1. Introduction¹

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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

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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/factsheets/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

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 agreements¹³ as well as the ethical components of tobacco control¹⁴ 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

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 Liberman²⁵ 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

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 Gispén, 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 Gispén 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 Spire, '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.

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