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A missing voice: the human rights of children to a tobacco-free environment

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ABSTRACT

In this commentary, we flag the importance of taking a child-rights approach in the context of tobacco control, which is thus far unprecedented. This text was written in response to the Seventh Conference of States Parties of WHO's Framework Convention on Tobacco Control held in India from 7 to 12 November 2016.

While the links between tobacco control and human rights were emphasised at this conference, a child-rights approach was missing. We argue that this novel angle provides important legal tools to protect the health and well-being of children. Because children are seen as 'replacement smokers' by the tobacco industry, protecting children in this context is key to halting the devastating effects of tobacco use and exposure worldwide.

Children's human rights are of paramount importance in discussions on tobacco control. Children are regularly exposed to second-hand smoke (SHS), and as approximately 90% of smokers start before the age of 18, the tobacco industry views children as replacement smokers.¹ At the recent Conference of States Parties (COP7) held in India (7–12 November 2016), the 180 States Parties of the WHO Framework Convention on Tobacco Control (FCTC) unequivocally reinforced the link between human rights and tobacco control measures.² Despite this pronouncement, a child-rights approach was under-emphasised in the COP7 reporting, which is a missed opportunity as this provides important—hitherto largely unused—legal tools to protect the health and well-being of children. Rights-based reasoning has, in general, prompted changes in social rights and health policy, and this approach therefore offers considerable potential in protecting the rights of children in the context of tobacco control.³

The Convention on the Rights of the Child (CRC) is the most widely endorsed human rights treaty in the world. It is legally binding on 196 states parties. Notably, the CRC obliges governments and third parties to protect and promote a range of rights relevant to tobacco control, including two central tenets: children's right to health (Article 24 CRC) and the general norm that children's best interest shall be a primary consideration in the application and implementation of the Convention (Article 3 CRC) (for a comprehensive overview of relevant rights, see [table 1](#)). In this commentary, we set the stage by elaborating on these two 'umbrella norms' as relevant to smoking and cessation and exposure to SHS in children.

This child-specific human rights framework is reinforced by the FCTC, which explicitly recognises and reinforces the importance of the CRC in tobacco control (see [box 1](#)).

The CRC committee, the monitoring body of the CRC, clarifies the content and scope of the Convention in authoritative general comments. Through multiple references to tobacco control in these comments, the committee has clearly identified tobacco control as falling within the remit of the CRC. Governments, therefore, have a legal obligation to protect children against the harmful effects of tobacco.⁴

On the basis of children's right to health specifically, governments should provide appropriate information to protect children against the harmful effects of tobacco use.^{5 6} While access to health related information is part of the right to health as such, the specific obligations on part of states should be explored in the context of the nature and scope of the right to information for children (Article 17 CRC).⁷ Governments must also protect children from tobacco and take appropriate measures to reduce its use among children.⁵ Furthermore, they are urged to regulate the tobacco industry by limiting the advertisement, marketing and sale of tobacco to children.^{4 5} Research demonstrates that adolescents are more susceptible to tobacco marketing than adults.⁸ The government responsibility to protect children against tobacco marketing should therefore also be explored in light of the protection against exploitation as included in Article 36 CRC.

The CRC committee further stipulates that the best interest of the child shall be taken into account when a 'decision will have a major impact on a child or children'.⁶ This principle has received little systematic attention in a health law context. However, given the clear evidence indicating specific health benefits of tobacco control policies for children, the best-interest norm is very important in relation to tobacco control.^{9–11} This norm implies that governments have a legal obligation to ensure that children's best interests are consistently implemented in every tobacco-related action taken by administrative and legislative bodies as well as public or private welfare institutions.⁶ Prevention of tobacco-related health infirmity is in children's best interest as this contributes to creating these conditions relevant to the cumulative healthy development and well-being of the child. The latter should be further analysed in light of the right to life, survival and development (Article 6 CRC) and the right to an adequate standard of living (Article 27 CRC), to mention just two aspects.



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Commentary

Table 1 UN Convention on the Rights of the Child (adopted 20 November 1989)

Umbrella norms in the context of children and tobacco control			
Type of norm	Provision	Content	Relevant legal text
General	Article 3	Best interest of the child	'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Article 3
Individual right	Article 24	highest attainable standard of health	'States Parties recognise the right of the child to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (...) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures ... to develop preventive healthcare.' Article 24(1)(2.f)
Other rights relevant to children's rights and tobacco control			
Type of norm	Provision	Content	
Individual right	Article 6	Life, survival and development	
	Article 17	Information	
	Article 18	Government support for parental responsibility to protect best interest of the child	
	Article 19	Protection against, among others, neglect	
	Article 27	Adequate standard of living	
	Article 33	Protection against illicit drug use	
	Article 36	Protection against exploitation	

At the policy level, an array of multisectoral approaches is available for governments to minimise tobacco use and exposure in children's living environments. These approaches include introducing plain packaging and display bans for tobacco products that have been associated with reduced smoking-related behaviours among youth.^{12 13} Raising tobacco taxes, raising the minimum age for purchasing tobacco and prohibiting smoking in public spaces have also been associated with significant health benefits.^{14 15} Implementation of these domestic responses, in the context of a 'tobacco endgame' strategy, dovetails with the human rights obligation of working progressively, within a set timeline, toward full realisation of the CRC.^{16 17} An important remaining research question is whether the full realisation of the CRC requires adoption of such endgame strategies as adopted in various forms around the world.

The international human rights framework includes a range of accountability mechanisms complementary to the FCTC to challenge governments and other actors for their failure to live up to their obligations.^{18 19} An important accountability mechanism for children is the CRC individual complaint procedure.²⁰ Its potential should be further explored in light of protecting children's rights in a tobacco control context.

The same international human rights framework also establishes responsibilities for the tobacco industry. Based on the UN Guiding Principles on Business and Human Rights, businesses have a responsibility to respect human rights in order to avoid causing adverse impact on human rights protection.²¹ Arguably, the tobacco industry is violating its responsibility to respect

children's rights by designing and selling tobacco products with flavours, additives and attractive packaging to target children in particular. As we demonstrated, the protection against which is part of at least children's right to health and best interest and their right to access information and to be protected against exploitation. The fact that Philip Morris International has joined the UN Global Compact, a voluntary initiative based on chief executive officer commitments to ensure, among others, human rights protection and sustainable development throughout its entire value chain, does not necessarily change this picture as long as it produces, sells and markets a product that is—according to the WHO—'deadly in any form or disguise'.²²

At the above-mentioned COP7, FCTC member states reinforced the importance of establishing the civil liability of the tobacco industry for the serious health consequences of persistent use of its products and its obstruction of effective tobacco control policies.² At the domestic level, civil society organisations and individuals are increasingly challenging the role and responsibilities of governments and the tobacco industry in relation to tobacco in court to establish civil liability. However, these actors also try to enforce public health protection more generally and other forms of accountability via domestic court cases.

In the Netherlands, for example, the close ties between the Dutch government and the tobacco industry were challenged in a claim based on Article 5.3 FCTC.²³ The article stipulates that governments shall protect their public health policies relevant to tobacco control from the commercial interests of the tobacco industry, such as using child-focused marketing techniques. The applicants stated that Article 5.3 FCTC is a specification of the human rights to life and health. Although the claim was unsuccessful, the Dutch government still took measures to limit its interaction with the tobacco industry. This is a clear example of how human rights can ultimately inspire and support claims to a tobacco-free environment.²³ Such precedents of legal challenges can catalyse the move to a tobacco-free environment, which, in different ways, may form part of every child's human rights.

Contributors BT conducted the underlying research and took care of the overall drafting of the text. She carries overall responsibility for the text and accepts full

Box 1 Framework Convention on Tobacco Control (adopted 21 May 2003)

'The Parties to this Convention, (...) Recalling further that the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, provides that States Parties to that Convention recognise the right of the child to the enjoyment of the highest attainable standard of health (...).' **Preamble**

responsibility for the finished text. MEG contributed to the research and to the text, and she took care of the endnotes. JVB contributed to the research and to the written text and took care of the endnotes, together with MEG. AS gave extensive feedback to the text on a number of occasions.

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