

**SMOKE AND MIRRORS:
RECONCILING THE RIGHT TO HEALTH
AND THE RIGHT TO TOBACCO IN TIMES
OF ARMED CONFLICT**

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I. INTRODUCTION

Imagine a situation where one internee or prisoner of war demands his right to tobacco—presumably in the form of smoking a cigarette—under the 1949 Geneva Conventions while a neighbor simultaneously demands his right to health—here, in the form of the right to be free from the harmful effects of tobacco. As individuals within these groups tend to live in close proximity to one another for the duration of the hostilities, this problem presumably is not merely hypothetical, even though an actual case that pits these two rights against one another has not yet grabbed the public spotlight. Given the growing number of pirates,¹ their apparent predilection for cigarettes,² and the

1. See DAVID F. MARLEY, *MODERN PIRACY* 175 tbl.6.7 (2011) (observing the spread of piracy in recent years, ballooning out of Somalia into the Gulf of Aden); U.N. Security Council Committee, Letter Dated 18 July 2011 from the Chairman of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea Addressed to the President of the Security Council, ¶ 87, U.N. Doc. S/2011/433 (July 18, 2011) (“Somali piracy continued to flourish in 2010, with the International Maritime Bureau Piracy Reporting Centre recording 219 incidents and 49 hijackings. International counter-piracy operations have made little impact on the level of pirate activity, with the number of piracy incidents and the 27 per cent hijacking success rate virtually unchanged in comparison with 2009”) (footnote omitted).

2. See Jeffrey Gettleman, *Somalia’s Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 31, 2008, at A1 (providing an estimate by one captured pirate that his team spent approximately 20 percent of their loot on essentials like guns, fuel, and cigarettes).

possibility of them enjoying prisoner-of-war status after their capture until a competent tribunal has determined their status,³ the stage might be set for just such a case. Regardless, which neighbor's right prevails? Putting aside the somewhat obvious solution of creating smoking and non-smoking zones, similar to those that exist in some airports, this article explores how to resolve this apparent conflict between rights and whether they actually conflict in the first place.

At first glance, it would seem like these rights directly and irreconcilably conflict. However, upon closer inspection, it becomes clear that there is no actual conflict between these two rights. Although the traditional view is that as soon as armed conflict begins, international humanitarian law supersedes international human rights law as the *lex specialis*, in reality this is not necessarily true. Indeed, several conditions must be satisfied for *lex specialis* to apply. For this article's purposes, the key condition is that both rights must be applicable at the same time for them to conflict. Despite the expansion of the scope of international human rights law into times of armed conflict through the 2003 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion,⁴ the two rights in question actually do not apply at the same time. Since international humanitarian law remains applicable only during times of armed conflicts, the two norms will be applicable at the same time only if the international human rights norm also applies during times of armed conflicts. The *Wall* advisory opinion established that only non-derogable human rights norms—for example, those under Article 4 of the International Covenant on Civil and Political Rights—would apply during armed conflicts.⁵ It is highly unlikely that the right to be free from the harmful effects of tobacco is a non-derogable right. Therefore, the tobacco user's right will trump virtually every time, again,

3. See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 30-31 (2008).

4. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 103-32 (July 9).

5. *Id.* ¶ 106.

assuming *arguendo* that that use takes the form of smoking tobacco.

This article is divided into six parts, including this introduction and an equally brief conclusion in Parts I and VI, respectively. Part II lays out the history of tobacco use, focusing specifically on the perceived harms and benefits of tobacco on health, which is important in understanding why the right to tobacco and the right to be free from the harmful effects of tobacco have evolved as they have. Part III explains the oft-overlooked rights to tobacco contained in such provisions of international humanitarian law as Article 11 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 Geneva Convention), Articles 26 and 28 of the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), and Articles 87 and 89 of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). Part IV explores the right to be free from the harmful effects of tobacco that comes from the World Health Organization's Framework Convention on Tobacco Control (Framework Convention), various human rights treaties, and customary international law. Part V evaluates the secondary rules that exist for resolving this apparent conflict and concludes that there is no legal conflict between these primary rules, although they do still conflict from other perspectives. Critics will complain that this article fails to fully address the clash-of-rights issues presented in the first paragraph of this introduction. However, such criticism misses the entire point of this article—that clash-of-rights issues arise only when rights actually conflict, and there is no actual conflict between the right to tobacco and the right to be free from the harmful effects of tobacco. While ample literature focuses on how international humanitarian law and international human rights law conflict or potentially conflict,⁶ this article appears to be the first to provide a detailed analysis of whether rights in these two areas of international law actually conflict, making the secondary rules for resolving conflicts relevant.

6. *E.g.*, Paul Eden & Matthew Happold, *Symposium: The Relationship Between International Humanitarian Law and International Human Rights Law*, 14 *J. CONFLICT & SECURITY L.* 441, 442 (2010).

This article also is unique in providing the first academic analysis of the right to tobacco, although there are other academic articles on the right to be free from the harmful effects of tobacco.⁷ It is somewhat surprising that previous academic studies have not focused on the right to tobacco, given that tobacco made up 2.18 percent of the overall weight of consignments to prisoners of war, civilian internees, and deportees from October 18, 1940 to December 1945,⁸ with tobacco apparently becoming the category of supply with the highest percentage on the International Committee of the Red Cross' budget in recent years.⁹ This article also provides the first comparison of these two rights, which would have been an interesting case study for the interaction of different branches of international law and the interpretive tools available for reconciling conflicts had these two branches actually conflicted with regard to tobacco-related rights.

II. A BRIEF HISTORY OF TOBACCO USE

Tobacco discovery, cultivation, and use date back to time immemorial, with commentators attributing the early efforts to indigenous groups in the Americas.¹⁰ Tobacco use spread to Europe in the 1500s through Portugal and Spain's adventures in the Americas,¹¹ and it quickly became associated with British colonialism as one of its main cash crops.¹² In particular, tobacco

7. E.g., Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783 (1998); Carolyn Dresler & Stephen Marks, *The Emerging Human Right to Tobacco Control*, 28 HUM. RTS. Q. 599 (2006).

8. See 4 INT'L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 5 (1948).

9. Interview with Int'l Conference of the Red Cross (Sept. 12, 2012).

10. See ERIC BURNS, *THE SMOKE OF THE GODS: A SOCIAL HISTORY OF TOBACCO* 1, 3-5 (2007) (describing tobacco use by the ancient Mayan civilization and asserting that earlier "tribes" discovered tobacco before 16,000 B.C., with natives of Peru and Ecuador beginning to cultivate it as early as 5,000 B.C.); see also JOHN P. HARRINGTON, *TOBACCO AMONG THE KARUK INDIANS OF CALIFORNIA* 1, 5-6 (1932) (discussing the Karuk tribe of California and their significant knowledge and use of tobacco).

11. BURNS, *supra* note 10, at 15-16, 29-31.

12. See GEORGE LOUIS BEER, *THE ORIGINS OF THE BRITISH COLONIAL SYSTEM, 1578-1660*, at 86-87 (1908); Gary M. Pecquet, *British Mercantilism and Crop Controls in the Tobacco Colonies: A Study of Rent-Seeking Costs*, 22 CATO J. 467, 467 (2003); Jacob M. Price, *The Tobacco Adventure to Russia: Enterprise, Politics, and Diplomacy in the Quest for a Northern Market for English Colonial Tobacco, 1676-1722*, 51 TRANSACTIONS AM.

production has featured prominently in the history of certain parts of the United States.¹³ This part does not attempt to repeat that history. Nor does this part focus on the perceived non-health-related harms and benefits from tobacco use, such as the enhanced ability of tobacco users to detect gases in the air, thereby making them the human equivalent of the proverbial canary in a coal mine when it comes to chemical weapons.¹⁴ Instead, this part focuses on the perceived health-related benefits and harms of tobacco use, with the aim of better understanding how the right to tobacco and the right to be free from the harmful effects of tobacco were created.

A. Perceived Health Benefits from Tobacco Use at the Time of Drafting the Geneva Conventions

The rise in consumption of tobacco during this century can be attributed, to a large extent, to the success of the cigarette.¹⁵ Part of that success can be attributed to the tobacco industry's specious propaganda concerning the health benefits from smoking, which this section reviews, *inter alia*. These considerations presumably acted as the impetus behind the right to tobacco within the 1929 Geneva Convention and the 1949 Geneva Conventions. To be

PHIL. SOC'Y 1, 5-6 (1961).

13. See, e.g., ANTHONY J. BADGER, *PROSPERITY ROAD: THE NEW DEAL, TOBACCO, AND NORTH CAROLINA* xvi-xvii (1980) (explaining that tobacco was the cash crop of North Carolina and the state's economic reliance on the production of cigarettes); ARTHUR PIERCE MIDDLETON, *TOBACCO COAST: A MARITIME HISTORY OF CHESAPEAKE BAY IN THE COLONIAL ERA* 93-94 (1953) (discussing how tobacco was used as an "economic foundation" in Virginia); THOMAS J. WERTENBAKER, *THE SHAPING OF COLONIAL VIRGINIA* 28-29 (1958) (discussing the role tobacco had on the economic and societal development of Virginia).

14. See L.F. HABER, *THE POISONOUS CLOUD: CHEMICAL WARFARE IN THE FIRST WORLD WAR* 83 (1986) (describing how soldiers who smoked could identify traces of phosgene by its peculiar taste, providing a means of detecting danger during the chemical warfare of World War I).

15. See Ctr. for Disease Control & Prevention, *Achievements in Public Health, 1900-1999: Tobacco Use—United States, 1900-1999*, 48 *MORBIDITY & MORTALITY WKLY. REP.* 986, 988 (1999) (noting several events that resulted in the rise of tobacco consumption, including improvements in mass production, transportation that permitted cigarette distribution, and mass media advertising); see generally RICHARD MCGOWAN, *BUSINESS, POLITICS, AND CIGARETTES: MULTIPLE LEVELS, MULTIPLE AGENDAS* (1995) (exploring the American cigarette industry and how it remains extremely profitable despite consistent questions about its future viability).

clear, however, this section does not condone such propaganda or otherwise temper the health dangers of tobacco use.

The cigarette made it convenient to light up vis-à-vis lighting up pipes, cigars, or roll-ups that were commonly used in the 1800s. Coined the “fast food” equivalent of tobacco,¹⁶ the modern cigarette is complex to the extent that it not only contains tobacco but also thousands of chemicals to aid with the delivery of nicotine, as well as other natural ingredients such as sugar, chocolate, wine, herbs, licorice, and spices.¹⁷ In addition, the cigarette has been scientifically engineered so that these ingredients can be released in their appropriate proportions in order to maximize their effect.¹⁸ Not only does cigarette usage involve relatively less mess, it gives the consumer an immediate feeling of well being, occurring in a matter of seconds.¹⁹ The “appeal” in the consumption of nicotine may be explained by the suppression of nerves and the release of endorphins in the brain that give the consumer relaxing and pleasurable feelings from its use.²⁰ This ultimately reinforces “smoking behavior” for the perceived improvements on mood states,²¹ as well as perceived relief of anxiety, trauma, and pain.²² However, recent studies on

16. *Tobacco Wars: Lighting Up* (British Broadcasting Corporation & The Learning Channel 1999); see also Arthur William Musk & Nicholas Hubert de Klerk, *History of Tobacco and Health*, 8 RESPIROLOGY 286, 287 (2003) (acknowledging the convenience of manufactured cigarettes as a popular means of nicotine delivery due to their convenient usage in the trenches of World War I).

17. Andrew Mitchell & Tania Voon, *Regulating Tobacco Flavors: Implications of WTO Law*, 29 B.U. INT'L L.J. 383, 395-96 (2011).

18. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1476-78 (1999) (discussing how cigarette manufacturers have scientifically engineered their cigarettes in order to enhance nicotine delivery).

19. Neal L. Benowitz, *Nicotine Addiction*, 362 NEW ENG. J. MEDIC. 2295, 2299 (2010).

20. *Id.* at 2296; Robert N. Proctor, *The Global Smoking Epidemic: A History and Status Report*, 5 CLINICAL LUNG CANCER 371, 372-73 (2004).

21. J.L. del Arbol et al., *Plasma Concentrations of Beta-Endorphin in Smokers Who Consume Different Numbers of Cigarettes Per Day*, 67 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 25, 25 (2000).

22. See Joseph W. Ditte & Thomas H. Brandon, *Pain as a Motivator of Smoking: Effects of Pain Induction on Smoking Urge and Behavior*, 117 J. ABNORMAL PSYCHOL. 467 (2008) (asserting that smokers are motivated to use tobacco to combat pain, and thus increase smoking behavior).

chronic pain and cigarette smoking are now advancing research into reviewing the prevalence of greater negative effects on health from cigarette smoking. A study by Michael Zvolensky and his co-authors observed no significant incremental relationship between lifetime dependence on smoking and chronic pain relief, but conversely found that persons suffering chronic pain were motivated to smoke because they believed it would help them deal with chronic pain, depression, and anxiety.²³

Other perceived health benefits include the release of adrenaline, which directly stimulates the brain and provides an energy rush.²⁴ Furthermore, nicotine impedes insulin output that curbs appetite and increases metabolism rates.²⁵ On the surface, these effects may seem to be positive to health, particularly in the immediate to short term. Such short-term effects certainly have had their appeal to combat troops in an age where there was little knowledge of long-term health damage, required stress and anxiety suppression, and brain and physical stimulation, which arguably can be provided through cigarette usage. However, since the two world wars, researchers increasingly have rejected the perceived positive health benefits of consuming nicotine.²⁶ It is now well known that the long-term use of tobacco significantly increases bad cholesterol (low-density lipoprotein) levels, thus increasing the risk of heart attacks and strokes, as well as causing cancer, bronchitis, emphysema, and other illnesses.²⁷

This section has highlighted some of the health benefits seen in tobacco usage in the past, most of which, if not all, have been entirely discredited. This section is intended to help the reader

23. Michael J. Zvolensky et al., *Chronic Pain and Cigarette Smoking and Nicotine Dependence Among a Representative Sample of Adults*, 11 NICOTINE & TOBACCO RES. 1407, 1413 (2009).

24. GORDON EDLIN & ERIC GOLANTY, HEALTH & WELLNESS 394 (10th ed. 2010).

25. Mandeep Bajaj, *Nicotine and Insulin Resistance: When the Smoke Clears*, 61 DIABETES 3078, 3078-79 (2012) (observing that smoking is associated with insulin resistance and weight loss).

26. Musk & de Klerk, *supra* note 16, at 287.

27. D.J. Freeman et al., *Smoking and Plasma Lipoproteins in Man: Effects on Low Density Lipoprotein Cholesterol Levels and High Density Lipoprotein Subfraction Distribution*, 23 EUR. J. CLINICAL INVESTIGATION 630, 637 (1993); Allyn L. Taylor & Douglas W. Bettcher, *WHO Framework Convention on Tobacco Control: A Global "Good" for Public Health*, 78 BULL. WORLD HEALTH ORG. 920, 923-24 (2000).

understand why the drafters of the 1929 Geneva Convention and 1949 Geneva Conventions might have provided a right to tobacco, rather than substantiating any of these claims or providing more than a superficial understanding of these issues. The following section goes into greater detail about the health dangers from tobacco use, which were already alluded to in this section. As explained below, the recent Framework Convention on Tobacco Control is particularly helpful in identifying and understanding the international norms that have arisen in response to these health dangers.

B. Perceived Health Harms from Tobacco Use

The tobacco industry largely had been unregulated in its development and expansion due to its historical contribution to economic growth and development of cities; therefore, it had been given a special status that was relatively free of restrictions.²⁸ This has now changed since the rise of tobacco-related deaths and diseases have caused regulators to take action to increase regulation of the tobacco industry.

Nicotine is lethally toxic in more than small amounts, and one cigarette is found to contain approximately 10 mg of nicotine; a typical tobacco user will absorb between 1 to 2 mg of nicotine, although absorption can range from 0.5mg to 3.0mg of nicotine.²⁹ The smoke that tobacco emits has been said to contain “every toxic air polluting substance defined and regulated by the Environmental Protection Agency under the Clean Air Act.”³⁰ Over 4,000 chemicals are estimated to be emitted into the air from burning a cigarette, over 50 of which are known to promote cancer.³¹ Indeed, the health dangers seem obvious. According to the World Health Organization (WHO), tobacco kills up to half its

28. See RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 505-06 (1996); M.L. Myers, *Opposition in Search of a Rationale: The Case for Food and Drug Administration Regulation*, 13 *TOBACCO CONTROL* 441, 441 (2004).

29. WORLD HEALTH ORG., *GENDER, WOMEN AND THE TOBACCO EPIDEMIC* 139 (2010).

30. Lynn M. Galbraith-Wilson, *The Call for State Legislation on Environmental Tobacco Smoke in State Prisons*, 13 *HAMLIN J. PUB. L. & POL'Y* 335, 337 (1992).

31. *Tobacco: Fact Sheet*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs339/en/> [<http://perma.cc/BG36-77NW>] (last updated May 2017).

consumers, it is one of the highest causes of preventable death in the world, and it is the principal cause of premature death in industrialized States such as the United States.³² WHO reported more than seven million deaths per year; more than six million of which are caused by direct tobacco use, and an additional 890,000 caused by non-users of tobacco being exposed to second-hand smoke.³³ Furthermore, 80 percent of the world's billion tobacco users live in low- and middle-income countries, meaning that tobacco consumers who die prematurely will deprive their families of income and hinder economic development.³⁴ Based on WHO findings, tobacco caused 100 million deaths in the 20th century, with projections of over one billion deaths in the 21st century if current trends continue.³⁵ In short, a global tobacco pandemic has emerged.

Direct impacts of smoking on health include cancer (the most prevalent kinds being lung and bladder cancer), heart and circulation disease, respiratory illnesses, and increased antenatal and prenatal mortality.³⁶ Indirect impacts through passive smoking put non-users of tobacco at risk of these tobacco-related illnesses.³⁷ In addition, this presents a significantly heavier burden on governments when providing public health services; where the pandemic is mostly concentrated in developing countries, the cost is disproportionately higher on low- and middle-income economies. The Framework Convention entered into force in February 2005 and has 180 state parties supporting the enforcement of this tobacco control mechanism,³⁸ which

32. *Id.*, *Smoking, High Blood Pressure and Being Overweight Top Three Preventable Causes of Death in the U.S.*, HARV. T.H. CHAN SCH. PUB. HEALTH (Apr. 27, 2009), <https://www.hsph.harvard.edu/news/press-releases/smoking-high-blood-pressure-overweight-preventable-causes-death-us/> [<http://perma.cc/76CS-MKUY>].

33. *Tobacco: Fact Sheet*, *supra* note 31.

34. *Id.*

35. WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2008, at 8 (2008), http://www.who.int/tobacco/mpower/mpower_report_full_2008.pdf [<http://perma.cc/4TLN-Z3B8>].

36. Taylor & Bettcher, *supra* note 27, at 923.

37. *Id.* at 923-24.

38. WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166 [hereinafter Framework Convention]; *Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, http://www.who.int/fctc/signatories_parties/en/ [<http://perma.cc/BF93-6WZR>] (last visited June 4, 2017).

account for approximately 90 percent of the world's population.³⁹ Most notably, the Framework Convention reaffirms the human right to health at the highest standard and promotes legal enforcement for international health cooperation and compliance.⁴⁰ Furthermore, WHO set up guidelines for national and local governments in adopting 100 percent smoke-free public places and workplaces.⁴¹ The guidelines were adopted by 146 parties to the Framework Convention in 2007, signaling further implementation of initiatives to combat the deadly effects of the global tobacco pandemic.⁴² Article 8 of the Framework Convention establishes broad guidelines to cover protection from exposure to second-hand tobacco smoke and implements measures to protect against the exposure of smoke in public places, including indoor workplaces and indoor public places:

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.⁴³

Interestingly, indoor workplaces include prisons, mental health institutions, and nursing homes, even though they also are dwelling homes.⁴⁴ In addition, Article 9 of the Framework Convention requires members to establish regulations, testing,

39. *Tobacco Fact Sheet*, *supra* note 31.

40. *Id.*

41. *New Guidelines Adopted on Smoke-Free Environments*, WORLD HEALTH ORG. (July 6, 2007), <http://www.who.int/mediacentre/news/releases/2007/pr38/en> [<http://perma.cc/436W-25K5>].

42. Conference of the Parties, *Guidelines on Protection from Exposure to Tobacco Smoke*, FCTC/COP2(7) (July 2007), http://www.who.int/fctc/cop/art%208%20guidelines_english.pdf?ua=1 [<http://perma.cc/36A4-Z77K>].

43. Framework Convention, *supra* note 38, art. 8.

44. Conference of the Parties, *supra* note 42, ¶ 21.

and monitoring of tobacco products.⁴⁵

The detrimental effects of smoking on health have restricted the freedom of the tobacco user in smoking in public areas. In tandem with the Framework Convention and the WHO guidelines on smoke-free environments, the European Commission has coordinated a campaign towards a “smoke-free Europe,” which includes introducing smoking bans in prisons in order to promote better indoor air quality in those workplaces.⁴⁶ The European Commission report reflects public policy advocacy to protect both tobacco users and non-users of tobacco against the ill effects of second-hand smoke. According to its 2008 *Report on Tobacco Smoking in Prison*, certain States such as Belgium, France, the Netherlands, and Scotland have initiated smoking bans in prisons in 2006.⁴⁷ Subsequent research reports in the United States and Europe further argue that there must be a complete smoking ban in prisons based on claims of improved air quality, citing evidence that there are 77 percent less respirable suspended particles from tobacco smoke,⁴⁸ and thus lower second-hand smoke levels as a result of enforced anti-tobacco regulations.⁴⁹

C. ICRC Involvement in Tobacco Usage

Cynics might be quick to blame the tobacco industry for the development of a right to tobacco, with the obvious benefits to its bottom line if such a right were widely recognized. However, as explained in Part III below, it appears that humanitarians associated with the International Committee of the Red Cross (ICRC) and the International Conference of the Red Cross first presented the possibility of a right to tobacco for the benefit of

45. Framework Convention, *supra* note 38, art. 9.

46. Directorate-General for Health and Consumers, *Report on Tobacco Smoking in Prison*, 5, SANCO/2006/C4/02 (Apr. 2008), <http://www.ohrn.nhs.uk/resource/policy/TobaccoSmoking.pdf> [<http://perma.cc/7ANW-DV9A>].

47. *Id.* at 15 tbl.2.

48. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE 628-29 (2006), <http://www.ncbi.nlm.nih.gov/books/NBK44324/> [<http://perma.cc/4DQV-YVBV>]; S.K. Proescholdbell et al., *Indoor Air Quality in Prisons Before and After Implementation of a Smoking Ban Law*, 17 TOBACCO CONTROL 123, 125 (2008).

49. See Proescholdbell et al., *supra* note 48, at 126.

prisoners of war and internees. A thorough search of the ICRC archives relating to the 1929 Geneva Convention and the 1949 Geneva Conventions did not reveal a link between these humanitarians and tobacco companies, although the possibility remains of some nefarious connection. With no evidence of such a connection, this article assumes that the humanitarians proposed this right for the comfort and relief of these groups, if not out of a genuine belief that tobacco was a necessity of life at that time.

The revolution of the cigarette was supported by its mass consumption by soldiers during World War I, which resumed during World War II.⁵⁰ John Pershing, Commander of the American Expeditionary Forces during World War I, is reported as having said the following about the importance of tobacco during the war effort: “You ask me what we need to win this war. I answer tobacco as much as bullets.”⁵¹ While there might have been some sense of the potentially harmful effects of tobacco at that time,⁵² such concerns certainly were not emphasized, with smoking becoming overwhelmingly socially acceptable during and after the two world wars.⁵³ It is no surprise that the right to tobacco was first mentioned during this period, in the 1929 Geneva Convention.⁵⁴ This convention went further than the 1899 and 1907 Hague Regulations in promoting and protecting the rights of prisoners of war. In particular, the 1929 Geneva Convention explicitly stipulates the provision of food, clothing, and bedding, as well as the right to smoke tobacco, with all of these items seen as necessities of life at that time.⁵⁵ The presence of the obligation to supply water to prisoners and the authorization of tobacco within Article 11 of the 1929 Geneva Convention can be seen as a valid basis to argue that the right to tobacco was regarded as a necessity of life, alongside water.⁵⁶

50. See KLUGER, *supra* note 28, at 63, 112-13.

51. *Id.* at 63.

52. Fleming James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CAL. L. REV. 1550, 1557 (1966).

53. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1026-27 (1995).

54. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Geneva Convention].

55. *Id.* arts. 10-12.

56. *Id.* art. 11.

While Article 11 does not obligate the detaining powers to supply tobacco, like it requires the supply of water, there is evidence that the detaining power had to provide tobacco in certain ways. For example, Article 28(1) of the 1949 Geneva Convention requires the detaining power to stock tobacco in canteens alongside foodstuffs.⁵⁷

Although tobacco technically is not a food, the ICRC has asserted that for many detainees, tobacco is as necessary as food.⁵⁸ As musician Frank Zappa once said, “To me, a cigarette is food.”⁵⁹ Undoubtedly many tobacco users would agree, especially during the two world wars. The ICRC justifies its views on the necessity of tobacco on the basis that tobacco provides important psychological benefits to individuals in prison. While the ICRC acknowledges that tobacco is not an “article of prime necessity”⁶⁰ and is a poison to some extent, the fact that it helps calm nerves, soothes minds, and helps prisoners deal with their suffering outweighs its negative health effects and makes it a necessity to prisoners.⁶¹ Furthermore, tobacco was believed to be a “harmless narcotic” that was an important cure in light of the humanistic needs of prisoners at the time.⁶² Around the same time, King George VI of England, who was known to have suffered a speech impediment, used tobacco to help calm his nerves and deal with his stammer.⁶³ In spite of these immediate and short-term benefits, the King became a heavy tobacco user, and he eventually developed lung cancer.⁶⁴

57. Third Geneva Convention, *supra* note 3, arts. 26, 28.

58. See OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 394 (Jean S. Pictet ed., 1958) [hereinafter GENEVA CONVENTION COMMENTARY IV]. It should be noted that Article 89 of the Fourth Geneva Convention and Article 28 of the Third Geneva Convention are the same, meaning that the commentary in relation to Article 89 can also apply to Article 28.

59. FRANK ZAPPA, THE REAL FRANK ZAPPA BOOK 229 (1989).

60. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

61. See *id.* (discussing the psychological impacts smoking has on prisoners).

62. *Id.*

63. See DAVID HILLIAM, KINGS, QUEENS, BONES & BASTARDS: WHO'S WHO IN THE ENGLISH MONARCHY FROM EGBERT TO ELIZABETH II 108-09 (1998); see also Nigel Farndale, *The King's Speech: The Real Story*, TELEGRAPH (Jan. 5, 2011, 10:06 AM), <http://www.telegraph.co.uk/culture/film/8223897/The-Kings-Speech-the-real-story.html> (noting that King George VI smoked because he heard it would alleviate his stammer).

64. HILLIAM, *supra* note 63, at 109; see also SARAH BRADFORD, THE RELUCTANT

When Henry Dunant—the founder of the ICRC—arrived in Castiglione delle Stiviere, Solferino, the town had been overwhelmed by 9,000 wounded soldiers, and he decided to help them: “He gave them water to ease their thirst; he cleaned their wounds, changed dressings; he sent his coachman to the city of Brescia to buy cloth for dressings, pipes and tobacco, herbal infusions and fruit.”⁶⁵ In these momentous beginnings of the ICRC, upon which today’s international humanitarian movement is built, even the founding father himself sourced tobacco.⁶⁶ In his own record of the events he observed at Solferino,⁶⁷ Dunant describes the humanitarian assistance he provided to the wounded in churches and hospitals and explains that he spent several days distributing tobacco:

[T]he smell of the tobacco, smoked by hundreds of men, was of great value against the pungent stench which arose as a result of crowding so many patients in stifling hot buildings. The stocks of tobacco in Brescia were very soon exhausted, and more had to be bought from Milan. Only tobacco could lessen the fears which the wounded men felt before an amputation. Many underwent their operation with a pipe in their mouths, and a number died still smoking.⁶⁸

This haunting account of the horrors experienced by the wounded supports the psychological comfort of smoking tobacco while in traumatic conditions; perhaps from a humanitarian and compassionate standpoint, the ill effects of tobacco may be temporarily condoned for the sake of immediate relief.

At its 25th International Conference of the Red Cross in Geneva in October 1986, the ICRC passed Resolution 30, which acknowledged the resolutions of the World Health Assembly on the health hazards of tobacco smoking and considered tobacco

KING: THE LIFE & REIGN OF GEORGE VI 1895-1952, at 7 (1989) (“By the time he sat down to breakfast he had already smoked two cigarettes and one cigar, while by dinner he would often had got through twenty more cigarettes, which he smoked exhaling reflectively through his nose, and twelve more large cigars.”).

65. FRANÇOIS BUGNION, FROM SOLFERINO TO THE BIRTH OF CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW 3 (2009).

66. See HENRY DUNANT, A MEMORY OF SOLFERINO 93-94, 129-30 (1959).

67. *Id.* at 16.

68. *Id.* at 93-94.

smoking to be incompatible with the goals set forth in the publication *Health for All by Year 2000*.⁶⁹ Additionally, it was acknowledged that passive smoking violates the right to health of non-users of tobacco, and the International Conference resolved that its National Societies were to (a) establish educational and public information programs on the effects of the use of tobacco; (b) support WHO's implementation of strategies on smoking control; and (c) encourage the total ban, restrictions, or limitations on tobacco advertising.⁷⁰ Moreover, the ICRC urged for smoking not to be permitted in meetings of the International Conference, the Council of Delegates, the General Assembly and Executive Council of the League, all committees and subsidiary bodies of the ICRC, and in meetings sponsored by the ICRC.⁷¹ Indeed, the ICRC has produced public information on the health hazards of tobacco smoking, such as *Antenatal Guidelines for Primary Health Care in Crisis Conditions*, which warns of tobacco being a maternal cause of fetal death.⁷² Nevertheless, neither Resolution 30 nor the 25th International Conference addressed Articles 26 and 28 of the Third Geneva Convention or Articles 87 and 89 of the Fourth Geneva Convention, which provide a right to tobacco. Therefore, it is apparent that international humanitarian law has not updated its rules in light of the ICRC's own thinking on the subject or the WHO Framework Convention on Tobacco Control, nor has it kept up with the practice of enforcing smoking bans in prisons, like other international organizations, such as the European Commission, have done. A close study of the right to tobacco and the right to health appears to be in order, given how they appear to conflict on their face. Part III sets out the right to tobacco under international humanitarian law, while Part IV explains the right to be free from the harmful effects of tobacco, which is provided by the rights to life and health. This basic understanding of these rights is needed

69. Int'l Comm. of the Red Cross, 25th International Conference of the Red Cross, Res. 30 (Oct. 1986), <https://www.icrc.org/eng/resources/documents/article/other/57jmdz.htm> [<http://perma.cc/93UF-7MSS>].

70. *Id.*

71. *Id.*

72. See CRISTINA OTERO GARCIA, ANTENATAL GUIDELINES FOR PRIMARY HEALTH CARE IN CRISIS CONDITIONS 152 (2005).

in order to determine whether these rights conflict and, if so, how to resolve that conflict.

III. THE RIGHT TO TOBACCO IN INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has a long history of providing various groups—for example, civilian populations, the sick and wounded, prisoners of war, and internees—with rights to food and other necessities of life.⁷³ This part focuses on the provisions that expressly provide these groups with the right to tobacco. These provisions include those requiring detaining states to stock the canteens of prisoners of war and internees with tobacco, thereby giving them a right to tobacco inasmuch as prisoners of war and internees are entitled to purchase and use items from the canteen. This part starts with the 1929 Geneva Convention and moves on to the Third and Fourth Geneva Conventions.

A. 1929 Geneva Convention

The 1929 Geneva Convention represents a dramatic improvement in the protection of prisoners of war when it comes to their sustenance. For example, Chapter 2 is entirely devoted to food and clothing of prisoners of war. Reviewing the content of all 12 articles of Chapters 1 and 2 of the 1929 Geneva Convention falls outside the scope of this article. Instead, this part focuses on the provisions relating directly to tobacco. The third sentence of Article 11 of the 1929 Geneva Convention is the first place where a right to tobacco for prisoners of war appears: “The use of tobacco shall be authorized.”⁷⁴ This provision applies equally to prisoners of war working for private individuals and other labor detachments through the operation of Articles 28 and 33, respectively. Article 28 of the 1929 Convention places the “entire responsibility for the maintenance, care, treatment and the

73. See, e.g., JEAN DE PREUX ET AL., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 196, 199 (Jean S. Pictet ed., 1960) [hereinafter GENEVA CONVENTION COMMENTARY III]; GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

74. 1929 Geneva Convention, *supra* note 54, art. 11.

payment of the wages of prisoners of war working for private individuals” on the detaining state.⁷⁵ Article 33 requires that labor detachments have the same conditions as prisoners-of-war camps: “Conditions governing labour detachments shall be similar to those of prisoners-of-war camps, particularly as concerns hygienic conditions, food, care in case of accidents or sickness, correspondence, and the reception of parcels.”⁷⁶ This authorization to use tobacco is relatively unrestricted.

Article 37 of the 1929 Convention allows prisoners to receive packages containing foodstuffs and other consumables: “Prisoners of war shall be authorised to receive individually postal parcels containing foodstuffs and other articles intended for consumption or clothing. The parcels shall be delivered to the addressees and a receipt given.”⁷⁷ Although not expressly mentioned, Article 37 could conceivably include tobacco. Article 57 indicates that prisoners subject to disciplinary punishment can have their packages withheld until the end of their sentence.

Prisoners of war undergoing disciplinary punishment shall be permitted to read and write and to send and receive letters.

On the other hand, it shall be permissible not to deliver parcels and remittances of money to the addressees until the expiration of the sentence. If the undelivered parcels contain perishable foodstuffs, these shall be handed over to the infirmary or to the camp kitchen.⁷⁸

Similar to Article 37, while tobacco is not expressly mentioned in this article, it can be presumably included. Article 40 relates to these other provisions in that it provides for how these packages, which conceivably can include alcohol, are to be examined:

The examination of postal parcels shall, moreover, be effected under such conditions as will ensure the preservation of any foodstuffs which they may contain, and, if possible, be done in the presence of the addressee

75. *Id.* art. 28.

76. *Id.* art. 33.

77. *Id.* art. 37.

78. *Id.* art. 57.

or of a representative duly recognized by him.⁷⁹

Article 72 of the Third Geneva Convention also provides a similar right to packages,⁸⁰ which, like the 1929 Geneva Convention, could conceivably include tobacco, but does not expressly mention it. Article 72 is not exhaustive of the types of materials that can be sent through parcels.

Critics will emphasize how these provisions do not expressly mention tobacco, but instead focus on foodstuffs. As previously indicated, the authorization to use tobacco appears in Article 11 of the 1929 Geneva Convention, as part of the chapter entitled “Food and clothing of prisoners of war.” Tobacco clearly is not clothing, so it could be assumed that the drafters of the 1929 Geneva Convention saw tobacco (and drinking water) as equivalent to food. As explained below, the same is true with Article 26 of the Third Geneva Convention, which permits the use of tobacco in a provision entitled “Food.” Therefore, it appears as though the drafters intended to include tobacco among the foodstuffs referred to in these articles.

Along with Article 57, which ostensibly permits the deprivation of tobacco to detainees undergoing disciplinary punishment, Article 55 may also limit the right to tobacco:

Subject to the provisions of the last paragraph of article 11, the restrictions in regard to food permitted in the armed forces of the detaining Power may be applied, as an additional penalty, to prisoners of war undergoing disciplinary punishment.

Such restrictions shall, however, only be ordered if the state of the prisoner’s health permits.⁸¹

However, this is a moot point, inasmuch as Article 55 provides the manner to apply additional disciplinary punishments to detainees, which stipulates that restrictions with regard to food may be applied as an additional penalty (except as a collective

79. *Id.* art. 40.

80. Third Geneva Convention, *supra* note 3, art. 72.

81. 1929 Geneva Convention, *supra* note 54, art. 55. Again, critics will assert that Articles 11 and 55 relate only to food, not tobacco, making it inappropriate to analyze these provisions in the context of the right to tobacco. However, as previously mentioned, Article 11 expressly includes tobacco within its discussion of food, thereby indicating that they—along with drinking water—are directly related, if not equivalent.

measure), provided the state of the detainee's health permits. The proposal to permit detaining states to restrict food and cut off alcohol and tobacco as a means of increasing punishment was proposed in an early draft of the 1929 Geneva Convention.⁸² Even though this idea was not accepted, it suggests that detaining states may, when necessary, resort to restricting food and depriving tobacco and alcohol as long as it does not harm the health of the internee, if such an increase in the severity of the punishment is likely to advance respect for discipline by the internee.⁸³

Without an express mention of tobacco (or alcohol) in Article 55, an ambiguity arises as to whether detaining states may withhold tobacco as a means of increasing punishment. After all, Article 55 specifies from the list of rations a detainee is provided in Article 11 that food may be restricted, but it does not mention tobacco. It does not state that only the food restriction can serve as an increasing punishment, suggesting that tobacco deprivation is not entirely excluded as an additional punishment. One interpretation of this apparent conflict may be that, as a starting point, food restrictions—not tobacco deprivation—may be applied as an increased punishment, as provided under Article 55; however, the detaining state may resort to the latter if necessary, provided the detainee's health permits and such action would further improve the detainee's respect for discipline. This interpretation dovetails with the Third Convention's Commentary on Article 89(1)(B) in relation to forms of punishment and Article 98(5)(2) with respect to disciplinary safeguards, which allows the withholding and reducing of tobacco, respectively.⁸⁴ Nevertheless, the absence of tobacco deprivation in Article 55 is an indication of the important role tobacco served in the lives of detainees, which may be seen as more important than food in some instances.

The ICRC itself proposed the following language as the starting point for deliberations at the Diplomatic Conference of 1929, which appeared as the fourth sentence of Article 14 of the preliminary draft of the Code for Prisoners of War: "L'usage du

82. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 496.

83. *Id.*

84. *See id.* at 437-38, 469.

tabac sera autorisé.”⁸⁵ It is unclear exactly who introduced this language and why, although the 11th International Conference of the Red Cross was intended to revise the Geneva Convention of 1906 and draft a new Convention to protect prisoners of war.⁸⁶ The resolution of the 11th International Conference did not even mention tobacco and instead debated the separation of the conventions governing the protection of prisoners of war and civilians.⁸⁷

The draft conventions produced at the 11th International Conference were submitted to the Swiss Federal Council in 1929, which convened a Diplomatic Conference to review the draft Geneva Convention and produce a new Convention protecting prisoners of war.⁸⁸ During this Diplomatic Conference, which drafted the 1929 Geneva Convention, Germany suggested an amendment to the tobacco provision in Article 11, which would change “shall be authorized” to “is permitted.”⁸⁹ There is no indication as to why this language was proposed, but it was rejected, resulting in the exact same language being presented to the Diplomatic Conference in 1929 as was presented by the ICRC

85. ACTES DE LA CONFERENCE DIPLOMATIQUE CONVOQUEE PAR LE CONSEIL FEDERAL SUISSE POUR LA REVISION DE LA CONVENTION DU 6 JUILLET 1906 POUR L'AMELIORATION DU SORT DES BLESSES ET MALADES DANS LES ARMEES EN CAMPAGNE ET POUR L'ELABORATION D'UNE CONVENTION RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE ET REUNIE A GENEVE DU 1ER AU 27 JUILLET 1929, at 23 (1930).

86. See Philippe Abplanalp, *The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement*, 1995 INT'L REV. RED CROSS 520, 530.

87. CONFERENCE INTERNATIONALE DE LA CROIX-ROUGE, ONZIEME CONFERENCE INTERNATIONALE DE LA CROIX-ROUGE TENUE A GENEVE DU 28 AOUT AU 1ER SEPTEMBRE 1923, at 198 (1923) (“La Conférence, après avoir pris acte du rapport et projet de Code des prisonniers de guerre, présenté par le Comité international de la Croix-Rouge et avoir entendu les suggestions de plusieurs délégués, décide que ce rapport et ce projet de code, auxquels seront joints tous les amendements et propositions nouvelles qui pourraient être présentés par les Sociétés nationales et par les gouvernements, seront transmises au Conseil fédéral suisse, en vue de la convocation, au moment opportun, de la conférence diplomatique chargée d’élaborer un Code des prisonniers de guerre et de reviser la Convention de Genève.”).

88. Abplanalp, *supra* note 86, at 530.

89. PROPOSITIONS ET OBSERVATIONS DES GOUVERNEMENTS, SUR L'AVANT-PROJET DE CONVENTION INTERNATIONALE RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE, DOCUMENT NO. 2, at 17 (1929).

in 1923.⁹⁰ However, the language proposed by Germany became the adopted language of the Third and Fourth Geneva Conventions.⁹¹ It is important to note that the 1949 Geneva Conventions superseded the 1929 Geneva Convention.⁹² The analysis in this section was provided merely as background for understanding the evolution of international humanitarian law with the 1949 Geneva Conventions.

B. Third Geneva Convention of 1949

The Third and Fourth Geneva Conventions took tremendous strides in protecting certain groups. For example, while the 1929 Geneva Convention did not oblige detaining states to protect the health of detainees, the Third Geneva Convention prohibits the detaining state from “causing death or seriously endangering the health” of the detainee.⁹³ It would be easy to interpret this provision as creating an adequate internal check on the right to tobacco, except for the qualification of “seriously.”⁹⁴ As it stands,

90. ACTES DE LA CONFÉRENCE DIPLOMATIQUE, *supra* note 85, at 579.

91. *See infra* Sections III.B-C.

92. THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1416 (Frauke Lachenmann & Rudiger Wolfrum eds., 2017).

93. Third Geneva Convention, *supra* note 3, art. 13. Please note that the Fourth Geneva Convention is far narrower and limited when it comes to a positive obligation for a detaining state to look after the health of internees. For example, Article 85 of the Fourth Geneva Convention provides a positive obligation for a detaining state to move temporarily interned protected persons “in an unhealthy area or [one which] has a climate which is harmful to his health . . . to a more suitable place of internment as rapidly as circumstances permit.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 85, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. This type of provision falls far short of creating an obligation on a detaining state that could provide an adequate internal check on the right to tobacco contained in the Fourth Geneva Convention, especially with its limitation to “temporarily” interned persons and its reference to “as rapidly as circumstances permit.” Other health-related provisions of the Fourth Geneva Convention are similarly narrow and limited.

94. Some authors inappropriately leave off “seriously” when paraphrasing this provision. *See, e.g., Amicus Curiae Briefs in Janowiec and Others v. Russia*, 32 POLISH Y.B. INT’L L. 325, 348 (2012); Heather L. Rooney, Note, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions that Should Be Governing Our Treatment of Guantánamo Detainees*, 54 DRAKE L. REV. 679, 691 (2006); Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 MARQ. L. REV. 1147, 1177 (2015).

“seriously endangering the health” seems to involve acts equivalent to “physical mutilation, medical or scientific experiment[ation], or removal of tissue or organs.”⁹⁵ While it is no surprise that tobacco causes health problems, it is difficult to see these health problems rising to the same level as physical mutilation. Therefore, this provision of the Third Geneva Convention does not provide an adequate check on the right to tobacco.

With regard specifically to tobacco, the Third and Fourth Geneva Conventions required the provision of various necessities for prisoners of war and internees, including tobacco, similar to Article 11 of the 1929 Geneva Convention. The commentary points out that the provision in the Third Geneva Convention closely resembles Article 11 of the 1929 Geneva Convention because States did not complain of any problems with Article 11 during the course of World War II.⁹⁶ Article 26 of the Third Geneva Convention broadly establishes the right of detainees to use tobacco:

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.⁹⁷

The first paragraph of Article 28 is similarly broad:

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.⁹⁸

In short, Article 26 requires that detainees be allowed to use tobacco while Article 28 requires the detaining state to provide a canteen where detainees can procure foodstuffs and tobacco. Such allowances are the same as saying that detainees have a right to

95. L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 288 (1993); Jesse Medlong, Note, *All Other Breaches: State Practice and the Geneva Conventions' Nebulous Class of Less Discussed Prohibitions*, 34 MICH. J. INT'L L. 829, 835 (2013).

96. See GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 196-99 (comparing three instances where the 1929 and 1949 Conventions overlap).

97. Third Geneva Convention, *supra* note 3, art. 26.

98. *Id.* art. 28.

tobacco. As previously indicated, detainees certainly are not expressly limited to smoking tobacco when exercising their right, although recent history has shown that this is the most common form of tobacco use, and so will be the focus here. Moreover, while nicotine patches and other tobacco substitutes might be available, the presence of these alternatives does not disrupt the detainee's right to tobacco according to Article 26. Article 28 guarantees access to this right to tobacco by ensuring tobacco is available to detainees at canteens. A similarly broad right to tobacco also is found in Article 87 of the Fourth Geneva Convention, which provides that tobacco must be available to detainees.⁹⁹

On closer examination, the third paragraph of Article 26 shows how the right to tobacco, as established in the Third Geneva Convention, combines the language of Article 11 in the 1929 Geneva Convention with the suggested German amendment to the 1929 Geneva Convention by requiring that the use of tobacco be permitted, not just authorized.¹⁰⁰ The use of "permitted" here suggests a type of pull back on the right to tobacco. The definition of "authorize" is "to give legal authority; to empower; to formally approve; to sanction."¹⁰¹ By contrast, the definition of "permit" is "to consent to formally; to give opportunity for; to allow or admit of."¹⁰² Although the difference between these two definitions is slight, this difference would have a significant impact on the obligation to provide tobacco depending on whether the right is either an authorization or a permission. The latter suggests a mere license rather than a hard right, which may be easier to revoke or deny compared to an authorization, which generally implies ownership of the right by the holder, making it harder to modify.

The permission to use tobacco is in sharp contrast to the requirement that detaining states provide drinking water to prisoners of war. The original draft of this provision submitted to the 17th International Red Cross Conference stated "[t]he use of

99. See discussion *infra* Part III(C).

100. Third Geneva Convention, *supra* note 3, art. 26; 1929 Geneva Convention, *supra* note 54, art. 11.

101. *Authorize*, BLACK'S LAW DICTIONARY 153 (9th ed. 2009).

102. *Permit*, *id.*

tobacco shall be authorized.”¹⁰³ However, the draft amended and approved by the 17th International Red Cross Conference shows that the Conference changed the language to read “[t]he use of tobacco shall be permitted.”¹⁰⁴ The weakening of the right to use tobacco under Article 26 may be analyzed in conjunction with Article 28 of the Third Geneva Convention, which reflects the obligation of detaining states to provide certain items to detainees. Article 28 establishes the items that detaining states must make available in canteens for all prisoners, which includes tobacco.¹⁰⁵ Thus, the references to permission in Article 26 mean that detaining states did not have to directly supply prisoners with tobacco, as the commentary notes.¹⁰⁶ This constituted a carve-out of the overarching obligation on the detaining state to provide for the maintenance of prisoners of war under its care, as required by Article 4 of the 1929 Geneva Convention.¹⁰⁷ There was no explicit requirement to supply tobacco to prisoners under the 1929 Geneva Convention, although the broad obligation under Article 4 to “provide for the maintenance of prisoners of war in its charge” arguably made such a right to tobacco implicit.¹⁰⁸ General shortages caused by the conflicts during World War II may explain this weakening of the right to tobacco and the practicalities of discharging the detainee state from this obligation during times of shortage.¹⁰⁹ In addition, Article 12 of the 1929 Geneva Convention, which previously stipulated that food commodities and ordinary articles may be procured at market prices in the canteen, was amended by Article 28 of the Third Geneva Convention to include soap and tobacco as well.¹¹⁰

103. WORKING DOCUMENT DRAWN UP FOR THE DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS: DRAFT CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 14 (1949) [hereinafter DRAFT CONVENTION]. The Third Geneva Convention incorporates this language in Article 26.

104. *Id.*

105. Third Geneva Convention, *supra* note 3, art. 28.

106. GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 199.

107. *See* 1929 Geneva Convention, *supra* note 54, art. 4.

108. *Id.*

109. *See* GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 202-03.

110. *Compare* Third Geneva Convention, *supra* note 3, art. 28 (listing the articles to be sold in the canteen, including soap and tobacco), *with* 1929 Geneva Convention, *supra*

This amendment ensured that access to tobacco was now available through the means of purchase in canteens.

1. Limitations on Access to Tobacco

Even though Article 26 of the Third Geneva Convention broadly requires tobacco to be permitted, Article 26 still imposes limitations, especially in the context of the evacuation, transfer, and work of prisoners of war. Article 20 of the Third Geneva Convention relates to the evacuation of prisoners of war and requires that they have “sufficient food and potable water, and . . . the necessary clothing and medical attention.”¹¹¹ No reference is made to tobacco in that provision, suggesting that the permission to use tobacco in Article 26 may be suspended during evacuations.

Likewise, Article 46 of the Third Geneva Convention relates to the transfer of prisoners of war, ensuring that they have “sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention.”¹¹² In addition, Article 51 of the Third Geneva Convention relates to the working conditions of prisoners of war, ensuring that they have suitable “food, clothing and equipment.”¹¹³ Like Article 26, these provisions also do not reference the use of tobacco.

To be clear, however, none of these provisions expressly prohibit the use of tobacco. Therefore, there is the possibility that there is a residual effect of the main requirement that tobacco use be permitted. However, the fact that these more specific provisions relating to evacuation, transfer and work of prisoners of war expressly mention food, clothing, and equipment and not tobacco suggests that tobacco was not equal to these other necessities of life. The ICRC reaffirms this sentiment, stating, “Tobacco is not an article of prime necessity,” even though it

note 54, art. 12 (stating only that “food commodities and ordinary articles” are to be sold at canteens).

111. Third Geneva Convention, *supra* note 3, art. 20.

112. *Id.* art. 46.

113. *Id.* art. 51.

recognizes the psychological benefits tobacco provides detainees.¹¹⁴

2. Canteens and Tobacco

The amendment to Article 28 goes hand in hand with the apparent pull back of the right to tobacco use by way of Article 26. In general, the Third Geneva Convention went beyond the 1929 Geneva Convention by requiring detaining states to provide prisoners of war with a canteen where they could buy tobacco and other “ordinary articles in daily use.”¹¹⁵ As previously mentioned, Article 28 of the Third Geneva Convention permits the procurement of tobacco in canteens, meaning there is no obligation for the detaining state to supply it directly to prisoners.¹¹⁶ The 1949 Geneva Conventions, however, expanded the items to be available in canteens to cover “foodstuffs, soap and tobacco and ordinary articles in daily use.”¹¹⁷

The significance of requiring canteens to provide tobacco to internees and prisoners of war is clearer when compared to the provisions in the 1929 Geneva Convention. Article 12 of the 1929 Geneva Convention dealt with the establishment of canteens, although it did not mention tobacco: “In all camps, canteens shall be installed at which prisoners shall be able to procure, at the local market price, food commodities and ordinary articles.”¹¹⁸ The draft Article 26 submitted to the 17th International Red Cross Conference adjusted the language of the 1929 Geneva Convention, but it did not contain a reference to tobacco: “In all camps, canteens shall be installed where prisoners of war shall be able to buy foodstuffs, articles of everyday use and soap at the local market prices.”¹¹⁹ Here, the key addition is the reference to soap. The 17th International Red Cross Conference amended and approved the article, but still did not reference tobacco: “Canteens shall be installed in all camps, where prisoners of war may

114. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

115. Third Geneva Convention, *supra* note 3, art. 28.

116. Geneva Convention Commentary III, *supra* note 73, at 199.

117. Third Geneva Convention, *supra* note 3, art. 28; Fourth Geneva Convention, *supra* note 93, art. 87.

118. 1929 Geneva Convention, *supra* note 54, art. 12.

119. DRAFT CONVENTION, *supra* note 103, at 14.

procure foodstuffs, ordinary articles of daily use and soap.”¹²⁰ The final version of Article 12 reads as follows: “In all camps, canteens shall be installed at which prisoners shall be able to procure, at the local market price, food commodities and ordinary articles.”¹²¹ While the question may arise as to whether tobacco is considered an “ordinary article,” the express reference to tobacco in Article 28 of the Third Geneva Convention avoids this guesswork. More importantly, even though Article 26 of the Third Geneva Convention does not require detaining states to provide an internee with tobacco, Article 28 indirectly does require the detaining states to provide tobacco at the canteen. In conjunction, these two articles form the basis of the right to tobacco under the Third Geneva Convention.

3. Parcels

As mentioned above, Article 72 of the Third Geneva Convention provides a right to receive packages, which conceivably could include tobacco, without expressly mentioning tobacco. This section reproduces Article 72 in its entirety to provide a sense of its breadth and general nature:

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in

120. *Id.*

121. 1929 Geneva Convention, *supra* note 54, art. 12.

respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.¹²²

Article 72 is not an exhaustive list of the types of materials that can be sent through parcels. The ICRC commentary on Article 72 noted the use of the term “in particular” as showing “the list is not exhaustive, and that in principle parcels may contain other articles which may be required.”¹²³ The commentary to Article 72 refers to this provision as “relat[ing] only to material relief, even if . . . it is the instrument of moral relief.”¹²⁴ It is unclear if tobacco would fall under this category; however, if foodstuffs and clothing fall under “moral relief,” then it is not difficult to see tobacco as also falling under this category.

The Commentary notes how the 1929 Convention limited the contents to “certain articles, such as books, foodstuffs or clothing,” but World War II “showed the need to permit a greater variety of articles to be sent to prisoners of war, and Article 72 therefore mentions medical supplies and makes a general reference to articles of a religious, educational or recreational character.”¹²⁵ There is no mention in the commentary as to the exact parameters of “recreational character,” although it does provide “musical instruments, and sports outfits” as examples.¹²⁶ Tobacco could be allowed in as part of “recreational,” given that tobacco no longer is seen as being medically (or otherwise physically) necessary. While the ICRC notes that tobacco may fulfill a psychological need in its commentary on Article 89 of the Fourth Geneva Convention, the ICRC did not view tobacco as being

122. Third Geneva Convention, *supra* note 3, art. 72.

123. GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 355.

124. *Id.* at 352.

125. *Id.* at 355.

126. *Id.* at 356.

medicinal.¹²⁷ As the commentary to the Third Geneva Convention notes, disagreements between the POW Powers and the Detaining Powers required special agreement on what could be sent.¹²⁸ However, the receipt of tobacco through parcels for recreational purposes of detainees is done through the context of “recreational pursuits, sports and games amongst prisoners” under Article 38 of the Third Geneva Convention.¹²⁹ Therefore, it may be possible that tobacco does not fall under “recreational pursuits” in such a context if, for example, it comes in as part of a “games amongst prisoners.” If “sports outfits” come in as “recreational” rather than as a part of sports, then it is conceivable that tobacco might come in as part of a sport or game, thereby making it less “recreational” in nature, at least according to the language of these provisions within the Third Geneva Convention.

Tobacco also may be considered a foodstuff for the purposes of restricting black marketing. The commentary to Article 72 notes how some foodstuffs “encourage black marketing,”¹³⁰ perhaps suggesting that this limited the types of items that could be sent. This conceivably would apply to tobacco, even though there is an apparent carve-out in the ICRC Commentary on Article 89 of the Fourth Geneva Convention that states that tobacco is not a foodstuff, thereby significantly confusing the matter.¹³¹

While the receipt of tobacco through parcels addressed to detainees as part of the receipt of relief supplies is ambiguous, the acceptance of relief shipments does not release the detaining state of its obligations. After all, relief supplies are complementary—detaining states are obliged to provide, free of charge, for the maintenance and medical attention that detainees need.¹³² In addition, there are obligations as to the provision of food (Article 26), clothing (Article 27), and ordinary articles for their daily use through canteens (Article 28). Furthermore, there are obligations for providing sufficient medical attention (Article 30) as well as

127. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

128. GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 351.

129. Third Geneva Convention, *supra* note 3, art. 38.

130. GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 355.

131. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

132. *See* GENEVA CONVENTION COMMENTARY III, *supra* note 73, at 356.

the means for detainees to practice their religious beliefs (Article 34). These, in addition to the encouragement of recreational pursuits (Article 38), must all be made available for detainees to live a “healthy and decent life.”¹³³

C. *Fourth Geneva Convention of 1949*

Articles 87 and 89 of the Fourth Geneva Convention also provide a right to tobacco, and they reflect similar content of the right and regulation of it as the Third Geneva Convention does.¹³⁴ One difference between the Third and Fourth Geneva Conventions is that the Third Geneva Convention obliges detaining states to establish canteens, whereas the Fourth Convention requires detaining states to establish canteens only if suitable facilities are not available to internees.¹³⁵ The expectation is that internees may make their purchases at local shops where possible. Where this is not possible, however, detaining states must establish a canteen and supply goods that do not exceed the local market prices. In addition, Article 97 of the Fourth Geneva Convention guarantees that internees keep their pocket money and valuables to make these purchases.¹³⁶ Access to money by internees to make purchases for daily use is protected by Articles 97 and 98 of the Fourth Geneva Convention, and so they need to be considered in tandem with Article 87.

Article 87 of the Fourth Geneva Convention provides the following:

Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their

133. *Id.* at 356-57.

134. Compare Fourth Geneva Convention, *supra* note 93, arts 87, 92 (containing the same language as the Third Convention including the right to tobacco), with Third Geneva Convention, *supra* note 3, art. 28 (explaining canteens will be installed at every camp which sell, among other things, tobacco).

135. Fourth Geneva Convention, *supra* note 93, art 87; GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 389.

136. Fourth Geneva Convention, *supra* note 93, art 97.

personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.¹³⁷

The pertinent point worth highlighting is the stipulation for making tobacco available for procurement in the canteen in order to “increase their personal well-being and comfort.” There is no mention of the latter phrase in the Third Geneva Convention, while the ICRC commentary on Article 87 only mentions tobacco in the summary and includes no further discussion.¹³⁸ Article 87’s specification of “foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort” indicates the ICRC’s acknowledgement that these items are necessary for internees’ comfort. The mention of supplying soap to internees in the ICRC commentary on Article 87 in order to “sustain[]the morale’ of the internees” without making a similar reference to tobacco may also indicate another view regarding tobacco.¹³⁹

This other view is reaffirmed in the ICRC Commentary on Article 89. Similar to the Third Geneva Convention, Article 89 of the Fourth Geneva Convention only requires that detaining states *permit* the use of tobacco. The rest of Article 89 focuses on the promotion of health, the provision of food, water and

137. *Id.* art. 87.

138. *See* GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 388-90.

139. *Id.* at 389.

additional food:

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.¹⁴⁰

Article 89 extends beyond the mere provision of food and drinking water established in Article 11 of the 1929 Geneva Convention. Tobacco is permitted within this context of the promotion of health and greater nutritional intake, which is highly contradictory. In the end, the amendment of the right to tobacco from being “authorized” to “permitted” may, in the context of health promotion, be an advantage inasmuch as it weakens the right to tobacco. Article 11 of the 1929 Geneva Convention and Article 89 of the Fourth Geneva Convention both stipulate the quantity and quality of food to be provided; however, the 1929 Geneva Convention guarantees the quantity and quality to be equivalent to the depot troops of the detaining state, which is significant.

Article 89 of the Fourth Geneva Convention stipulates that the quantity, quality, and variety of food provided must keep internees in a “good state of health and prevent the development of nutritional deficiencies,” but does not require provided food to be equivalent in quantity and quality to that of depot troops.¹⁴¹ This provision, however, requires the detaining states to “take account of the customary diet” of internees, meaning it would be, in practice, difficult to provide internees with quantities and quality less or worse than the depot troops.¹⁴² Such a requirement to monitor the internees’ state of health instead imposes a greater obligation of care on detaining states. Furthermore, Article 89 guarantees additional food to pregnant women, nursing mothers,

140. Fourth Geneva Convention, *supra* note 93, art. 89.

141. *Id.*

142. *Id.*; GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 392-94.

and children, and requires the detaining state to provide the means for any preparation of additional food of the internees.¹⁴³ Therefore, Article 89 can be seen as encouraging the growth of a healthy population of internees while in adverse conditions of shortage.

Article 89 also includes a mandatory provision for sufficient drinking water, permission to use tobacco, and the award of additional rations for extra labor done. The mandatory drinking water provision complements the overall “health promotion” sentiment of Article 89 by ensuring the nutritional and healthy development of internees. The provision of sufficient drinking water has previously been emphasized as a mandatory obligation, while tobacco is not. Instead, the use of tobacco is permitted, indicating that its necessity is not on par with food and water. However, the ICRC’s commentary on Article 89 acknowledges that, for many individuals, tobacco is as necessary as food (although it is not a foodstuff) since it “plays a very important part in the life of men in confinement” by calming nerves, helping them deal with suffering, and providing a source of currency.¹⁴⁴ Not equating tobacco to a foodstuff is an important distinction the ICRC makes with respect to determining the status of tobacco in relation to other necessities of life for internees. One understanding of the right to tobacco is that it carries less weight compared with the right to food, water, clothing, and other necessities of life in order for an individual to have the right sustenance for life; these items are guaranteed even in shortage conditions. This interpretation complements the idea that tobacco is not considered an “article of prime necessity.”¹⁴⁵

Nevertheless, the permission to use tobacco within the 1949 Geneva Conventions overrides considerations of tobacco’s toxicity. The ICRC acknowledges this paradox, noting that tobacco provides psychological relief to help an individual cope with distress and trauma and calls it a harmless narcotic, but also describes tobacco as a poison.¹⁴⁶ It is possible that the drafters of

143. Fourth Geneva Convention, *supra* note 93, art. 89; GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 395.

144. GENEVA CONVENTION COMMENTARY IV, *supra* note 58, at 394.

145. *Id.*

146. *Id.*

Article 87, whose views were reminiscent of earlier times, were relatively unenlightened about the harmful effects of tobacco. However, notwithstanding the ICRC's contradictory outlook on tobacco, the perceived benefits of tobacco were far too valuable to not permit, at least in its own mind. Thinking back to Henry Dunant's own experiences in Solferino, with the stench of cramped bodies in the small confines of churches and hospitals and the relief tobacco brought to persons dealing with such pain and suffering, then the permission to use tobacco has to be protected in these extremely harsh circumstances. Of course, the provisions in the Geneva Conventions protecting such permission to tobacco could have been better drafted to take into account permission of the smoking of tobacco in specific and exceptional circumstances such as relief of pain, or as currency, rather than leaving it unregulated, which seems too broad in view of the toxic nature of tobacco smoke and the health damage caused to tobacco users and non-users of tobacco alike.

So far, the permission to use tobacco in international law has been considered in the 1929 and 1949 Geneva Conventions. As this part has shown, the 1929 Geneva Convention dealt with tobacco in broad terms, providing only that its use is "authorized." This language was amended in the 1949 Geneva Conventions by permitting the use of tobacco, thereby relieving detaining powers from a strict obligation to supply tobacco. This right does not stand on par with the necessities of life, which include food, water, and clothing. In situations of evacuation and transfer, only the necessities of life are guaranteed by the conventions; there is no provision for tobacco, thus indicating that this right is limited to certain situations and where there is an established canteen. Through analysis of the commentaries to the 1949 Geneva Conventions, the ICRC's views regarding tobacco are now better understood, even if it has become clear how contradictory its views are. On one hand, the ICRC recognizes tobacco as toxic, while on the other hand, it also recognizes the psychological and other benefits of tobacco use. This paradoxical nature of tobacco appears to have been accepted, with prisoners of war and detainees receiving certain rights to tobacco. The following part explores the right to be free from the harmful effects of tobacco, which adds an even larger paradoxical element to the situation.

IV. THE RIGHT TO BE FREE FROM THE HARMFUL EFFECTS OF
 TOBACCO UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to be free from the harmful effects of tobacco can be established from various sources of law, namely the World Health Organization's Framework Convention on Tobacco Control, various human rights treaties, and perhaps customary international law. First, Article 8 of the Framework Convention obliges states to protect their people from exposure to tobacco smoke.¹⁴⁷ The implementation guidelines make clear that the obligation corresponds to the duty of the state to protect everyone from harmful exposure to tobacco usage and smoke. This obligation has led states like Australia and Uruguay to adopt various forms of plain-packaging legislation, resulting in tobacco companies like Philip Morris commencing investor-state arbitrations in connection with the alleged expropriation of their intellectual property resulting from such legislation.¹⁴⁸ Second, the rights to life and health are widely recognized in various international human rights treaties. The right to be free from the harmful effects of tobacco may be derived from these other rights, although the precise scope of the right is unclear. Finally, the right to be free from the harmful effects of tobacco may exist under customary international law, as the Framework Convention already reflects state practice to a certain degree. This part starts with an overview of the Framework Convention and the provisions establishing a human right to be free from the harmful effects of tobacco. This part responds to the literature relating to this right, as well as possible counterarguments to its establishment. Finally, this part addresses the right to be free from the harmful effects of tobacco beyond the Framework Convention.

147. Framework Convention, *supra* note 38, art. 8.

148. Philip Morris v. Uru., ICSID Case No. ARB/10/7, Request for Arbitration, ¶¶ 1-6 (Feb. 19, 2010); Philip Morris Asia Ltd. v. Austl., PCA Case. No. 2012-12, Written Notification of Claim, ¶ 10 (June 27, 2011). For more information on these arbitrations and the issues that they raise, see generally Ankita Ritwik, *Tobacco Packaging Arbitration and the State's Ability to Legislate*, 54 HARV. INT'L L.J. 523 (2013).

A. *Overview of the Framework Convention on Tobacco Control*

The World Health Organization's Framework Convention on Tobacco Control reflects a global effort to combat the consumption and production of tobacco. WHO first formed the idea for such an international instrument in 1995. In the early stages, feasibility studies indicated that the instrument should take the form of a framework convention.¹⁴⁹ A working group handled the first stage of the drafting process from 1999 to 2000, which was then submitted to the 53rd World Health Assembly and an Intergovernmental Negotiating Body.¹⁵⁰ All six sessions of the Intergovernmental Negotiating Body focused on drafting the framework convention, and the final draft of the Framework Convention on Tobacco Control was submitted to the 56th World Health Assembly, which unanimously adopted it.¹⁵¹ As of June 2017, there are 180 parties to the Framework Convention.¹⁵²

In addressing the aim of global tobacco regulation, the Framework Convention focuses on reducing both the demand for and the supply of tobacco. The Framework Convention sets out the primary obligations of the Parties, as well as provisions that address international cooperation¹⁵³ and liability on the domestic level.¹⁵⁴ This part focuses on the core substantive provisions in the Framework Convention: Part III (Articles 6 to 14) of the Framework Convention on Tobacco Control, which deals with the reduction of demand for tobacco, and Part IV (Articles 15 to 17), which deals with the reduction of supply of tobacco.

The Framework Convention focuses on public health and economic consequences on a societal level. The preamble to the Framework Convention expressly sets out the Parties' determination "to give priority to their right to protect public health," and recognizes that a global concerted effort is needed to

149. See Framework Convention, *supra* note 38, annex 2.

150. *Id.*

151. *Id.*

152. The latest number and the list of signatories and parties are found on the WHO Framework Convention on Tobacco Control website. *Parties to the WHO Framework Convention on Tobacco Control*, *supra* note 38.

153. See Framework Convention, *supra* note 38, pt. VII.

154. *Id.* art. 19.

reduce the harmful effect that tobacco, as shown by unequivocal scientific evidence, has on their people.¹⁵⁵ In particular, the preamble recalls the obligation of the state under other international legal instruments:

Article 12 of the International Covenant on Economic, Social and Cultural Rights . . . which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, . . .

[T]he preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition,

. . .

[T]he Convention on the Elimination of All Forms of Discrimination against Women . . . provides that State parties . . . shall take appropriate measures to eliminate discrimination against women in the field of health care, . . . [and]

[T]he Convention on the Rights of the Child . . . provides that State Parties . . . recognize the right of the child to the enjoyment of the highest attainable standard of health.¹⁵⁶

The Framework Convention builds on these existing obligations relating to the right to health and provides further guidance and obligations in the area of tobacco control. Article 2 of the Framework Convention spells out the relationship between the Framework Convention and other agreements and legal instruments, and encourages parties to implement higher standards that are consistent with the Framework Convention's provisions and these other instruments of international law.¹⁵⁷

Article 3 sets out the objective of the Framework Convention, echoing the preamble: "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco

155. *Id.* pmb1.

156. *Id.*

157. *Id.* art. 2.

smoke by providing a framework for tobacco control measures to be implemented by the Parties” at all levels.¹⁵⁸ The aim of the Framework Convention is to reduce the prevalence of tobacco use and exposure to tobacco smoke.¹⁵⁹ Therefore, it is clear that these are the two key areas on which the Framework Convention focuses.

The guiding principles in Article 4 supplement the objective of the Framework Convention. Article 4 states that “effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke.”¹⁶⁰ Article 4 stresses strong political commitment in developing measures at all levels “to protect all persons from exposure to tobacco smoke”¹⁶¹ and “prevent the initiation, to promote and support cessation [of smoking], and to decrease the consumption of tobacco products in any form.”¹⁶²

Article 5 provides the general obligations of state parties in relation to tobacco control. In rather vague and general wording, it states that the parties should implement policies and establish tobacco control mechanisms in accordance with the Framework Convention and the protocols.¹⁶³ Article 5 does not add much to the articles already discussed or the existing obligations states may have under the aforementioned international legal instruments. Nonetheless, Article 5 spells out the areas that parties should focus on in order to achieve tobacco control.

The next two parts of the Framework Convention contain the core substantive provisions. The provisions are divided into two parts: measures relating to the reduction of demand for tobacco, and measures relating to the reduction of the supply of tobacco.¹⁶⁴

158. *Id.* art. 3.

159. *Id.*

160. *Id.* art. 4(1).

161. *Id.* art. 4(2)(a).

162. *Id.* art. 4(2)(b).

163. *Id.* art. 5. Such general wording resulted from arguments during the early stages of the drafting process that rigid and specific obligations might deter states from supporting the Convention. Working Group on the WHO Framework Convention on Tobacco Control, Rep. of the Second Meeting of the Working Group, ¶ 9, U.N. Doc. A/FCTC/WG2/5 (Apr. 26, 2000).

164. Framework Convention, *supra* note 38, pts. III-IV.

These two categories ideally would complement each other in achieving effective tobacco control. The measures are categorized as a matter of directness in achieving the stated aims. Direct measures mean that, once implemented, these measures immediately will reduce the availability of or the exposure of the tobacco products to an individual. In comparison, indirect measures fall outside this category and will not have such an immediate effect, but are conducive in achieving the overall objective of tobacco control.

1. Direct Measures

The most effective measure to deter people from buying tobacco products is to control the price and tax on tobacco products. These controls are regarded as the major measures in reducing the demand for tobacco. Article 6 of the Framework Convention states that the “Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption . . . in particular [with] younger persons,” and recommends that parties adopt or maintain tax and price policies to help reduce tobacco consumption and restrict duty-free tobacco products.¹⁶⁵ Measures in tax and price policies generally are welcomed by states.¹⁶⁶

Article 8 of the Framework Convention is the only provision that deals with the protection of people from exposure to tobacco smoke:

Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.

Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.¹⁶⁷

165. *Id.* art. 6.

166. *See id.*

167. *Id.* art. 8.

To be clear, Article 8 is not a straight ban on smoking but rather a limitation on smoking in indoor and other public places to protect others from exposure to tobacco smoke.

The Conference of the Parties (COP) has established a set of guidelines in relation to Article 8. These guidelines provide a number of key principles, definitions, and recommendations to help fulfill the obligations in the Framework Convention.¹⁶⁸ The guidelines' main aim is to help promote among state parties the "highest attainable standard of health."¹⁶⁹ The underlying principles of the guidelines show how the duty to protect from tobacco smoke is rooted in fundamental principles of human rights, such as the right to life and the right to the highest attainable standard of health, as found in international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the WHO Constitution, and the Convention on the Elimination of All Forms of Discrimination Against Women. Such a duty resembles the obligations on governments to adopt laws that protect the people's rights.¹⁷⁰ Principle 2 of the Guidelines sets out that "[a]ll people should be protected from exposure to tobacco smoke[; a]ll indoor workplaces and indoor public places should be smoke free."¹⁷¹

It should be noted that Article 8 primarily provides "protection from tobacco smoke in 'indoor' workplaces and public places."¹⁷² The guidelines state that "public places" should be defined "as broadly as possible" and "should cover all places accessible to the general public or places for collective use, regardless of ownership or right to access."¹⁷³ In contrast, "indoor" should be defined as inclusively and as clearly as possible.¹⁷⁴ The suggested definition is "any space covered by a roof or enclosed by one or more walls or sides, regardless of the type of material used

168. Conference of the Parties, *supra* note 42, ¶ 2.

169. *Id.* ¶ 3.

170. *See id.* ¶ 4 (suggesting that a government's duty to protect individuals from tobacco smoke is implicit in its duty to protect basic human rights, such as the right to life).

171. *Id.* ¶ 7.

172. *Id.* ¶ 19.

173. *Id.* ¶ 18.

174. *Id.* ¶ 19.

for the roof, wall or sides, and regardless of whether the structure is permanent or temporary.”¹⁷⁵ Therefore, Article 8, when read together with the guidelines, imposes “an *obligation to provide universal protection* [to the people] by ensuring that all indoor public places, all indoor workplaces, all public transport and possibly other (outdoor or quasi-outdoor) public places are free from exposure to second-hand tobacco smoke.”¹⁷⁶ It also “creates a continuing obligation to move as quickly as possible to remove any exemptions and make the protection universal.”¹⁷⁷

The Convention Secretariat of the Framework Convention on Tobacco Control reports an extremely high implementation rate for Article 8. In its *2010 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control*, the Secretariat provided a detailed analysis of the implementation of Article 8 by 104 parties.¹⁷⁸ There have been high implementation rates for measures or policies to prevent tobacco smoke exposure in accordance with the Framework Convention.¹⁷⁹ While universal protection within a jurisdiction is only achieved by around 15 percent of the 135 reporting parties, it is reported that most indoor workplaces and public transport facilities are already well covered by national legislation in a large number of states.¹⁸⁰

Another form of direct measure is the prohibition concerning minor-related tobacco sales. Article 16 relates to these types of sales:

Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen.

175. *Id.*

176. *Id.* ¶ 24.

177. *Id.*

178. See CONVENTION SECRETARIAT, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, 2010 GLOBAL PROGRESS REPORT ON IMPLEMENTATION OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 13, 37-38 (2010), http://www.who.int/fctc/reporting/progress_report_final.pdf?ua=1 [<http://perma.cc/9R96-FYHY>].

179. *Id.* at 50.

180. *Id.* at 15.

...

Each Party shall prohibit or promote the prohibition of the distribution of free tobacco products to the public and especially minors.

Each Party shall endeavour to prohibit the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.

...

Each Party should, as appropriate, adopt and implement effective legislative, executive, administrative or other measures to prohibit the sales of tobacco products by persons under the age set by domestic law, national law or eighteen.¹⁸¹

In practice, Article 16 directly imposes an obligation on the parties to prevent minors from being exposed to tobacco products.

This subsection has addressed the direct measures provided for in the Framework Convention on Tobacco Control for creating the right to be free from the harmful effects of tobacco. The following subsection addresses the indirect measures the Framework Convention presents for encouraging a smoke-free environment.

2. Indirect Measures

The Framework Convention specifies the adoption and implementation of measures to eliminate potentially misleading messages given by tobacco products and give proper warning of related health risks. These measures include regulating the content of tobacco products,¹⁸² and disclosure of the content.¹⁸³ The objective of these regulations is to reduce the attractiveness of tobacco products, their addictiveness, and overall toxicity, thereby reducing tobacco-attributable disease and premature death.¹⁸⁴

181. Framework Convention, *supra* note 38, art. 16.

182. *See id.* art. 9.

183. *See id.* art. 10.

184. *See* Conference of the Parties, Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control, § 1.2.1, FCTC/COP5(19) (2012), http://www.who.int/fctc/guidelines/Guideliness_Articles_9_10_rev_240613.pdf?ua=1 [<http://perma.cc/BJ73-GB98>].

The obligation created under Article 11 is closely related to Articles 9 and 10 of the Framework Convention. In light of the misleading designs of tobacco-product packaging and the lack of effective warning of the harmful effects of tobacco, Article 11 of the Framework Convention sets out the minimum requirement that packaging and labeling of tobacco products should meet.¹⁸⁵ Under Article 13, the ban on tobacco promotion also is relevant in freeing the people from the harmful effects of tobacco.¹⁸⁶ It is often the case that—like tobacco product packaging—tobacco advertising, promotion, and sponsorship promote tobacco use or provide misleading information on tobacco consumption and exposure.¹⁸⁷

Broader measures are to be implemented by parties to educate the public about the dangers from tobacco usage and exposure to smoke.¹⁸⁸ This duty to educate comes from the right to life and the “right to the highest attainable standard of health.”¹⁸⁹ States are to protect their people from threats to their fundamental rights and freedom.¹⁹⁰

Treatment for tobacco dependence and the promotion of cessation of tobacco use is encouraged in Article 14 of the Framework Convention.¹⁹¹ While such measures do not protect individuals from tobacco consumption and exposure altogether, the measures do protect tobacco users from further harmful effects of tobacco.

3. Possible Counterarguments to the Right to be Free from the Harmful Effects of Tobacco

One recurring concern and argument raised in the drafting and negotiation processes of the Framework Convention was the

185. Framework Convention, *supra* note 38, art. 11.

186. *See id.* art. 13.

187. Conference of the Parties, Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control, ¶ 3, FCTC/COP3(12) (Nov. 2008), http://www.who.int/fctc/guidelines/article_13.pdf [<http://perma.cc/NU3V-LZ87>]

188. Framework Convention, *supra* note 38, art. 12.

189. Conference of the Parties, Guidelines for Implementation of Article 12 of the WHO Framework Convention on Tobacco Control, annex ¶ 3, FCTC/COP4(7) (Nov. 2010), <http://www.who.int/fctc/guidelines/Decision.pdf?ua=1> [<http://perma.cc/PAA9-BC55>].

190. *Id.*

191. Framework Convention, *supra* note 38, art. 14.

relationship between the tobacco industry and the local economy. In particular, some developing countries have their tobacco industries and tobacco cultivation as the major backbone of their local economies.¹⁹² Heavily regulating the tobacco industry would undoubtedly create hardships on the people and damage those economies.

Another objection was the freedom of choice of the people.¹⁹³ While none of the documents elaborated on this point, it is clear that restricting individuals' contact with tobacco deprives those individuals of their freedom of choice. It is no surprise that it is tobacco companies that advocate for smokers' rights and argue against any form of government intervention in the personal freedom of individuals. The argument against government intervention on tobacco control follows a wider ideological opposition of the infringement of personal liberty of the individual, the lack of personal accountability, and expanded forms of government action (including taxation).¹⁹⁴

B. The Right to be Free from the Harmful Effects of Tobacco Outside the Framework Convention

Before the Framework Convention on Tobacco Control was drafted and promulgated, debates arose regarding the right of the individual to be free from the harmful effects of tobacco. The basis of these arguments was found in international legal instruments (and some quasi-legal instruments) that the states already had entered into—namely, the Universal Declaration of Human Rights, the Constitution of the World Health Organization, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on

192. See PRABHAT JHA ET AL., CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL 58, 61 (1999), <http://documents.worldbank.org/curated/en/914041468176678949/pdf/multi-page.pdf> [<http://perma.cc/K3D3-GY8N>].

193. See Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, Proposed Draft Elements for a WHO Framework Convention on Tobacco Control: Provisional Texts with Comments of the Working Group, ¶ 20, U.N. Doc. A/FCTC/INB1/2 (July 26, 2000), <http://apps.who.int/gb/fctc/PDF/inb1/e1inb2.pdf> [<http://perma.cc/396Q-BZV7>].

194. See Joanna E. Cohen et al., *Political Ideology and Tobacco Control*, 9 TOBACCO CONTROL 263 (2000).

the Elimination of All Forms of Discrimination Against Women. These instruments are referenced in the preamble to the Framework Convention, which recognizes the obligations imposed on the parties by these instruments. This section discusses these instruments and how these instruments were used in the debates leading up to the Framework Convention on Tobacco Control. These instruments are also relevant in understanding the right to be free from the harmful effects of tobacco outside of the Framework Convention.

1. International Human Rights Instruments

The Universal Declaration of Human Rights was promulgated in 1948 and forms the foundation of international human rights law today.¹⁹⁵ Article 25 of the Universal Declaration of Human Rights states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁹⁶

This language is similar to that of the Constitution of the World Health Organization, which affirms the following:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.¹⁹⁷

These two provisions provide an overarching principle to guide parties to the United Nations and the World Health Organization when it comes to health. However, it was not until the 1966 International Covenant on Economic, Social and Cultural Rights provided the right to health that states had a relatively heavy

195. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> [<http://perma.cc/SR7D-NJUL>] (last visited June 5, 2017).

196. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948).

197. Constitution of the World Health Organization pmbl., July 22, 1946, 14 U.N.T.S. 185.

obligation to recognize and protect the right to health of their people. In particular, Article 12 of the International Covenant on Economic, Social and Cultural Rights provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provisions for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.¹⁹⁸

The right to enjoy the highest attainable standard of physical and mental health, referred to here as the right to health, mirrors the terms of the Constitution of the World Health Organization.

The Committee on Economic, Social and Cultural Rights extensively interpreted this right to health in its General Comment No. 14 in 2000.¹⁹⁹ The General Comment first refers to several other international instruments, such as the Universal Declaration of Human Rights, the Constitution of the World Health Organization, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women, and clearly states that these instruments affirm the right to health.²⁰⁰ The Committee then went on to discuss the normative content of Article 12, stating the

198. International Covenant on Economic, Social and Cultural Rights art 12, Dec. 19, 1966, 993 U.N.T.S. 3.

199. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

200. *Id.* ¶ 2.

following:

The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.²⁰¹

The "highest attainable level of health" depends on what resources the state has available and the socio-economic and biological situation of the individual.²⁰² It also is clear from the General Comment that the right is to be enjoyed by everyone without discrimination.

According to the Committee, states have three types of obligations: the obligations to respect, protect, and fulfill. The obligation to respect requires States to "refrain from interfering directly or indirectly with the enjoyment of the right to health."²⁰³ The obligation to protect demands that states endeavor to prevent others from interfering with the protections provided in Article 12.²⁰⁴ Finally, the obligation to fulfill "requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health."²⁰⁵

In the context of tobacco consumption, the Committee made clear that Article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights embraces the effort to discourage use of tobacco.²⁰⁶ In particular, the Committee set out:

Violations of the [right to health] follow from the failure of a State to take all necessary measures to safeguard

201. *Id.* ¶ 8.

202. *Id.* ¶ 9.

203. *Id.* ¶ 33.

204. *Id.*

205. *Id.*

206. *Id.* ¶ 15.

persons within their jurisdiction from infringements of the right to health by third parties . . . [which includes] the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; . . . [and] the failure to discourage production, marketing and consumption of tobacco.²⁰⁷

This language violates the obligation to protect as imposed under Article 12 of the International Covenant on Economic, Social and Cultural Rights. Therefore, it is unequivocally clear that Article 12 of the International Covenant on Economic, Social and Cultural Rights imposes an obligation on states to protect their people from external interference in their right to health, and failure to discourage the use of tobacco is a violation of that obligation. A logical extension of this obligation is that exposure to tobacco smoke is an external interference with the right to health and that states must protect their people from the harm associated with tobacco smoke. As the Framework Convention unequivocally provides, exposure to tobacco smoke has been scientifically proven to be the cause of significant health impairment; therefore, it should be eliminated.²⁰⁸ As a result, exposure to tobacco smoke is clearly a human rights issue that relates directly to Article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights.²⁰⁹

Specific protections in relation to the right to health for women and children are provided through the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. Article 24(1) of the Convention on the Rights of the Child states:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.²¹⁰

207. *Id.* ¶ 51.

208. Dresler & Marks, *supra* note 7, at 615.

209. *Id.*

210. Convention on the Rights of the Child art 24(1), Nov. 20, 1989, 1577 U.N.T.S.

Similarly, Article 11(1)(f) of the Convention on the Elimination of All Forms of Discrimination Against Women provides that State Parties must eliminate discrimination and ensure that women enjoy the same rights to protection of health and safety with regard to working conditions.²¹¹ Article 12 also provides that women must have equal access to health care services.²¹² These provisions are an extension of the right to health under the International Covenant on Economic, Social and Cultural Rights, and they impose specific obligations on the signatories to protect the right to health of women and children.

From this discussion, it may seem possible to conclude that the right to be free from the harmful effects of tobacco is rooted in international instruments; in particular, Article 12 of the International Covenant on Economic, Social and Cultural Rights. However, because the International Covenant on Economic, Social and Cultural Rights was not drafted just to cover tobacco-related issues, there has not been an agreed approach or “definition” on such a tobacco-specific right in the literature outside the context of the Framework Convention on Tobacco Control. As a result, the Framework Convention fills an important gap in this area.

2. Areas of Uncertainty

There are two areas of uncertainty when it comes to the right to be free from the harmful effects of tobacco: the scope of the right, and the clash of rights between tobacco users and non-users of tobacco. This section addresses both areas of uncertainty.

a. Scope of the Right

Based on the general notion of the right to health or the right to highest attainable health, various arguments have been put forward to advance the protection in the tobacco context. Carolyn Dresler and Stephen Marks suggest that there is a human right to tobacco control.²¹³ Dresler and Marks first refer to legal

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211. Convention on the Elimination of All Forms of Discrimination Against Women art. 11(1)(f), Dec. 18, 1979, 1249 U.N.T.S. 13.

212. *Id.* art. 12.

213. Dresler & Marks, *supra* note 7, at 615.

instruments such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women to provide a legal basis for such a right.²¹⁴ They then analogize to the right to water—which is also a derivative right under the International Covenant on Economic, Social and Cultural Rights—to support the assertion that there is an emerging implied derivative human right to tobacco control.²¹⁵ Their first argument is the evidence of the magnitude of the problem. The problems related to inadequate water supply and sanitation are shown to be the cause of water-related diseases and problems with water supply.²¹⁶ Likewise, extensive evidence is shown about the causal connection between tobacco consumption and tobacco-related disease.²¹⁷

Second, as a matter of logic, Dresler and Marks suggest that water as a human right is a necessary consequence of the nature of the commodity, referring to the Committee on Economic, Social and Cultural Rights argument that water is a “prerequisite for the realization of other human rights.”²¹⁸ Similarly, Dresler and Marks argue that, given the impact of tobacco consumption on mortality and morbidity, control of such a lethal activity is imperative to protecting life and livelihoods.²¹⁹

The third argument is the legal basis of such a right. The right to water has its basis in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, just as the right to tobacco control has its roots in the right to health and the right to life. In the context of tobacco use, Dresler and Marks are of the view that, without implementing the right to adequate tobacco control for everyone, it would be difficult to say that a state has fulfilled its minimum core obligations under the

214. *Id.* at 612-34. Since Dresler and Marks’s article was originally published in 2006, the right to water has been recognized as a human right in 2010 by the UN General Assembly, G.A. Res. 64/294 (July 28, 2010), and the Human Rights Council, G.A. Res. 15/9 (Oct. 6, 2010).

215. Dresler & Marks, *supra* note 7, at 614, 629-31.

216. *Id.* at 629-30.

217. *Id.* at 630.

218. *Id.*

219. *Id.*

International Covenant on Economic, Social and Cultural Rights and in relation to the right to health.²²⁰

The uncertainty in the right-to-health-based approach is that the actualization of the right of health of an individual depends on the concurrent realization of other rights, such as the right to information.²²¹ These related rights extensively expand the scope of obligations that states may have in relation to tobacco control. Rangita de Silva de Alwis and Richard Daynard suggest that the core elements of the right to health presuppose that state and non-state parties “refrain from violating the right to health by banning smoking in public places, and that States Parties take positive action to intervene to protect people from the ruthless marketing tactics of tobacco corporations.”²²²

b. Clash of Rights

How the right to be free from the harmful effects of tobacco stands in the light of other human rights has been a contested issue. The clash supposedly occurs where the tobacco user’s right (or liberty) to smoke coincides with the rights of the non-user of tobacco to be free of harmful interference. A further dilemma is what the government or state should do in light of such a conflict. Arguably, both rights are well recognized in international legal instruments—such as the two international covenants—and the instruments imposing binding legal obligations on the states. The state should protect these rights of an individual from being infringed. Legislation to ban indoor smoking may be construed as interference in and a deprivation of the liberty of tobacco users, while the absence of such a measure may constitute a failure to protect its people from infringement of their right to health.

Arguments and analysis on this topic tend to go back to the basics: the nature of the right. James Katz argues that individual rights, which inevitably revolve around life, liberty, and the use

220. *Id.* at 630-31; *see also* Rangita de Silva de Alwis & Richard Daynard, *Reconceptualizing Human Rights to Challenge Tobacco*, 17 MICH. ST. J. INT’L L. 291, 293 (2009) (adopting a similar approach in their analysis and arguing that the derivative human right to tobacco control emerges from the right to life and right to health guarantees).

221. de Silva de Alwis & Daynard, *supra* note 220, at 298.

222. *Id.* at 299.

of property, are entitled to each member of society.²²³ From a public health perspective, there is a priority in these rights; rights to life trump those of liberty, which trump those of use of property.²²⁴ Katz argues that environmental tobacco smoke, or second-hand smoke, clearly interferes with an individual's physical and mental health, thereby violating one's right to life.²²⁵ Failing to stop tobacco use in public places is a violation of the rights of non-users of tobacco.²²⁶ The individual-rights approach suggests that states do not "grant" or give people these rights but instead safeguard the inherent rights of every human being.²²⁷ With the hierarchy of rights and the obligation of the state to safeguard the inherent rights of its people in mind, non-users' right to be free of harmful interference should trump the right of others to be at liberty to smoke.²²⁸

David Ezra comes to this same conclusion.²²⁹ Ezra refers to the "battle" between users and non-users of tobacco in California in the 1990s. The argument that tobacco users upheld was that it was a matter of choice and privacy; however, this argument ignores the fact that the act of smoking forces environmental tobacco smoke exposure to non-users of tobacco.²³⁰ Ezra argues that the correct analysis should take into account the issue of whether non-users of tobacco have a right to avoid inhaling environmental tobacco smoke.²³¹ The non-users of tobacco in the United States have successfully claimed a right to avoid environmental tobacco smoke exposure, and the government has taken action to protect non-users of tobacco from the harmful effects of tobacco smoke.²³²

223. J.E. Katz, *Individual Rights Advocacy in Tobacco Control Policies: An Assessment and Recommendation*, 14 TOBACCO CONTROL ii31, ii31 (2005).

224. *Id.*

225. *Id.*

226. *Id.* at ii34.

227. *Id.* at ii32.

228. *Id.* at ii33.

229. See David B. Ezra, *Sticks and Stones Can Break My Bones, but Tobacco Smoke Can Kill Me: Can We Protect Children from Parents that Smoke?*, 13 ST. LOUIS U. PUB. L. REV. 547 (1994).

230. *Id.* at 555-56.

231. *Id.* at 556.

232. See, e.g., K. Michael Cummings, *Programs and Policies to Discourage the Use*

Other commentators argue on the basis of public health, or collective rights, instead of an individual's right to health.²³³ This does not suggest that these two sets of rights are mutually exclusive; in fact, the collective and individual rights to health work together.²³⁴ Benjamin Meier argues that the notion of public health refers "to the obligations of a government to fulfill the collective rights of its peoples to health."²³⁵ These collective rights relate to the broader issues that are pertinent to the health of a state's peoples and the conditions needed for them to be healthy.²³⁶ Taiwo Oriola also considers the broader issues associated with the prohibition of smoking tobacco primarily in public places.²³⁷ While the right or liberty of an individual to smoke should be acknowledged, and that a restriction imposed by the state on smoking in public places arguably is an interference on this right or liberty, such intervention can be rationalized as protecting public health in accordance with the harm principle.²³⁸ By analyzing the harm principle, the prohibition can even be justified in non-public places, so long as the act of smoking is causing harm to others.²³⁹ Chuan-Feng Wu also is of the view that the personal freedom to smoke is not absolute, and it "must be balanced against the responsibility of the state to protect public health, the expenses incurred by the state in doing so due to tobacco use, and the pursued public health benefits."²⁴⁰ If a restriction in an individual's freedom to smoke furthers the

of Tobacco Products, 21 ONCOGENE 7349 (2002) (describing various programs and policies implemented to protect nonsmokers in the United States).

233. See Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 137 (2005) (arguing that a tradeoff between the advancement of individual human rights and the promotion of public health is not always necessary).

234. *Id.*

235. *Id.* at 121.

236. See *id.*

237. Taiwo A. Oriola, *Ethical and Legal Analyses of Policy Prohibiting Tobacco Smoking in Enclosed Public Places*, 37 J.L. MED. & ETHICS 828 (2009).

238. *Id.* at 833-34.

239. *Id.* at 835.

240. Chuan-Feng Wu, *State Responsibility for Tobacco Control: The Right to Health Perspective*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 394 (2008).

aforementioned interests, the imposition of this restriction is justified.²⁴¹

Regardless of the approach that is taken, it seems clear that a majority of commentators see the right to be free from the harmful effects of tobacco as prevailing over the individual freedom or liberty of tobacco users to smoke. As the analysis in Part V below shows, a consensus of commentators, unfortunately, is not enough to mold the law in this direction.

C. The Right to be Free from the Harmful Effects of Tobacco as Customary International Law

The discussion thus far in the literature, which does not address the Framework Convention on Tobacco Control, shows that the right to tobacco control is derived from the right to health under the international legal instruments relating to human rights. It is important to note that rights come from not only international instruments, but also customary international law. De Silva de Alwis and Daynard suggest that the right to be free from second-hand smoke can be established through customary international law:

The now-established indivisibility of rights affords an important channel through which the right to health can be linked with the right to life. The right to life and health has been established as a cornerstone of customary international law. Thus, linking the right to be free of secondhand smoke to the right to life elevates the right to be free of secondhand smoke to a customary human rights norm or a peremptory norm: these norms are considered non-derogable and therefore impose binding obligations on countries that have not ratified certain treaties.²⁴²

This argument is based on Eleanor Kinney's article on the international human right to health, which she based on customary international law.²⁴³ Kinney argues that the widespread ratification of UN and regional treaties and other

241. *Id.*

242. de Silva de Alwis & Daynard, *supra* note 220, at 301.

243. Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457 (2001).

instruments that recognize international human rights can establish a customary norm of human rights in this area, in particular, a binding international human right to health.²⁴⁴ The attempt to establish an international human right to health is important, as it would legally bind those who have not entered into or ratified the international legal instruments, such as the International Covenant on Economic, Social and Cultural Rights.²⁴⁵

This approach, however, is not flawless, as Kinney herself admits. Kinney refers to the problematic circularity in the rationale for customary international law: while law is built by state practice based on a sense of legal obligation (*opinio juris*), the issue is whether there can “be a sense of legal obligation before the law from which the legal obligation derives has matured.”²⁴⁶ The same problem arises with a derivative right of health: what is the scope of the right? It is extremely likely that state practice will vary among states. Despite those difficulties in establishing the right to health under customary international law, having an international right to health should not in and of itself be an impossibility. As de Silva de Alwis and Daynard mentioned, linking the right to be free from second-hand smoke to the right to health gives it a status as a customary human rights norm that binds those that have not expressly ratified the international instruments.²⁴⁷ Should the argument stand, people from those jurisdictions conceivably will be able to enforce that right against the state. However, as Kinney herself asserts, this approach relies on flawed logic.²⁴⁸

In conclusion, the right to be free from the harmful effects of tobacco can be established by reference to the express provisions in the World Health Organization’s Framework Convention on Tobacco Control. For states that are not parties to the Framework

244. *Id.* at 1464.

245. *Id.*

246. *Id.* at 1466-67 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. 2 (1986)).

247. To be clear, this article does not go so far as to say that the right to be free from the harmful effects of tobacco is a peremptory norm, as de Silva de Alwis and Daynard seem willing to conclude. de Silva de Alwis & Daynard, *supra* note 220, at 301.

248. See Kinney, *supra* note 243, at 1466 (“There is a circularity in the rationale for international customary law that is problematic.”).

Convention, other methods to establish this right include referencing human rights treaties and customary international law in relation to the right to life and the right to health. Having elaborated on the right to be free from the harmful effects of tobacco and the right to tobacco under international humanitarian law, the stage is set to explore how these two rights interact and whether international law provides adequate secondary rules to identify and reconcile a conflict between them.

V. *LEX SPECIALIS* AND THE NEED FOR CONFLICT

The purpose of this part is to explain, evaluate, and apply the principles that help answer the question of whether the right to tobacco overrides the right to be free from the harmful effects of tobacco, or vice versa. The first section examines the meaning and rationale of the *lex specialis* principle, while the second section discusses one of the conditions for the *lex specialis* principle to apply—the requirement that both rights be applicable at the same time for the *lex specialis* principle to govern. Inasmuch as the right to tobacco and the right to be free from the harmful effects of tobacco do not overlap, it is relatively easy to resolve the central question at hand. Nevertheless, this part walks the reader through the logic of that determination, by providing an oft-overlooked perspective on *lex specialis*.

A. *The Meaning of and Rationale Behind lex specialis derogat legi generali*

Lex specialis derogat legi generali is a maxim of legal interpretation for the resolution of normative conflict.²⁴⁹ Although it has no explicit place in the Vienna Convention on the Law of Treaties and is not a customary rule per se, it is a logical technique and a fundamental principle of international legal analysis.²⁵⁰ The essence of the principle is that the more specific

249. Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27, 36 (2005).

250. Conor McCarthy, *Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 101, 104 (Roberta Arnold & Noelle Quenivet, eds., 2008). However, Kammerhofer asserts that the *lex specialis* principle “is not and cannot be based on logic”

norm should take priority over other norms addressing the issues; therefore, a decision-maker should apply the more specific norm when there are two conflicting norms that are simultaneously applicable.²⁵¹ The two conflicting norms may be (1) provisions within the same instrument, (2) provisions in two different instruments, (3) a treaty and a non-treaty or (4) two non-treaty standards.²⁵²

One rationale behind this maxim is that it is more effective to apply the more specific norm, because it is clearer and more definite than a general norm.²⁵³ Therefore, the *lex specialis* principle has a contextual character, and its applicability depends on whether it would be more effective to apply the more specific rule.²⁵⁴ Hugo Grotius wrote that, in relation to those agreements that are to be regarded as equal, certain norms “should be given preference which is most specific and approaches most nearly to the subject at hand; for special provisions ordinarily are more effective than those that are general.”²⁵⁵

Another rationale behind the *lex specialis* principle is that special provisions more closely reflect the deliberate will of the parties, thereby allowing for the norms of greater merit to be followed more closely.²⁵⁶ Emerich De Vattel stated:

Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general and which approaches nearer the point in

because classical logic excludes contradiction (e.g., A and non-A cannot both be true), and in the context of conflict of norms, this means that according to classical logic, only one of the norms is true and can “survive”; as there is only one norm left, there is no conflict and no place for the *lex specialis* principle. JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 152 (2010).

251. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 408 (2006).

252. Rep. of the Study Grp. of the Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 68, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

253. Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 269 (2006).

254. *Id.*; Lindroos, *supra* note 249, at 42.

255. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 250 (Stephen C. Neff ed., 2012).

256. *See* Krieger, *supra* note 253, at 269.

question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision and appears to have been more pointedly intended.²⁵⁷

Similarly, Joost Pauwelyn explained:

[T]he principle of *lex specialis* is but a consequence of the contractual freedom of states, grounded in the idea that the ‘most closest, detailed, precise or strongest expression of state consent’, as it relates to a particular factual circumstance, ought to prevail.²⁵⁸

Although international humanitarian law is no longer seen as a corpus of law separate from international law, it often still is considered to be a *lex specialis*. This special character is predicated on the sharp distinction between the conditions of peace and war.²⁵⁹ As soon as peace is replaced by war, the applicable rules of law tend to change dramatically in nature.²⁶⁰ Traditionally, as soon as war had begun, international humanitarian law “was conceived as *leges speciales* superseding the *leges generales* of the rest of international law.”²⁶¹

B. Applicability of Both the General and Specific Norm

The proposition that, during wartime, international humanitarian law necessarily trumps international human rights law is not as straightforward as it might seem. To begin, the *lex specialis* principle may not apply if the facts of the case do not fall squarely within the scope of both the *lex specialis* (international humanitarian law) and the *lex generalis* (international human rights law). In other words, both norms

257. EMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS § 316 (1797). *But see* KAMMERHOFER, *supra* note 250, at 153 (“[I]t is difficult to see how one could deduce a ‘special’ consent to be more valuable than a ‘general’ consent [when arguing that both norms are an expression of state consent].”).

258. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 388 (2003).

259. H.H.G. Post, *Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Legal Perspective*, 25 NETH. Y.B. INT’L L. 83, 84 (1994).

260. *Id.* at 87.

261. *Id.* at 90.

must be simultaneously applicable to the circumstances of the case. The reason for this requirement is obvious: if one of the norms is not applicable to the case, it cannot conflict with the other norm, and there will be no need for the *lex specialis* principle. Put differently, the *lex specialis* principle plays “the role of identifying the strictly applicable norm to a certain case,” so there must first be two norms belonging to the applicable set regarding a particular case.²⁶²

This issue of applicability may be difficult to notice. An example would be where Norm X explicitly terminates or provides for an exception to Norm Y.²⁶³ In such cases, “[b]ehaviour falling within the purview of the special norm is only ‘evaluated’ on the special norm’s terms, while the general norm’s scope is limited and no longer covers behaviour which the special norm covers.”²⁶⁴ For example, GATT Article XX declares that “nothing in this Agreement shall be construed to prevent” Article XX measures, thus providing an exception to, *inter alia*, GATT Article III.²⁶⁵ At first glance, there is an apparent conflict between Article III and Article XX. However, the key is that Article XX has *explicitly* dealt with its relationship with Article III. Therefore, Article III would be carved out to give effect to Article XX, applying the norms in different ways.²⁶⁶ Another example is the relationship between Article 51 and Article 2(4) of the UN Charter, on which the International Law Commission commented that “a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4).”²⁶⁷ In other words, Article 2(4) is carved out by Article 51; an action defined as “self-defense” cannot be classified as “a threat or use of force” in the first place.²⁶⁸

The problem of applicability also arises when the *lex specialis*

262. Pablo E. Navarro et al., *Applicability of Legal Norms*, 17 CANADIAN J.L. & JURIS. 337, 353 (2004).

263. See PAUWELYN, *supra* note 258, at 162-63.

264. KAMMERHOFER, *supra* note 250, at 148.

265. See PAUWELYN, *supra* note 258, at 162-63.

266. See *id.* at 163.

267. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 177 (2001).

268. KAMMERHOFER, *supra* note 250, at 149.

is only applicable by analogy. Here, it may be more appropriate to apply just the general law. For example, because the legislative purpose of international humanitarian law is to balance humanitarian considerations and military necessity, it is intended to apply in circumstances where states use military force to bring down military adversaries.²⁶⁹ Therefore, when armed forces deployed with the consent of the government undertake police functions inside the state, it may be more suitable to apply human rights norms rather than the law of armed conflict.²⁷⁰ In such a case, it is questionable whether applying international humanitarian law (or the specific norm) would be more effective, since it was barely applicable to the case.²⁷¹ As the special law does not cover the facts of the case, the general law functions as a gap filler.²⁷²

Generally, as evident by the name, the law of armed conflict (or international humanitarian law) applies when there is an armed conflict. The Geneva Conventions are applicable to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”²⁷³ War, as understood in the modern era, is a hostile interaction between two or more States, generated by a declaration of war or actual use of armed force.²⁷⁴ Legally speaking, war is supposed to begin with a declaration of war and conclude with a peace treaty.²⁷⁵ In practice, however, there is considerable freedom on how to legally begin or end a war.²⁷⁶ Declarations of war have been rare, and it is possible to terminate war without a peace treaty. Therefore, the demarcation of war has become unclear.²⁷⁷

Historically, the issue faced by commentators and states was not whether there had been a state of war, but rather the more

269. Krieger, *supra* note 253, at 273.

270. *See id.*

271. *See id.* at 273-74.

272. *See Int'l Law Comm'n, supra* note 251, ¶ 15.

273. Third Geneva Convention, *supra* note 3, art. 2.

274. *See Post, supra* note 259, at 87.

275. *See id.* at 88.

276. *See id.*

277. *See id.* at 90.

practical question of what kind of conflict would give rise to the application of international humanitarian law. There are four types of conflicts: (1) international armed conflicts, (2) wars of national liberation, (3) internal armed conflict, and (4) internal disturbances.²⁷⁸ Although the Geneva Conventions initially only applied to armed conflicts of an international nature, this position has changed. Article 1(4) of the First Additional Protocol to the Geneva Conventions provides that the law of armed conflict applies in wars of national liberation, which are defined as “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination.”²⁷⁹ By virtue of Article 1(1) of Additional Protocol II, internal armed conflicts also are subject to the protections afforded by international humanitarian law.²⁸⁰ However, in cases of internal disturbances, such as riots and civil unrests, states are not bound by this body of law.²⁸¹

As already mentioned, the facts of the case must also fall within the scope of the *lex generalis*: in this case, international human rights law. At the beginning of the 20th century, the generally accepted rule was that the law of war would apply in cases of armed conflict, and the law of peace (or international human rights law) would apply in other situations.²⁸² In other words, international human rights law would not apply to any of the four types of conflicts previously mentioned. Such a delineation is no longer viable. The applicability of international humanitarian law has expanded, and international human rights law also is no longer restricted to times of peace.

278. Marco Odello, *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A MERGER IN INTERNATIONAL LAW, *supra* note 249, at 15, 24-26.

279. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 3.

280. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), June 8, 1977, 1125 U.N.T.S. 609.

281. Odello, *supra* note 278, at 24.

282. *Id.* at 22.

The expansion of the scope of human rights law is best illustrated by the ICJ's 2003 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, which addressed the lawfulness of Israel's construction of a wall in the occupied Palestinian territory.²⁸³ While it was suggested that the construction might violate principles of international humanitarian law and international human rights law, Israel argued that the human rights obligations were not applicable because human rights are supposed to protect citizens from their own government during peacetime.²⁸⁴ In the context of a violent conflict, such as the one in Gaza and the West Bank, Israel argued that the applicable norm should be international humanitarian law, not international human rights law.²⁸⁵ The International Court of Justice rejected this argument, however, stating that the "protection offered by human rights conventions does not cease in cases of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."²⁸⁶ The traditional view that international human rights law does not apply during armed conflict was thus rejected.

It should be noted that the *Wall* advisory opinion does not touch on the central issue at the heart of this article. The *Wall* advisory opinion holds simply that human rights obligations made non-derogable in human rights conventions remain operative in times of war. Non-derogable norms are norms that continue to apply outside of peacetime and crisis. In other words, non-derogable norms apply all the time. It usually is clear from the express language in the treaty if a particular norm is non-derogable. Indeed, the holding in the *Wall* advisory opinion seems obvious in light of the express language in provisions such as Article 4 of the International Covenant on Civil and Political Rights, which states:

283. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

284. *Id.* ¶ 102 (concluding that Israel's construction of the wall violated international agreements).

285. *Id.*

286. *Id.* ¶ 106.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation. . . . No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.²⁸⁷

What the International Court of Justice failed to elaborate on was the interaction between international human rights law and international humanitarian law. The Court only concluded that there might be three situations for interaction: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”²⁸⁸ Again, this appears to be a somewhat obvious observation. Regrettably, the Court did not explain the ensuing consequences for when the first two situations happened concurrently and clashed. Instead, the Court dealt with the applicability of international human rights norms in wartime, but it did not go further and explain what would happen if a non-derogable human rights norm conflicted with an international humanitarian law norm, which is the focus of the discussion here.

Nonetheless, the implication of the *Wall* advisory opinion is that most human rights norms, except those which are made non-derogable, still do not apply in circumstances where international humanitarian law norms apply. This implication is clear from the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, which the Court cited in the *Wall* advisory opinion:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however,

287. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171.

288. *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. Rep. ¶ 106.

such a provision.²⁸⁹

In other words, states can activate Article 4 and derogate from norms that have not been made non-derogable. For the purposes of this Article, this means it is impossible for the right to be free from the harmful effects of tobacco and the right to tobacco to apply at the same time, assuming the former is derogable. In turn, this means it is impossible for them to conflict, and there is no need for interpretative rules, such as the *lex specialis* principle, to apply. As mentioned, the *lex specialis* principle is a conflict rule, meaning that a conflict must actually exist. For there to be a conflict, logically these rights must apply at the same time. This is not the case, however, and therefore there is no conflict to reconcile.

VI. CONCLUSION

This article has highlighted the different tobacco-related rights under international humanitarian law and international human rights law. While they appear to conflict at first glance, this article has concluded that the international humanitarian law norm trumps in times of armed conflict, not because of it being the *lex specialis*, but because the international human rights norm is derogable, and so the two actually do not conflict. This conclusion creates an interesting (although presumably fictitious) incentive for tobacco users to join the losing side of an armed conflict in order to be captured and enjoy the right to tobacco as an internee, assuming the detaining power respects such a right. While non-users and light users of tobacco may balk at this admittedly facetious scenario, heavier tobacco users may not dismiss the possibility out of hand, especially if national smoking laws continue to restrict their usage of tobacco. Outside of this hypothetical scenario, it is plausible that the civilized community of states would want to remove all trivial reasons for going to war, especially when the political will needed to remove the right to tobacco in international humanitarian law might be too difficult to muster. The current anti-tobacco trends on the international and national levels alike are gaining traction, mainly because of national laws banning smoking indoors. The

289. *Id.* ¶ 105.

case study of smoking in detention is interesting as it provides an opportunity to investigate the “clash of rights” in enclosed places where the right to health of non-users of tobacco must be balanced with permitting tobacco users to exercise their right within the same confined space.

This article has shown how broad both rights are. By investigating each one, it has shown how each right was dominant at certain times in history. The right to tobacco is “permitted” and does not have to be qualified, nor does it operate in certain conditions. A person can smoke anywhere he or she wants within the prison or confined area that he or she occupies. There has been little consideration in international humanitarian law of the effects that smoking has on the tobacco user as well as those surrounding the tobacco user. Skeptics will question why anyone would care about the supposed rights to tobacco of detainees. However, if an applicable provision exists in the Geneva Conventions, it should be applied as a matter of principle, if not for any other reason but to promote broad respect for the Geneva Conventions across the board. The perceived benefits of tobacco at the time of the two world wars led to its protection within the Geneva Conventions. However, World War II ended with a lung cancer epidemic caused by tobacco use. In the 1950s, a scientific case grew against the global cancer consequences of tobacco use. These efforts were spearheaded by Richard Doll, Bradford Hill, and others, whose studies showed that tobacco was the cause of the “modern rise of lung cancer.”²⁹⁰ Since 1900, this trend has risen in tandem with the consumption of cigarettes, and if such a trend does not slow or reverse, predictions by the World Health Organization of a global tobacco epidemic that causes ten million deaths each year by 2030 may be realized.²⁹¹ With the understanding of the deadly effects of tobacco usage comes a moral, if not legal, conflict between the right to tobacco and the right to health (in the form of the right to be free from the harmful effects of tobacco). The emerging right to be free from the harmful effects of tobacco has gained considerable support from national governments, with the WHO Framework Convention on Tobacco

290. Robert N. Proctor, *Tobacco and the Global Lung Cancer Epidemic*, 1 NATURE REVIEWS CANCER 82, 84 (2001).

291. *Id.* at 85.

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Control having a significant role in trying to reverse the global tobacco epidemic. Greater evidence of a link between tobacco use and poverty, education problems, and problems associated with the realization of other human rights will further emphasize the tension between these rights. Such tension will mount until the international community can muster enough political will to remove the anachronistic right to tobacco from international humanitarian law. Let us hope that that point arrives sooner rather than later so that the right to be free from the harmful effects of tobacco can go unrestrained.