus documents acknowledge that the goal of eliminating drugs has not been achieved.[6] Overall, drug use, production and trade have not decreased in recent decades following the boom of the 1960s. A review conducted in advance of a major UN review of global drug policy in 2009, for example, found 'no evidence that the global drug problem was reduced' between 1998 and 2007.[7] Recent surveys have found record production of coca and opium.[8] Globally, approximately one in 20 people aged 16–64 uses illicit drugs.[9] From one perspective this may seem like failure, but from the perspective of the UN Office on Drugs and Crime (UNODC), rates of opium production and use have fallen overall since the early 1900s, and for this and other substances, what could have been a problem of the magnitude of tobacco or alcohol has been 'contained'.[10] In this way, compared to tobacco outcomes, the drug control system has been very successful. We may already reflect on tobacco control at this stage. One in 20 people uses illicit drugs. At 5 per cent of the population it mirrors the target for tobacco endgames set by some countries.[11] But even if we were to accept the UNODC's argument,[12] drug control has brought considerable human rights costs.[13]

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6 For example, 'Political Declaration' (n 1).

7 Peter Reuter and Franz Trautmann, *A Report on Global Illicit Drug Markets 1998–2007* (European Commission 2009).

8 UNODC and MCN/NSD, 'Afghanistan Opium Survey 2017: Challenges to sustainable development, peace and security' (UNODC Research, May 2018) https://www.unodc.org/documents/crop-monitoring/Opium-survey-peace-security-web.pdf, accessed 2 May 2019; Colombia, *Monitoreo de Territoreos Affectados por Cultivos Ilícitos 2016* (UNODC 2017).

9 UNODC, *World Drug Report 2016* (UN Publishing 2016) ix.

10 UNODC, *World Drug Report 2008* (UN Publishing 2008) 25–35, 212–218.

11 Robert Beaglehole, Ruth Bonita, Derek Yach, Judith Mackay and K Srinath Reddy, 'A Tobacco-Free World: A Call to Action to Phase Out the Sale of Tobacco Products by 2040' (2015) 385 Lancet 1011.

12 Challenging the UNODC position, see 'International Drug Control: 100 Years of Success?' (*TNI*, 26 June 2006) https://www.tni.org/en/publication/international-drug-control-100-years-of-success, accessed 2 May 2019.

13 See International Drug Policy Consortium, 'Taking Stock: A Decade of Drug Policy – A Civil Society Shadow Report' (IDPC, 21 October 2018) https://idpc.net/publications/2018/10/taking-stock-a-decade-of-drug-policy-a-civil-society-shadow-report, accessed 2 May 2019; Steve Rolles, George Murkin, Martin Powell, Danny

There is almost no aspect of human rights that is unaffected by drug control. Perhaps the most prominent issues are violent police or military 'crackdowns', the death penalty for drug offences, stop and search policing and mass incarceration.[14] However these are far from the only issues. Forced eradication of illicit crops has led to food insecurity, violence and ill-health.[15] The criminalization of personal possession or use has produced a significant toll in unnecessary criminal records.[16] Privacy rights have been eroded through drug testing of benefits claimants and school students.[17] Pregnant women who use drugs have been detained for the entirety of their pregnancy.[18] Zero tolerance approaches that deny harm reduction services have fuelled HIV and hepatitis C epidemics as well as overdose deaths, which has been a focus of right to health advocacy that has long moved beyond an abstinence-only discourse.[19] People who use drugs have been tarred with a social stigma and 'pushed to the margins of society'.[20] Their autonomy and agency has been eroded by reference to addiction[21] and informed consent to treatment has been easily denied, leading in some cases to severe abuses.[22] Traditional, religious and indigenous

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Kushlick and Jane Slater, *The Alternative World Drug Report: Counting the Costs of the War on Drugs* (Count the Costs 2012).

[14] Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2015* (International Harm Reduction Association 2015); Pien Metaal and Coletta Youngers, *Systems Overload: Drug Laws and Prisons in Latin America* (Transnational Institute 2011).

[15] UNDP, *Addressing the Development Dimensions of Drug Policy* (UNDP 2015).

[16] International Network of People who Use Drugs, *Stigmatising People Who Use Drugs* (Drug War Peace Initiative 2015).

[17] Adam Fletcher, 'Drug Testing in Schools: A Case Study in Doing More Harm Than Good' in Damon Barrett (ed), *Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People* (iDebate Press 2011) 196–204.

[18] Kerstin Söderström and John-Arne Skolbekken, 'Pregnancy and Substance Use – The Norwegian 10-3 Solution. Ethical and Clinical Reflections Related to Incarceration of Pregnant Women to Protect the Foetus from Harmful Substances' (2017) 29 Nordic Studies on Alcohol and Drugs 155.

[19] Richard Elliott, Joanne Csete, Evan Wood and Thomas Kerr, 'Harm Reduction, HIV/AIDS and the Human Rights Challenge to Global Drug Policy' (2005) 8 Health and Human Rights 104.

[20] UNODC, 'Making Drug Control Fit for Purpose: Building on the UNGASS Decade. A Report by the Executive Director' (7 May 2008) UN Doc E/CN.7/2008/CRP.17.

[21] See, for example, Nora Volkow, 'Addiction Is a Disease of Free Will' (*Huffington Post*, 12 June 2016) https://www.huffpost.com/entry/addiction-is-a-disease-of_b_7561200, accessed 1 May 2019; Volkow is currently Director of the National Institute on Drug Abuse in the US.

[22] 'Joint Statement: Compulsory Drug Detention and Rehabilitation Centres ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP,

uses of certain plants have been banned.[23] Fair trial standards and extradition protections have been eroded, including through constitutional limitations for drugs cases.[24] International assistance to drug enforcement, moreover, has been implicated in human rights abuses due to a long-standing blind spot for human rights in such efforts.[25]

While the above are all real, indisputable issues, what remains contested is the extent to which drug laws and policies, including the international system, are to blame. For some the 'war on drugs' and its legal framework is clearly a structural factor in rights abuses.[26] For others, the problems lie elsewhere as human rights and drug control, far from conflicting, go 'hand in hand'.[27] These seem to be incommensurate arguments, so let us look more closely at the international regime and these differing approaches to its relationship to human rights.

3. THE INTERNATIONAL DRUG CONTROL SYSTEM

The multilateral legal framework for drug control consists of three main treaties: the Single Convention on Narcotic Drugs, 1961 (as amended by the 1972 Protocol); the Convention on Psychotropic Substances, 1971; and the Convention Against Illicit Traffic in Narcotic Drug and Psychotropic Substances, 1988. The Single Convention is the cornerstone of the regime, controlling plant-based substances and derivatives, with a primary focus on cannabis, coca and opium poppy. This includes a wide range of substances used for medical purposes. It also established the system's main administrative and monitoring mechanisms, including the estimates and statistical returns systems for controlled medicines. The 1971 Convention adds by bringing

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WHO and UNAIDS' (*OHCHR*, 2012) https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11941&LangID=E, accessed 2 May 2019.

[23] Single Convention on Narcotic Drugs (entered into force 13 December 1964) 520 UNTS 151 (Single Convention) art 41 requires that such practices be abolished within a given time period.

[24] The Constitution of the Hashemite Kingdom of Jordan, art 101 (removing the right to civilian trial from drug trafficking suspects); The Constitution of the Federative Republic of Brazil, art 5 LI (removing the standard protection from extradition for Brazilian citizens).

[25] Patrick Gallahue, Roxanne Saucier and Damon Barrett, *Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights* (International Harm Reduction Association 2012).

[26] For example, Richard Lines, *Drug Control and Human Rights in International Law* (Cambridge University Press 2017).

[27] INCB (n 2).

under international control synthetic substances that had been omitted, such as LSD, MDMA and amphetamines. Each treaty contains 'schedules' into which controlled drugs are placed, and which determine the stringency of the controls to be adopted, based (ostensibly) on their risk profile versus medical benefit.[28] The Trafficking Convention supplements the other two by strengthening transnational cooperation against illicit trafficking and bringing under control precursor chemicals necessary for the production of substances controlled under the other treaties. It also contains extensive penal provisions and has served as a model for transnational crime treaties.

The drug control conventions are weighted towards illicit production and trade, and on controlling the licit market, rather than on the demand side. Political agreements and other official UN documents now reaffirm the need for 'balance' between supply and demand policies, and between reducing supply and ensuring access to controlled medicines such as morphine.[29] In practice, significant imbalances remain, with the overwhelming focus on law enforcement and supply reduction.[30] Together the treaties form a tightly woven system controlling and, in effect, criminalizing the entire supply chain, with the aim of limiting the uses of controlled substances strictly to 'medical and scientific purposes'.[31] All other uses, whether recreational, quasi-medical, traditional or religious, are not permitted.[32] A wide array of behaviours must therefore be suppressed[33] and each treaty allows for 'more strict or severe measures' to be adopted for doing so.[34] The endgame to be achieved has long

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[28] Christopher Hallam, Dave Bewley-Taylor and Martin Jelsma, 'Scheduling in the international drug control system' (Transnational Institute, Series on Legislative Reform of Drug Policies No 25, June 2014) https://www.tni.org/files/download/dlr25_0.pdf, accessed 2 May 2019.

[29] 'Political Declaration' (n 1); UNODC, *Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem New York, 19–21 April 2016* (United Nations 2016); WHO, *Ensuring Balance in National Policies in Controlled Substances: Guidance for Availability and Accessibility of Controlled Substances* (WHO 2011) (referred to in the 2016 Outcome Document).

[30] Allyn L Taylor, 'Addressing the Global Tragedy of Needless Pain: Rethinking the United Nations Single Convention on Narcotic Drugs' (2007) 35 Journal of Law and Medical Ethics 556; Marie Elske Gispen, *Human Rights and Drug Control: Access to Medicines in Resource-Constrained Countries* (Intersentia 2017).

[31] Single Convention, art 4(c).

[32] Single Convention, arts 4(c) and 49; UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (entered into force 11 November 1990) 1582 UNTS 95 (Trafficking Convention) art 3.

[33] See, for example, Single Convention, art 36.

[34] Single Convention, art 39; Narcotic Drugs and Psychotropic Substances (entered into force 16 August 1976) 1019 UNTS 175 (1971 Convention) art 23; Trafficking Convention, art 24.

been the elimination of the illicit market. This has been somewhat tempered in recent political declarations to 'elimination or significant reduction' of supply and demand given the realization that the drugs market will not go away.[35] But a 'drug free world' (or society) is still the vision of many governments and regional strategies.[36]

All three treaties enjoy near universal ratification or accession (the Trafficking Convention has 189 States parties) and by and large their provisions have been adopted in national laws worldwide.[37] From this perspective the regime has been very successful. But the success of a legal regime such as this depends on the quality of the strategies it legalizes and the effects, across various metrics, of those strategies.

4. HUMAN RIGHTS AND DRUG CONTROL: COMPLEMENTARY OR CONFLICTING?

Most drug control and human rights literature focuses on the human rights problems that drug control produces.[38] An initial concern is that the drug problem is framed, like terrorism, as one of existential threat. Political speeches referring to drugs as a 'scourge' and a 'global threat' are a regular feature in UN forums.[39] The Single Convention, moreover, refers in its preamble to the 'evil' of addiction and the moral duty of States parties to 'combat this evil'.[40] The preamble to the Trafficking Convention refers to the threat to the State, to the economy and to children. This rhetoric, it is argued, generates important effects, one of which is harmful stigma and discrimination. People who use drugs have, through criminalization and zero tolerance approaches, been 'tainted with a moral stigma' with serious consequences for the protection of

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[35] 'Political Declaration' (n 1).

[36] UNGA, 'Special Session on the World Drug Problem, Official Records' (10 April 2016) UN Doc A/S-30/PV.1, 30 (Pakistan), 32 (Kenya). See also Ann Fordham, 'Questioning the 'Limits of Reality' – ASEAN Reaffirms Commitment to Become "Drug-Free"' (*International Drug Policy Consortium*, 24 October 2016) https://idpc.net/blog/2016/10/questioning-the-limits-of-reality-asean-reaffirms-commitment-to-a-drug-free-asean, accessed 1 May 2019.

[37] See, for example, Control on Narcotics Substances Act 1997 (Pakistan); Misuse of Drugs Act 1971 (UK); Narcotic Drugs and Psychotropic Substances Act 1985 (India); Narcotics and Psychotropic Substances Act 1988 (Jordan); Controlled Substances Act 1970 (US).

[38] Much of the literature is addressed, from opposing perspectives, in Lines (n 26) and Saul Takahashi, *Human Rights and Drug Control: The False Dichotomy* (Hart Publishing 2016).

[39] For example, 'Special Session Records' (n 36) 19 (Costa Rica), 20 (Panama), 30 (South Africa), 34 (Angola).

[40] Lines (n 26) 50–73.

their health and rights.[41] Another concern about this threat-based framing is its ability to justify heavy-handed laws, policies and interventions, noted above.[42]

Critically, the drugs conventions cannot be separated from the human rights abuses associated with drug control. To give effect to their international obligations, States must control personal behaviours, ban traditional and indigenous practices, make arrests, prosecute, punish, eradicate crops, extradite and confiscate property. For Neil Boister, '[t]he drugs conventions and the drug control institutions have an indirect but influential relationship with human rights abuses; while they do not prescribe them, they do structure the system that employs them at a national level'.[43] Meanwhile, human rights protections within these 'suppression conventions' are weak or absent.[44] Indeed, there is only one explicit, yet qualified, mention of human rights across the more than 110 articles of the three treaties.[45] The *travaux préparatoires* of the conventions show how rarely human rights issues appeared in drafting, and how easily they gave way to the drugs threat when they did.[46]

Some, however, reject the association of drug control with human rights abuses, even if the abuses themselves are acknowledged. As the UNODC argues '(n)othing in the Conventions provides a justification for punishment or other actions directly contrary to human rights'.[47] The problem, from this perspective, is in a 'misinterpretation' of the treaties.[48] For Saul Takahashi, '[t]he problem is one of the death penalty and its general incompatibility with international human rights standards in those countries in general', and 'not one of

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[41] UNODC (n 20) 11.

[42] See, for example, Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Manfred Nowak' (5 February 2010) UN Doc A/HRC/13/39/Add.5 [44] referring to drug control as an 'exceptional circumstance' used by government officials to explain human rights abuses; 'Special Session Records (n 36) 14 and 15 (Indonesia on behalf of a group of death penalty states referring to the threat posed by drugs to justify capital punishment).

[43] Neil Boister, 'Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs' (2016) 29 Leiden Journal of International 389, 397.

[44] Neil Boister, 'Human Rights Protections in the Suppression Conventions' (2002) 2 Human Rights Law Review 199.

[45] Trafficking Convention, art 14(2). The protocol to the FCTC is somewhat better, at least with regard to extradition, data protection and an explicit mention of proportionality of sentences.

[46] Damon Barrett, 'Drugs and the Convention on the Right of the Child: Fragmentation, Contention and Structural Bias' (PhD Thesis, Stockholm University 2018) 47–98.

[47] UNODC, 'Drug Policy Provisions from the International Drug Control Conventions' (10 February 2014) UN Doc E/CN.7/2014/CRP.5, 13.

[48] ibid 14.

drug control as such'.[49] However, a clear correlation between the signing or ratification of the Trafficking Convention and the adoption of capital drug laws has been shown, weakening the central premise of such a view.[50] Indeed, the official commentary to the Single Convention bears out this worry, referring to the death penalty as an example of a 'more strict or severe' measure permitted under Article 39.[51] Thus, for Neil Boister, it is 'disingenuous' to argue that these measures have nothing to do with the conventions. The conventions, he says, 'introduce invasive measures into domestic law, but importantly, they also introduce a no-holds-barred ethos into domestic crime control law'.[52]

Rick Lines therefore argues that the clear human rights risks associated with this form of compliance regime, alongside the permissive norm to take 'more strict or severe measures', places the drugs conventions in a constant state of conflict with human rights law, whatever the humanitarian or health goals it may espouse.[53] This view is also rejected by some, including the UNODC and the International Narcotics Control Board (INCB, the treaty body for the drugs conventions). Instead, human rights and drug control are seen as complementary. Indeed, the drugs conventions are considered by these bodies to fulfil a direct human rights role by aiming to free people from addiction and to protect children from drugs, which mirrors the human rights rationale for protecting people, especially children, from tobacco addiction. For the UNODC, '[d]rugs undermine personal and social development, inhibit critical thinking, and deaden autonomy … people become dependent on drugs, slaves of drug dealers, isolated from the community, deprived of mental health and cognitive/affective abilities. This is inconsistent with basic human rights.'[54] As further stated by the INCB, 'drug abuse is often in conflict with the due recognition of the rights and freedoms of others and in meeting the requirements of health, public order and the general welfare in a democratic society'.[55] Again, there is a similarity here to the non-smokers' rights versus smokers' rights divide that we sometimes see in tobacco control.

The view of complementarity between human rights and drug control is easily supported by the child's right to protection from drugs under Article

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[49] Takahashi (n 38) 119.

[50] Rick Lines and Patrick Gallahue, 'The Death Penalty for Drug Offences: Asian Values or Drug Treaty Influence?' (*Opinio Juris*, 21 May 2015) http://opiniojuris.org/2015/05/21/guest-post-the-death-penalty-for-drug-offences-asian-values-or-drug-treaty-influence/, accessed 1 May 2019.

[51] UNODC, *Commentary on the Single Convention on Narcotic Drugs*, *1961* (UN Publishing 1973) 449–450 [2].

[52] Boister (n 44) 220–221.

[53] Lines (n 26).

[54] UNODC (n 47) 14.

[55] INCB (n 2).

33 of the Convention on the Rights of the Child (CRC), which is interpreted by some, including some States, to mean a right to a drug free environment.[56] Because of its explicit treaty basis, some argue that precedence should be given to this over the rights of people who use drugs.[57] The Hungarian Constitutional Court has ruled along these lines, for example, finding that both the Trafficking Convention and the CRC were breached by allowing certain exemptions from imprisonment for drug possession.[58] As Takahashi has put it, Article 33 is 'not only a clear reference to the international drug conventions, but an unambiguous reaffirmation of states' obligations in drug control'.[59] Indeed, Article 33 is currently being deployed diplomatically as a bulwark against drug policy reform. At the UN Commission on Narcotic Drugs in 2018 the Russian Federation proposed a resolution entitled 'Protecting children from the illicit drug threat', linking the CRC to the extant drug control system.[60]

As noted above, tobacco control and drug control are different in various ways. To be clear, in our view the tobacco control framework is easily preferable. But even if the actual rights concerns may differ there are similarities with regard to how the human rights and drug control nexus is approached. Of interest is that the tobacco and human rights literature tends to focus on making the case for a human right to tobacco control or on demonstrating the complementarities between the two.[61] This is important work, but quite differ-

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[56] UNESCO and others, 'Youth Charter for a Twenty-First Century Free from Drugs' UN Doc ED-98/WS/6 (1998) linking Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3, art 33 to the goal of a drug free society; UN CommRC, 'Third Periodic Report of States parties due in 2003: Lebanon' (25 October 2005) UN Doc CRC/C/129/Add.7 [618], reporting its strategy for a 'drug free century' as part of its art 33 obligations; Ministry of Health and Social Affairs, 'Swedish Drug Policy: A Balanced Policy Based on Health and Human Rights' (*Government Offices of Sweden*, 2015) https://www.government.se/496f5b/contentassets/89b85401ed204484832fb1808cad6012/rk_21164_broschyr_narkotika_a4_en_3_tillg.pdf, stating that the CRC 'recognises a child's right to grow up in a drug-free environment as a human right'.

[57] Commission on Narcotic Drugs, 'Written Statement Submitted by IOGT-NTO' (21 March 2016) UN Doc E/CN.7/2016/NGO/1, 2; Stephan Dahlgren and Roxana Stere, *The Protection of Children from Illicit Drugs: A Minimum Human Rights Standard* (Fri Förlag, World Federation Against Drugs 2012).

[58] Constitutional Court of Hungary, Decision 54/2004 (XII. 13.) AB, 2004.

[59] Takahashi (n 38) 63.

[60] ECOSOC, 'Implementation of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem' (6 February 2018) UN Doc E/CN.7/2018/L.2.

[61] See, for example, Dresler and Marks (n 4); Rangita De Silva De Alwis and Richard Daynard, 'Reconceptualizing Human Rights to Challenge Tobacco' (2009) 17 Michigan State Journal of International Law 291; Oscar A Cabrera and Alejandro Madrazo, 'Human Rights as a Tool for Tobacco Control in Latin America' (2010) 52

ent from most of the human rights literature in drug control. The difference is explicable, perhaps, in that both fields are responding to differing challenges from their respective regulatory environments – punitive suppression on the one hand, and unregulated commercial promotion on the other. But as these regulatory environments change, so too must the human rights focus. Ideally each process should learn from the other. To be sure, there is still far too little work on the human rights challenges posed by post-prohibition scenarios for cannabis. Similarly, lessons are there to be learned from the excesses of responses to drugs.

The tobacco control literature, however, tends to lean more towards the positions of those that seek to insulate the drug control system from human rights critique. We see this, for example, in the mirroring of the child's right to a drug free and a tobacco free environment, which adopt similar approaches[62] in the questioning of autonomy due to addiction[63] and in the priority given to non-smokers' rights. The attention to non-smokers' rights, of course, is an inevitable response to the corporate capture of 'smokers' rights'. But 'a right to smoke' is not the issue that we would raise, in the same way that the human rights and drugs literature does not focus on a 'right to use drugs'. Rather, the issue is the potential effects of certain interventions that receive insufficient human rights scrutiny and that require a more nuanced approach than smoker versus non-smoker. For example, according to the Centers for Disease Control and Prevention in the US, higher smoking prevalence is evident among 'multiracial persons and American Indian/Alaska Natives … live below the federal poverty level … are insured through Medicaid or are uninsured' or people with

Salud Publica de Mexico s288; Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285; Richard A Daynard, 'Allying Tobacco Control with Human Rights: Invited Commentary' (2012) 21 Tobacco Control 213; Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'A Human Rights-Based Approach to Tobacco' (2012) 21 Tobacco Control 208.

[62] Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of the Children to a Tobacco Free Environment' (2018) 27 Tobacco Control 3; cf Dahlgren and Stere (n 57).

[63] Yvette van der Eijk and Gerard Porter, 'Human Rights and Ethical Considerations for a Tobacco-Free Generation' (2015) 24 Tobacco Control 238, 240 'given the addictive properties of tobacco, it can be suggested that smoking is incompatible with the notion of "liberty", as the addict is not entirely free to choose whether to continue smoking or not. Furthermore, in practice, governments do restrict liberty to protect citizens from the effects of harmful and addictive psychoactive drugs, such as opium, heroin and cocaine'.

disabilities.[64] From this perspective, we might look again at smoke-free public housing policies as an example. A rights analysis draws our attention not only to the health impacts of passive smoking, but also to the potential differential consequences of tobacco control measures for people who smoke and belong to these other intersecting categories.

Looking more to the supply chain, the influence of the 1988 Trafficking Convention on the FCTC protocol on the elimination of illicit tobacco is clear.[65] The preamble to the protocol, in fact, emphasises the importance of the Trafficking Convention and other transnational crime agreements, 'and the obligation that Parties to these Conventions have to apply, as appropriate, the relevant provisions of these Conventions to illicit trade in tobacco …'.[66] In other words, States parties are asked to use the methods of the drug control system for illicit tobacco. With this protocol (which stems from Article 15 of the FCTC), tobacco control has entered into transnational criminal law. In drug control this is where a considerable number of human rights problems have occurred. However, given the relative novelty of the protocol there remains a lack of human rights scrutiny of the policing of the illicit tobacco market and little attention to human rights safeguards in its implementation. This is precisely where much of the drugs and human rights literature sits.

With the human rights case for better tobacco control now made, it is time to focus more on the possible risks of tobacco laws and policies, whether similar to those we have seen in drug control or new to tobacco. This, in our view, is an important aspect of a human rights-based approach because while human rights can and do support better tobacco control, it must retain a critical role or it risks legitimizing policies that may carry important human rights concerns.

5. FROM REGULATION TO 'WAR ON DRUGS': A SLOW CREEP

Like tobacco, opium was once also seen as an exceptional threat. The damage it had brought about was extensive, especially in China.[67] In the US, Canada and the UK, moral panics about opium had grown, all of which paved the way

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[64] Ahmed Jamal and others, 'Current Cigarette Smoking Among Adults — United States, 2005–2014' (2015) 64 Morbidity and Mortality Weekly Report 1233.

[65] Compare parts 4 (offences) and 5 (international cooperation) of the FCTC, *Protocol to Eliminate the Illicit Trade in Tobacco Products* (WHO 2013), art 3 (offences) with the Trafficking Convention, arts 4–11 (international cooperation).

[66] FCTC (n 65).

[67] James Windle, 'How the East Influenced Drug Prohibition' (2013) 35 The International History Review 1185, 1191.

for the first international opium commission in 1909.[68] The aim was to move from an unregulated market to a vision of a society free of the 'evil' of opium, unless used for medical or scientific purposes.[69] The endgame was a universal international system for the achievement of that aim.[70] It was expected that in tightly controlling the licit market, the illicit market would die on the vine. It did the opposite and became its own exceptional threat that would ultimately dominate drug law, policy and funding.

The Single Convention was intended to consolidate a patchwork of treaties dating back to the League of Nations. It 'represented a moment when the multilateral framework shifted away from regulation and introduced a more prohibitive ethos'.[71] Indigenous, traditional and religious practices involving coca, cannabis and opium were specifically targeted for abolition.[72] As matters worsened throughout the 1960s and 1970s, in relation to both supply and demand, the gaps and problems with the Single Convention became obvious. States found themselves not knowing what to do, overwhelmed by societal changes, market forces and the consequences of their own strategies. As the criminal market grew, violence and corruption followed. To respond to these emerging threats resources were 'displaced' from health into enforcement.[73]

Drugs, of course, never went away. Instead the regime had shifted in approach and tone over the century from one of trade, market regulation and administrative measures, to punitive suppression based on existential threat.[74] In this context human rights concerns were easily side-stepped. For example, in the early 1970s, suggestions to include a ban on incitement to use drugs in a protocol amending the Single Convention had been controversial on freedom of speech grounds.[75] By the late 1980s and the Trafficking Convention, those

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[68] See generally William B McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (Routledge 2000).

[69] Philip Quincy Wright, 'The Opium Question' (1924) 18 American Journal of International Law 281.

[70] ibid; see also Neil Boister, 'The Historical Development of International Legal Measures to Suppress Illicit Drug Trafficking' (1997) 30 Comparative and International Law Journal of South Africa 1.

[71] David Bewley-Taylor and Martin Jelsma, 'Regime Change: Revisiting the 1961 Single Convention on Narcotic Drugs' (2012) 23 International Journal of Drug Policy 72, 73.

[72] Single Convention, art 49.

[73] UNODC (n 20).

[74] Lines (n 26) 68.

[75] UN, 'United Nations Conference to Consider Amendments to the Single Convention on Narcotic Drugs, 1961, Official Records, Vol II' UN Doc E/CONF.63/10/Add.l (1973).

worries were no more.[76] A broad incitement provision limiting expression was agreed via Article 3(1)(c)(iii) of that treaty, one which was intended to capture literature, movies and other artworks.[77] Moreover, while few today call for the criminalization of smokers or those possessing cigarettes (though some, including *The Lancet*, already have),[78] it is worth noting that the criminalization of personal possession of drugs only entered into international drug control law in 1988, via Article 3(2) of the same treaty. Following its adoption drug laws became more stringent at national level.[79]

The protocol on illicit tobacco reflects a similar development in the later attention to criminal law from a more regulatory beginning. With stronger controls and as the licit market is squeezed, the illicit tobacco market will change, albeit unpredictably.[80] We do not know the future trajectory of international or national tobacco controls to respond to these changes. It is therefore critical to recall that the drug control system was not originally intended to produce the system of 'punitive suppression' that ultimately came about.[81] International drug control is over 100 years old. The 'war on drugs' is far more recent.

6. HUMAN RIGHTS AND TOBACCO CONTROL: COMPLEMENTARITIES, TENSIONS AND CONFLICTS

Elsewhere, developing theories of treaty interactions, we and colleagues have written about three forms of interaction between the international drug control treaties and human rights law: complementarities, tensions and conflicts.[82] We

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[76] UN, 'United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November–20 December 1988, Official Records, Vol. II' UN Doc E/CONF.82/16/Add.1 (1991), in which freedom of speech concerns are absent.

[77] UN, 'Commentary on the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' UN Doc E/CN.7/590 (1998) [3.72].

[78] Editorial, 'How Do You Sleep at Night, Mr Blair?' (2003) 362 Lancet 1865 'Calling for a ban on smoking in public places is a start, but it is missing the point … If tobacco were an illegal substance, possession of cigarettes would become a crime, and the number of smokers would drastically fall'.

[79] See Lines and Gallahue (n 50).

[80] Peter Reuter, 'Can Tobacco Control Endgame Analysis Learn Anything from the US Experience with Illegal Drugs?' (2013) 22 Tobacco Control i49.

[81] John Collins, 'Regulations and Prohibitions: Anglo-American Relations in Drug Control 1939–1964' (PhD Thesis, London School of Economics 2015).

[82] See also Lines (n 26); and Damon Barrett, *Drug Policy and Human Rights in Europe: Managing Tensions, Maximising Complementarities* (Council of Europe 2018).

offer this basic framework here as a means to foreground the more diverse forms of interaction between tobacco control and human rights.

By our definition, a complementarity is where, on their face, the goals or objectives of human rights and drug control law converge. An example is access to essential medicines under international human rights law,[83] and access to essential controlled medicines under the international drug control system.[84] Human rights obligations may add further obligations, which strengthen those under the UN drugs conventions, or they may necessitate alternative methods to achieve the shared goal. Complementarities have been the primary focus of tobacco and human rights to date, including the use of human rights mechanisms for advocacy and the use of human rights law in tobacco litigation and to bolster specific interventions.[85]

A tension, on the other hand, is a situation where drug laws and policies, or the means adopted for achieving their aims, create the risk of breaching human rights. It is about the translation of a goal or law into action – whether this be from the international to the national or from the national to the local. It is here that the majority of human rights problems in drug control reside and where the majority of human rights problems in tobacco control could emerge. Harm reduction fits into this category, given its strong support under the right to health, alongside its grating against the strategic vision of the drugs conventions.[86] It remains a flashpoint of drug policy diplomacy[87] and is no less controversial in tobacco control, even if harm reduction is referred to in the FCTC.[88]

The preambular provision in the FCTC protocol, moreover, calls on States parties to apply the methods of the Trafficking Convention to illicit tobacco, as we have seen. The extensive tensions between that treaty and human rights are thereby engaged by this association. For example, should buyers of illicit tobacco be criminalized as Article 3(2) of the Trafficking Convention would suggest? Should tobacco crops be forcibly eradicated, as Article 14 requires?

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[83] CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art.12)' (11 August 2000) UN Doc E/C.12/2000/4 [43(d)].

[84] INCB, *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes* (UN Publication 2016).

[85] UNODC (n 20) 11.

[86] Damon Barrett and Patrick Gallahue, 'Harm Reduction and Human Rights' (2011) 16 Interights Bulletin 188.

[87] David R Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge University Press 2012) 100–151.

[88] See FCTC, art 1(d); Benjamin Mason Meier and Donna Shelley 'The Fourth Pillar of the Framework Convention on Tobacco Control: Harm Reduction and the International Human Right to Health' (2006) 121 Public Health Reports 494; see also Lukasz Gruszczynski (ed), *The Regulation of E-cigarettes: International, European and National Challenges* (Edward Elgar Publishing 2019).

Is there a 'right' to such measures because human rights and tobacco control are linked, or does human rights operate as an important check on State action in this regard?

A conflict, meanwhile, is where human rights and drug policy cannot be reconciled unless the right in question gives way entirely. An example is the ban on the traditional uses of coca in the Single Convention on Narcotic Drugs set against indigenous peoples' rights.[89] Arguably, the folding of traditional forms of tobacco use into endgame strategies could become a similar conflict when set against indigenous and cultural rights.[90] Clearly this can be resolved. One way is to separate traditional and indigenous uses from general anti-smoking or endgame strategies. Another is to disregard the cultural and indigenous rights relevant to those strategies. The latter was the drug control option.

The challenge, then, is to maximize complementarities, manage tensions so that human rights problems are avoided and mitigated, and resolve conflicts in favour of human rights. In this regard, the boundaries between the three are porous. For example, an apparent complementarity may become a tension. Drug dependence treatment is a good example, where access to treatment appears to be a shared goal of drug control and human rights, yet abuses can take place in how drug treatment is delivered. Similarly, controlled medicines may be regulated in such a way that creates tension with human rights law even if the drugs conventions are adhered to. Conversely, a tension may be resolved through a rights-based analysis to become a complementarity.

The above framework is premised on priority to human rights in any interaction between it and another regime. Leaving aside for now that some may disagree with that priority, a problem arises when the relevant policy or law that intersects with human rights is itself classified as a human right. When this is done, there is no theoretical or principled hierarchy to human rights over policy. Policy and rights become the same thing.[91] In this way a rights-based objection to a policy can be responded to by the fact that the policy is a right. This was precisely the outcome of the Hungarian Constitutional Court case noted above. A human rights-based objection to the stringency of Hungarian drug laws was rejected by associating that stringency with Article 33 of the CRC. Thus, while there are always tensions between rights, some caution might be warranted, from a human rights perspective, in too readily seeing tobacco control per se as a human right. While good tobacco control advances

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[89] Sven Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing' (2013) 5 Goettingen Journal of International Law 287.

[90] For example, Beaglehole and others (n 11).

[91] Martti Koskenniemi, 'The Effect of Rights on Political Culture' in Martti Koskenniemi (ed), *The Politics of International Law* (Hart Publishing 2011) 133–152.

the right to health, the two should remain separate to retain the critical lens that human rights law should provide. The framework we have briefly set out allows for a critical perspective on the relationship, bringing potential tensions and conflicts to the forefront with equal weight to the many demonstrated complementarities.

7. CONCLUSION

Eric Garner was choked to death by police in 2014. He had been suspected of selling illicit cigarettes. The killing galvanized the Black Lives Matter movement and placed police violence at the forefront of public attention. But the cigarettes barely featured in the coverage. Is this a tobacco control problem? We might instinctively say no if our gaze is elsewhere in tobacco control. But experiences with other drugs tell us that it is. It is not that tobacco laws or policies mandated this abuse. It is that such laws and policies can increase the vulnerabilities of people already on the margins and provide the pretext for abuse. As the *New York Times* put it, '[t]his was not a chance meeting on the street. It was a product of a police strategy to crack down on the sort of disorder that, to the police, Mr. Garner represented'.[92] That line is old news to drug policy reformers in the US.

There are other examples that should give cause for concern. The Kenyan government has taken a tough line on public smoking. In Nairobi, public smoking huts are intentionally unpleasant and shameful places. As *The Guardian* reported of one such hut, '[t]he [smoking] shed is vile, but few dare smoke even on the pavement outside in the cleaner air in the knowledge that the plain clothed official public health enforcers will be circling'.[93] If caught they face a crippling fine. Those possessing cigarettes can face prison in Malaysia.[94] Bhutan walked back its stringent penalties for tobacco possession, which many saw as unjust.[95] Should possession of tobacco ever be a crime?

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[92] Al Baker, J David Goodman and Benjamin Mueller, 'Beyond the Chokehold: The Path to Eric Garner's Death' (*New York Times*, 13 June 2015) https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html, accessed 1 May 2019. See also Calvin John Smiley and David Fakunle, 'From "Brute" to "Thug": The Demonization and Criminalization of Unarmed Black Males in America' (2016) 26 Journal of Human Behaviour in the Social Environment 350, on the role of the cigarette sales in depictions of Garner in the media.

[93] Sarah Boseley, 'Inside the Murky World of Nairobi's Smoking Zones' (*The Guardian*, 12 July 2017) https://www.theguardian.com/world/2017/jul/12/nairobi-kenya-smoking-zones-cigarette-crackdown, accessed 1 May 2019.

[94] The Control of Tobacco Product Regulations 2004, part IV.

[95] Tobacco Control (Amendment) Act of Bhutan 2014; Kencho Wangdi, 'Do Bhutan's Anti-Smoking Laws Go Too Far?' (*Time*, 12 April 2011) http://content.time.com/time/world/article/0,8599,2057774,00.html, accessed 1 May 2019.

Should buyers of illicit cigarettes be criminalized? Should we criminalize incitement to smoke? Beyond criminal law, should we force people into tobacco treatment who refuse to quit? Should we strip search in schools or use sniffer dogs and random nicotine testing? Should smoking in the home be banned? Should we register smokers? Should we deny people employment or public housing because they smoke? Should we test benefits claimants? Should people growing illicit tobacco have their crops sprayed or manually destroyed? Should traditional uses of tobacco be treated the same way as cigarettes? All of these happen in relation to illicit drugs. While some are more realistic than others in relation to tobacco, some are happening already or have been called for. We do not claim that the same human rights trajectory we have witnessed in drug control is inevitable for tobacco. On the contrary, our main point is that it is not. But these questions are important to foreground in a human rights-based approach to tobacco. Avoiding a similar path that the drug control system has taken requires actively predicting potential human rights risks and giving them equal weight to the human rights case for stronger tobacco control.

12. The role of IEL dispute settlement bodies in reinforcing the sovereign rights of States in the field of tobacco control[1]

Lukasz Gruszczynski

1. INTRODUCTION

International economic law (IEL)[2] is frequently perceived as establishing significant constraints on the regulatory freedom enjoyed by States. It is argued that IEL rules, which promote the neoliberal vision of the international order, may force countries to abandon certain societally important policies if they collide with the free trade principles or legal guarantees provided to foreign investors, or at least that they can create, due to their general formulation and inconsistent judicial practice, a regulatory chilling effect.[3] This tension is particularly troublesome when it comes to national policies that aim for the protection of public health. Such policies are not only important because of the values that they protect, but also because they relate to an area that has

[1] This research was financed by the National Science Centre (Poland) pursuant to grant number UMO-2018/31/B/HS5/03556.

[2] IEL is a term that encompasses international rules relating to international trade, investment, economic development, financial matters, economic institutions and regional economic integration. This chapter, when referring to IEL, means international trade and investment law, two areas that are particularly relevant for tobacco control policies. The chapter also includes in its analysis the EU case law relating to tobacco control measures. Although it may be disputed whether EU law (or at least its internal market section) is a part of IEL, such an approach seems to be justified by the existing similarities between judicial practice of the EU Court and its (general) IEL counterparts.

[3] See generally Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1. See also Section 2 of this chapter.

historically been regarded as constituting the core of sovereign prerogatives of States.[4]

Tobacco control measures are specifically important in this context. They are relatively frequently challenged, either directly or indirectly, under IEL rules by multinational tobacco companies (MTCs). At the same time, the global tobacco epidemic is widely considered one of the biggest challenges of the contemporary world. As of the time of writing, smoking is responsible for more than 5 million deaths per year, and this figure is expected to rise to 8 million by 2030.[5] According to some estimates, cited by the World Health Organization (WHO),[6] if governments fail to implement comprehensive and effective tobacco control measures nearly 1 billion people will die of tobacco-related diseases this century.[7]

This chapter critically analyses the role that IEL dispute settlement bodies (DSBs) play in the field of tobacco control. In particular, it looks at the recent case law of the World Trade Organization (WTO) and ad hoc investment tribunals that have dealt with the national tobacco control measures. The chapter seeks to demonstrate that IEL DSBs recognize the importance of public health policies relating to tobacco control, and that through their recent decisions they have actually broadened, rather than undermined, the regulatory space available to States. If the specific measure is found illegal in the course of the proceeding, this is due to its discriminatory design and not because of any specific IEL hierarchy of values (for example trade and investment protection above public health).

This chapter proceeds as follows. Section 2 explains why IEL is often considered an obstacle to the implementation of national tobacco control policies. Section 3 analyses how this perceived (or actual) obstacle may be addressed. The chapter first concentrates on the international human rights framework, with the right to health as a possible defence available to States in IEL disputes. It concludes that in IEL practice arguments based on human rights are rarely used and other solutions are employed to guarantee sufficient regulatory space for countries. On the basis of the recent decisions in tobacco control-related IEL disputes, the chapter identifies and discusses four specific

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[4] See, for example, Lawrence O Gostin, 'A Theory and Definition of Public Health Law' (2007) 10 Journal of Health Care Law & Policy 1, 4.

[5] Colin D Mathers and Dejan Loncar, 'Projections of Global Mortality and Burden of Disease from 2002 to 2030' (2006) 3 PLoS Medicine e442.

[6] WHO, *Report on the Global Tobacco Epidemic 2008. The MPOWER package* (WHO 2008) 14.

[7] Richard Peto and Alan D Lopez, 'Future Worldwide Health Effects of Current Smoking Patterns' in C Everett Koop, Clarence E Pearson and M Roy Schwarz (eds), *Critical Issues in Global Health* (Jossey-Bass 2001) 154–161.

strategies that are used by DSBs in their adjudicatory practice. The last section draws some conclusions.

2. IEL AS A POTENTIAL OBSTACLE FOR NATIONAL TOBACCO CONTROL POLICIES

Some public health specialists see IEL as a potential obstacle that may prevent countries in certain situations from implementing effective and comprehensive tobacco control policies. In particular, it is argued that the IEL system may sometimes be biased against non-economic regulatory objectives and promote the free trade agenda and interests of multinational companies over other socially important values, such as protection of human health.[8] There are different arguments which are advanced in this context. Some scholars argue that WTO panel members are embedded in specific trade culture and may place a greater emphasis on economic interests rather than public health (for example because of their better understanding of economic concerns).[9] This argument is also frequently made with respect to the investor–State dispute settlement system, which is simultaneously regarded as non-transparent and is considered to be dominated by a small circle of business-orientated arbitrators.[10]

Some authors also claim that the flexibilities provided by IEL law, in the form of exception clauses (i.e. clauses that allow for justification of otherwise illegal measures) or specific conditions used by panels and investment tribunals in various legal tests (for example in order to establish indirect expropriation), have been construed too narrowly to guarantee necessary freedom for States adopting tobacco control measures. For instance, Ziegler has argued that the least trade-restrictive alternative requirement provided by WTO law as part of its general exception under the General Agreement on Tariffs and Trade or the necessity test under the Agreement on Technical Barriers to Trade (TBT Agreement) is overly restrictive as panels do not consider feasibility – from a political and financial point of view – of possible alternative options.[11]

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[8] For example, Ellen Ruth Shaffer, JE Brenner and TP Houston, 'International Trade Agreements: A Threat to Tobacco Control Policy' (2005) 14 Tobacco Control 19. See also the sources cited in notes 9–17 below.

[9] Jonathan Liberman and Andrew Mitchell, 'In Search of Coherence Between Trade and Health: Inter-Institutional Opportunities' (2010) 25 Maryland Journal of International Law 143.

[10] Matthew Rimmer, 'Plain Packaging for the Pacific Rim – Tobacco Control and the Trans-Pacific Partnership' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Publishing 2013).

[11] Donald W Ziegler, 'International Trade Agreements Challenge Tobacco and Alcohol Control Policies' (2006) 25 Drug and Alcohol Review 567.

Others point to the correlation between liberalization of international trade and increased consumption of tobacco products in developing countries. Chaloupka and Nair have suggested that higher tariffs are frequently responsible for higher consumer prices and associated level of smoking prevalence.[12] Closed markets may also facilitate the controlling tasks of the governments, preventing marketing and pricing competition that normally accompany trade liberalization.[13] While in most cases, those concerns may be addressed by internal non-discriminatory measures, developing countries often lack the necessary regulatory capacity to undertake such tasks.

There are also experts who believe that IEL rules may produce regulatory chilling effects. Crosbie and Thompson have argued that in certain situations States may choose not to enact tobacco control legislation out of concern that the proposed laws would conflict with their obligations under international trade and investment law (particularly if they are threatened with potential legal challenges by MTCs).[14] There are different factors which are relevant in this context. First, IEL rules are not only complex, but also formulated in general language (sometimes deliberately to secure the necessary consensus of parties negotiating a particular treaty). This may increase difficulties for States to precisely assess compatibility of planned tobacco control measures with their international trade and investment obligations. Second, their task is not made easier by existing case law, which remains contradictory with respect to certain important issues.[15] This problem seems to be more compelling for international investment law because of the decentralized character of the system and lack of appellate structures.[16] Third, some authors stress that since innovation and experimentation in tobacco control have been essential for developing effective policies, the potential uncertainties may be even higher in this specific field. Some tobacco control policies, such as plain packaging laws,

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[12] Frank J Chaloupka and Rima Nair, 'International Issues in the Supply of Tobacco: Recent Changes and Implications for Alcohol' (2000) 95 Addiction 477. See also World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* (World Bank 1999).

[13] Ira S Shapiro, 'Treating Cigarettes as an Exception to the Trade Rules' (2002) 22 SAIS Review of International Affairs 87.

[14] For a recent example of this phenomenon see Eric Crosbie and George Thomson, 'Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand' (2018) 131 New Zealand Medical Journal 25.

[15] Cf Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.

[16] See generally Lukasz Gruszczynski, 'Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect' (2014) 2 European Journal of Risk Regulation 160.

have an experimental character and might not be able to meet the high evidentiary standards that are required from science-based measures.[17] Fourth, the costs of IEL proceedings are prohibitively high for many States, particularly smaller and less developed economies.[18] For example, the costs of defending the Australian plain packaging law in the investment dispute initiated by Philip Morris under a bilateral investment treaty with Hong Kong amounted to USD 28.8 million.[19] Considering the investment tribunal only looked at the admissibility of the claim (whether the case could have been considered by the tribunal), one may expect much higher expenses if the substance of the claim (actual violation of the provision of the relevant bilateral investment treaty between Australia and Hong Kong) would also have been examined. Of course, those costs may be multiplied if a challenge is successful.[20]

While some of the above concerns are regarded by many IEL experts as overstated and insufficiently empirically substantiated,[21] there seems to be agreement among scholars that IEL may indeed pose certain challenges for the countries (particularly less developed ones) that decide to adopt ambitious tobacco control measures, notably because of its regulatory chilling effect.

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[17] Cynthia Callard, Hatai Chitanondh and Robert Weissman, 'Why Trade and Investment Liberalization May Threaten Effective Tobacco Control Efforts' (2001) 10 Tobacco Control 68.

[18] One way of responding to this problem was the creation of a special fund by Bloomberg Philanthropies and the Bill & Melinda Gates Foundation that aims at assisting smaller countries in defending their tobacco control laws. See Kate Kelland, 'Gates and Bloomberg create $4 million fund to fight Big Tobacco' (*Reuters*, 18 March 2015) https://reut.rs/2wh8KZq, accessed 23 November 2018.

[19] Rex Patrick, '39 Million Taxpayer Dollars Up in Smoke: Government forced to release Philip Morris Tobacco Plain Packaging ISDS Legal Costs' (*Rex Patrick*, 2 July 2018) https://bit.ly/2PEmeXg, accessed 2 May 2019. See also Jarrod Hepburn, 'Final cost details are released in Philip Morris v Australia following request by IAReporter', https://bit.ly/2OI0zxw, accessed 2 May 2019.

[20] The largest award in the history of international investment arbitration (nearly USD 50 billion) was awarded in the dispute *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227.

[21] See, for example, Jeffrey Drope and Raphael Lencucha, 'Tobacco Control and Trade Policy: Proactive Strategies for Integrating Policy Norms' (2013) 34 Journal of Public Health Policy 153.

3. ADDRESSING THE CHALLENGE

3.1 Using Human Rights as a Possible Defence for National Tobacco Control Measures

Protection of public health is not only a sovereign prerogative of States, it is also informed by their international obligations. In particular, a number of human rights treaties identify the right to health as one of the most basic human rights. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires State Parties to 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (Article 12). The Committee on Economic, Social and Cultural Rights (CESCR) – an expert body that monitors implementation of the ICESCR – noted authoritatively in a General Comment that the failure of a State to discourage production, marketing and consumption of tobacco (to the extent of available resources) constitutes a violation of Article 12.[22] Similarly, the Convention on the Rights of the Child (CRC) recognizes 'the right of the child to the enjoyment of the highest attainable standard of health' (Article 24). This right imposes both positive and negative obligations on States to take certain actions and refrain from taking others.

One should also mention here the Framework Convention of Tobacco Control (FCTC or Convention), an international treaty specifically aimed at 'protect[ing] present and future generations from the devastating health, social, environmental and economic consequences of tobacco use and exposure to tobacco smoke' (Article 3).[23] This objective is achieved by requiring the FCTC Parties to adopt various tobacco control measures (for example requirements for packaging and labelling of tobacco products and restrictions on sales to and by minors). The general FCTC obligations are further developed and elucidated through technical guidelines, which are adopted from time to time by its Conference of the Parties. Although the guidelines are not legally binding,[24] in practice they are followed by the FCTC Parties.

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[22] CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4 [51].

[23] The WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC) is almost universally accepted (181 Parties). The full list of the parties is available at 'WHO Framework Convention on Tobacco Control' (*UN Treaty Collection*) http://bit.ly/2nxt0k1, accessed 2 May 2019. Except for the European Union, all the parties are States.

[24] Note that the International Law Commission in its Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties held that some guidelines could be regarded as subsequent agreements under the

The operational text of the Convention does not refer to human rights. Such references are only included in the preamble, which recalls States' obligations with respect to the right to health and related rights included in the ICESCR, the CRC and the Convention on the Elimination of All Forms of Discrimination against Women. While this formulation may have an impact on the interpretation of the FCTC provisions, it does not indicate that the Convention is a human rights treaty. The doctrine and practice appear to be divided on this issue. Some reject this idea, claiming that these are two separate systems which are mutually reinforcing;[25] others see the FCTC as a human rights treaty.[26] Some national courts have actually shared the second view. For example, the Constitutional Court of Peru recognized the Convention as a human rights treaty protecting the right to health. In the context of the specific dispute, it was an important qualification as it affected the balancing process between different rights (the right to health versus freedom to conduct a business) under the Peruvian Constitution.[27] At the international level, the investment tribunal in *Philip Morris v Uruguay* noted that the 'FCTC is one of the international conventions to which Uruguay is a party guaranteeing the human rights to health'[28] and added that the contested measures were taken in fulfilment of Uruguay's international obligations.[29] At the same time, the tribunal did not explain how this classification influenced (if it actually did) its reasoning and specific legal findings. Whatever the status of the FCTC, from

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Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.3(c), which must be considered in the interpretation of obligations of the FCTC. See UNGA, 'Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' International Law Commission 66th Session (26 March 2014) UN Doc A/CN.4/671 [87].

[25] For example, Oscar A Cabrera and Lawrence O Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems' (2011) 7 International Journal of Law in Context 285, 292; see also Allyn Taylor, 'Trade, Human Rights and the WHO Framework Convention on Tobacco Control: Just What the Doctor Ordered?' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press 2005) 329 (noting 'absence …of any meaningful discourse on the intersection between human rights and public health during the course of [the Convention] negotiations').

[26] For example, Carolyn Dresler, Harry Lando, Nick Schneider and Hitakshi Sehgal, 'Human Rights-based Approach to Tobacco Control' (2012) 21 Tobacco Control 208.

[27] Constitutional Court of Peru, *Claim of unconstitutionality filed by over 5,000 citizens against Article 3 of Law No. 28705* (19 July 2011) Docket 00032-2010-PI/TC [67].

[28] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (8 July 2016) ICSID Case No ARB/10/7, Award [304].

[29] ibid [306].

the point of view of IEL DSBs, it simply constitutes a treaty that is extraneous to a legal framework in which a particular DSB operates.

One would intuitively expect that human rights treaties and/or the FCTC could provide a legal shield for States taking tobacco control measures, protecting them against challenges under IEL rules. The reality, however, is much more complex. Although IEL DSBs do not generally perceive their respective legal frameworks (WTO law or investment law, for example) as self-contained regimes,[30] they have been cautious in using extraneous legal instruments, including human rights treaties. Neither WTO DSBs nor investment tribunals have ever relied on *lex specialis* or *lex posterior* maxims to override specific IEL obligations with other external treaty rules.[31] For example, the Appellate Body explicitly rejected *inter se* modifications (that is agreements that modify multilateral treaties between certain of the parties only) to WTO obligations. In this context, it observed that 'WTO agreements contain specific provisions addressing amendments, waivers … which prevail over the general provisions of the Vienna Convention, such as Article 41'.[32] On those rare occasions when an extraneous treaty finds its way to IEL, this is done indirectly, for example through evolutionary interpretation of IEL norms[33] or considering those external norms as evidence of facts. The review of the recent tobacco control-related IEL disputes confirms that general assessment. Except for a marginal note in the *Philip Morris – Uruguay* award, none of the decisions refer to human rights treaties or the FCTC as a source of international obligations that could modify relevant provisions of the applicable legal framework.

There are different reasons which stand behind this conservative approach. These range from the limited mandate of IEL DSBs (for example to decide disputes arising under the WTO covered agreements) to treaty limitations on applicable law or certain legal restraints expressed by the IEL DSBs, resulting from their conception of IEL dispute settlement objectives (adjudicating disputes within narrowly defined legal boundaries).

The above does not mean, however, that IEL DSBs have failed to recognize the importance of the protection of human health, particularly from the risks

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[30] As famously observed by the Appellate Body, WTO law 'is not to be read in clinical isolation from public international law'. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (20 May 1996) WT/DS2/AB/R, 17.

[31] Such an approach has been postulated in the literature. See, for example, Hadii M Mamudu, Ross Hammond and Stanton A Glantz, 'International Trade versus Public Health During the FCTC Negotiations, 1999–2003' (2011) 20 Tobacco Control e3.

[32] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products* (31 July 2015) WT/DS457/AB/R/Add.1 [5.112].

[33] See, for example, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998) WT/DS58/AB/R [130].

posed by tobacco consumption. On the contrary, as the subsequent section shows, they have in practice used a number of different legal strategies to ensure that States enjoy necessary regulatory freedom in this policy space.

3.2 Alternative Strategies Used in the Assessment of Tobacco Control Measures

Although IEL obligations may create certain challenges for States implementing tobacco control measures, the recent IEL judgments show that DSBs can actually strengthen, rather than undermine, the position of States in this policy area. Based on this jurisprudence, one can identify at least four strategies taken by the DSBs that are relevant in this context: (a) recognizing the sovereign right of States to regulate in the area of tobacco control; (b) clarifying the scope of IEL obligations in a manner sympathetic to public health; (c) accepting the limited scope of DSBs' review in health-related disputes that involve complex scientific and political questions; and (d) heavy reliance on the FCTC and its guidelines as evidence of fact in IEL disputes. The subsequent four subsections will illustrate how those strategies were applied in specific IEL disputes. It should be noted in this context that some tribunals have only used selected strategies, while others have relied on the entire available repertoire.

3.2.1 Recognizing the sovereign right of States to regulate in the area of tobacco control

Under public international law States enjoy a number of prerogatives that emerge from the mere fact of being sovereign entities.[34] The right to regulate (that is to adopt binding legislative and administrative measures relating to a State's internal affairs), particularly in the field of public health, is one of those basic attributes of sovereignty. This right may, however, be constrained by international rules. Countries can agree to comply with certain international obligations included in treaties (for example WTO agreements, bilateral investment treaties or preferential trade agreements), thus restricting the scope of their regulatory freedom. Of course, recognition of the sovereign right of States to regulate in the area of tobacco control, which is granted by IEL DSBs, is only of declaratory character as the right already exists as a matter of State sovereignty. In other words, the right to regulate is not granted by international treaties, but it may be constrained by those instruments. Nevertheless, such general reaffirmations are important as they highlight a need for balancing

[34] See generally Robert Jennings, 'Sovereignty and International Law' in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth De Vos, and John Dugard (eds), *State, Sovereignty and International Law* (Oxford University Press 2012).

States' rights and obligations and provide DSBs with broad interpretive guidance for the future.

The investment tribunal in *Philip Morris v Uruguay* was explicit in stating that the relevant bilateral investment treaty did not prevent Uruguay 'in the exercise of its sovereign powers, from regulating harmful products in order to protect public health'.[35] According to the tribunal, bona fide exercise of States' police powers (with the public health protection being one of them) was not compensable even if it caused economic damage to the investor because it could not have been regarded as a form of indirect expropriation.[36] The tribunal dealt with the claims under the fair and equitable treatment (FET) clause in a similar fashion. In this context, it observed that the 'FET standard do[es] not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances'.[37]

Along similar lines, the WTO Appellate Body observed in *US – Clove Cigarettes* that

> [it does] not consider that the TBT Agreement or any of the covered agreements is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular, through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers.[38]

As a general rule WTO Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in a manner consistent with the TBT Agreement. This was also confirmed more recently by the WTO panel in *Australia – Plain Packaging*.[39] The case concerned the Australian law which requires the use of uniform packaging for all tobacco products, specifying its colour, shape and size, as well as layout. It also prohibits placing on the packaging of tobacco products any trademarks or other marks, except for the brand name, the name of the manufacturer and the specification of the product variant (but again only in a specific font). The

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[35] *Philip Morris v Uruguay* (n 28) [288].

[36] ibid [295]. The tribunal referred in this context to a number of previous investment awards such as *Tecmed v Mexico*, *Saluka v Czech Republic* and *Chemtura v Canada*.

[37] ibid [422].

[38] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (24 April 2012) WT/DS406/AB/R [235].

[39] Formally speaking, there were four panels that issued four identical reports in the form of one document. However, for simplicity all four panels are collectively referred to here as 'the panel'; the same applies to the reports.

panel stressed in its report that specific provisions of the TBT Agreement had to be interpreted 'in light of its preambular objective that "no country should be prevented from taking measures necessary … for the protection of human … life or health"'.[40] The same approach was taken by the same panel under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), where it was highlighted that provisions of the agreement were to be interpreted in the context of its objectives (Article 7) and principles (Article 8). According to the panel, both provisions required an interpretation that maintains the overall balance between the protection of private rights and the sovereign rights of States to pursue their legitimate regulatory goals (including protection of public health).[41] Those findings are generally compatible with the previous WTO jurisprudence.

3.2.2 Clarifying the scope of specific IEL obligations in a manner sympathetic to public health

While the most important aspect of the first strategy is a reaffirmation of the broad regulatory powers enjoyed by States, the second strategy centres around the clarification of specific IEL provisions and quasi-precedential assessment of individual tobacco control measures.

Clarifying the scope of generally formulated IEL obligations is an important function performed by IEL DSBs. Although their decisions always concern specific disputes between individual parties and cannot be regarded as precedents, in practice they strongly influence the subsequent IEL jurisprudence. While this is particularly visible in the context of the case law of the WTO Appellate Body, awards of investment tribunals, despite the decentralized nature of the investment protection system, can also have a quasi-precedential character.[42] Consequently, a decision of an IEL DSB rejecting a claim against a specific tobacco control measure can give the green light for other States that contemplate a similar policy, sending a strong message about the compatibility of a particular type of measure with relevant IEL obligations. This obviously reduces the likelihood of regulatory chill.

In the above-mentioned case of *Philip Morris v Uruguay* the arbitration tribunal found that neither the single presentation requirement (that is prohibition of the use of a single brand for different variants of tobacco products) nor the

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[40] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R [7.104].

[41] ibid [7.2403]–[7.2404].

[42] Cf, for example, Gabrielle Kauffmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse' (2007) 23 Arbitration International 357.

increased size of graphic health warnings (80 per cent of the front and back of cigarette packages) constituted a form of indirect expropriation of the claimant with respect to its intellectual property rights and associated goodwill. The tribunal observed that in the case of indirect expropriation one had to consider the investment in its entirety rather than examining its components separately (and the claimant business as a whole remained profitable).[43] Similarly, those measures did not violate the FET clause because they were not arbitrary. In particular, the tribunal found that measures were based on sufficient scientific evidence – as reflected in the FCTC – and adopted via due process.[44] There was also no violation of the legitimate expectations requirement (being a part of the FET clause) as only specific undertakings or commitments with respect to future laws made by a host State could have created such expectations. According to the tribunal, legislation of general application, existing at the moment of investment, was not sufficient in this regard.[45] At the same time, the tribunal did not believe that the measures altered the legal framework beyond the 'acceptable margin of change'.[46]

In the *Australia – Plain Packaging* dispute the panel held, among other things, that the contested measure was not more trade restrictive than necessary to achieve the Australian regulatory objective and as a consequence it did not violate Article 2.2 of the TBT Agreement. In particular, the panel found that despite difficulties in ascertaining the precise effects of the plain packaging law, the measure, applied within the context of a broad comprehensive strategy, was apt to contribute to the objective of reducing smoking prevalence, while none of the identified alternatives could have been perfect substitutes.[47] The panel also held that the plain packaging did not constitute unjustifiable encumbrance on the use of a trademark as prohibited by Article 20 of the TRIPS Agreement. In this context, the panel noted that 'Australia has [not] acted beyond the bounds of the latitude available to it under Article 20 to choose an appropriate policy intervention to address its public health concerns in relation to tobacco products'.[48] Last but not least, the panel rejected the claim that various provisions of the TRIPS Agreement that relate to the registration of trademarks also implicitly provide for a protection of the right to use a trademark. In this context, the panel found that trademark rights under the agreement have a negative dimension (to prevent other people from using

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[43] *Philip Morris v Uruguay* (n 28) [276], [286]. See also remarks in section 3.2.1 above on States' exercise of their police powers.

[44] *Philip Morris v Uruguay* (n 28) [410], [420].

[45] ibid [426].

[46] ibid [423].

[47] Panel Report, *Australia – Plain Packaging* (n 40) [7.1043], [7.1726]–[7.1728].

[48] ibid [7.2604].

the same trademark).[49] Overall, the panel report indicates that public health considerations have precedence over trade concerns.

The clarifying function of IEL DSBs may also be important in those cases where the regulating State ultimately loses the case. For example, in *US – Clove Cigarettes*, the US measure prohibiting the sale of flavoured cigarettes (other than menthols) was found to be incompatible with the requirement of the TBT Agreement. Nonetheless, the panel and the Appellate Body clearly stated that the problematic aspect related to its discriminatory character, that is treating domestic products (menthol cigarettes) differently from foreign ones (clove cigarettes), and not to its restrictive effect on the international trade of tobacco products. The reports, therefore, clearly confirm that non-discriminatory measures targeting flavouring ingredients in tobacco products are permissible under WTO law.

3.2.3 Accepting the limited scope of IEL DSBs' review in health-related disputes

Sometimes IEL DSBs highlight the limited scope of their review in examining complex health- and environment-related measures and take a rather deferential approach. This means that DSBs defer to certain factual and scientific determinations made at the national level by a defendant/host State, assessing their rationality but not correctness. They do not enquire whether those determinations represent the best available (scientific) knowledge at the specific point of time.

Probably the clearest example of this approach can be found in the *Philip Morris v Uruguay* award. The tribunal particularly observed that

> [t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors'.[50]

This general statement was subsequently reflected in the character of the examination undertaken by the tribunal, which concentrated on the rationality of the contested measures. For example, the tribunal was not interested in the correctness of the science standing behind the measures but rather in the reasonableness of the approach taken by Uruguay, implicitly recognizing its limited epistemic competence in scientific matters: 'the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects

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[49] For example, ibid [7.1908].
[50] *Philip Morris v Uruguay* (n 28) [399].

that were intended by the State, what matters being rather whether it was a "reasonable" measure when it was adopted'.[51] Similarly, when examining the FET clause, it made clear that deferential examination was required when assessing the choice of specific measures made by a host State: 'the fair and equitable treatment standard is not a justiciable standard of good government'.[52]

A similar approach (albeit more intrusive) was taken in *Australia – Plain Packaging*. Despite the fact that the WTO panel was not entirely clear on the applicable standard of review,[53] and did engage (at least on its face) with the scientific evidence submitted by the parties, in practice it reminded relatively deferential and only analysed whether the measure was rational, proper, defensible and warranted. In this context, the panel particularly observed that '[i]n assessing the probative value of … evidence, [its] role [was] not to make scientific determinations or otherwise seek to resolve scientific debates'.[54] This meant that the panel was interested in the formal criteria such as reputation of institutions behind the specific scientific reports, objectivity of evidence and methodological rigour.[55] This stance closely corresponds to the general WTO practice.[56] For example in the *EC – Asbestos* dispute, the panel refused to act as an arbiter of the opinions expressed by the scientific community.[57] This meant that the panel only assessed whether the available evidence was sufficient to conclude that there was a health risk and whether the measure was necessary to achieve the regulatory goal of France (and not whether the relevant risk objectively existed or whether the best available regulatory response was employed).

The Court of Justice of the European Union (CJEU or Court) has also taken a similar approach. In a recent judgment (*Philip Morris v Secretary of State*), the Court clearly deferred in its examination of proportionality of the contested

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51 ibid [407], [409].

52 ibid [418].

53 Cf Panel Report, *Australia – Plain Packaging* (n 40) sec. 7.3.5.5.1.3 (confusing the applicable standard of review with specific criteria used for assessment of the measure).

54 ibid [7.514].

55 For example, ibid [7.569], [7.577], [7.673].

56 See Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration. Converging Parallels?' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (Oxford University Press 2014) 152–172.

57 Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (5 April 2001) WT/DS135/R as modified by Appellate Body Report WT/DS135/AB/R [8.181].

tobacco control measure (the Tobacco Products Directive)[58] to the assessment made by EU regulators. In this context, the CJEU highlighted its limited role in making complex assessments of political, economic and social choices. Consequently, the measure could be struck down by the Court only if it would be 'manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue'.[59] Again such an approach reflects the general stance of the Court when it comes to the assessment of EU secondary laws that involve complex factual determinations.[60]

However, the WTO panel in *US – Clove Cigarettes* took a more intrusive approach to the science behind the US measure (particularly with regard to its effectiveness). Although eventually the panel found that banning clove and other flavoured cigarettes contributed to a reduction in youth smoking, this conclusion was based on in-depth examination of the evidence. At the same time, the panel also referred to the sanitary and phytosanitary (SPS) case law (which calls for relatively deferential type of review) and noted that the scientific basis was to be checked against the methodological criteria.[61]

This difference in approach (if there is any) may be explained by distinct levels of scientific certainty in those two cases. While the science behind restrictions on flavours used in tobacco products is well developed (as the panel noted, 'evidence before the Panel provides a solid basis for reaching a definite conclusion'), both the single presentation requirement as well as plain packaging were, at the time of their adoption, experimental measures (Uruguay and Australia were the first countries to adopt those measures). This is also reflected in the work of the FCTC Conference of the Parties. While the Partial guidelines for implementation of Articles 9 and 10[62] provide detailed recommendations on flavouring substances, guidelines on Article 11 and Article 13 merely suggest plain packaging as one of the regulatory options.

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[58] Directive 2014/40 (EU) of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products [2014] OJ L127/1.

[59] Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325 [166].

[60] Cf, for example, Case C-84/94 *United Kingdom v Council* [1996] ECLI:EU:C:1996:431; Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231 or Case C-157/96 *National Farmers' Union and Others* [1998] ECLI:EU:C:1998:191.

[61] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (24 April 2012) WT/DS406/R as modified by Appellate Body Report WT/DS406/AB/R [7.401] and accompanying footnote.

[62] 'Partial guidelines for implementation of Articles 9 and 10' (*FCTC*) https://www.who.int/fctc/treaty_instruments/adopted/article_9and10/en/, accessed 2 May 2019.

The single presentation requirement is not even mentioned in the FCTC or its guidelines. The level of scientific uncertainty was therefore higher, warranting a more deferential approach by the DSBs.

3.2.4 Using the FCTC in IEL disputes

Arguably one of the most significant developments in the IEL case law relating to tobacco control measures concerns the role that is played in this context by the FCTC and its guidelines. The Convention as such has not been regarded as an external treaty that modifies specific IEL rules between the parties to the dispute and which could have been directly applied by IEL DSBs. Similarly, neither have its provisions been recognized as relevant rules of international law applicable in the relations between the parties that need to be taken into account, as provided by Article 31.3(c) of the Vienna Convention on the Law of Treaties, in the process of interpretation of the IEL treaties.[63] Instead, the FCTC was used as evidence of fact,[64] helping IEL DSBs to establish existence of risk, reasonableness, proportionality and effectiveness of specific regulatory measures adopted by States. As a result, there was no need for the IEL DSBs to distinguish between both categories of instruments (despite their completely different normative value). Note that the FCTC is an international treaty that provides binding obligation on its parties. Guidelines, meanwhile, are non-binding recommendations that are merely intended to assist the FCTC Parties in implementation of their conventional obligations. However, since both of them are used as evidence of facts (and not as a potential sources of international obligations), their normative character is – as of yet – of no importance.

The investment tribunal in *Philip Morris v Uruguay* used the FCTC and its guidelines as a means of demonstrating that measures had a bona fide public health purpose, as well as that they were reasonable (the FCTC was described by the tribunal as a 'point of reference for the reasonableness' of Uruguay's measures)[65] and proportionate, therefore constituting a legitimate

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[63] Note also that some of the countries (US, Switzerland and Indonesia) involved in the relevant IEL disputes are not FCTC Parties. This formally prevents IEL DSBs from directly applying the provisions of the FCTC or considering them in the process of interpretation via Article 31.3(c) of the VCLT.

[64] See Lukasz Gruszczynski and Margherita Melillo, 'The FCTC and Its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report' (2018) 9 European Journal of Risk Regulation 564; Pedro Villarreal and Brigit Toebes, 'The WTO Plain Packaging Reports: Some Reflections' (*Global Health Law Groningen*, 1 September 2018) https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/the-wto-plain-packaging-reports-some-reflections-01-09-2018, accessed 2 May 2019.

[65] *Philip Morris v Uruguay* (n 28) [401].

exercise of States' regulatory powers.[66] In this context, the tribunal particularly noted that there was no need for Uruguay to conduct its own studies on contemplated measures. Instead, the country could rely on the Convention and relevant guidelines as they are evidence-based instruments.[67] At the same time, the tribunal also took an expansive, teleological approach to the FCTC. As noted above, a single presentation requirement is mentioned neither in the Convention nor in its guidelines. The tribunal was, however, satisfied by the fact that the relevant provision (Article 11(1)(a) of the FCTC) required the parties to prevent 'the false impression that a particular tobacco product is less harmful than other tobacco products' and saw the single presentation requirement as performing such a function.[68]

In *US – Clove Cigarettes*, the panel relied on the Partial guidelines for implementation of Articles 9 and 10 in its analysis on the scientific rationality behind the US ban on flavoured cigarettes and the risk that they pose to youth as a gateway product. The panel used the guidelines as evidence of fact and observed that they draw 'on the best available evidence and the experience of Parties'.[69] The Convention and its guidelines were also extensively referred to in the *Australia – Plain Packaging* report. The panel particularly noted that 'it is not uncommon in WTO disputes for parties to refer to, and panels and the Appellate Body to rely on, non-WTO international instruments as evidence of fact'.[70] In this specific dispute, the panel used the Convention and its Guidelines, among other things, as evidence of: (a) existence of a genuine health risk;[71] (b) effectiveness of various tobacco control measures (for example those relating to packaging and health warnings as well as possible alternatives to plain packaging);[72] and (c) the gravity of the consequences of not reducing the use of and exposure to tobacco products.[73] Unlike the investment tribunal in *Philip Morris v Uruguay*, both WTO panels did not privilege the Convention and looked at the other evidence, which nonetheless confirmed the science behind the FCTC and its guidelines.

In two recent tobacco-related judgments, the CJEU adopted essentially the same approach. In *Poland v Parliament and Council* (with respect to a part

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66 ibid [305]–[307].
67 ibid [396].
68 ibid [404]. Note, however, that one of the members of the arbitration tribunal (Mr Gary Born) submitted a dissenting opinion in which he explicitly disagreed with this specific finding.
69 Panel Report, *US – Clove Cigarettes* (n 61) [7.414].
70 Panel Report, *Australia – Plain Packaging* (n 40) [7.412].
71 ibid [7.1309].
72 ibid [7.1660], [7.664]–[7.665].
73 ibid [7.2595]–[7.2596].

of the challenge that related to a ban on characterizing flavours in tobacco products), the CJEU noted that the FCTC guidelines have 'particularly high evidential value', given their basis in the 'best available scientific evidence'.[74] In *Philip Morris v Secretary of State*, the Court observed 'the EU legislature cannot be accused of having acted arbitrarily in selecting a figure of 65% for the area reserved for combined health warnings … [as] that selection is based on criteria deriving from the FCTC recommendations'.[75]

4. CONCLUSIONS

Although IEL obligations can potentially have some negative impact on the regulatory freedom enjoyed by States in the area of tobacco control, in practice they only seem to prohibit discriminatory measures (i.e. prohibiting clove cigarettes which are imported, but permitting sale of menthols which are mostly of domestic origin) and poorly designed health regulations that affect trade or investment (e.g. measures that lack scientific basis). At the same time, due to the complexity and generality of IEL rules, contradictory case law and costs of potential legal proceedings, they indeed can have a regulatory chilling effect.

Human rights treaties that reaffirm the importance of human life and health can potentially provide a shield for States taking tobacco control measures, protecting them against IEL challenges. Although the DSBs have yet to recognize the legal relevance of the right to health in IEL disputes, the above analysis of the recent tobacco control-related IEL case law has clearly shown that in practice DSBs have strengthened States' position in the field of public health. This has been achieved by using various legal strategies including: reaffirming by IEL DSBs of the sovereign right of States to regulate in the area of tobacco control; clarifying the scope of IEL obligations in a public health-friendly manner; accepting the limited scope of the review by IEL DSBs in health-related disputes that involve complex scientific and political questions; and heavy reliance on the FCTC and its guidelines – but as evidence of fact rather than a source of independent international obligations. Those developments definitively contribute to reducing the potential regulatory chilling effect that may be produced by IEL rules.

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[74] Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* [2016] ECLI:EU:C:2016:323 [85].

[75] *Philip Morris v Secretary of State* (n 59) [208].

PART III

Specific elements of tobacco control law and policy in light of human rights

13. Smoke-free environments: lessons from Italy

Stefania Negri

1. INTRODUCTION

Exposure to second-hand tobacco smoke (SHS) is a global problem and a major risk factor for health,[1] particularly for vulnerable persons such as children and pregnant women.[2] Comprehensive smoking bans aimed at establishing 100 per cent smoke-free environments are considered the only effective intervention against SHS.[3] However, only 20 per cent of the global population is adequately protected by comprehensive smoke-free laws, which are currently in force in 55 countries worldwide.[4] In Europe, only 17 EU Member States have adopted smoke-free legislation.[5] Among these countries, Italy has had a set of regulations prohibiting smoking indoors in public places and on public transportation for more than 40 years. Over time, Italy has extended smoking bans to several outdoor public places, such as areas surrounding schools and hospitals, and more recently also to beaches and parks. The latest step forward in the development of this legislation has concerned the introduction of a total smoking ban in private cars in the presence of children and pregnant women. Pushing the boundaries of its regulatory powers so as to include private spaces, Italy

[1] See also the Introduction to this book (Chapter 1) by Gispen.

[2] United States Department of Health and Human Services, *The health consequences of involuntary exposure to tobacco smoke: a report of the Surgeon General* (Centers for Disease Control and Prevention 2006); WHO, 'Factsheet on Tobacco' (*WHO*, 29 May 2019) https://www.who.int/news-room/fact-sheets/detail/tobacco, accessed 14 June 2019.

[3] WHO, *Report on the Global Tobacco Epidemic*, *2017* (WHO 2017) 64–65.

[4] ibid 66.

[5] A detailed (though only updated to 2013) overview and table of legislation on smoke-free environments are available at 'Public Health' (*European Commission*) https://ec.europa.eu/health/sites/health/files/tobacco/docs/smoke-free_legislation_overview_en.pdf, accessed 14 June 2019 and at 'Overview of smoke-free legislation' (*European Commission*) https://ec.europa.eu/health/sites/health/files/tobacco/docs/smoke-free_legislation_table_en.pdf, accessed 14 June 2019.

has set a positive example for the protection of the most vulnerable from SHS despite possible tensions between public health needs, individual freedoms and the right to private life.

Against this background, this chapter intends to offer a brief overview of the relevant international obligations concerning smoke-free environments stemming from the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC)[6] and human rights treaties, in particular the United Nations Convention on the Rights of the Child (CRC),[7] and related to the recommendations issued at the European level. Special attention is paid to smoke-free legislation in Italy, which is explored through the lens of international and European law and in the light of the constitutional protection of health, as guaranteed by Article 32 of the Italian Constitution.

2. THE INTERNATIONAL LEGAL FRAMEWORK CONCERNING SMOKE-FREE ENVIRONMENTS

2.1 The WHO Framework Convention on Tobacco Control

International obligations concerning the establishment of smoke-free environments mainly stem from Article 8 FCTC. According to this provision, States Parties unequivocally accept the scientific evidence of the dangerousness of SHS and agree to adopt and implement smoking bans in indoor workplaces, public transport, indoor public places and 'as appropriate, other public places'.[8]

The Conference of States Parties (COP) has interpreted Article 8 in its Guidelines on protection from exposure to tobacco smoke. The Guidelines offer authoritative, although non-binding, guidance on the obligations deriving from this provision.[9] According to the Guidelines, States are under an '*obligation to provide universal protection*' from SHS exposure and such protection should extend to 'outdoor or quasi-outdoor' public places.[10] In line with this interpretation, States Parties should enact laws creating no-smoking areas in open-air public spaces, although the Guidelines lack any guidance as to which

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[6] WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2301 UNTS 166 (FCTC).

[7] The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[8] FCTC, art 8 [2].

[9] WHO, 'Guidelines on protection from exposure to tobacco smoke' (2007) FCTC/COP2(7) [24], https://www.who.int/fctc/cop/art%208%20guidelines_english.pdf, accessed 14 June 2019.

[10] ibid [24] (emphasis in the original).

areas States should expand smoking bans.[11] In light of the discretion left to States, this provision is aptly described in legal scholarship as 'reflect[ing] an open-ended obligation with a minimum requirement'.[12]

Conversely, when it comes to private places – and despite the fact that Principle 7 of the Guidelines advocates the progressive expansion and strengthening of protecting measures from SHS – the COP concedes that there are 'settings for which legislation may not be feasible or appropriate, such as private homes'. Thus it merely calls for public education campaigns aimed at raising awareness about the risks of SHS exposure.[13]

2.2 Human Rights Obligations to Ensure Smoke-Free Environments

As clearly explained by the above-mentioned Guidelines on Article 8, '[t]he duty to protect from tobacco smoke … is grounded in fundamental human rights and freedoms', especially the right to life and the right to health, and 'corresponds to an obligation by governments to enact legislation to protect individuals'.[14] Though extending to all persons, it is evident that this obligation is ever more compelling when the fundamental rights at stake are children's rights.[15] In fact, children's special vulnerability explains the importance of adopting a child-rights perspective to approach and debate the legitimacy of legislative measures encroaching on individual autonomy and the right to private life.

In this respect, it is important to note that Articles 3, 6 and 24 of the CRC,[16] as interpreted by the Committee on the Rights of the Child, impose some fundamental obligations that are relevant to the present discourse. In particular,

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[11] ibid [27].

[12] Marie Elske Gispen, 'Expanding smoking bans in public spaces in light of international law' (*Global Health Law Groningen Blog*, 13 August 2018) https://ghlgblog.wordpress.com/2018/08/13/expanding-smoking-bans-in-public-spaces-in-light-of-international-law/, accessed 14 June 2019.

[13] WHO 'Guidelines' (n 9) [29].

[14] ibid [4].

[15] For extensive discussion on the relevance of international and regional human rights regimes in the protection of the health of children in the context of tobacco control, see Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 Human Rights Quarterly 2.

[16] Italy became a party to the CRC by Law 27 May 1991, no. 176, Ratification and execution of the Convention on the rights of the child, *Gazzetta Ufficiale*, no. 135 of 11 June 1991, Supplement no. 35. On the interpretation of Article 24 CRC and its implementation in Italy, see Vitulia Ivone and Stefania Negri, 'Il diritto alla salute e al benessere dei minori', in Autorità Garante per l'Infanzia e l'Adolescenza, *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza. Conquiste e prospettive a 30 anni dall'adozione* (AGIA: Rome 2019) 309–333.

Article 3, paragraph 1 requires that the best interests of the child be assessed and taken as a primary consideration in all actions affecting children and all health-related decisions concerning them. The Committee considers that the best interests of the child might conflict with other interests or rights (for example of other children, the public or parents). According to the Committee, such conflicts should be resolved carefully, balancing the interests of all parties, and

> if harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations.[17]

Moreover, paragraph 2 adds:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

This provision could be interpreted as implying that appropriate legislative measures that are taken by the State to guarantee the necessary level of protection of children, also taking into consideration the parents' duties, may include restrictions on the parents' (and other caregivers') freedom to smoke, including in private places (for example at home).[18] This interpretation would be in line with the Committee's emphasis on the fact that '[t]he responsibilities of parents and other caregivers are expressly referred to in several provisions of the Convention. Parents should fulfil their responsibilities while always acting in the best interests of the child.'[19]

Moving to Article 24 CRC on the right to health of children, paragraph 2 imposes obligations that include the State's duty to reduce neonatal mortality and address specific problems such as low birth weight and pneumonia,

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[17] CommRC, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14 [39].

[18] Gispen and Toebes (n 15) argue '[t]he reference of the CRC Committee to in-house smoke-free environments is a clear indicator that governments should extend their tobacco control regulations to in-house settings, which goes beyond the public smoking ban included in Article 8 WHO Framework Convention on Tobacco Control (FCTC)' (see section IV, para. A).

[19] CommRC, 'General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 [78].

which can be caused by exposure of children and pregnant women to SHS. The Committee affirms that States have to 'take measures to address the dangers and risks that local environmental pollution poses to children's health in all settings'.[20] It clarifies that '[a]dequate housing that includes … a smoke-free environment … [is one of the] core requirements to a healthy upbringing and development',[21] which are the primary responsibility of parents and legal guardians under Article 18 of the Convention. These obligations substantially coincide with those stemming from Article 12 paragraph 2.a of the International Covenant on Economic, Social and Cultural Rights, which 'outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children'.[22]

2.3 Smoking Bans Based on European Law

At the European level, the promotion of smoke-free environments as a prominent component of tobacco control essentially relies on soft law (non-binding law). In this respect, the Warsaw Declaration for a Tobacco-free Europe[23] and the European Strategy on Tobacco Control (ESTC),[24] both adopted by the WHO Regional Office for Europe in 2002, are the most relevant documents.[25]

The Warsaw Declaration for a Tobacco-free Europe recognizes that 'present and future generations deserve smoke-free air and protection from involuntary exposure to environmental tobacco smoke and the negative health, economic and social impacts of tobacco use'.[26] It includes 'protection against involuntary exposure to environmental tobacco smoke in public places and workplaces'[27] among the most important components of comprehensive policies with measurable impact on the reduction of tobacco use.

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[20] ibid [49].

[21] ibid.

[22] CESCR, 'General Comment No. 14: The right to the highest attainable standard of health (Art. 12)' (11 August 2000) UN Doc E/C.12/2000/4 [22].

[23] WHO Europe, 'Warsaw Declaration for a Tobacco-free Europe: WHO European Ministerial Conference for a Tobacco-Free Europe, Warsaw, 18–19 February 2002' EUR/01/5020906/6 https://apps.who.int/iris/handle/10665/107427, accessed 14 June 2019.

[24] WHO Europe, 'European Strategy on Tobacco Control' EUR/02/5041354, http://www.euro.who.int/__data/assets/pdf_file/0016/68101/E77976.pdf, accessed 14 June 2019.

[25] On the role of the Council of Europe on tobacco control, see also Chapter 6 by Garde and Toebes.

[26] 'Warsaw Declaration for a Tobacco-free Europe' (n 23) preamble.

[27] ibid [1].

The ESTC sets out strategic directions for actions to be carried out through national policies, legislation and action plans. It takes into account the guiding principles enshrined in the Warsaw Declaration while putting forward additional guiding principles, which include acknowledgement of non-smoking as the norm and of all citizens' right to smoke-free air, as well as their right to protection from the damaging effects of SHS. According to the ESTC, to promote smoke-free environments and protect citizens (non-smokers and especially children) from passive smoking:

> strategic national actions should include: introducing or strengthening legislation to make all public places smoke-free, including public transport and workplaces; banning smoking indoors and outdoors in all educational institutions and their premises for children up to the age of 18 years, and indoors in all other educational institutions; banning smoking in all places of health care delivery and their indoor and outdoor premises; banning smoking at all public events arranged indoors and outdoors; banning or severely restricting smoking in restaurants and bars, to protect owners, employees and clients from serious health damage; classifying environmental tobacco smoke as a carcinogen to protect the right of workers (non-smokers and smokers), particularly those working in smoking environments, and to speed up the banning of smoking at all workplaces.[28]

In the framework of EU law, the most relevant soft law document is the Council Recommendation on Smoke-Free Environments of 30 November 2009.[29] The Recommendation calls on Member States to implement the obligations set forth by Article 8 of the WHO FCTC and recommends that Member States 'develop and/or strengthen strategies and measures to reduce exposure to second-hand tobacco smoke of children and adolescents'.[30] It further recommends that Member States develop and implement 'comprehensive multi-sectoral tobacco control strategies, plans or programmes which address, inter alia, the issue of protection from tobacco smoke in all places accessible to the general public or places of collective use, regardless of ownership or right to access'.[31]

As far as hard law is concerned, despite the extensive obligations on tobacco regulation stemming from Directive 2014/40/EU of 3 April 2014 (Tobacco

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[28] ibid 12–13.

[29] Council Recommendation of 30 November 2009 on smoke-free environments [2009] OJ C296/4. See also Report on the implementation of the Council Recommendation of 30 November 2009 on Smoke-free Environments [2013] (2009/C 296/02) SWD (2013) 56 final/2.

[30] ibid [2].

[31] ibid [4].

Products Directive),[32] and notwithstanding the stated aim of meeting the obligations of the EU under the FCTC (Article 1), Recital 48 of the Directive clearly states that it is not intended to harmonize the rules on smoke-free environments and that 'Member States are free to regulate such matters within the remit of their own jurisdiction and are encouraged to do so'.

3. LESSONS FROM ITALY

3.1 The Protection of Health under Article 32 of the Italian Constitution as a Basis for Extensive Smoking Bans

Article 32, paragraph 1, of the Italian Constitution states that '[t]he Republic protects health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent'.[33] The language used in this provision shows that in 1948 the Italian Constitution had already adopted the same approach that would later characterize Article 12 of the International Covenant on Economic, Social and Cultural Rights[34] and other treaty provisions[35] that similarly conceptualize health as a fundamental right and a collective interest at the same time.[36]

Among the several prominent decisions interpreting the scope of Article 32, the Italian Constitutional Court has also issued some interesting judgments concerning the protection of public health from the adverse effects of SHS. These judgments were rendered in the framework of the Court's assessment of the constitutional legitimacy of national and regional laws regulating smoking bans, especially in relation to disputes between workers and employers.

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[32] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L127/1.

[33] Constitution of the Italian Republic, in force as of 1 January 1948, English text available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, accessed 14 June 2019.

[34] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[35] Most relevant are Article 10, paragraph 2, of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) A-52, which states that 'States Parties agree to recognize health as a public good', and Article 16, paragraph 2, of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter), which declares that 'States parties to the present Charter shall take the necessary measures to protect the health of their people'.

[36] See Stefania Negri, *Salute pubblica, sicurezza e diritti umani nel diritto internazionale* (Giappichelli 2018) chapter 2.

According to the settled case law of the Constitutional Court,[37] 'health is a primary good that rises to the status of fundamental right of the person and imposes full and exhaustive protection, such as to operate both in the public sphere and in private law relationships'.[38]

The Court has also repeatedly stated that the protection of health includes the general and common claim of individuals to conditions of life, environment and work that do not endanger this essential 'good'. In the Court's view, however, the protection of health also implies the duty of every individual not to harm or to put at risk the health of others with their own behaviour. Therefore, wherever there is a clash between the right to health, which is constitutionally protected, and any individual freedom (or 'free behaviour', as the Court says) which has no direct constitutional coverage, the former must take precedence.[39] This means that limitations imposed on smokers are legitimate and justified on grounds that an essentially different legal protection is guaranteed to the 'freedom not to smoke' (to be interpreted as freedom from exposure to passive smoke, which derives from the right to health) as compared to the smokers' 'freedom to smoke'.

In this respect, the Court also declared that 'the prohibition of smoking is a fundamental principle' and that 'the rules determining the relevant offences and the corresponding sanctions can be qualified as fundamental principles'.[40] This latter statement is the basis of the Court's assertion that the State has exclusive competence to legislate on the protection of health from passive smoke and on the corresponding determination of fines for infringements of smoke-free legislation (notwithstanding regions have concurrent legislative competence over health issues under Article 117, paragraph 3, of the Constitution). In this respect, the Court's view is that the protection of health from SHS has to be regulated in a uniform manner throughout the whole territory of the State. Being a fundamental 'good', health cannot, by its very nature, lend itself to differentiated protections depending on the discretion of regional legislators. Once the harmfulness of exposure to passive smoking is assumed, the nature of 'fundamental principles' recognized to the rules concerning health protection makes it impossible to allow that the relevance and consequences of the violation of smoking bans may vary from one place to another

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[37] Constitutional Court, judgments no. 218 of 1994; no. 202 of 7 July 1991; no. 307 of 1990; no. 455 of 1990; no. 559 of 1987; no. 184 of 1986, available at https://www.cortecostituzionale.it, with English summary of selected judgments at https://www.cortecostituzionale.it/actionJudgment.do, both accessed 14 June 2019.

[38] Constitutional Court, judgment no. 399 of 20 December 1996 [2].

[39] ibid.

[40] Constitutional Court, judgment no. 63 of 16 February 2006 [2.1].

within the national territory.[41] It follows that with regard to the rules aimed at determining, sanctioning and enforcing the prohibition on smoking, regions cannot introduce their own regulations on sanctions and fines, even if they are considered justified by particular territorial conditions and requirements.[42]

As illustrated below, Article 32 of the Constitution, as interpreted by the Constitutional Court and pursuant to the principles distilled in its jurisprudence, has paved the way for the adoption of robust smoke-free legislation, which has been largely supported by a strong political will and the proactive role of the Italian Ministers of Health that have governed over the last 50 years.

3.2 Italian Smoke-free Legislation: Consistency with International and EU Law and Developments Going Beyond International Obligations

According to the Italian Constitution, international and EU law take precedence over conflicting Italian law, with the only exception being the fundamental principles of the Constitution, which are at the top of the hierarchy of domestic legal sources. Two constitutional provisions express this primacy: Article 10, paragraph 1, stating that '[t]he Italian legal system conforms to the generally recognised norms of international law', which covers customs and general principles; and Article 117, paragraph 1, stating that '[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU law and international obligations', which covers treaties which have been duly concluded and ratified as well as EU legislation.[43]

As applied to tobacco control, this primacy implies that, to be legitimate, Italian laws should not conflict with the obligations stemming from the FCTC (to which Italy has been a party since 30 September 2008[44]), relevant human rights treaties protecting the right to health and the EU Tobacco Products Directive (or any other relevant EU binding act). However, it has to be noted that a peculiar characteristic of anti-tobacco legislation in Italy is that most laws pre-date, anticipate, broaden the scope of and even go beyond international obligations in the field of smoke-free environments.

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[41] Constitutional Court, judgment no. 361 of 19 December 2003 [3].

[42] Constitutional Court, judgment no. 59 of 16 February 2006 [4.1].

[43] For relevant constitutional interpretation, see Constitutional Court, judgments nos 348 and 349 of 22 October 2007.

[44] Italy signed the FCTC on 16 June 2003 and ratified it on 2 July 2008, upon authorization granted by Law 18 March 2008 no. 75, Ratification and execution of the WHO Framework Convention on Tobacco Control, *Gazzetta Ufficiale*, no. 91 of 17 April 2008, supplement no 97 (in force as of 18 April 2008).

As a matter of fact, the first Italian law regulating smoking in public places was adopted in 1975 (Law no. 584 of 11 November 1975).[45] Article 1 of this law imposed a ban on smoking in hospital wards, classrooms, vehicles owned by the State, public bodies and private dealers of public service for the collective transport of persons, metros, waiting rooms of railway stations, airports and harbours and train carriages reserved for non-smokers. It also addressed indoor venues used for public gatherings, including closed showrooms, cinemas or theatres, halls, dance halls, academy meeting rooms, museums, libraries and reading rooms open to the public, art galleries open to the public and public art galleries. Although it was criticized because it did not cover restaurants and did not apply to hospitals and schools as a whole, the law was welcomed as the first successful step in smoke-free regulation aimed at protecting public health pursuant to Article 32 of the Constitution. It was supported by a strong political will shared by the Ministers of Health, Justice, the Interior, the Treasury, Transport and Civil Aviation, and Tourism and Culture, who jointly proposed the draft bill to the Italian Parliament.[46] As stressed by both rapporteurs to the Senate and the Chamber of Deputies, the law would finally align Italy with other European countries that had already enacted smoke-free legislation, thus making up for the failure of previous legislative initiatives that had been discussed since the beginning of the 1960s. In particular, the rapporteur to the Senate underscored the responsibility of the State to protect public health, and especially the right to health of non-smokers, which justified the imposition of restrictive measures on smoking.[47]

Further restrictions on smoking in public places were imposed by Law no. 3 of 16 January 2003,[48] which in substance anticipated the international obligations stemming from Article 8 of the FCTC that Italy was to sign. In this respect, Article 51 of this law, concerning the protection of the health of non-smokers, imposed a ban on smoking in all indoor venues, with the excep-

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[45] Law 11 November 1975, no. 584, Prohibition on smoking in selected premises and on public transports, *Gazzetta Ufficiale* no. 322 of 5 December 1975. It has to be noted that the very first law on tobacco control was Law 10 April 1962 no. 165 banning advertising of tobacco products, *Gazzetta Ufficiale* no 111 of 30 April 1962. Unofficial English translations of Italian legislation are available at https://www.tobaccocontrollaws.org/legislation/country/italy/laws, accessed 14 June 2019.

[46] Senate of the Republic, VI Legislature, Draft Bill no. S510; Chamber of Deputies, VI Legislature, Draft Bill no. C1787.

[47] Senate of the Republic, VI Legislature, Proceedings of Assembly meeting no. 108, 27 February 1973, p 5146.

[48] Law 16 January 2003, no. 3, Regulatory provisions concerning public administration, *Gazzetta Ufficiale* no. 15 of 20 January 2003, Ordinary supplement no. 5 (so-called Sirchia Law, after the name of the Italian Minister of Health, in force as of 4 February 2003).

tion of private places not open to third users or the general public and public places reserved to smokers, equipped with ventilated smoking rooms clearly marked as such and separate from non-smoking areas.[49]

More recently, two decrees adopted after the entry into force in Italy of the FCTC introduced new prohibitions on smoking in outdoor public places, which broaden the scope of international obligations on smoke-free environments, although they are substantially in line with the Guidelines on Article 8 FCTC (which, as said before, refer to outdoor or quasi-outdoor public places) and the Council Recommendation of 2009. The first is Decree-Law no. 104 of 12 September 2013,[50] in which Article 4 amended Article 51 of Law no. 3/2003 to ban smoking on outdoor premises of educational institutions, both public and private. The second is Legislative Decree no. 6 of 12 January 2016, transposing Directive 2014/40/UE,[51] in which Article 24, paragraph 1 extended this ban to outdoor areas near hospitals (namely in the vicinity of paediatrics, neonatology, gynaecology and obstetrics units). Although the regulation of smoke-free areas within this act seems at odds with the fact that the Tobacco Directive does not contain any rule on smoke-free environments, Article 24 is nonetheless justified in light of the overall aim of the Decree. This, according to Article 1, is to guarantee a high level of protection for human health (therefore it finds its legal grounds in Article 32 of the Constitution) and to fulfil the obligations deriving from Law no. 75/2008 (which ratified and executed the FCTC).

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[49] In this respect, it has to be noted that the exception to allow smoking in enclosed and separately ventilated rooms with automatic closing doors is not aligned with best practices under the FCTC Article 8 Guidelines (n 9). In particular, Principle 1 states that '[e]ffective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment. ... Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke.'

[50] Decree-Law 12 September 2013, no. 104, Urgent measures in the fields of education, universities and research, *Gazzetta Ufficiale* no. 214 of 12 September 2013, converted with modifications into Law no. 128 of 8 November 2013, *Gazzetta Ufficiale* no. 264 of 11 November 2013 (in force as of 12 November 2013).

[51] Legislative Decree 12 January 2016, no. 6, Transposition of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, *Gazzetta Ufficiale* no. 13 of 18 January 2016 (in force as of 2 February 2016).

On a local basis, the establishment of smoke-free areas in outdoor places has gone even farther, involving public beaches like Bibione, in the Municipality of San Michele al Tagliamento,[52] which is the second smoke-free beach in Europe after Plage Lumière in France.[53] Moreover, some municipalities have also decided to declare smoke-free parks upon the initiative of the Italian League for the Fight Against Cancer, as is the case in Alghero, Bolzano, Marina di Massa, Ravenna, Verona and others. In some cases, a ban on smoking has also been imposed at bus stops and waiting points, as is the case in Florence and Trento. These examples represent an eloquent testimony to the argument that it is easier to achieve major results at local level and that municipalities can play a dramatically important role in promoting and urging the adoption of new smoke-free legislation at national level, acting as catalysts for change and improvement of the population's protection from SHS.[54] They can also inspire other States to expand smoking bans to outdoor public places, in line with similar initiatives launched abroad, such as in the Netherlands.[55]

What is truly remarkable about tobacco control in Italy is that legislation on smoke-free environments has gone far beyond international obligations, starting to impose prohibitions and fines also in private enclosed spaces such as private cars. In this sense, Article 24, paragraph 2, of Legislative Decree no. 6/2016, establishing 'Measures for the protection of children', amended the above-mentioned Article 51 of Law no. 3/2003 by imposing a ban on smoking for drivers of private cars and vehicles – both stationary and moving – carrying minors and pregnant women, with penalties doubled in the presence of a child under 12 or a pregnant woman.[56]

Another step forward was even attempted with the submission to the Italian Senate of a draft bill[57] introducing changes to the new Road Code to the effect that a general ban on smoking be imposed while driving, for reasons of safety (primarily) along with the protection of the health of passengers. In this case, in addition to monetary fines, penalties would have included suspension of the

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[52] See WHO Europe, *Bibione. Breathe by the sea. The story of a smoke-free beach in Italy* (WHO 2014).

[53] 'French town makes Mediterranean beach smoke free' (*The Telegraph*, 3 August 2011) https://www.telegraph.co.uk/news/health/news/8679790/French-town-makes-Mediterranean-beach-smoke-free.html, accessed 14 June 2019.

[54] In this sense, see especially WHO, *Making Cities Smoke-free* (WHO 2011) 1.

[55] See Gispen (n 12).

[56] The UK also changed the law to ban smoking in private vehicles carrying someone under 18 years old (in force from 1 October 2015). Contrary to Italian law, the UK prohibition does not cover pregnant women.

[57] Senate of the Republic, Bill no. S.1902 of 30 April 2015, https://www.senato.it/leg/17/BGT/Schede/Ddliter/45597.htm, accessed 14 June 2019.

driving licence. However, this bill was never enacted as law because it was not approved before the dissolution of the Parliament in December 2017.

Indeed, regulation of tobacco use and prohibitions imposed in private places which are not open to the public goes much beyond the content of international obligations and good practices. It raises important human rights issues and calls for balancing autonomy, individual freedoms and the right to private life with legitimate limitations for public health reasons,[58] the rights and best interests of children[59] and the right to health of the vulnerable.[60] However, it can be argued that protective measures adopted in favour of children and pregnant women (such as smoking bans in private cars or other private places), even if heavily encroaching on private life, are firmly grounded in human rights law and can thus be considered legitimate under international law despite overriding the obligations imposed by the FCTC.

4. CONCLUDING REMARKS

Independently of international obligations binding on Italy, Article 32 of the Italian Constitution has been the overarching legal basis for the introduction of extensive bans on smoking for the protection of public health and the right to health of non-smokers and the most vulnerable (especially children and pregnant women). The constitutional protection of public health with regard to tobacco has been further reinforced by the pronouncements of the Constitutional Court, which have attributed to the rules on tobacco control the rank of fundamental principles of the Italian legal order.

Therefore, inspired by Article 32 and the principles distilled by the Constitutional Court, the Italian smoke-free legislation has gone beyond the scope of international obligations, imposing limitations in outdoor public places and in private places such as cars, thus setting an important example for other countries. With regard to smoke-free environments, it can thus be concluded that Italian law is quite advanced and consistent with Article 8 FCTC, as interpreted in the COP Guidelines, and with the EU Council's Recommendation on Smoke-free Environments. It is also in line with the relevant obligations stemming from human rights law, in particular the CRC.

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[58] *See* Negri (n 36) chapter 3.

[59] See Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to a Tobacco-free Environment' (2018) 27 Tobacco Control 3; Gispen and Toebes (n 15).

[60] See Negri (n 36) chapter 2.

Looking ahead, and in line with the principles enshrined in the FCTC Guidelines,[61] much more could be done, and more ambitious results could be achieved towards 100 per cent smoke-free environments, if additional amendments to the law were passed to impose a total ban on smoking in all indoor public places and in private enclosed places, including vehicles of any kind. These additional steps would first and foremost require a removal of the exception regulated in Article 51, paragraphs 1.b, 2 and 4, of Law no. 3/2003, concerning ventilated smoking areas allowed in indoor public places (such as restaurants and any other place 'where people are forced to stay not voluntarily'), which would also bring the law into line with Principle 1 of the FCTC Guidelines.[62] Second, it would require the adoption of a new law banning smoking in private cars in all circumstances for reasons of public health protection and not only for reasons related to the safety of driving. Moreover, moving forward along the lines already adopted by some municipalities, general restrictions could be imposed to establish at national level total bans on all outdoor public places open to children, including parks, beaches and playgrounds.

[61] Especially relevant in this respect is Principle 7: 'The protection of people from exposure to tobacco smoke should be strengthened and expanded, if necessary; such action may include new or amended legislation, improved enforcement and other measures to reflect new scientific evidence and case-study experiences'.

[62] See above n 49.

14. The tobacco endgame: experiences from Finland

Milka Sormunen and Sakari Karjalainen

1. INTRODUCTION

The objective of tobacco control policies can be formulated either in terms of reducing tobacco consumption or ending the use of tobacco products. The latter approach, commonly called the 'tobacco endgame', shifts the focus from tobacco control towards a vision of a tobacco-free future where smoking prevalence is brought to near-zero levels. The tobacco endgame concept refers both to a process – the final stage of the process of ending tobacco use – and a goal.[1] The concept is radical in that it shifts regulatory focus to the supply side of the market, the tobacco industry.[2] The origins of endgame strategies lie in an article published by Benowitz and Henningfield in 1994 where the authors proposed that nicotine in cigarettes be gradually reduced to non-addictive levels.[3] The idea has been further developed by scholars, but only in recent years has there been research about the explicit notion of seeking an endgame for smoking.[4]

In 2010 Finland was the first country in the world to include the tobacco endgame as the objective of its national tobacco regulation. Prior to this, the objective of Finnish tobacco regulation was to reduce tobacco use but not to end it completely. The Finnish Tobacco Act recently underwent a comprehensive reform after which the current Tobacco Act (549/2016) came into force

[1] George Thomson, Richard Edwards, Nick Wilson and Tony Blakely, 'What Are the Elements of the Tobacco Endgame?' (2012) 21 Tobacco Control 293.

[2] Cynthia Callard and Neil E Collishaw, 'Exploring Vector Space: Overcoming Resistance to Direct Control of the Tobacco Industry' (2012) 21 Tobacco Control 291; Bryan P Thomas and Lawrence O Gostin, 'Tobacco Endgame Strategies: Challenges in Ethics and Law' (2013) 22 Tobacco Control i55.

[3] Neal L Benowitz and Jack E Henningfield, 'Establishing a Nicotine Threshold for Addiction. The Implications for Tobacco Regulation' (1994) 331 New England Journal of Medicine 123.

[4] Kenneth E Warner, 'An Endgame for Tobacco?' (2013) 22 Tobacco Control i3.

in 2016. Finland now aims to be smoke free by 2030, meaning that 5 per cent or less of the population will use tobacco products daily by that year.[5] The Tobacco Act begins by describing the objective of the Act (section 1):

> (1) The objective of this Act is to end the use of tobacco products and other nicotine-containing products that are toxic to humans and cause addiction.
> (2) To achieve the objective referred to in subsection 1, this Act lays down measures to prevent people from taking up the use of tobacco products and developing a nicotine addiction, to promote the cessation of the consumption of tobacco products and similar products and to protect the population from exposure to smoke from such products.[6]

This chapter provides an analysis of the endgame objective of the Finnish Tobacco Act from a human rights perspective, with a special focus on children's rights. The chapter first discusses the legislative history of the endgame objective in the Finnish context. By analysing the preparatory works of the Finnish legislation as well as other relevant materials, the chapter focuses on reasons for which the objective was set, especially on the role of fundamental and human rights arguments.[7] During the drafting of the legislation, the endgame objective was not supported by human rights-related arguments; on the contrary, concerns were raised that the objective would allow for interpretations that would restrict fundamental and human rights of those using tobacco products as well as rights associated with the tobacco industry. Another concern was that the means presented in the Tobacco Act would not be suitable for achieving the aim.[8] Despite these concerns, endgame became the objective of tobacco regulation. In response to the initial concerns, the latter part of the chapter analyses the endgame objective in the light of human rights obligations and focuses on children's rights because children are dependent on

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[5] Government Bill 15/2016, 52. See 'Smoking in Finland' (*National Institute for Health and Welfare*, 14 March 2018) https://thl.fi/en/web/alcohol-tobacco-and-addictions/tobacco/smoking-in-finland, accessed 24 July 2019, stating that the prevalence of daily smoking among people aged 20–84 in 2017 was 13 per cent for men and 10 per cent for women. According to the latest Adolescent Health and Lifestyle Survey (2017), 7 per cent of boys and girls aged 14–18 smoked daily.

[6] Unofficial translation by the Finnish Ministry of Social Affairs and Health. The Act is legally binding in Finnish and Swedish only.

[7] In Finland the Parliament enacts most legislation on the basis of Government Bills. Government Bills are considered weakly binding sources of law – Finnish sources of law are customarily divided into strongly binding, weakly binding and admissible – and are used to interpret legislation since they are considered to reflect the intent of the drafters.

[8] Constitutional Law Committee Opinion 21/2010, 6; Constitutional Law Committee Opinion 17/2016, 2.

adults and are more susceptible to the dangers of smoking and being exposed to smoke.[9] The analysis shows that human rights obligations can be interpreted as permitting and even requiring a tobacco endgame or other similar strategy aiming at reducing smoking as much as possible.

2. TOBACCO ENDGAME AS THE OBJECTIVE OF THE FINNISH TOBACCO ACT

Finland has been building an active tobacco policy since the early 1970s. The Tobacco Act (693/1976) that came into force in 1977 introduced measures with the objective of reducing use of tobacco products, for instance prohibition of advertising. Prohibition of indirect advertising was adopted in 1994. The idea of a tobacco-free Finland was first presented in 2006 by former Prime Minister and then-speaker of the Parliament from the Social Democratic Party, Paavo Lipponen.[10] In 2008 the Tobacco-free Finland 2040 project, which later became the Tobacco-free Finland 2030 Network, was established. In 2010 the objective of the Tobacco Act was changed to ending tobacco use by 2040.[11] In the 2016 reform of tobacco legislation the target was set to 2030 and the objective was broadened to all non-medical nicotine products.[12]

When analysing the preparatory works of the Tobacco Act, Opinions of the Constitutional Law Committee of the Parliament, the prime authority of constitutional interpretation and review in Finland, are essential. Finland does not have a constitutional court, and the judiciary has traditionally played a limited role in reviewing the constitutionality of legislation. The Constitutional Law Committee is a political body reviewing constitutionality of legislative proposals *ex ante* before they are passed. The Committee is composed of Members of Parliament. The mandate of the Committee includes issuing statements on the constitutionality of legislative proposals and other matters brought to its consideration as well as on their relation to international human rights treaties (section 74 of the Constitution). The Committee hears experts in constitutional law but is not obliged to follow their advice. The Opinions of the Committee determine whether a legislative proposal may be enacted in accordance with

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[9] US Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (Atlanta: US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health 2006).

[10] Yle Uutiset, 'Lipponen kieltäisi tupakan myynnin' (*Yle*, 30 October 2008) https://yle.fi/uutiset/3-5755546, accessed 24 July 2019.

[11] Government Bill 180/2009, 18.

[12] Government Bill 15/2016, 53–58.

the ordinary legislative procedure through a majority of votes cast or whether it has to be enacted through a qualified procedure for constitutional enactments due to its conflict with the Constitution or human rights treaties (section 73 of the Constitution). The qualified procedure is rarely used; instead, the Committee may require certain changes to be made in order for the proposal to be passed in accordance with the ordinary procedure. The Committee may also identify issues of interpretation and guide the interpretation without requiring the use of the qualified procedure.[13]

In the Government Bill proposing the endgame as the objective of tobacco legislation it is explained that smoking has not decreased as much as assumed, which is why it is necessary to enhance the measures aimed at reducing tobacco consumption. The Government Bill mentions as an objective that more young people would not consider starting smoking before adult age and would therefore give up the idea of starting to use tobacco products in the first place.[14] The new objective, ending consumption of tobacco products by 2040, had been proposed by the working group that started the preparation of the legislative proposal.[15] In the Government Bill it is explained that the objective is intended to be achieved so that young people would not even start smoking as well as so that current smokers would reduce tobacco consumption and eventually quit smoking. The Government Bill explains that public interventions are justified because of the harmful health and economic effects of tobacco. Furthermore, the Government Bill specifies that tobacco endgame would describe the general objective of tobacco control policy better than an objective of reducing consumption of tobacco products. Although not binding, the endgame as an objective would be a consistent starting point and ground for all the prohibitions and restrictions laid down in the Act. According to the Government Bill, articulating the aim clearly is important in order for the actors producing and selling tobacco products to prepare themselves for future restrictions of production, distribution and supply.[16]

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[13] For an analysis of the Finnish system of constitutional review, see Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 International Journal of Constitutional Law 505.

[14] Government Bill 180/2009, 4.

[15] Final and progress reports of the Working Group preparing amendments to tobacco legislation and tobacco policy measures. 'Proposals for amendments to the Act on Measures to Reduce Tobacco Smoking and the Act on Excise Duty on Manufactured Tobacco' (Reports of the Ministry of Social Affairs and Health, Finland, 2009) http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/72750/URN%3aNBN%3afi-fe201504226037.pdf?sequence=1&isAllowed=y, accessed 19 September 2019, 47.

[16] Government Bill 180/2009, 18, 29; see also Government Bill 15/2016, 76.

In its Opinion on the Government Bill the Constitutional Law Committee took a rather critical stance towards the endgame objective. The Committee stated that neither the old regulation nor the legislative proposal contain provisions that would allow the objective to be reached. The Committee continued that from the point of view of fundamental rights, the endgame provision risks being used to support interpretations restricting fundamental rights. A preferred approach would be interpreting the relevant provisions in light of fundamental rights in problematic situations. The Committee therefore held that the endgame objective, which reflects a general political position, should be removed or at least essentially reshaped in order to better correspond to other provisions of the Tobacco Act. However, the Committee did not require changes to be made even though it recommended them, and the tobacco endgame was set as the objective of the Tobacco Act as proposed in the Government Bill.[17]

In the Government Bill concerning the current Tobacco Act of 2016, it is reiterated that the objective of smoking prohibitions is that no one is exposed to tobacco smoke against their will.[18] It is acknowledged that tobacco legislation has an obvious connection to Section 19 § 3 of the Finnish Constitution, according to which the public authorities shall guarantee for everyone adequate social, health and medical services and promote the health of the population. The Government Bill examines as a separate question whether permissible grounds exist for limiting other fundamental rights, such as right to personal liberty, right to respect for private life, freedom of expression, protection of property, right to work and the freedom to engage in commercial activity.[19] The identification of issues seems to reflect the previous Opinion of the Constitutional Law Committee. It is explained in the Government Bill that according to experts, a tobacco-free Finland would be possible as early as 2030, instead of 2040, if new measures restricting and preventing smoking were introduced and more efficient support offered for quitting smoking. It is estimated that reaching the aim presupposes, among other things, that the new Tobacco Act will be passed according to the Government Bill as well as that legislation is reformed when needed. Gradually increasing tobacco taxes is equally important. It is also noted that in addition to legislative measures, health education is important in order to reduce smoking among young people.[20] The Government Bill contains a section evaluating the impact of the proposed legislation on children but the assessment is rather short and the

[17] Constitutional Law Committee Opinion 21/2010, 6.
[18] Government Bill 15/2016, 12.
[19] Government Bill 15/2016, 138.
[20] Government Bill 15/2016, 52–53.

rights of the child are not discussed. The focus of the assessment is on describing the proposed restrictions targeting minors specifically.[21]

In its Opinion on the Government Bill concerning the 2016 Tobacco Act, the Constitutional Law Committee identified the right to life and the obligation of public authorities to take responsibility for the protection of the labour force as well as guaranteeing for everyone the right to a healthy environment to be relevant in the context of tobacco control. The Committee now found the objective of the tobacco endgame acceptable but stressed that the aim should not be used to support interpretations limiting fundamental rights.[22]

The legislative history of the tobacco endgame objective in Finnish tobacco regulation shows that fundamental and human rights arguments can be used on both sides of the discussion – either to argue that tobacco production and use should be restricted because of human rights, or to argue that restrictions breach human rights. In the government bills concerning setting the endgame as the objective of tobacco regulation, rights language is not used in justifying the measures aiming at protecting the health of all the population and especially children. The main concern expressed by the Constitutional Law Committee in its two opinions concerning the endgame objective is that the objective can be used to support interpretations restricting fundamental rights. Fundamental and human rights arguments are not introduced to support the endgame objective although, as shown in the next section, such arguments receive strong support from international human rights obligations.

3. THE FINNISH TOBACCO ENDGAME FROM A HUMAN RIGHTS PERSPECTIVE

3.1 Children's Rights and the Tobacco Endgame

When analysing the endgame as the objective of tobacco legislation, a children's rights perspective and, more specifically, the best interests of the child provision, are essential. According to research on tobacco consumption, children's role as tobacco consumers is remarkable since a great majority of all current smokers started smoking under the age of 18.[23] In addition to primary smoking, exposure to second-hand smoke – in general, but particularly in

[21] Government Bill 15/2016, 71–72.

[22] Constitutional Law Committee Opinion 17/2016, 2.

[23] Estimates from the US are presented in National Center for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health, *Preventing Tobacco Use Among Youth and Young Adults – A Report of the Surgeon General* (Centers for Disease Control and Prevention 2012).

enclosed places – is harmful for children.[24] These two problems, exposure to second-hand smoke and children as active smokers, are key when children's rights are examined in the context of tobacco control.[25] The following paragraphs discuss the obligation to consider the best interests of the child and other relevant rights in the context of tobacco control.

Children's right to a tobacco-free environment can be derived from international and regional human rights instruments protecting the right to health and other rights. Article 6 of the International Covenant on Civil and Political Rights guarantees the right to life. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) gives everyone the right to the enjoyment of the highest attainable standard of physical and mental health. In addition, States Parties shall take necessary measures for the healthy development of the child. The UN Committee on Economic, Social and Cultural Rights (CESCR) has specified that Article 12 ICESCR extends to the underlying determinants of health, such as a healthy environment, discouraging the use of tobacco.[26] It has been argued that since the right to tobacco control derives from the right to life and the right to health, it would be unthinkable for a State to claim to have fulfilled its obligations to respect, protect and fulfil the right to health without an effective tobacco control programme.[27]

The UN Convention on the Rights of the Child (CRC), the most ratified human rights treaty in the world with 196 States Parties, safeguards both the civil-political and the economic, social and cultural rights of children. The concept of the best interests of the child is one of the most important provisions of the CRC. According to Article 3(1) CRC, the best interests of the child shall be a primary consideration in all actions concerning children. According to the UN Committee on the Rights of the Child (CommRC), the monitoring body of the CRC, the concept is aimed at ensuring both the full and effective

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[24] U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health 2006).

[25] Problems related to children working in the tobacco industry also support the tobacco endgame; use of child labour is common, and children who work in the tobacco fields are prevented from attending school. See Carolyn Dresler and Stephen Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599, 622–624. In addition, rights of unborn children are endangered if the mother smokes. These issues fall outside the remit of the chapter.

[26] UN CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C.12/2000/4 [4].

[27] Dresler and Marks (n 25) 631.

enjoyment of all the rights recognized in the CRC and the holistic development of the child. Rights of the child can therefore not be trumped by a statement that the outcome is in the best interests of the child.[28] The relevant rights of the child have to be respected in decision-making, and in the case of several possible scenarios, the one that best respects the child's rights has to be chosen.[29] When the rights of the child and rights or interests of others conflict, balancing has to be conducted in each case, keeping in mind that the best interests of the child have to be a primary consideration.[30]

The CommRC has specified that the best interests of the child should influence the development of policies to regulate actions that impede the physical and social environments in which children live, grow and develop.[31] The Committee has also underlined the connection between the right to health and the best interests of the child.[32] The best interests of the child provision has a role as a procedural rule: States have to ensure that a best interests assessment and determination is conducted whenever a matter concerning children is being decided. In addition, the justification of a decision must show that the right has been explicitly taken into account.[33] In the context of tobacco control, this means that the best interests of children both as individuals and as a population group have to be treated as a primary consideration when tobacco-related decisions are made, whether they concern children directly or indirectly.[34] The obligation to conduct a best interests assessment includes measures not targeted at children, which is important when tobacco control is discussed.

The importance of the CRC has been acknowledged in the context of tobacco control. The preamble of the Framework Convention on Tobacco Control (FCTC) mentions the role of the CRC in protecting children's health. Article 6 CRC on the right to life and Article 24 CRC on the right to health are essential in this respect. Article 6 CRC recognizes that every child has the inherent right to life as well as that States Parties shall ensure to the maximum

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[28] UN CommRC, 'General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14.

[29] UN Doc CRC/C/GC/14 (n 28) [6].

[30] UN Doc CRC/C/GC/14 (n 28) [39].

[31] UN CommRC, 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15 [13].

[32] UN Doc CRC/C/GC/14 (n 28) [77]–[78].

[33] UN Doc CRC/C/GC/14 (n 28) [6].

[34] Brigit Toebes, Marie Elske Gispen, Jasper V Been and Aziz Sheikh, 'A Missing Voice: The Human Rights of Children to a Tobacco-free Environment' (2018) 27 Tobacco Control 3; UN Doc CRC/C/GC/14 (n 28) [19]–[20].

extent possible the survival and development of the child. Other relevant rights include participation rights (Article 12 CRC) and the concept of evolving capacities (Article 5 CRC), but other provisions are also important in guaranteeing that children fully enjoy their right to health and development without being exposed to the dangers of smoking.

The CommRC has taken a critical stance towards tobacco use. The Committee has emphasized the importance of approaching children's health from the perspective that 'all children have the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each child's full potential'.[35] The Committee has expressed its concern about the increase in tobacco use among adolescents and instructed States to take measures to address the risks that local environmental pollution poses to children's health. These measures include guaranteeing adequate housing with a smoke-free environment.[36] The Committee has also stated that States should protect children from tobacco, increase the collection of relevant evidence and take appropriate measures to reduce tobacco use among children. Regulation of advertising and sale of substances harmful to children's health as well as regulation of promotion in places where children spend time, and in media channels and publications that are accessed by children, are recommended.[37] The Committee has also encouraged States to ratify the FCTC. In addition, the Committee has underscored the importance of adopting a rights-based approach to substance use.[38] The Committee has also expressed that in line with Article 17 CRC on the right to information, States should regulate or prohibit information on and marketing of tobacco, particularly when it targets children and adolescents.[39]

Protecting young children from smoke is especially important. The CommRC has stated that young children are especially reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities.[40] Since young children are dependent on adults, they cannot usually control their environment. In accordance with Article 5 CRC, States shall respect the responsibilities of parents to provide, in a manner

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35 UN Doc CRC/C/GC/15 (n 31) [1].
36 UN Doc CRC/C/GC/15 (n 31) [38], [49].
37 UN Doc CRC/C/GC/15 (n 31) [65].
38 UN Doc CRC/C/GC/15 (n 31) [66].
39 UN CommRC, 'General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) UN Doc CRC/GC/2003/4 [21].
40 UN CommRC, 'General Comment No. 7: Implementing child rights in early childhood' (20 September 2006) UN Doc CRC/C/GC/7/Rev.1 [13].

consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC. In the context of smoking, this means that children cannot be expected to fully understand the long-term consequences of smoking and being exposed to smoke.[41] They should therefore be provided accurate information about the dangers and addictiveness of smoking (or more precisely nicotine), which is an obligation equally required by Article 17 CRC. The concept of evolving capacities is a developmental concept: since scientific evidence shows that childhood is an important period for the development of human beings, fulfilment of both the civil-political and the socio-economic rights of children is essential in order for them to realize their developmental potential.[42]

Another argument supporting the tobacco endgame is non-discrimination. Article 2 CRC provides that rights safeguarded in the CRC have to be guaranteed to each child without discrimination of any kind.[43] Since being exposed to smoke is harmful, States have to make sure that children, regardless of their parents' social status or conditions at home, have the same potential to enjoy their right to health without being exposed to second-hand smoke. According to the statistics in Finland, for example, tobacco use is more prevalent among the less well educated.[44] Non-discrimination is all the more important given that children do not have the same possibilities to control their exposure to smoking. Similarly, the CESCR has underlined the connection between non-discrimination and the right to health.[45]

3.2 Rights of Others as a Justification for the Endgame

Is it a valid concern that the endgame objective risks disproportionately restricting the rights and freedoms of those who smoke as the Constitutional Law Committee expressed? This question can be approached from the point of view of limiting fundamental and human rights. Similarly to any legislative choice, endgame strategies have to meet the general criteria for limiting fun-

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[41] For the adverse health effects of smoke exposure, see W Hofhuis, JC de Jongste and PJFM Merkus, 'Adverse Health Effects of Prenatal and Postnatal Tobacco Smoke Exposure on Children' (2003) 88 Archives of Disease in Childhood 1086.

[42] Gerison Lansdown, *The Evolving Capacities of the Child* (Innocenti Insight 2005) 16–21.

[43] See also UN Doc CRC/C/GC/15 (n 31) [8]–[11].

[44] 'Smoking in Finland' (*National Institute for Health and Welfare*, 14 March 2018) https://thl.fi/en/web/alcohol-tobacco-and-addictions/tobacco/smoking-in-finland, accessed 24 July 2019.

[45] UN Doc E/C.12/2000/4 (n 26) [18]–[19].

damental and human rights, demonstrating that they significantly improve the public's health.[46]

When assessing endgame strategies from the perspective of human rights law, it is important to identify whose rights are at stake. First, the situation needs to be assessed from the point of view of the individual using tobacco products and the obligations of the State towards individuals, especially vulnerable groups. Secondly, we need to consider the situation from the point of view of the rights of those who do not use tobacco products themselves but whose rights are violated because someone else uses them. Thirdly, we have to consider those rights of the individual that speak against strict tobacco regulation – essentially the right to personal liberty and the right to respect for private life. Finally, some rights, such as freedom to engage in commercial activity and the right to property, are relevant from the point of view of the industry. It is important to note that the assessment of which rights and whose rights are relevant also depends on whether we are assessing smoking or other nicotine-containing products. The question of second-hand smoke is relevant in the case of smoking only.

The general permissible limitations test under the Finnish Constitution bears many similarities with the European Convention on Human Rights (ECHR) system of limiting rights, Article 52.1 of the Charter of Fundamental Rights of the European Union and the Siracusa principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights.[47] The Finnish criteria consist of seven cumulative criteria for limiting rights protected in the Constitution. The list was set out in the preparatory works of the reform of the constitutional catalogue of rights in 1995. In assessing the permissibility of a limitation, all of the following criteria have to be fulfilled: (1) the limitation must be based on an Act of Parliament; (2)

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[46] See, for example, Thomas and Gostin (n 2). A report proposing measures required in order to reach the endgame goal in Finland by 2030 was issued on 31 May 2018 by a working group appointed by the Ministry of Social Affairs and Health. For a summary in English see Ministry of Social Affairs and Health, 'Working group: Smoke-free Finland through better tobacco and nicotine policy' (*Ministry of Social Affairs and Health*, 31 May 2018) https://stm.fi/en/artikkeli/-/asset_publisher/tyoryhma-tupakka-ja-nikotiinipolitiikkaa-kehittamalla-suomi-savuttomaksi, accessed 24 July 2019.

[47] UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) E/CN.4/1985/4; on the ECHR system of limiting rights, see, for example, George Letsas, 'The Scope and Balancing of Rights. Diagnostic or Constitutive?' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).

the limitation must be precise; (3) the limitation must be acceptable; (4) the essence of a right cannot be limited; (5) the limitation must be proportionate; (6) protection under the law has to be considered; and (7) the limitation cannot breach international obligations binding upon Finland.[48]

Based on these criteria, the proportionality of the endgame objective was contested by the Constitutional Law Committee, which raised concerns that the means introduced in the Tobacco Act would not be suitable for achieving the aim. When restrictions to tobacco use are introduced, it is important to consider them in light of the criteria. The proportionality of each individual measure is indeed important. This means assessing whether the means are suitable for achieving the aim and whether the aim could be reached with other, less restrictive means.

It is, however, important to note that the issue could have been framed from the point of view of protecting others from the harms of tobacco use. If the starting point had been the right to health and other relevant rights of others, the argumentation could have been different. In the light of the human rights obligations described in the previous section, it seems clear that reducing smoking as much as possible is in the best interests of the child. Being exposed to smoke endangers children's enjoyment of the right to health and prevents children from fully realizing their developmental potential. In addition, the State's obligation to protect the right to health and other rights is relevant in this context. The CESCR has stated concerning Article 12 ICESCR that the State's obligation to protect the right to health requires States to take measures that prevent third parties from interfering with Article 12 guarantees. The obligation to fulfil requires States to adopt appropriate measures, including legislative, towards the full realization of the right to health.[49] The full realization of the right to health may be interpreted as requiring adoption of an endgame strategy or some other kind of effective strategy aiming at reducing tobacco consumption as much as possible.

In the Finnish context, the Constitution offers additional support for the obligation of the State to protect others from exposure to tobacco smoke. According to Section 22 of the Constitution, public authorities shall guarantee the observance of basic rights and liberties and human rights. The provision expresses a positive obligation of the State to not only refrain from interfering with freedoms but to actively protect fundamental and human rights. In the context of smoking, this obligation can be interpreted as an obligation to take

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[48] Constitutional Law Committee 25/1994, 4–5; see also Tuomas Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart Publishing 2018) 146–147.

[49] UN Doc E/C.12/2000/4 (n 26) [33].

measures to restrict smoking since smoking compromises the right to health. An endgame as an objective of tobacco legislation – or other similar strategy – therefore appears proportionate, even necessary, and gets further support from the obligation of the State to protect vulnerable groups such as children.

Furthermore, it is questionable whether a practice harming the realization of rights of others can be seen as an interest that deserves to be protected by the human rights system. Dressler and Marks have argued that smoking is not about human rights but rather about smokers' legally protected interests, which may compete with social welfare as a matter of legislative policy. The human rights to life and to health trump the right to consume a toxic but legal substance.[50] One of the Finnish criteria for permissible limitations is whether the limitation respects the essence of the right. It would be hard to argue that the right to use tobacco products belongs to the essence of the right to personal liberty, right to respect for private life, freedom of expression, protection of property or the freedom to engage in commercial activity.

4. CONCLUSIONS

Setting the tobacco endgame as the objective of the Finnish Tobacco Act was justified by health concerns. During the drafting of the Tobacco Act there was little explicit consideration of fundamental and human rights issues from the point of view of protecting the right to health or other human rights. Rather, the Constitutional Law Committee raised concerns that the criteria for limiting smokers' fundamental rights would not be met since the means provided for in the Act would not allow achieving the aim. The Committee, however, accepted that the legislative proposal be enacted in accordance with the ordinary legislative procedure and did not require the procedure for constitutional enactment. Both the Government Bill and the Opinion of the Constitutional Law committee can be criticized for not giving enough consideration to the rights of others, especially children, as well as to the perspective of protecting the individual from harmful effects of smoking.

In the light of fundamental and human rights obligations, an endgame or other effective strategy aiming at reducing smoking as much as possible as the objective of tobacco regulation seems desirable, even necessary. Especially the need to protect children's rights speaks strongly for reducing smoking as much as possible. The effectiveness of an endgame strategy is, however, important for it to be justified, and each individual measure laid down in the Tobacco Act has to be assessed in the light of the criteria for limiting fundamental rights. It is therefore essential that tobacco policy be constantly monitored and updated.

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[50] Dresler and Marks (n 25) 617.

In its latest concluding observations to Finland in 2011, the CommRC expressed its concern about the high level of alcohol and tobacco abuse among adolescents and recommended that Finland strengthen its measures to divert adolescents from alcohol, tobacco and substance abuse by raising awareness on the negative impacts of alcohol and tobacco and engaging the mass media to ensure their contribution to healthy lifestyles and consumption patterns of children and adolescents.[51] The concluding observations were given before the reform of the Tobacco Act. It will be interesting to observe how the CommRC assesses the new Tobacco Act and the endgame objective in the future.

[51] UN CommRC, 'Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Finland' (3 August 2011) UN Doc CRC/C/FIN/CO/4 [48]–[49].

15. E-cigarettes in Belgium: while the smoke clears the fog rises

Steven Lierman and Mathijs van Westendorp

1. INTRODUCTION

The increased use of e-cigarettes leads to the question how this relatively new phenomenon should be regulated. While a substantial body of evidence exists on the detrimental health effects of combustible tobacco products, there is no full clarity yet on the health effects of e-cigarettes. Even though multiple studies are dedicated to the topic of e-cigarettes,[1] the uncertainty surrounding e-cigarettes fuels an increasingly polarized debate.

Proponents of e-cigarettes stress the positive health benefits of switching smokers from classic tobacco products to e-cigarettes by pointing to the usefulness of e-cigarettes as a harm-reduction tool.[2] They argue a positive 'cessation effect' on public health as e-cigarettes are a healthier alternative for people who would otherwise smoke tobacco.

Opponents, on the other hand, fear a 'temptation effect' of e-cigarettes, where e-cigarettes are seen as more attractive to young people than classical smoking, leading to their increased use and/or functioning as a gateway to tobacco smoking. Considering the uncertainty of the health effects of (different types of) e-cigarettes for different sub-populations (that is, smokers and non-smokers), there is an open question as to the optimal regulation of e-cigarettes.

In this chapter we will explore the Belgian legislation on e-cigarettes and highlight the choices that the Belgium legislature made regarding the use of the margin of discretion in the Tobacco Product Directive (TPD) for Member

[1] See, for example, Superior Health Council, 'Advice 9265 – the Electronic Cigarette' (*Federal Public Service*, 7 October 2015) https://www.health.belgium.be/en/advice-9265-electronic-cigarette#anchor-27526, accessed 27 July 2019; Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others, *Public Health Consequences of E-Cigarettes* (National Academies Press 2018).

[2] Superior Health Council (n 1) 7.

States to regulate aspects of e-cigarettes. First, we describe the different areas of (scientific) uncertainty concerning e-cigarettes. Next, the different categories that the TPD introduced are assessed. Thereafter, the different relevant Belgian national laws and Royal Decrees are discussed in light of the right to health and the precautionary principle. While the notion of prevention is used in relation to health protection against well-known risks, precaution deals with health risks for which no scientific certainty exists. It strengthens public authorities' responsibility to respect, protect and fulfil the right to health.

Besides briefly looking into advertising restrictions, age restrictions and prohibition of distance sales, we will focus on the Belgian smoking ban. Finally, we summarize lessons (to be) learned from the choices and implementation of e-cigarette legislation in Belgian national law. Our analysis shows the importance of a consistent use of terminology, especially when it concerns such a highly contested and polarizing product.

2. RIGHT TO HEALTH, PRECAUTION AND SCIENTIFIC UNCERTAINTY ON THE HEALTH RISKS OF E-CIGARETTES

2.1 Uncertainty of Risk and Measure

The duty of progressive realization of the right to health is reinforced by the precautionary principle. The latter provides a legal basis for public authorities to act aimed at reducing uncertain but plausible risks. These are risks for which there are serious reasons to believe that there may be danger, but 'for which scientific data on the likelihood of a hazard and the nature of the importance of the hazard are insufficient or impossible to identify'.[3] A limited overview of the current evidence in relation to e-cigarettes provides an insight into the uncertainties surrounding the health risks of e-cigarettes and shows that there are still unsolved questions. This complexity in relation to public health leaves the public authorities a wide margin of appreciation to adopt protective

[3] Harriet Bradley, Leonie Reins, Nicola Crook, Nienke van der Burgt and Virginie Rouas, *Study on the Precautionary Principle in EU Environmental Policies: Final Report* (European Union 2017) 7. Traditionally, the precautionary principle is applied only to the uncertainty of risks. An extension of the scope of application to the uncertainty of measures is currently under discussion. Alberto Alemanno, 'The Precautionary Principle' in Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer International Publishing 2016) 839–842. According to the traditional approach it only applies to the direct health risks of e-cigarette use and not to the secondary health effects, as these relate to the uncertainty of the efficacy and effectiveness of measures.

measures in relation to e-cigarettes but may not be a reason to deviate from the principles of legal certainty, proportionality and non-discrimination.[4]

The uncertainties surrounding e-cigarettes can be categorized into uncertainty regarding direct health risks, where the risks directly relate to the actual usage of e-cigarettes,[5] and indirect risks, not being the result of use of the product itself but of an increased risk that the same or a similar product will be used later. The indirect risks refer to a behavioural change resulting from advertisement of e-cigarettes resulting in an increase in use.

2.2 Direct Health Risks

The primary health risks are related to those risks resulting directly from the use of e-cigarettes. Similar to tobacco smoke, health risks exist for the user as well as for those exposed to the emissions of e-cigarettes (that is, 'second-hand vaping').

2.2.1 The risk for the e-cigarette user

The primary health risks relate to the exposure of the user to the emissions of e-cigarettes. While there seems to be consensus that the health risk of e-cigarettes for the user is lower compared with that of tobacco products, several aspects, including the long-term effects of nicotine and of the exposure to other pollutants in the emissions of e-cigarettes, remain uncertain.[6] Even when excluding the potential health risks posed by nicotine, uncertainty remains as there is a suspicion of toxicity in non-nicotine e-liquid substances such as flavourings, scents and colourings.[7] As such, the health effects are still poorly understood.

2.2.2 The risks of second-hand vaping

Limited research is currently available on the health risks of bystander exposure to the vapour of e-cigarettes.[8] This lack of substantive evidence gives rise to controversy. On the one hand, a report by Public Health England states that '[e-cigarettes] release negligible levels of nicotine into ambient air with

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4 European Commission, 'Communication from the Commission on the Precautionary Principle' (COM/2000/0001 Final).

5 In this chapter we do not discuss product safety issues.

6 Superior Health Council (n 1) 27–30.

7 ibid 6.

8 Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others (n 1) 77.

no identified health risks to bystanders'.[9] On the other hand, a more recent report by the US National Academies of Sciences Engineering and Medicine concludes '[t]here is conclusive evidence that e-cigarette use increases airborne concentrations of particulate matter and nicotine in indoor environments compared with background levels' and that '[t]here is limited evidence that e-cigarette use increases levels of nicotine and other e-cigarette constituents on a variety of indoor surfaces compared with background levels'.[10] While there is increasing evidence that e-cigarettes emit toxic compounds,[11] the health effects of passive exposure to the compounds remain uncertain as there are no studies available yet.[12] Consequently, there is no indication of scientific consensus on the health risks of second-hand vaping.

2.3 Indirect Health Risks

In relation to the indirect or secondary health risks, we highlight two perspectives: (1) e-cigarettes as a cessation tool for smokers and (2) e-cigarettes as an incentive for non-smokers.

2.3.1 Cessation effect: the risk of continued use of tobacco products

E-cigarettes are considered to be a healthier alternative for regular tobacco products. The reasoning behind a positive effect on public health is that e-cigarettes offer current smokers the possibility to transition to a less dangerous alternative. The assumption is that other harm-reduction methods are insufficiently effective and that without e-cigarettes smokers will continue this far unhealthier habit. While the UK seems to have all but embraced this strategy to improve public health,[13] the Belgian strategy is more reserved, merely acknowledging that e-cigarettes *could* be part of a comprehensive harm-reduction strategy, as the Superior Health Council (SHC) recommends in its advice.[14] The latest systematic review of the available evidence con-

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[9] A McNeill and others, 'E-Cigarettes: An Evidence Update – a Report Commissioned by Public Health England' (Public Health England 2015) 65.

[10] Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others (n 1) 84.

[11] ibid 78–83.

[12] ibid 84.

[13] Global and Public Health/Population Health/HB/cost centre, 'Towards a Smoke-Free Generation: Tobacco Control Plan for England' (Department of Health 2017) 15.

[14] Superior Health Council (n 1) 7. The Belgian Superior Health Council draws up scientific advisory reports that aim at providing guidance to political decision-makers and health professionals, see Superior Health Council, 'About Us' (*Federal Public Service*) https://www.health.belgium.be/en/about-us-0, accessed 27 July 2019.

cludes: '[o]verall, there is limited evidence that e-cigarettes may be effective aids to promote smoking cessation'.[15] It is clear that the debate on the effects of using e-cigarettes as a cessation tool is still ongoing.

2.3.2 Temptation effect: the risk of non-smokers starting with e-cigarettes

The temptation effect relates to the fear that the attractiveness of e-cigarettes could tempt young people to start using them. Moreover, e-cigarettes could be a gateway to the smoking of combustible tobacco cigarettes. This risk is not an unsubstantiated claim as '[t]here is substantial evidence that e-cigarette use increases risk of ever using combustible tobacco cigarettes among youth and young adults'.[16] While this provides some clarity, 'ever using' is not equal to 'habitual using' or effectively becoming a smoker. Even though scientific uncertainty remains, research does indicate that non-smokers,[17] and especially young people, would be encouraged to use e-cigarettes as well as tobacco products by regular exposure to e-cigarettes in their living environment, and certainly when e-cigarettes are marketed as a safer alternative.[18] In conclusion, while more research is still required, there is substantial evidence to support the assertion of a temptation effect of e-cigarettes.

3. E-CIGARETTES AND THE TOBACCO PRODUCT DIRECTIVE

In 2014 the EU adopted the new TPD with a special article for the regulation of e-cigarettes.[19] This directive harmonizes the previously existing patchwork of national regulations regarding e-cigarettes,[20] with the objective to provide

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[15] Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others (n 1) 584.

[16] ibid 532.

[17] Philip Morris is aware of this argument as is evident from the following: 'These new products are only intended for adult smokers and not for those who have never smoked or are former smokers', 'Creating a Smoke-Free Future. Science and Innovation' (*Philip Morris International*) https://www.pmi.com/science-and-innovation, accessed 27 July 2019.

[18] Pallav Pokhrel, Pebbles Fagan, Lisa Kehl and Thaddeus A Herzog, 'Receptivity to E-Cigarette Marketing, Harm Perceptions, and E-Cigarette Use' (2015) 39 American Journal of Health Behavior 121; Superior Health Council (n 1) 50–56.

[19] Directive 2014/40/EU on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products and Repealing Directive 2001/37/EC (Tobacco Product Directive) [2014] OJ L127/1, art 20.

[20] Eugenie Syx, 'The Case of the Electronic Cigarette in the EU' (2014) 21 European Journal of Health Law 161; Eugenie Syx and Stefaan Callens, 'Over

a level playing field while guaranteeing a high level of consumer protection.[21] This is done through the regulation of the notification procedure for new products, packaging, nicotine composition, advertisement and procedure for the gathering of extra information on nicotine-containing e-cigarettes.[22] In addition, the definitions in the TPD result in different categories of e-cigarettes. Considering that the category of an e-cigarette affects the legislation that is applicable and its terminology, a brief discussion of the different categories of e-cigarettes is essential for an understanding of the Belgian national legislation.

3.1 Categories of E-cigarettes

The TPD defines 'tobacco products' as 'products that can be consumed and consist, even partly, of tobacco'.[23] Consequently, any e-cigarette containing 'tobacco', which 'means leaves and other natural processed or unprocessed parts of tobacco plants, including expanded and reconstituted tobacco',[24] should be considered as a tobacco product in the sense of the directive. Consequently, there is little to no discussion that this category of e-cigarettes must adhere to the regulations applicable to tobacco products.[25]

In the TPD, electronic cigarettes are defined as

> a product that can be used for consumption of nicotine-containing vapour via a mouth piece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank. Electronic cigarettes can be disposable or refillable by means of a refill container and a tank, or rechargeable with single use cartridges.[26]

Essentially, this definition includes all products used to administer nicotine-containing vapour. Evidently, this definition can overlap with the first one when the vapour is based on (processed) tobacco where the latter takes precedence.

Elektronische Sigaretten En Health Apps. Recente Ontwikkelingen in Het Medisch Hulpmiddelenrecht' (Recht in beweging, 21ste VRG alumnidag, 14 March 2014, Leuven).

[21] Marco Inglese, 'Please Smoke Your E-Cigarette Proportionally' (2017) 25 European Journal of Health Law 75, 78; Tobacco Product Directive (n 19) recital 4, 43.

[22] Tobacco Product Directive (n 19) art 20.

[23] ibid art 2(4).

[24] ibid art 2(1).

[25] Eugenie Syx, 'Reclamebeperkingen Als Instrument Ter Bestrijding van Tabaksgebruik' in Ilse Samoy and Eline Coutteel (eds), *Het rookverbod uitbreiden? Juridisch onderzoek, casussen & aanbevelingen* (Acco 2016) 587.

[26] Tobacco Product Directive (n 19) art 2(16).

As the definition of e-cigarettes in the TPD specifically requires a product for the consumption of nicotine-containing vapour, e-cigarettes that cannot be used for the inhalation of nicotine fall outside the scope of the TPD.[27] The aforementioned leaves Member States the discretion to regulate these e-cigarettes.[28]

E-cigarettes can be advertised as a medicinal product or as a medical device because of a claim of medical function or objective,[29] to which the TPD does not apply.[30] A discussion of this category of e-cigarettes is not within the scope of this chapter.

3.2 Limited Harmonization

The TPD explicitly mentions that it does not harmonize the rules on smoke-free environments, domestic sales arrangements or domestic advertising, brand stretching and age limits for e-cigarettes, where the Member States are encouraged to take the necessary initiatives.[31] Consequently, the Member States have a level of discretion within which to regulate these aforementioned topics regarding e-cigarettes.

The aforementioned raises questions of whether Member States should regulate e-cigarettes similar to tobacco products and whether legislators should account for the specific characteristics of (different categories of) e-cigarettes. We will explore these questions by looking at the choices made by the Belgian legislature in relation to e-cigarettes. We will focus in particular on the regulations concerning advertisement, age restrictions, the smoking ban for public places and limiting distance sales.

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[27] See Section 5.4.

[28] 'E-Cigarettes Myth Buster' (*European Commission*, 26 February 2014) https://ec.europa.eu/health/sites/health/files/tobacco/.../tobacco_mythbuster_en.pdf, accessed 27 July 2019.

[29] Eugenie Syx, 'Promotie van medische hulpmiddelen: Juridische analyse op basis van het geneesmiddelenrecht' (KU Leuven Faculteit Rechtsgeleerdheid 2016) 561–564.

[30] These categories of electronic cigarettes fall outside the scope of the TPD (Tobacco Product Directive (n 19) recital 36).

[31] Tobacco Product Directive (n 19) recital 48.

4. LAW FOR PROTECTION OF CONSUMER HEALTH REGARDING FOODSTUFFS AND OTHER PRODUCTS

The law for protection of the health of consumers in relation to foodstuffs and other products has the aim to protect public health from dangerous products.[32] In so far as relevant for e-cigarettes, the law establishes advertisement and age restrictions. The legal history provides an interesting insight into how the Belgian legislature deals with the new phenomenon of e-cigarettes. Rather than opting for a new legal framework, the existing legislation on traditional tobacco products is used. Despite the lack of an explicit reference to e-cigarettes in the Belgian Act, the legislator intended e-cigarettes to fall within the ambit of the law. This is a valid option if the different categories of products, as well as the legal consequences, are clearly defined, which is not the case under Belgian law.

4.1 Are E-cigarettes Within the Material Scope of This Law?

The law is applicable to the products defined as 'tobacco, products based on tobacco and similar products [, hereafter referred to as tobacco products]'.[33] This definition raises questions on its exact meaning: what is meant by 'similar products' and how are 'tobacco products' defined? Evidently, the initial definition in the law of 1977 did not include e-cigarettes as this product was first commercialized in the twenty-first century. However, the definition is clearly meant to have a broad scope[34] and, for example, include tobacco-related products that are not smokable such as chewing tobacco or snus.

The Belgian legislature added the umbrella notion 'tobacco products' to the definition through an amendment of the law in 2016, thus including tobacco, products based on tobacco and similar products. According to the drafting history, the motivation for this addition by the Belgian legislature is to clarify that the measures (specifically the age restriction) related to the products as defined in the legislation are also applicable to e-cigarettes.[35]

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[32] Wet van 24 januari 1977 betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere produkten/Loi du 24 janvier 1977 relative à la protection de la santé des consommateurs en ce qui concerne les denrées alimentaires et les autres produits, *BS* 8 april/avril 1977 (Law on the protection of health of the users of foodstuffs and other products).

[33] ibid art 1, 2°, d, our translation.

[34] Syx (n 25) 571.

[35] 'The definition of tobacco products is clarified ... so as to explicitly include products such as the "e-cigarette" in the age restriction of 16. As there were differ-

The choice of including e-cigarettes under the notion 'tobacco product' is a peculiar choice as the TPD reserves this term for products containing or based on tobacco.[36] The ambit of the definition in the Belgian law obviously is not restricted to the category of e-cigarettes as defined by the TPD but extends to all tobacco-free e-cigarettes (with or without nicotine). The reuse of these terms with a different meaning is confusing and does not contribute to legal certainty.

4.2 Age Restriction for Buying E-cigarettes

Belgian law only allows the selling of tobacco products, including e-cigarettes, to people of 16 years of age and older. The main reasoning for this restriction on the sale of these products is the protection of young people from the influence and unhealthy effects of such products. However, Belgium is one of the few remaining countries in Europe where the minimum purchase age for tobacco products is below 18 years old.[37] While not a definitive argument as more scientific research is needed (see Section 2.3.2), it would be difficult to assert this measure as disproportionate in relation to e-cigarettes. However, the more substantial evidence supports the assertion of a temptation effect of e-cigarettes for young people, the more an increase in minimum purchase age to 18 is advisable.

4.3 Advertising Restrictions for E-cigarettes

In the legal provision on advertising restrictions, the umbrella notion 'tobacco products' dates back to the period before e-cigarettes were commercialized and the adoption of the TPD. According to a 1997 amendment, the law 'prohibits the advertisement and sponsorship by tobacco, tobacco products based on tobacco and similar products, in general referred to as tobacco products'.[38]

In light of the clarification in the drafting history on the applicability of the age restriction, it seems likely that 'tobacco product' should be interpreted

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ent interpretations before', our translation (Belgian Chamber of Representatives, *Wetsontwerp Houdende Diverse Bepalingen Inzake Gezondheid/Projet de Loi Portant Des Dispositions Diverses En Matière de Santé* (DOC 54 1838/004) 39).

[36] See Section 3.1.

[37] Law on the protection of health of the users of foodstuffs and other products (n 32) art 6 [4].

[38] Wet van 10 december 1997 houdende verbod op de reclame voor tabaksproducten/Loi du 10 décembre 1997 interdisant la publicité pour les produits du tabac, BS 11 februari/février 1998 (Law on the prohibition of advertisement for tobacco products) art 7, §2*bis*, our translation.

as having the same meaning regarding advertisement (that is, including e-cigarettes). The inconsistency between the definitions within the law appeared to be an important reason why the legislature adopted the same notion for the age restriction in 2016. Consequently, e-cigarettes are subject to the same advertising restrictions as traditional tobacco products, where advertisement is defined as: 'every announcement or act that directly or indirectly improve the sale of tobacco regardless of the place, means of communication or used techniques'.[39] One of the rare exceptions to the advertising restrictions are specific shops, such as tobacco shops and shops selling newspapers, which are allowed to have posters inside and on the facade.[40] This exception is the result of a balancing act between access for e-cigarette users and prevention of inducements to start using e-cigarettes for non-smokers. Although this may be considered a strict measure in relation to certain categories of e-cigarettes, especially tobacco-free e-cigarettes without nicotine, the measure can hardly be considered disproportionate in the light of the current state of scientific knowledge about the temptation effect, especially on young people.

5. SMOKING BAN IN ENCLOSED PLACES ACCESSIBLE TO THE PUBLIC

The objective and rationale of the Belgian smoking ban[41] is slightly different from the law discussed above. This is because the smoking ban regulates the use of a product rather than the characteristics of the product itself.[42] The aim of the law is to implement a general smoking ban in enclosed places accessible to the public, including bars and restaurants, in a non-discriminatory

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[39] Law on the protection of health of the users of foodstuffs and other products (n 32) art 7 [2*bis*] 1°, our translation.

[40] ibid art 7 [2*bis*] 2°.

[41] Wet van 22 december 2009 betreffende een algemene regeling voor rookvrije gesloten plaatsen toegankelijk voor het publiek en ter bescherming van werknemers tegen tabaksrook/Loi du 22 décembre 2009 instaurant une réglementation générale relative à l'interdiction de fumer dans les lieux fermés accessibles au public et à la protection des travailleurs contre la fumée du tabac, *BS* 29 december/décembre 2009 (Law on the smoking ban in public places).

[42] 'The proposal assumes that one should not be involuntarily exposed to passive smoking when in a public area but allows for the possibility of every public area to provide a ventilated smoking room', Wetsvoorstel wat betreft de rookvrije gesloten plaatsen toegankelijk voor het publiek en de bescherming van werknemers tegen tabaksrook/proposition de loi modifiant la législation relative à l'interdiction de fumer dans les lieux fermés accessibles au public et à la protection des travailleurs contre la fumée du tabac 2009 14, 8 (Belgian smoking ban bill), our translation.

manner for reasons of public health.[43] Although it is generally accepted that the smoking ban extends to e-cigarettes,[44] the wide scope of application of the ban cannot easily be derived from the text of the law. An explicit reference to vaping and e-cigarettes is again lacking. While the notion 'smoking' in the act does not extend to 'vaping', e-cigarettes are nevertheless deemed to fall within the ambit of the law because they are expected to mitigate exposure to tobacco smoke. Legal certainty is certainly not served by this very implicit reference, which may give rise to legal disputes.

5.1 Does 'Smoking' Include 'Vaping'?

As its name implies, the law revolves around the act of 'smoking', which is defined as 'the smoking of tobacco, products based on tobacco and of similar products'.[45] Although this wording resembles the definition in the law for the protection of consumer health, the notion of 'smoking' is different and leads to complications in relation to e-cigarettes. Given that smoking is defined as the action or habit of inhaling and exhaling the smoke of tobacco or a drug,[46] and that smoke is a suspension of particles following combustion or pyrolysis, it is not evident that this definition includes e-cigarettes. Indeed, the latter are associated with vaping instead of smoking, which refers to an aerosol that is inhaled.[47] Consequently, the use of e-cigarettes is not the same as smoking and cannot be the reason the smoking ban is applicable to e-cigarettes.[48]

Further complicating the assumption that e-cigarettes fall within the scope of the articles discussed above is that there is the absence of any discussion

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[43] Pieter Pecinovsky and Frank Hendrickx, 'De mogelijkheid en wenselijkheid van een uitbreiding van het rookverbod op de werkplaats' in Ilse Samoy and Eline Coutteel (eds), *Het rookverbod uitbreiden? Juridisch onderzoek, casussen en aanbevelingen* (Acco 2016) 479; Belgian smoking ban bill (n 42).

[44] Superior Health Council (n 1) 55; Ilse Samoy and Eline Coutteel, *Het Rookverbod Uitbreiden? Juridisch Onderzoek, Casussen & Aanbevelingen* (Acco 2016) 571; FAGG and FOD Volksgezondheid, 'Mededeling van het fagg en de FOD Volksgezondheid betreffende de elektronische sigaret. News' (*FAGG*, 9 April 2013) https://www.fagg.be/nl/news/news_cigarette_electronique_2013_04, accessed 27 July 2019.

[45] Law on the smoking ban in public places (n 42) art 2, our translation.

[46] Dutch: Betekenis 'roken' (*Van Dale*), available at https://www.vandale.nl/gratis-woordenboek/nederlands/betekenis/roken, accessed 27 July 2019; English: 'Smoking' (*Oxford Living Dictionaries*) https://en.oxforddictionaries.com/definition/smoking, accessed 27 July 2019.

[47] 'E-cigarette aerosol is best described as a mist, which is an aerosol formed by the condensation of spherical liquid droplets in the submicrometer to 200-m size range', Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others (n 1) 69.

[48] See also Syx (n 25) 571.

in the preparation of this law on whether this definition extends to vaping. Given that e-cigarettes already existed in 2009, it is highly remarkable that e-cigarettes were not discussed in the preparation of the Act.

Additionally, considering that Article 133 of the Belgian Social Penal Code makes the violation of the smoking ban a punishable offence, *nulla poena sine lege* applies, reducing the interpretation of the extent of the scope. Legal certainty in criminal law cases may be infringed due to the lack of an explicit reference to e-cigarettes in the Act.

5.2 Mitigate Exposure to Tobacco Smoke

Mitigating the exposure to tobacco smoke is the underlying reason to extend the scope of the act to e-cigarettes. The SHC uses this reasoning in its advice to extend the smoking ban to e-cigarettes.[49] The SHC and others use the following reasoning:

> Article 3, paragraph 3 of the law of 22 December 2009 … states: Any element likely to encourage smoking or to give the impression that smoking is permitted is prohibited in the areas referred to in paragraphs 1 and 2. It is thus forbidden to use any electronic cigarette (all three types, without exception) in enclosed public spaces, including bars and restaurants, in Belgium.[50]

This reasoning depends on the validity of the assumption that using e-cigarettes in public places encourages smoking or gives the impression that smoking is prohibited.

Regarding the encouragement of smoking, in the same advice the SHC finds that '[t]here is certainly a chance of non-smokers becoming habitual users of nicotine-containing e-cigarettes, but as yet there is little to suggest this' as an answer to the question whether '… non-smokers run the risk of starting to use e-cigarettes with nicotine'.[51] In combination with the uncertainty of the evidence highlighted in Section 2.3, this does not provide the necessary evidence to assume that e-cigarettes are within the scope of this law, especially when considering that such an interpretation could unintentionally broaden the scope of the law far beyond tobacco products and e-cigarettes to any product that could be hypothesized to encourage smoking.[52]

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[49] 'The law of 22 December 2009 states that the use of an e-cigarette (with or without nicotine) is forbidden in any place covered by a smoking ban', Superior Health Council (n 1) 10.

[50] ibid 55; FAGG and Volksgezondheid (n 44); Syx (n 25) 571.

[51] Superior Health Council (n 1) 8.

[52] For example, alcoholic beverages lower inhibitions, which consequently could lead to increased smoking. Evidently, this is not the goal of the law.

Due to the lack of scientific evidence, a stronger argument can be found in the reference in the text of the law to 'any element that is likely to … give the impression that smoking is permitted'. It may indeed be hard to distinguish tobacco-free e-cigarettes from tobacco (e-)cigarettes, as both produce vapour and smoke that can be difficult to tell apart. The SHC points out that it may be difficult to tell e-cigarettes and tobacco cigarettes apart when applying the ban.[53] However, such an interpretation has a downside as it would allow for the possibility of e-cigarettes that are sufficiently distinctive from tobacco products (for example, new products such as JUUL)[54] to fall outside of the scope of the smoking ban.

In conclusion, due to the lack of an explicit reference to e-cigarettes the scope of the Belgian smoking ban partly depends on the (subjective) interpretation of the results of a highly contested area of research on the indirect health effects of e-cigarettes. The assertion that Article 3 of the Belgian law extends the material scope to e-cigarettes is a more ambivalent interpretation than necessary, given that it hinges on the assumption that e-cigarettes encourage smoking or give the impression that smoking is permitted. This ambiguity leads to reduced legal certainty and gives room for unnecessary disputes about the ambit of the Act.

This is even more problematic when other laws explicitly refer to the definitions in this federal Act. The recent Flemish law on air quality in motorized vehicles, imposing a smoking ban in the presence of children aged 16 years old or younger, indeed applies to tobacco products as formulated in the federal Law on the smoking ban.[55] As a result, the aforementioned discussion on the ambit of the federal Act is also relevant here. However, the explanatory statement of the Flemish law explicitly intends to bring e-cigarettes with or without nicotine within the scope of the smoking ban in cars.[56]

6. GENERAL BAN ON DISTANCE SALES

In Belgium the TPD is partly implemented by a Royal Decree of 28 October 2016 on the manufacture and sale of electronic cigarettes. While the Royal Decree is mostly a straightforward implementation of the TPD, Belgium

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53 Superior Health Council (n 1) 55.

54 'JUUL' (*JUUL Labs Inc*) https://www.juul.com/, accessed 27 July 2019.

55 Decreet van 21 december 2018 houdende de luchtkwaliteit in het binnenmilieu van voertuigen, BS 30 January 2019, 10069.

56 Ontwerp van decreet houdende de luchtkwaliteit in het binnenmilieu van voertuigen 1751-1, 7 November 2018.

used the margin of discretion given by the TPD to ban both national and cross-border e-cigarette distance sales.[57]

6.1 Protecting Young People

The reason for this general distance sales ban is to ensure the protection of non-smokers, especially young people, against the temptation and health risks of e-cigarettes.[58] As it is difficult to verify the age of a buyer in a distance sale, there is a substantial risk that young people would get access to e-cigarettes. The restriction on distance sales has been accepted by the Council of State as a proportional restriction in light of the precautionary principle and the protection of public health.[59]

6.2 A Ban on All Distance Sales?

The definition of e-cigarettes in the Royal Decree is the same as in the TPD. Therefore, the material scope of the Royal Decree is equal to the TPD. Consequently, different from the legislation discussed above, the scope of the Royal Decree is limited to e-cigarettes that 'can be used for consumption of nicotine-containing vapour via a mouth piece, or any component of that product …'. Therefore, e-liquids that do not contain nicotine are not within the scope of the ban of distance sales in the Royal Decree.[60] An unfortunate side-effect could be that it allows for the possibility of distance selling a device that is 'incompatible' with nicotine-containing e-liquids, despite the possibility for user-modification towards compatibility with e-liquids with nicotine.

7. CONCLUSION

Scientific evidence on the direct and indirect health risks of vaping is becoming more consistent over time, albeit not conclusive at this stage, leaving many questions unresolved. The precautionary principle urges public authorities to

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[57] Tobacco Product Directive (n 19) arts 18 and 20; Koninklijk besluit betreffende het fabriceren en het in de handel brengen van elektronische sigaretten/Arrêté royal relatif à la fabrication et à la mise dans le commerce des cigarettes électroniques, *BS* 17 november/novembre 2016 (Royal Decree on the fabrication and on putting on the market of electronic cigarettes) art 6.

[58] Council of State (BE) 8 March 2018, *Dampwinkel.be v Belgian State* [12].

[59] ibid [12].

[60] Supporting this interpretation 'E-Cigarette. Federal Public Service Health, Food Chain Safety and Environment' (*Federal Public Service*, 27 January 2016) https://www.health.belgium.be/nl/gezondheid/zorg-voor-jezelf/alcohol-tabak/e-sigaret, accessed 27 July 2019.

take action to protect citizens against uncertain risks, reinforcing their duty to fulfil the right to health. In Belgium, e-cigarettes are in general treated equally to tobacco products. By doing so, the Belgian legislature clearly adopts a precautionary approach in the light of the contested area of research on the public health effects of e-cigarettes. However, the Belgian legislation on e-cigarettes currently lacks a consistent and clear terminology for the range of different types of e-cigarettes and other tobacco products. Due to the absence of an explicit reference to e-cigarettes, the extended scope of legislation must be derived from general and ambivalent notions such as 'similar products' and 'encourage smoking'. For the sake of consistency and legal certainty, legislators should account for the influence of novel EU legislation (in this case the TPD) on the terminology used in national law. Therefore, it is highly recommended that the Belgian legislature clarify the terminology and explicitly extend the scope of the legislation to e-cigarettes.[61]

[61] For an example of an improved definition: 'use "electronic cigarettes" and "e-cigarettes" interchangeably to refer to any device with a heating element that produces an aerosol from a liquid that users can inhale.' Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems and others (n 1) 25.

16. Human rights and tobacco plain packaging in Australia[1]

Andrew Mitchell and Marcus Roberts

1. INTRODUCTION

In 2011 Australia became the first country to enact legislation requiring that tobacco products be sold in plain packages. In doing so, it gave effect to several international instruments establishing a right to health, and it defended itself against charges by tobacco companies that it had breached its own constitution and various protections in international trade and investment law.

Plain packaging is a logical consequence of the right to health, a right that the Constitution of the World Health Organization (WHO) calls 'one of the fundamental rights of every human being'[2] and the Committee on Economic, Social and Cultural Rights calls 'a fundamental human right indispensable for the exercise of other human rights'.[3] Yet it is only recently that plain packaging has been presented as a tool in the regulation of tobacco products that is both effective and, importantly, practicable.

In 2008 the WHO offered guidance on the implementation of Article 11 of the WHO Framework Convention on Tobacco Control (FCTC),[4] saying that 'Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging'.[5]

[1] This research was supported in part by the Australian Research Council pursuant to the Future Fellowship scheme (project number FT130100416).

[2] Constitution of the World Health Organization (signed 22 July 1946, entered into force 7 April 1948) 14 UNTS 185, preamble.

[3] UN CESCR, 'General Comment No 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4 ('General Comment No 14') [1].

[4] WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.

[5] FCTC, 'Guidelines for the Implementation of Article 11 of the WHO Framework Convention on Tobacco Control (Packaging and Labelling of Tobacco Products)', https://www.who.int/fctc/guidelines/article_11.pdf?ua=1, accessed 29 July 2019 [46].

Three years later, Australia took up this call by implementing plain-packaging legislation, and research suggests that the benefits are already being felt: fewer people are taking up smoking, more people are quitting and fewer quitters are relapsing.[6]

In this chapter we discuss the human-rights implications of Australia's plain-packaging laws. We begin with a brief description of the laws' enactment and operation. We explain what the laws require, and we discuss early research that indicates that the laws are achieving their overarching goal of promoting community health by reducing the attraction of smoking.

We then describe three challenges to Australia's plain-packaging laws: a challenge brought in the High Court of Australia, Australia's highest court; a challenge brought under the Hong Kong–Australia bilateral investment treaty (BIT); and a challenge brought in the World Trade Organization (WTO). These challenges raised questions about the relationship between the right to health and the right to what tobacco companies characterized as their proprietary right to package their products as they wished. We explain, however, that in these challenges the respective tribunals did not engage with the right to health. Yet, in the final section of this chapter, we argue that these challenges cannot be properly understood divorced from the human-rights context in which they were decided. All challenges were decided in Australia's favour, and discrete questions about the nature of intellectual property rights under Australian common law, jurisdiction under the Hong Kong–Australia BIT and WTO obligations were resolved in a way that indirectly promoted the right to health.

2. AUSTRALIA'S PLAIN-PACKAGING LAWS

2.1 History

The Tobacco Plain Packaging Bill was introduced into the Australian Parliament on 6 July 2011. Its justification was not put in terms of an internationally recognized 'right to health', although the government did refer to its obligations under the FCTC.[7] Nonetheless, the health-based rationale for the

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[6] Victoria White, Tahlia Williams and Melanie Wakefield, 'Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents' Perceptions of Cigarette Packs and Brands?' (2015) 24 Tobacco Control 42; Hua-Hie Yong and others, 'Smokers' Reactions to the New Larger Health Warning Labels on Plain Cigarette Packs in Australia: Findings from the ITC Australia Project' (2016) 25 Tobacco Control 181.

[7] Tobacco Plain Packaging Bill 2001 (Bills Digest No 35, 2011–12) 7.

bill was made plain in the Explanatory Memorandum, which explained that the plain-packaging laws were designed to:

- reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
- increase the noticeability and effectiveness of mandated health warnings; and
- reduce the ability of the tobacco product and its packaging to mislead consumers about the harms of smoking.[8]

While the bill gathered bipartisan support, its introduction into Parliament prompted opponents to launch a publicity campaign to try to stop the bill's passage.[9] A new organization called the Alliance of Australian Retailers was established with money from Tobacco Australia, British American Tobacco Australia and Philip Morris. The Alliance placed advertisements in newspapers and on television stating that plain packaging would fail to achieve its objectives, would make counterfeiting easier (hitting tax revenue and increasing the rate of smoking among children) and would inconvenience mom-and-pop retailers of tobacco products. These messages were echoed by the tobacco companies themselves, who added that the proposed laws amounted to an acquisition of their intellectual property.[10]

Yet on 21 November 2011 the bill passed through the Australian Parliament. The efforts of tobacco companies had been rebuffed. Indeed, one survey suggested that Australians were more likely to support the plain-packaging legislation after seeing advertisements put out by the Alliance of Australian Retailers.[11]

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[8] Tobacco Plain Packaging Bill 2011 (Cth) Explanatory Memorandum, 1. These goals are now reflected in s 3(2) of the Tobacco Plain Packaging Act 2011 (Cth), which sets out the objects of the legislation.

[9] MM Scollo, B Freeman and EM Greenhalgh, 'Packaging as Promotion: Evidence for and Effects of Plain Packaging' in MM Scollo and MH Winstanley (eds), *Tobacco in Australia: Facts and Issues* (Cancer Council Victoria 2016) 11.10.5.3.

[10] *JT International SA v Commonwealth* [2012] HCA 43, (2012) 250 CLR 1.

[11] 'Tobacco Industry Persuades People to Support Plain Packaging of Cigarettes' (Cancer Council Victoria, 27 March 2011) https://www.cancervic.org.au/about/media-releases/2011-media-releases/media-march-2011/aus-retail-alliance.html, accessed 29 July 2019.

2.2 Requirements

Under the Tobacco Plain Packaging Act and associated regulations,[12] cigarette packets[13] sold in Australia must satisfy the following requirements: they must be a prescribed rectangular size, made of rigid cardboard with straight edges;[14] they must not be embossed;[15] and they must be a matt, drab brown.[16]

Packages must carry a health warning accompanied by a graphic picture,[17] such as 'SMOKING CAUSES LUNG CANCER'. They may carry a brand or variant name, but that name must be in a specified font (Lucida Sans), size and colour.[18] No other branding is permitted. The final product looks like the example shown in Figure 16.1.[19]

2.3 Effects

Before the introduction of plain-packaging legislation in Australia, experiments had shown that plain packaging reduced the appeal of cigarettes and increased the effectiveness of health warnings.[20] Research undertaken since the introduction of plain packaging in Australia has corroborated these earlier findings.

Since the introduction of plain packaging in December 2012, research has shown that fewer high-school students are starting smoking, more adults have quit or tried to quit smoking and fewer of those who have quit smoking have relapsed.[21] The findings are qualified as it is difficult to separate the effect of plain packaging from, for example, the effect of increases in tobacco excises. Further, tobacco companies have vigorously criticized the reliability of the findings.[22] As more information is gathered and other countries introduce plain

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12 Tobacco Plain Packaging Regulations 2011 (Cth).

13 Similar restrictions apply to other tobacco products.

14 Tobacco Plain Packaging Act 2011 (Cth) s 18(2).

15 ibid s 18(1)(a).

16 ibid s 19(2). Regulation 2.2.1(2) of the Tobacco Plain Packaging Regulations 2001 (Cth) provides, more specifically, that cigarette packets must be the colour known as Pantone 448C, chosen after marketing-research company GfK interviewed smokers to identify the least desirable colour.

17 Tobacco Plain Packaging Regulations 2011 (Cth) reg 2.6.1. The warnings and pictures are set out in pt 3 of the Competition and Consumer (Tobacco) Information Standard 2011 (Cth).

18 Tobacco Plain Packaging Regulations 2011 (Cth) reg 2.4.1.

19 Scollo and others (n 9) 11.10.11.

20 The various studies are summarized in ibid 11.10.4.

21 White and others (n 6); Yong and others (n 6).

22 See, for example, 'Evidence Shows Plain Packaging Has Failed' (British American Tobacco Australasia, 26 February 2016) http://www.bata.com.au/group/

Figure 16.1 Example of plain packaging in Australia

packaging, it will become easier to assess how successful plain packaging has been in achieving its goals.

3. CHALLENGES TO AUSTRALIA'S PLAIN-PACKAGING LEGISLATION

Even before Australia's plain-packaging legislation had been enacted, tobacco companies started to challenge it in different forums and on different legal grounds. These included a constitutional challenge, an investment-law challenge and a trade-law challenge. These have all been determined in Australia's favour (although at the time or writing the result in the third is under appeal in part). In this section, we describe the three challenges.

3.1 The High Court Challenge

The first challenge to Australia's plain-packaging measures was brought in the High Court of Australia, Australia's highest court, in 2011. Less than one month after Parliament passed the Tobacco Plain Packaging Act, both British

sites/bat_9rnflh.nsf/vwPagesWebLive/DO9RNMTE/$FILE/medMDA7H5SC.pdf ?openelement, accessed 29 July 2019.

American Tobacco Australia Ltd and JT International SA filed proceedings claiming that the Act was unconstitutional. The cases were heard together, in April 2012, with Philip Morris Ltd, Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Ltd intervening. On 15 August 2012 the High Court upheld the legislation.

The tobacco companies' argument against the legislation was based on section 51(xxxi) of the Australia Constitution, which provides that the Commonwealth Parliament has the power to make laws with respect to 'the acquisition of property on just terms [ie, with just compensation] from any State or person in respect of which the Parliament has power to make laws'.[23] Although framed as a positive grant of power, section 51(xxxi) is understood as a limitation: the Parliament may not make laws with respect to the acquisition of property other than on just terms.[24]

The tobacco companies argued that the legislation acquired their property, variously described as trademarks, copyright, get-up, licensing goodwill, design, patents, packaging rights, packaging goodwill and intellectual property licensing rights. Under section 51(xxxi), it was insufficient for the companies to show that their property had been taken; they had to show that it had been acquired, meaning that the Commonwealth had obtained an 'interest or benefit [that is] proprietary in character'.[25]

The High Court held by six to one that the tobacco companies' property had not been acquired. The six majority judges wrote five judgments, and at least two of the judges appeared to take the position that the tobacco companies' trademarks and other rights had been taken, in the sense that they had been 'denuded of their value and thus of their utility'.[26] But the case ultimately turned on how the tobacco companies' rights were characterized. The rights were held to be negative: that is, they entailed not a positive right to use trademarks but a right to stop other people from using them.[27] Under the Act, the

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[23] Australian Constitution, s 51(xxxi).

[24] *JT International SA v Commonwealth* [2012] HCA 43, (2012) 250 CLR 1 [165]–[167] (Hayne and Bell JJ), [313] (Kiefel J).

[25] ibid [42] (French CJ).

[26] ibid [44] (French CJ), [101], [138]–[139], [141] (Gummow J). See Tania Voon, 'Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute' (2013) 2 European Intellectual Property Review 113, 115; Jonathan Liberman, 'Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia' (2013) 39 American Journal of Law & Medicine 361, 370–71; Mark Davison, 'Tobacco Control in Australia: The High Court Challenge to Plain Packaging' in Andrew D Mitchell and Tania Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar Publishing 2014) 260–63.

[27] *JT International* (n 24) [36] (French CJ), [105] (Gummow J), [248] (Crennan J), [348] (Kiefel J).

tobacco companies retained this right of exclusion; the Commonwealth did not acquire it. Therefore section 51(xxxi) was not engaged.

Having come to this conclusion, the Court did not consider the merits of the legislation. But it is interesting to note that the Commonwealth argued that even if there had been an acquisition for the purposes of section 51(xxxi), the tobacco companies' claims should still be dismissed.

The Commonwealth argued that an acquisition of property without just compensation falls outside the scope of section 51(xxxi) if it 'is no more than a necessary consequence or incident of a restriction on a commercial trading activity *where that restriction is reasonably necessary to prevent or reduce harm caused by that trading activity to members of the public or to public health*'.[28] The Commonwealth stated (and the Court accepted) that '[s]moking tobacco products causes grave harm'[29] and that '[r]etail packaging promotes tobacco products'.[30] Thus, the Commonwealth argued, where the 'ultimate purpose' of the Act was 'the improvement of public health through the reduction of the harm to members of the public and to public health caused by the smoking of tobacco products',[31] the restrictions contained in the Act did not fall foul of section 51(xxxi).

The Court did not engage with this submission. But the Commonwealth's reference to public health may, by making clear the context of the dispute, have influenced the decision. We return to this in Section 4 of the chapter.

3.2 The Challenge Under the Hong Kong–Australia Bilateral Investment Treaty

The second challenge that Australia faced was brought under the Hong Kong–Australia BIT.[32] Under the BIT, Australia is subject to various obligations, including not depriving certain investors of their investments and not unreasonably impairing the 'management, maintenance, use, enjoyment or disposal'

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[28] Commonwealth, Submissions of the Commonwealth of Australia, Submission in *British American Tobacco Australasia Ltd v Commonwealth*, S389/2011, 5 April 2012, 38 (emphasis added). See Simon Evans and Jason Bosland, 'Plain Packaging of Cigarettes and Constitutional Property Rights' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing 2012) 69–78.

[29] Submissions of the Commonwealth of Australia (n 28) 7.

[30] ibid 10.

[31] ibid 40.

[32] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (signed 15 September 1993, entered into force 15 October 1993) 1748 UNTS 385 (Hong Kong–Australia BIT).

of those investments.[33] The investors who are given this protection are defined in Article 1(f) of the BIT. They include, relevantly, companies incorporated under Hong Kong law.[34]

On 23 February 2011 Philip Morris (Asia) Ltd (PMA), a company incorporated in Hong Kong, acquired 100 per cent of the shares in Philip Morris (Australia) Ltd, which, through Philip Morris Ltd, owned various trademarks that were affected by the Tobacco Plain Packaging Act. Four months later, PMA initiated an arbitration against Australia alleging that Australia's plain-packaging legislation would affect its investments contrary to the BIT.[35]

At the time, the widely held view was that PMA's claim would fail.[36] The arguments put against PMA included that PMA could not have a legitimate expectation that its trademarks would not be affected by legislation such as the Tobacco Plain Packaging Act (in part because Australia had a history of controlling tobacco products) and that Australia's actions fell outside the scope of the BIT because it was pursuing a legitimate public-health purpose. Ultimately, however, the tribunal did not need to consider these arguments because it found that PMA's claims were inadmissible.[37]

The tribunal held that PMA had acquired shares in Philip Morris (Australia) Ltd 'to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable'.[38] This was 'an abuse of rights (or an abuse of process, the rights abused being procedural in nature)'.[39]

The key question was whether at the time PMA acquired Philip Morris (Australia) Ltd the dispute with Australia was 'foreseeable'. Two tests for

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[33] ibid arts 2(2), 6. See Tania Voon and Andrew Mitchell, 'Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia' (2011) 14 Journal of International Economic Law 515, 530–44; Tania Voon and Andrew D Mitchell, 'Implications of International Investment Law for Plain Tobacco Packaging: Lessons from the Hong Kong–Australia BIT' in Tania Voon, Andrew D Mitchell and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing 2012) 153–68.

[34] Hong Kong–Australia BIT (n 32) art 1(f)(i)(B).

[35] Andrew D Mitchell, 'Tobacco Packaging Measures Affecting Intellectual Property Protection Under International Investment Law: The Claims Against Uruguay and Australia' in Alberto Alemanno and Enrico Bonadio (eds), *The New Intellectual Property of Health: Beyond Plain Packaging* (Edward Elgar Publishing 2016) 224–31.

[36] See Voon and Mitchell, 'Implications of International Investment Law' (n 33). Cf Daniel Gervais, 'Plain Packaging and the TRIPS Agreement: A Response to Professors Davison, Mitchell and Voon' (2013) 23 Australian Intellectual Property Journal 96.

[37] *Philip Morris Asia v Australia* PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

[38] ibid [554].

[39] ibid.

foreseeability were open. One earlier tribunal had decided that the test was whether the dispute was 'reasonably foreseeable',[40] another whether the dispute was 'very highly probable'.[41] The correct test, so the tribunal in Australia's case decided, was whether the dispute was reasonably foreseeable. This will always be a fact-sensitive inquiry, but it is clearly less demanding than the 'very highly probable' test.

Importantly, the date on which PMA acquired Philip Morris (Australia) Ltd was ten months after the Australian government had announced that it intended to introduce plain-packaging measures.[42] Thus, even though PMA acquired Philip Morris (Australia) Ltd before the legislation was introduced into Parliament, the tribunal held that the dispute was reasonably foreseeable.[43]

3.3 The World Trade Organization Challenge

The final legal challenge that we will discuss is the challenge brought in the WTO by Cuba, the Dominican Republic, Honduras and Indonesia. These countries alleged that Australia's plain-packaging measures were inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT).

On 28 June 2018, more than four years after the WTO panel was established, the panel released its reports, finding that Australia's legislation did not breach any of its WTO obligations. In this section we sketch the most important argument with respect to rights, concerning Article 20 of the TRIPS Agreement.[44]

TRIPS Article 20 provides:

> The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

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[40] *Tidewater Inc v Venezuela* (ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013 at [145]–[146], [184]).

[41] *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012 at [2.99]).

[42] Kevin Rudd, Prime Minister, 'Anti-Smoking Action' (*Parliament of Australia*, 29 April 2010) https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/67MW6/upload_binary/67mw60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/67MW6%22, accessed 29 July 2019.

[43] *Philip Morris Asia* (n 37) [569].

[44] See generally Tania Voon, 'Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme' (2019) 20 Journal of World Investment & Trade 146.

The key question here was: when is an encumbrance justifiable? Certainly, an encumbrance can be justifiable even though it damages the legitimate interests of trademark owners.[45] Justifiability is an objective standard that will be informed by Article 20's context.

The panel found that part of that context is found in other articles in the TRIPS Agreement. For example, Article 7 provides that '[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation … in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. Article 8 provides that 'Members may … adopt measures necessary to protect public health provided that such measures are consistent with' the TRIPS Agreement. Given this context, the panel concluded that Article 20 'reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use'.[46] The panel concluded that the complainants did not demonstrate that the trademark-related requirements of Australia's plain-packaging measures unjustifiably encumbered the use of trademarks in the course of trade within the meaning of TRIPS Agreement Article 20.[47]

This conclusion with respect to the TRIPS Agreement was mirrored, in terms of the recognition of health objectives, in relation to the analysis of Article 2.2 of the TBT Agreement. The panel recognized the importance of Australia's health objectives in implementing the challenged measures and found that the measures contributed to those objectives.[48] The panel concluded that the measures were no more trade restrictive than necessary to fulfil Australia's legitimate objectives, rejecting the complainant's proposed alternatives on the basis that they were equally or more trade restrictive or that they would not contribute equally to the relevant health objectives.[49]

In reaching these conclusions, and elsewhere in its reports, the panel took account of the FCTC, as well as amicus curiae briefs by the WHO and the FCTC Secretariat.[50] These sources influenced the panel's understanding of

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[45] Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (4th edn, Wolters Kluwer 2018) 353.

[46] Panel Reports, *Australia – Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2429].

[47] ibid [7.3.5.6].

[48] ibid [7.248], [7.1025].

[49] ibid [7.1583], [7.1649].

[50] ibid [7.250], [7.1309], [7.1507].

the significance of the tobacco epidemic and of the role of the challenged measures in the broader context of Australia's tobacco control regime. These contextual issues may be investigated further by the WTO Appellate Body, which is tasked with the ongoing appeals of the panel reports by Honduras and the Dominican Republic.

4. PLAIN PACKAGING AND THE RIGHT TO HEALTH

In this final section of the chapter, we consider how Australia's plain-packaging measures and the challenges to those measures raise issues relating to the right to health. None of the challenges grappled with the importance of human rights – in particular, whether the right to health can justify departing from norms that would otherwise prohibit legislation which denies companies the right to brand their products as they wish. This was because the challenges could be resolved without considering the merits of the legislation. Yet these decisions cannot be understood divorced from the public-health concerns that provided the context in which they were decided.

When tobacco companies argued that Australia's plain-packaging measures unconstitutionally interfered with their property rights, the High Court recognized that the categorization of intellectual property rights raises questions of public policy. By essentially limiting those rights to the negative right of excluding the use of intellectual property by others, the High Court preserved the government's right to control how harmful products are presented to the public. In doing so, it did not need to engage with the Commonwealth's submission that an exception should be created where an acquisition is effected for a legitimate public-health purpose. But it is clear that the result preserves the government's power, under domestic law, to limit the appeal of tobacco products in the interests of promoting public health. Intellectual property rights were thus construed in a way that accommodated the promotion of the right to health.

A similar point can be made about the resolution of PMA's claim under the Hong Kong–Australia BIT. Even though the tribunal did not have to engage with the merits of Australia's plain-packaging legislation, it had two choices to make with respect to the threshold question of whether PMA's claim was admissible. First, what is the relevant test for when a dispute is foreseeable? Second, what in fact was the point at which Australia's plain-packaging legislation was foreseeable? In both cases, the tribunal found in Australia's favour, though it would have been open to the tribunal to decide instead that the point at which the legislation was foreseeable was when it was introduced into Parliament (after PMA acquired Philip Morris (Australia) Ltd) rather than when the government announced its intention to introduce the legislation

into Parliament.[51] Whether human rights influenced the tribunal's decision is a matter of speculation. But again we see the law being interpreted to deny tobacco companies the ability to frustrate Australia's attempts to promote the right to health.

In both of these cases, the most we can do is draw inferences. Yet one of the main areas in which human rights may have a more explicit role to play is in trade law. For now, it is sufficient to note some references to the right to health in trade law, each of which can provide tools that will allow the WTO to accommodate the underlying goals of trade law while preserving countries' rights to promote the right to health.

References to public health, which are a clear reflection of the right to health, can be found not only in the TRIPS Agreement, but also in the GATT and the TBT Agreement. Article XX of the GATT creates 'General Exceptions' to its trade-liberalization rules, including for measures 'necessary to protect human … life or health'. Similarly, Article 2.2 of the TBT Agreement recognizes 'the protection of human health' as a 'legitimate objective'. To be clear, none of these constitutes a categorical statement that measures taken in the interests of the right to health will prevail over trade-law rules. Further, the references are scattered. But, as one of the authors of this chapter has stated elsewhere, 'the dearth of express references to the right to health in international economic law does *not* translate into a failure by decision-makers in that field to recognize the legitimacy and importance of public health objectives'.[52]

Tools exist to give effect to the right to health, be they exceptions or aids to interpretation. With respect to the latter, it is possible that, when the WTO gives its decision in the plain-packaging case, special importance will be given to the Doha Declaration on TRIPS and Public Health. There, the WTO Ministerial Conference stated:

> We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implement in a manner supportive of WTO Members' right to protect public health … .[53]

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[51] Alberto Alvarez-Jimenez, 'The International Law Gaze: The Plain Victory in *Philip Morris Asia v Australia*' [2016] New Zealand Law Journal 419, 421–22.

[52] Tania Voon and Andrew Mitchell, 'Community Interests and the Right to Health in Trade an Investment Law' in Eyal Benvenisti and Gerog Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 249, 251. See also Anna Lang, 'Rethinking the "Harmonisation" of International Trade and Public Health' (2016) 23 Journal of Law and Medicine 949.

[53] WTO Ministerial Conference, 'Declaration on the TRIPS Agreement and Public Health Adopted on 14 November 2001' (20 November 2001) WTO Doc WT/MIN(01)/DEC/2 [4] (Doha Declaration), para 4.

While this does not amend Article 20,[54] it probably amounts to an authoritative interpretation of the TRIPS Agreement under Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization.[55] In any event, it must be taken into account under Article 31(3)(a) of the Vienna Convention on the Law of Treaties. This too provides support for the view that human rights – in particular the right to health – can interact with trade law to safeguard the ability of States to regulate tobacco products as Australia has done.

With respect to trade law, the situation will become clearer when the WTO delivers its decision. We already see, however, that human rights, and specifically the right to health, have played their part in supporting Australia's plain-packaging legislation. Whether this is because they provided the context for the resolution of separate points (as in the constitutional and BIT challenges) or because they go directly to Australia's obligations (as in the WTO challenge), we find that Australia's measures cannot be divorced from their underlying purpose: to promote public health by reducing smoking.

5. CONCLUSION

In this chapter we introduced Australia's plain-packaging laws, explaining what the government sought to achieve by introducing the laws, what the laws required and what the laws have achieved so far. We described the challenges to the legislation brought in Australia's High Court and in international forums. We argued that although the challenges turned on legal points that did not appear to relate directly to the right to health, nonetheless those decisions cannot be understood divorced from the right to health.

Australia has removed one of the last tools that tobacco companies have for promoting smoking, and it has shown that plain packaging can be consistent with international norms regulating investment and trade. Of course, Australia's success in reducing smoking rates has depended not only on plain packaging, but also on measures such as taxation.[56] But by promoting public health, and thereby indirectly the right to health, over the right of tobacco companies to display their products as they wish, Australia has provided a model

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[54] Cf Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (30 November 2010) [109].

[55] Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3. See Andrew D Mitchell and Tania Voon, 'Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging' (2011) 22 Public Law Review 218, 237–38.

[56] See Matthew Thomas, 'Tobacco Excise Increase' (Budget Review 2016–17, Research Paper, 4 May 2016) 63.

that has already begun to be emulated in other countries. As more countries follow, we expect that plain packaging will increasingly be seen as an indispensable tool in the regulation of tobacco products.

17. Conclusions

Brigit Toebes

The aim of this book has been to critically analyse the interface between human rights and tobacco control. As evidenced by a vast amount of scientific research, tobacco has a devastating impact on the lives, health and well-being of many individuals in society. The production, sale and consumption of tobacco therefore raise important questions from the perspective of human rights.

The approach in this book aligns with a burgeoning discourse on the interface between human rights and health. Over the past decennia, human rights have been linked increasingly to health protection and to healthcare settings, addressing concerns such as equal access to healthcare services, the protection of vulnerable persons in healthcare settings, environmental health protection, and reproductive and sexual health.[1]

This book's approach is also in sync with an increasing 'mainstreaming' of human rights, which entails integrating human rights into various domains of law and policy at both international and domestic levels.[2] One such policy domain is tobacco control, and hence the question arises: what are the implications of introducing human rights into this field?

Our analysis of the role of human rights in tobacco control aligns with 'human rights-based approaches' to various policy areas. Human rights-based approaches are a way to clarify obligations of States and other responsible actors and to identify how these obligations can be operationalized in practice. Human rights-based approaches have been developed in particular in relation to development,[3] but they are also increasingly mentioned in the context of

[1] Inter alia, Thérèse Murphey, *Health and Human Rights* (Hart 2013); Brigit Toebes, Mette Hartlev, Aart Hendriks and Janne Rothmar Herrmann (eds), *Health and Human Rights in Europe* (Intersentia 2012); and Lawrence Gostin and Benjamin Mason Meier, *Global Health and Human Rights* (forthcoming Edward Elgar Publishing 2020).

[2] For example, Christopher McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2004) particularly the reference to mainstreaming the WHO.

[3] 'The human rights-based approach to development cooperation' (UN Sustainable Development Group, 2003), at: https://unsdg.un.org/resources/human-rights-based

non-communicable diseases (NCDs).[4] A human rights-based approach to tobacco means framing tobacco as a human rights concern and identifying the legal obligations of responsible actors, as well as actions that can be taken by various actors to address this concern. We hope that this book provides a useful and workable basis for identifying such human rights-based approaches to tobacco control.

As mentioned, tobacco poses tremendous challenges to public health and human rights and is therefore an important human rights concern. Tobacco control has, however, not yet been connected to human rights law as thoroughly and systematically as it could be.[5] As indicated by Gispen in the Introduction to this volume (Chapter 1), the precise interface between human rights and tobacco control still remains somewhat under-researched. With this publication, we attempt to contribute to this developing field by analysing a range of dimensions to human rights in tobacco control.

Without repeating what has already been addressed throughout this book, this chapter will draw some overall conclusions and identify an agenda for developing future research and policy. It will do so by addressing the following questions: what is the basis for addressing tobacco as a human rights concern? How has tobacco thus far been addressed by international and regional human rights bodies, and at the domestic level? Based on this experience, which human rights come into play? And what are the synergies and tensions that arise when taking a human rights approach to tobacco control? Subsequently: whose interests are at stake and which actors are responsible for realizing their rights? What does this responsibility entail and how can responsible actors be held to account?

What is the basis for addressing tobacco as a human rights concern? Beyleveld (Chapter 2) draws on the work of legal theorist Alan Gewirth and his Principle of Generic Consistency to argue that tobacco is a human rights concern, especially because it does harm to children as well as children yet to be born. Children are vulnerable in this context as they may be unable to express their will, they may face peer pressure, and addiction may influence their choices. Schmidt, in his chapter 'Is there a human right to tobacco control' (Chapter 3), takes a pluralist approach, according to which several

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-approach-development-cooperation-towards-common-understanding-among-un, accessed 19 May 2020.

[4] David Patterson, Kent Buse, Roger Magnusson and Brigit Toebes, 'Identifying a Human Rights-based Approach to Obesity for States and Civil Society' (2019) 20 Obesity Reviews 1.

[5] Carolyn Dresler and Steven Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 Human Rights Quarterly 599 made an important contribution to this approach.

aims and rights can justify a human right to tobacco control. He argues that the central objections to a human right to tobacco control fail, for example because a concern with personal freedom and consent does not speak against strong tobacco control. Schmidt also advances that a concern with power relations might speak *for* a human right to tobacco control as it could lessen the power asymmetries between tobacco control and vulnerable populations.

How has tobacco thus far been addressed by international and regional human rights bodies, and at the domestic level? As Cabrera and Constantin point out in Chapter 4, international human rights law mechanisms provide promising avenues for monitoring the implementation of human rights obligations related to tobacco control. Yet we must also conclude that in practice, the international and regional human rights mechanisms have only paid limited attention to the human rights dimensions of tobacco. Most emboldening seems the practice of the Convention on the Rights of the Child (CRC) Committee, which has engaged with the topic by addressing various children's rights dimensions of tobacco.[6] While a systematic analysis is lacking, it seems accurate to conclude that the other treaty bodies, including those of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), and the Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Council (HRC) and the UN Special Procedures have engaged to a lesser extent with tobacco. We are therefore pleased that the UN Special Rapporteur on the Right to Health, Dainius Puras, has endorsed our topic and approach in his Foreword to this volume. In addition to action taken through the UN Special Procedures, the human rights treaty bodies could organize a Day of General Discussion on the rights of children in tobacco control and adopt a General Comment on NCDs and/or NCD risk factors.[7] From an academic perspective, more systematic research documenting and analysing the practice of treaty bodies in relation to tobacco would contribute to identifying existing gaps as well as emerging human rights approaches to tobacco control.[8]

The book has also explored the existing regional human rights mechanisms in Europe, Asia, Africa and the Americas, thus providing a comprehensive overview of the practice of these mechanisms in the context of tobacco. When it comes to this practice, we see both potential and disappointment. Potential, because as on the international level, the existing regional human rights frameworks and mechanisms offer ample opportunity for addressing tobacco

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[6] For an elaborate discussion of this practice see Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 Human Rights Quarterly 340.

[7] See also Dresler and Marks (n 5) 638, 651.

[8] Data collection by Gispen and Rusli, Gispen and Toebes (n 6) CRPD tobacco.

as a human rights concern. In practice, however, the attention paid to tobacco control within the framework of such mechanisms is often quite limited.

To start with Europe: as discussed by Garde and this author in Chapter 6, while certain legal practices are emerging, we cannot speak of a coherent European human rights framework for assessing tobacco legislation and policy. It is promising that the European Committee of Social Rights of the Council of Europe has addressed the problems surrounding tobacco on several occasions in its State reporting procedure. In addition, the EU has adopted several authoritative tobacco control laws, in particular the Tobacco Advertising Directive and the Tobacco Products Directive. Although this EU legislation is not grounded in human rights law, the regulation marks important steps in tobacco control across Europe. It is also encouraging that the Council of Europe and EU monitoring bodies have all systematically rejected human rights claims from the industry. On the basis of this fragmented practice and attitude, a European human rights approach to tobacco control could gradually emerge.

On the American continent a similar, or perhaps somewhat bleaker, picture emerges. As explained by Cabrera and Constantin (Chapter 9), the Inter-American Human Rights System offers a wide range of avenues and opportunities for promoting tobacco control in the region. Yet when it comes to implementing the human rights standards in relation to tobacco, using the available mechanisms, the outcome is disappointing.

Nnamuchi, in his chapter on the African continent (Chapter 8), warns that because smoking rates continue to rise in Africa, tobacco use and exposure to second-hand smoke (SHS) are increasingly becoming a pressing public health concern. He illustrates how the mandate of the African Commission on Human and Peoples' Rights offers interesting opportunities for addressing tobacco concerns. For example, a State obligation to protect the right to health has clearly been recognized in its case law, thus offering potential for future tobacco-related cases.

Furthermore, as Zhang illustrates in Chapter 7 on ASEAN, the ASEAN Charter (2008) and the Intergovernmental Commission on Human Rights (2009) offer potential for advancing human rights in the region, which may ultimately also create possibilities for addressing human rights specifically in the context of tobacco. While these opportunities are a long shot, it is worthwhile to explore the options, and to insist on their importance. Zhang also explains that all ASEAN countries are signatories to the UN human rights treaties, which offers potential for addressing human rights in tobacco control. This also provides an important complementary opportunity for a country like Indonesia, which has not ratified the Framework Convention on Tobacco Control (FCTC).

Altogether, we must conclude that regional human rights treaty bodies could engage much more actively with tobacco and its related problems, including tobacco farming, tobacco use, and exposure to SHS. It is up to these organizations, Member States, NGOs and individuals to bring these matters up in the context of State reporting procedures, individual complaint mechanisms and other monitoring mechanisms.

For identifying the role of human rights in tobacco control, much can be learnt from the domestic level, where some countries have adopted innovative tobacco control policies. Sormunen and Karjalainen, in their chapter on the Tobacco Endgame in Finland (Chapter 14), explain how the country was the first to introduce an endgame, which aims to make Finland smoke free by the year 2030. While there was little consideration of human rights with the adoption of the endgame, the authors assert that such endgames are very much in line with protecting the rights of children in the context of tobacco.

Similarly, Australia has set an important example to the world by introducing plain packaging and by showing how these standards are consistent with international norms regulating investment and trade. The authors of Chapter 16 on plain packaging, Mitchell and Roberts, assert that the Australian government implicitly advanced the right to health by promoting public health in this context.

Negri, in her chapter on smoke-free environments (Chapter 13), explains that Italy has had extensive outdoor smoking bans for many years and has recently introduced a smoking ban for private cars in the presence of children and pregnant women, thus going beyond international legal requirements. What is particularly informative is how the Italian Constitutional Court has engaged with the introduction of smoking bans in the light of the right to health in the Italian Constitution. This shows how constitutional rights (and human rights) can provide an important anchor for the introduction of smoke-free laws. It is also important that the Court has stated that protection from SHS must be regulated in a uniform manner across the country so as to avoid differentiated protections. This provides a strong rationale for introducing smoke-free zones at a governmental rather than a local level. At the same time, the author shows how local initiatives for smoke-free zones can act as a catalyst for domestic laws.

Lastly, Lierman and van Westendorp's chapter on e-cigarettes in Belgium (Chapter 15) is illustrative of the complexities that arise when implementing international or regional (in this case, EU) tobacco regulation. They explain how Belgian legislation generally treats e-cigarettes equally to tobacco products, thus adopting a precautionary approach (as opposed to, for example, the

UK).[9] All in all, it seems that countries can learn from each other's successes and failures. Sharing and comparing these domestic practices and experiences are thus crucial for advancing best practices at the national, regional and international level.[10]

The third question was: which specific human rights are relevant in the context of tobacco and what are the synergies and tensions that arise? As mentioned above, Schmidt, in Chapter 3, makes a strong philosophical case for a human right to tobacco control. In current existing international human rights law, an explicit human right to tobacco control does not exist and it is not feasible to expect that such a right will be recognized in the future. However, translating the idea of a right to tobacco control to the legal discipline, we can construe a right to tobacco control in relying on various human rights, including, in particular, the right to health, rights to information and education, and rights to a healthy environment and an adequate standard of living.[11] A similar approach has been taken in relation to the right to water, which is grounded in several rights in, inter alia, the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right to an adequate standard of living, the right to health and the right to life.[12]

Yet, while a right to tobacco control for reasons of public health protection is important, there are other human rights dimensions to tobacco as well. Barrett and Hannah, in their chapter on the parallels between tobacco control and illicit drugs (Chapter 11), are wary of the potential negative human rights outcomes associated with tobacco control strategies. 'Should buyers of illicit tobacco be criminalised' and 'should tobacco crops be forcibly eradicated?' they ask. Based on these concerns, they argue in favour of recognition of the more complex linkages between tobacco and human rights.

All in all, it seems important to align with existing approaches on health and human rights. Taking a 'health and human rights' approach to tobacco control implies taking as a starting point that human rights are interrelated, as also stated in the Vienna Declaration and Programme of Action.[13] This means that economic, social and cultural rights as well as civil and political rights are important in the context of smoking and exposure to SHS. As Cabrera and

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[9] Lukasz Gruszczynski, *The Regulation of E-Cigarettes* (Edward Elgar Publishing 2019).

[10] We aim to foster this interaction with the European Scientific Network on Law and Tobacco.

[11] Dresler and Marks (n 5).

[12] CESCR, 'General Comment No. 15: The right to water (Arts 11 and 12 of the Covenant)' (2002) UN Doc E/C.12/2002/11.

[13] Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights in Vienna on 25 June 1993) A/CONF/157/23 [5].

Constantin point out in Chapter 4, tobacco control is a 'cross-cutting issue that relates to economic, social and cultural rights, and civil and political rights'.

The implications of economic, social and cultural rights, particularly the right to health, have been explored to some extent and are fairly straightforward. While the right to health does not explicitly mention tobacco, its scope as set forth in the treaties and accompanying documents contains many implicit bases for protection against tobacco. Take, for example, the right to health (Article 12 ICESCR), which contains State obligations to reduce infant mortality, improve environmental hygiene, prevent all types of diseases and secure access to medical services. All these components are directly relevant for the protection against the harmful effects of smoking and SHS.

However, when it comes to civil and political rights, the picture is less clear. The precise implications of civil and political rights in the context of tobacco control are much less crystallized. As evidenced above, the human rights claims from the tobacco industry, often based on civil and political rights to property and freedom of expression, have been rejected systematically by regional and domestic courts. Still, what remains to be considered is that tobacco control measures, varying from the introduction of smoke-free zones, to tobacco taxes, the introduction of display bans and the eradication of tobacco crops, may infringe on the human rights of the individuals involved. This concern was also implicitly voiced by Barrett and Hannah in Chapter 11, especially when it comes to criminalizing certain behaviour such as buying illicit tobacco and growing tobacco leaves. This means that a careful balance needs to be drawn between taking tobacco control measures, which presumably protect the right to health, and the protection of the civil and political rights of those involved. For example, how do civil and political rights come into play with the introduction of smoke-free zones? How does the prohibition on smoking in a car when a child is on board align with the right to privacy, for example? And how can we protect individuals who depend on growing tobacco for their livelihood? Given that tobacco control measures create potential infringements of personal freedom of smokers, they may touch in particular on their rights to privacy and physical integrity and freedom of movement, but also on their right to an adequate standard of living. It is important in this context to be cognizant of the vulnerability of smokers, tobacco farmers and others, and to consider their needs and respect their rights.[14] In this regard, lessons may also be learnt from related domains where human rights have been applied, including the regulation of drugs.

[14] For a vulnerability approach in relation to children see Marie Elske Gispen, 'Vulnerability and the Best Interests of the Child in Tobacco Control' (accepted for publication) International Journal of Children's Rights.

This brings us automatically to the question of whether and to what extent civil and political rights of individuals may be limited for the sake of tobacco control. According to international and regional human rights law, restrictions (limitations) to civil and political rights are only allowed if 'necessary', which means based on one of the limitation grounds (including public health), responding to a pressing public or social need, pursuing a legitimate aim and being proportionate to that aim.[15] Hence, in introducing a smoking ban in the private sphere the question arises: does it respond to a pressing public health goal and is such a prohibition proportionate to that aim? There is still little experience with the implementation of such principles in relation to tobacco control laws and policies. The outcome of this balancing may vary from one regional or domestic setting to another. Here, society's level playing field for tobacco control measures may also have to be considered.

The above addressed the complexities surrounding the limitation of mainly civil and political rights. As suggested above, introducing tobacco control measures may also be framed as an explicit balancing between the right to health and a range of civil and political rights. This balancing between the right to health and civil and political rights is a difficult matter that still raises many questions. It suggests that the right to health – as an individual right – can reflect public health claims.[16] This suggests that the right to health is a claim from a group of individuals ('the public') rather than exercised by an individual right holder. More research could be directed towards exploring this balancing act, and to addressing the question whether this balancing leads to meaningful outcomes.

Other tensions and synergies arise between human rights standards and other standards in international law. First, the question arises if and to what extent human rights are embedded in the FCTC. While human rights are mentioned in the preamble to this treaty, Taylor and McCarthy explain in their chapter on the FCTC (Chapter 10) that human rights considerations were largely absent from the negotiation and design of this Convention. According to the authors, this reflects the tobacco industry's historical success in co-opting the language of human rights in support of its own agenda. This does not mean, however, that there are no promising synergies between the FCTC and human rights law, which could be used in policy settings and in tobacco litigation.

A remaining source of tension concerns the rules under International Economic Law (IEL). Public health experts tend to see IEL as an obstacle to

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[15] See, inter alia, Principles 10 and 25 of the 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) UN Doc E/CV.4/1985/4.

[16] See also Brigit Toebes, 'Human Rights and Public Health: Towards a Balanced Relationship' (2015) 9 International Journal of Human Rights 488.

comprehensive tobacco control policies. Gruszczynski (Chapter 12) explains that while IEL Decision-Making Bodies (DMBs) have been reluctant to use the FCTC and human rights standards explicitly in their decision-making, they have attached considerable weight to the protection of public health, particularly when it comes to the risks posed by tobacco. While this is a promising outcome, it is still worth exploring how the implementation of the FCTC and human rights by DMBs could be further advanced.

Subsequently, whose interests are at stake? Interestingly, as Taylor and McCarthy explain, the language of human rights was first brought into the realm of tobacco by the industry itself, which claimed freedom of expression and rights to property. Hence the industry claimed that their interests and rights were violated by tobacco control measures. Again, as illustrated in this book, such claims have been rejected systematically by international bodies including the European Court of Human Rights and the European Court of Justice. It seems that the tide is turning and the tobacco control side of the field is increasingly using human rights, thus reflecting the rights of individual right holders rather than those of the industry.

So who are the right holders that we are talking about in the context of tobacco? It is about the rights of all individuals in society, varying from non-smokers to smokers, people of all ages and from all socio-economic backgrounds. They have a right to health, information and a healthy living environment, with due respect to their rights to privacy, their physical integrity and their freedom of movement.

Emerging from many chapters in the book is the pressing need to protect children and future generations as vulnerable populations with less decision-making authority. It is paramount that their rights are advanced in the context of tobacco, and the CRC offers a strong basis to do so.[17] But it is not only about the rights of children. There is a need to explore the needs and rights of others, including but not limited to persons with low socio-economic status, women and disabled persons. Their rights are more complex to identify and it will require a careful balancing of the various interests. As also suggested by Gispen in the Introduction, a vulnerability approach, giving recognition of the complex vulnerabilities of individuals in this context, may add to this analysis.[18]

Who are the duty holders in this context and how can they be held to account? Based on human rights and the FCTC, States have the primary obligation to regulate tobacco and to protect everyone in society against its harmful effects. Should States fail in this effort, they can be held to account before domestic

[17] Gispen and Toebes (n 6).
[18] See also Gispen (n 14).

courts, quasi-judicial domestic bodies, and regional and international human rights monitoring bodies. Research suggests that the FCTC is increasingly cited in court decisions.[19] In such cases, human rights claims could strengthen the claims based on the FCTC. Applicants could argue that the provisions in the FCTC form an operationalization of a range of constitutional and human rights provisions, including the rights to life and health, to underline the critical involvement of governments in the protection of health.[20]

Finally, how should we frame the responsibility of the tobacco industry? As Lane explains in her chapter (Chapter 5), accountability of the tobacco industry is difficult to pin down, both in theory and in practice. A complication is that only States can be held accountable before international and regional human rights monitoring bodies. Lane explains how the Organisation for Economic Co-operation and Development National Contact Points may offer a promising avenue, as well as domestic litigation. When it comes to domestic litigation, the proof is in the pudding. NGOs, victims and legal practitioners must not relax their vigilance and must continue their efforts to hold the tobacco industry accountable for their flagrant disregard of human rights. In doing so they can create important precedents for litigation all over the world.

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[19] Suzanne Y Zhou, Jonathan D Liberman and Evita Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2019) 28 Tobacco Control s113.

[20] Gohar Karapetian and Brigit Toebes, 'The Legal Enforceability of Articles 5(3) and 8(2) of the WHO Framework Convention on Tobacco Control: The Case of the Netherlands' (2018) Brill Open Law, doi.org/10.1163/23527072-00101001, with reference to Complaint submitted by the Youth Smoking Prevention Foundation against the Dutch State, 8 September 2014.

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