

Achieving greater integration of FCTC and human rights norms

Why this is important

The human rights system provides a relevant and robust set of global mechanisms that can assist countries in accelerating FCTC implementation and achieving tobacco control, health and development objectives. Including tobacco control in national human rights efforts promotes policy coherence and brings additional resources to both endeavors. The nexus between tobacco control and recognized human rights is clear, particularly in the case of the rights to health and life recognized in numerous human rights treaties and national constitutions, but encompassing many other rights as well. Human rights norms and obligations can also be powerful tools to combat tobacco industry interference in policy making and litigation.

Nexus between human rights and the FCTC

In designing the world's first public health treaty, the framers of the FCTC looked to human rights accords for inspiration, examples and substantive legal thinking. This link is evident in the text of the FCTC, which cites Article 12 of the International Covenant on Economic, Social and Cultural Rights¹ as well as the WHO Constitution² in recognition of the fundamental right of every human being to the enjoyment of the highest attainable standard of physical and mental health. Human rights references have been included in several FCTC decisions and Guidelines.³

The impact of tobacco products on human rights has been noted in a number of human rights fora, directly and implicitly. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 14, stated that the "failure to discourage production, marketing and consumption of tobacco"⁴ constitutes a violation of the obligation to protect under Article 12 of the International Covenant on Economic, Social and Cultural Rights,⁵ mirroring language in the FCTC Chapeau.⁶ Likewise, General Comment 15 of the Committee of the Rights of the Child noted that governments must implement and enforce the FCTC as part of their obligations under the Convention on the Rights of the Child.⁷

In 2016 the Seventh Session of the FCTC Conference of the Parties (COP) agreed to decision FCTC/COP7(26) (*International cooperation for implementation of the WHO FCTC, including on human rights*) urging parties to link the human rights and development frameworks in tackling the global tobacco epidemic and inviting the Convention Secretariat to collaborate with other UN bodies to protect public health interests from the commercial and other vested interests of the tobacco industry.⁸

Nexus among human rights, tobacco control, FCTC, the global development agenda, and global efforts to fight NCDs

Since the coming into force of the FCTC, tobacco policy coherence among global mechanisms has increased dramatically. This is particularly true of the Global Action Plan on Non-Communicable Diseases (NCD GAP)⁹ and the Sustainable Development Goals (SDGs).¹⁰ The NCD GAP calls for accelerated implementation of the FCTC and sets a target of a 30% relative reduction in tobacco use by 2025,¹¹ a target later adopted by COP 7.¹² The 2030 Agenda for Sustainable Development includes target 3.a, "strengthen the implementation of the

WHO Framework Convention on Tobacco Control in all countries,"¹⁶ which has been highlighted by the Special Rapporteur on the right to the highest attainable standard of mental and physical health.¹³

These linkages have been reinforced by human rights bodies. UN Human Rights Council Resolution 35/23 acknowledges the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in the implementation of the 2030 Agenda for Sustainable Development and urges States to work towards the full implementation of the 2030 Sustainable Development goals and targets including, inter alia, target 3.a on the FCTC.¹⁴ Another Human Rights Council resolution, 33/6, emphasizes the role of prevention in the promotion and protection of human rights.¹⁵

High courts support tobacco control policies as a way to protect the human right to health

Some courts have embraced the position that at a minimum the FCTC functions as a legal standard that specifies the content of the obligation to protect the right to health in the face of the tobacco epidemic. For example, the Constitutional Court of Belgium stressed the need to consider the protection of health in combination with the FCTC when addressing tobacco control legislation.¹⁶

Indeed, some judicial bodies have gone as far as to declare the FCTC a human rights treaty. The Constitutional Tribunal of Peru, for instance, in upholding the constitutionality of a tobacco control law, held that the FCTC creates human rights obligations. It stated that the "FCTC is a human rights treaty, since it seeks to clearly, expressly and directly protect the basic right to health protection recognized in Article 7 of the Constitution."¹⁷ The Tribunal further declared, the "FCTC is a human rights treaty, because although it does not recognize the right to health protection as a 'new right'... it obliges State Parties clearly and directly to take steps that contribute to optimizing its effectiveness."¹⁸ Along the same line, the Constitutional Chamber of the Costa Rican Supreme Court stated that the FCTC is a human rights treaty.¹⁹

State and corporate roles in achieving human rights goals

In general, international human rights law focuses on the relationship between the State and its citizens, placing positive and negative obligations on the State to respect and protect human rights norms. These norms stem from a number of international treaties, and like any system of law, human rights law is ever evolving. One of the most important advances in human rights law over the past few decades has been the increasing awareness of the importance of corporate actors in achieving human rights, in particular multinational companies that cannot be said to be the "citizen" of any one state. This evolution is reflected in General Comment 24 of the Committee on Economic, Social and Cultural Rights, clarifying the duties of States in preventing and addressing the adverse impacts of business activities on human rights.²⁰ The issue was also recognized by the COP in decision FCTC/COP7(26), inviting the Secretariat "to collaborate with existing United Nations mechanisms and processes working on issues of business and human rights in order to protect public health interests from the commercial and other vested interests of the tobacco industry."²¹

The UN Guiding Principles on Business and Human Rights has created the "protect, respect and remedy" framework, sometimes called the "three pillars" of human rights:

1. State duty to **protect** human rights, including against third parties;
2. Corporate responsibility to **respect** human rights; and
3. Access to **remedy** for victims of business-related abuses.²²

The first pillar applies to governments, the second to businesses, and the third to both. The tobacco industry presents a unique challenge to achieving human rights objectives. In addition to the human rights threats posed by any industry, such as labor practices, environmental degradation, etc., tobacco products are unique in that they are the only consumer product that kills when used as intended. The Special Rapporteur on the

Right to Health has drawn special attention to the corruption among industries that affects health and mentions tobacco industries as an example of obstruction of the ability of States to fulfil their right to health obligations.²³ The Political Declaration of the UN High-Level Meeting on the Prevention and Control of NCDs, adopted by the UN General Assembly a year after the Human Rights Council endorsed the Guiding Principles, specifically underscored the fundamental conflict of interest between the tobacco industry and public health.²⁴ FCTC parties have the duty and the right to protect their citizens' human rights from the tobacco industry, and to put in place mechanisms for victims to seek remedies. Both are necessary for the realization of the vision of the FCTC.

Impact of integrating the FCTC and human rights norms

The FCTC did not create or enhance new human rights, nor would further collaborations between the two regimes do so.²⁵ Many FCTC obligations were "born" already linked to recognized human rights. For example, FCTC Article 8 on protecting people from exposure to secondhand smoke is intrinsically linked to the rights to life, health and a healthy environment.²⁶ By extension, further integration with human rights processes does not create new state obligations.

Greater collaboration with human rights actors is potentially a boon for FCTC implementation and other tobacco control interventions that go beyond the FCTC to protect the right to health, as reflected in Article 2.1 of the FCTC which states that "In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention."²⁷

Linking FCTC with human rights instruments provides for mutual reinforcement. Tobacco industry interference and lack of whole of government engagement at the national and local levels are recognized as the greatest impediments to stronger tobacco control regulations. Integrating FCTC interventions into human rights efforts brings new allies and resources to the table. In addition, many countries have incorporated human rights law into their national constitutions or legal code, bringing powerful new arguments for litigation against the tobacco industry.

The tobacco epidemic has raged for over a century, causing over 100 million deaths. During that time, international human rights law has matured and evolved dramatically. The FCTC and human rights norms are intended to improve lives and alleviate suffering. Both can attain their goals more effectively by working together.

Additional resources can be found at ASH's Tobacco and Human Rights Hub- www.ash.org/hrhub

¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Art. 12, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>.

² UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131, available at: <http://www.refworld.org/docid/3b00f09554.html> [accessed 22 August 2018].

³ See for example Decision FCTC/COP/7/19, *Supra* note 4.

⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (11 August 2000), Available from undocs.org/E/C.12/2000/4.

⁵ *Supra* note 1.

⁶ World Health Organization, Framework Convention on Tobacco Control, Chapeau, 2003, available at http://www.who.int/fctc/text_download/en/.

⁷ UN Committee on the Rights of the Child (CRC), *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, CRC/C/GC/15, available at: <http://www.refworld.org/docid/51ef9e134.html>.

⁸ Framework Convention on Tobacco Control, Conference of the Parties, Decision FCTC/COP7(26), available at http://www.who.int/fctc/cop/cop7/FCTC_COP7_26_EN.pdf.

⁹ WHO *Global Action Plan for the Prevention and Control of NCDs 2013-2020*, 2013, resolution WHA66.10, available at http://apps.who.int/iris/bitstream/handle/10665/94384/9789241506236_eng.pdf?sequence=1.

¹⁰ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at: <http://www.refworld.org/docid/57b6e3e44.html>.

¹¹ *Id.*

¹² Framework Convention on Tobacco Control, Conference of the Parties, Decision FCTC/COP7(29), available at http://www.who.int/fctc/cop/cop7/FCTC_COP7_29_EN.pdf.

¹³ *Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. Available at: <http://www.refworld.org/docid/5875fed24.html>.

¹⁴ *Supra* note 10.

¹⁵ UN Human Rights Council, *the role of prevention in the promotion and protection of human rights: resolution / adopted by the Human Rights Council on 29 September 2016*, 5 October 2016, A/HRC/RES/33/6, available at: <http://www.refworld.org/docid/5875fed24.html>.

¹⁶ Vlaamse Liga tegen Kanker (Flemish Anti-Cancer League), et al. v. Belgium Council of Ministers, Arrêt n° 37/2011 du 15 mars 2011, Constitutional Court of Belgium (2011).

¹⁷ Peruvian Constitutional Tribunal, Jaime Barco Rodas contra el Artículo 3o de la ley N. 28705 – Ley general para la prevención y control de los riesgos del consumo de tabaco, unconstitution- ality proceeding, July 2011. 67.

¹⁸ Peruvian Constitutional Tribunal, Jaime Barco Rodas contra el Artículo 3o de la ley N. 28705 – Ley general para la prevención y control de los riesgos del consumo de tabaco, unconstitution- ality proceeding, July 2011. 69.

¹⁹ Constitutional Chamber of the Costa Rican Supreme Court. Request on the constitutionality of a proposed piece of legislation. Exp: 12-002657-0007-CO. Res. No 2012-003918, March 2012.

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 24, *State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*.

²¹ Framework Convention on Tobacco Control, Conference of the Parties, Decision FCTC/COP7(26), available at http://www.who.int/fctc/cop/cop7/FCTC_COP7_26_EN.pdf.

²² UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: <http://www.refworld.org/docid/484d2d5f2.htm>.

²³ Yet, the Special Rapporteur on the Right to Health has drawn special attention on the corruption among

industries that affects health and mentions tobacco industries as an example where obstruction occurs in the ability of States to fulfil their right to health obligation.

²⁴ United Nations General Assembly, *Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Disease*, 19 September 2011, UNGA 66/2, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/2. See para 38, recognize the fundamental conflict of interest between the tobacco industry and public health.

²⁵ Dresler, Marks. *The Emerging Human Right to Tobacco Control*, Human Rights Q 28 (2006) 599-651.

²⁶ World Health Organization, *Framework Convention on Tobacco Control*, Article 8, 2003, available at http://www.who.int/fctc/text_download/en/.

²⁷ World Health Organization, *Framework Convention on Tobacco Control*, Article 2.1, 2003, available at http://www.who.int/fctc/text_download/en/.