

The Role of National Human Rights Institutions in Facilitating Access to Remedy

Submission to the UN Working Group on Business and Human Rights

Action on Smoking and Health (ASH) appreciates the opportunity to provide input to the United Nations Working Group on Business and Human Rights in advance of the global consultation on the role of National Human Rights Institutions (NHRIs) in facilitating access to remedy. Founded in 1967, [Action on Smoking and Health](#) (ASH), an organization with ECOSOC Status, is the United States' oldest organization devoted to fighting the harms caused by tobacco, both in the US and globally, and dedicated to a world with zero tobacco deaths. 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. The goal of this submission is to draw attention to facilitating access to remedies for tobacco-related human rights abuses.

1. *In what ways could NHRIs facilitate – both directly and indirectly – access to effective remedy for business-related human rights abuses? Please provide concrete examples if possible.*

The first step is that NHRIs can help raise the visibility of tobacco as a human rights issue. The WHO Framework Convention on Tobacco Control (FCTC), the world's first public health treaty, which has over 180 Parties, was framed by looking 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.

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"³ constitutes a violation of the obligation to protect under Article 12 of the International Covenant on Economic, Social and Cultural Rights⁴, mirroring language in the FCTC Chapeau.⁵ Likewise, General

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>

³ 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.

⁴ *Supra* note 1.

⁵ World Health Organization, *Framework Convention on Tobacco Control*, Chapeau, 2003, available at http://www.who.int/fctc/text_download/en/.

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.⁶

Despite these linkages, national human rights institutions and governments often do not integrate tobacco control in their work to protect and promote human rights. NHRIs can help by increasing capacity and lending support to the government from a different view point. Most often, tobacco issues are viewed as a problem within the purview of the Department of Health, or when they are within the purview of the Ministry of Trade public health objectives might become secondary. Support from NHRIs adds another seat at the table and another argument against the deadly actions of transnational tobacco corporations.

NHRIs can also help to hold governments accountable against the influence of the tobacco industry. According to Article 5.3 of the Framework Convention on Tobacco Control (FCTC), the industry must have no part in shaping health policy. But despite FCTC Article 5.3 tobacco companies continue to interfere in public health policy and undermine governments' attempts to implement the FCTC. NHRIs can help expose and denounce such actions by the tobacco industry.

By encouraging countries to fully implement the FCTC, and reach target 3.a of the SDG's, NHRIs are helping avoid the need for smokers and/or victims of second hand smoke to use national courts, or regional human rights systems, as a remedy. Prevention is preferred to remedy. However, should governments fail to protect their citizens, as many currently are, NHRIs should use their resources to publicize these failings and assist victims in using their constitutionally guaranteed right to health, or other human rights arguments, in domestic courts.

4. What are the main challenges that NHRIs face in dealing with complaints concerning human rights abuses implicating parent and subsidiary companies, business operations in other jurisdictions, or the supply chain of a company?

There are a lot of challenges in dealing with the tobacco industry. First and foremost, Big Tobacco has a huge amount of financial influence. The combined profits of the world's biggest tobacco companies exceeded US \$62.27 billion in 2015.⁷ The tobacco industry often uses that wealth to fight against regulation and litigation. For context, the recent case where Australia defended its tobacco plain packaging laws against challenges by Philip Morris cost almost \$40 million in just one of three cases brought by the tobacco industry.⁸ The tobacco companies have nearly inexhaustible resources to dedicate to fighting complaints.

Another challenge is that the tobacco industry often attempts to frame their work in the context of human rights. For example, the industry and its front groups have recently taken to arguing that there is

⁶ 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>.

⁷ Drope J, Schluger N, Cahn Z, Drope J, Hamill S, Islami F, Liber A, Nargis N, Stoklosa M. 2018. *The Tobacco Atlas*. Atlanta: American Cancer Society and Vital Strategies

⁸ <https://www.theguardian.com/business/2017/jul/10/philip-morris-cigarettes-charged-millions-after-losing-plain-packaging-case-against-australia>.

a right to information and a right to access around electronic cigarettes. For many years, the industry and its front people have been asserting a human right to smoke as well.

A report from the American Cancer Society and Vital Strategies stated the problem concisely. “In its zeal to promote tobacco use, the tobacco industry regularly perpetrates unethical, and often unlawful, interference with life-saving tobacco control policies. Although tobacco companies compete for market share, they often collude to counter government tobacco control efforts, or support front groups to do the job for them. Other strategies involve openly misrepresenting scientific evidence to confuse the public.”⁹ Support from National Human Rights Institutions can be a huge asset to tobacco control and other public health advocates in preventing the tobacco industry, an industry long associated with corruption, from taking over the narrative.

6. Can you share any good practice examples in which your organization or institution was able to work collaboratively with NHRIs to facilitate, directly or indirectly, effective remedies for business-related human rights abuses?

In 2017, Philip Morris International (PMI) approached the Danish Institute for Human Rights (DIHR), a quasi-state body, to collaborate on a “human rights implementation plan.” The DIHR was given access to the corporation to assess PMI’s value chain. Following DIHR’s completion of their work, they concluded:

“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.”

This statement was a huge boon to the tobacco control community, and has generated momentum around using a human rights-based approach to ending the tobacco epidemic.

8. How could NHRIs collaborate better with regional and international human rights monitoring mechanisms (including UN special procedures, treaty bodies and the Universal Periodic Review) to facilitate access to remedy for business-related human rights abuses?

ASH and our partners are working to ensure that tobacco is included in as many human rights processes as possible, through shadow reports and, where possible, inclusion in country reports. Many treaty bodies have missions that are relevant to tobacco. For example, CEDAW can address rising smoking rates among women in a country up for review. However, most of these treaty bodies do not yet include tobacco within their area of work. However, some groups have begun to mention tobacco, for example the Ecuadorian Office of the Ombudsman submitted a statement to the Human Right’s Council last year that referenced tobacco.¹⁰ NHRIs can help influence countries to voluntarily include tobacco when reporting. If or when a country does not include a discussion of tobacco, NHRIs could raise the issue in written or oral statements in treaty body sessions.

⁹ Supra note 8.

¹⁰ https://www.ohchr.org/Documents/Issues/ESCR/SDG/Ombudsmen_Ecuador.docx