Achieving greater integration of FCTC and human rights norms

**Key Recommendations**

**FCA encourages the Convention Secretariat to**

- work with the United Nations Human Rights Council to embed support of the implementation of the WHO FCTC throughout Parties' national efforts to achieve human rights objectives, including by integrating WHO FCTC implementation in the development of human rights national action plans;
- in collaboration with human rights experts, develop tools to assist Parties in accessing human rights mechanisms to accelerate FCTC implementation;
- invite representatives of human rights bodies to participate as observers at future FCTC Conferences of the Parties;
- invite the UN High Commissioner for Human Rights to prepare a report, in collaboration with the Convention Secretariat, on the nexus between FCTC and human rights obligations;
- contribute to the work of relevant human rights mechanisms that can accelerate FCTC implementation, including the Human Rights Council and the Open-ended Intergovernmental Working Group on Transnational Corporations and Business Enterprises with Respect to Human Rights;
- encourage human rights bodies to raise states parties’ progress in FCTC implementation or ratification in periodic reporting processes; and
- seek clarification from the UN General Assembly to obtain observer status with the OHCHR.

**FCA urges States Parties to**

- include FCTC implementation in efforts to protect and advance human rights, including in periodic reporting to human rights bodies, and to include FCTC in the mandate of national human rights governmental bodies and national action plans.
Why this is important

The human rights system provides a relevant and robust set of global mechanisms that can assist the COP and States Parties in accelerating FCTC implementation. 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.

Background

COP 7 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. The Secretariat prepared report FCTC/COP/8/12 (Progress report on implementation assistance and international cooperation) for consideration by COP 8. Relevant information can also be found in FCTC/COP/8/11 (Measures to strengthen the implementation of the Convention through coordination and cooperation). In a related decision, COP 7 adopted FCTC/COP7(19) (Relationship of the Convention Secretariat with other international entities: observer), for which the Secretariat prepared the report FCTC/COP/8/20 (Relationship of the Convention Secretariat with other international entities: observer status). These documents demonstrate ongoing attempts to strengthen the link between human rights and tobacco control and the FCTC. While some communication has occurred between the Convention Secretariat and the human rights community, it is clear that important work remains to be done.

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 Rights as well as the WHO Constitution in recognition of the fundamental right of every human being to the

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enjoyment of the highest attainable standard of physical and mental health. Human rights references have been included in several FCTC decisions and Guidelines.  

From the human rights perspective, 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” constitutes a violation of the obligation to protect under Article 12 of the International Covenant on Economic, Social and Cultural Rights, mirroring language in the FCTC Chapeau. 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.

Nexus among human rights, 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) and the Sustainable Development Goals (SDGs). The NCD GAP calls for accelerated full implementation of the FCTC and sets a target of a 30% relative reduction in tobacco use by 2025, a target later adopted by COP 7. The 2030 Agenda for Sustainable Development includes target 3.a, “strengthen the implementation of the WHO Framework Convention on Tobacco Control in all countries,” which has been highlighted by the Special Rapporteur on the right to the highest attainable standard of mental and physical health.

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 goals and targets.

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7 See for example Decision FCTC/COP/7/19, Supra note 4.
9 Supra note 5.
14 Id.
16 Supra note 13.
including, inter alia, target 3.a on the FCTC. Another Human Rights Council resolution, 33/6, emphasizes the role of prevention in the promotion and protection of human rights.

**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.

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.” 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.” Along the same line, the Constitutional Chamber of the Costa Rican Supreme Court also stated that the FCTC is a human rights treaty.

**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. The issue was also recognized by the COP in decision FCTC/COP7(26), inviting the Secretariat “to collaborate with existing United Nations

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18 Supra note 13.
21 Peruvian Constitucional 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, unconstitutionality proceeding, July 2011. 67.*
22 Peruvian Constitucional 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, unconstitutionality proceeding, July 2011. 69.*
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.\textsuperscript{25}

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 \textit{protect} human rights, including against third parties;
2. Corporate responsibility to \textit{respect} human rights; and
3. Access to \textit{remedy} for victims of business-related abuses.\textsuperscript{26}

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 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.\textsuperscript{27} And 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.\textsuperscript{28} 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.

\textbf{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.\textsuperscript{29} 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.\textsuperscript{30} By extension, further integration with human rights processes does not create new state obligations.

To continue the example, eliminating secondhand smoke exposure accomplishes both FCTC and human rights obligations.

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\textsuperscript{25} \textit{Supra} note 1.
\textsuperscript{27} 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.
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Greater collaboration with human rights actors is potentially a boon for FCTC implementation. Linking FCTC with human rights instruments provides for mutual reinforcement. Political will at the national and local level is recognized as one of the greatest impediments to stronger tobacco control regulations, often due to tobacco industry interference. 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.

**Achieving greater integration**

FCA encourages the Convention Secretariat to further deepen its ties to human rights bodies and processes, and for the COP to provide sufficient resources for this work. This is also reflected in document FCTC/COP/8/11 on measures to strengthen implementation of the Convention through coordination and cooperation and emphasizing the need to forge alliances and promote tobacco control efforts by sectors beyond health. Greater collaboration may be accomplished in a number of ways, both formal and informal. An obvious path is to take advantage of the openness of most human rights proceedings and directly participate, both in person and by submitting commentary. The Secretariat should also build bridges in the other direction, by inviting representatives of human rights bodies to participate as observers at future FCTC COPs and including human rights experts in relevant intercessional work. Finally, the Secretariat, or the COP directly, could invite the UN High Commissioner for Human Rights to collaborate and prepare a report on the nexus between FCTC and human rights for consideration at COP 9.

FCA urges COP Member States to integrate FCTC implementation and human rights efforts at the national level. Many states have national action plans to achieve human rights; FCTC should be a part of those plans, including by reporting on FCTC achievements in periodic reviews with human rights bodies. For example, Parties should report to the Committee on the Rights of the Child and to the ILO supervisory bodies on progress in achieving relevant commitments under the FCTC, especially in relation to the SDGs. Parties could also consider including human rights experts on their COP delegations.

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31 Supra note 3.
32 See for example, SDG 8.7 Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.