

Perspectives

The potential of a human rights approach for accelerating the implementation of comprehensive restrictions on the marketing of unhealthy foods and non-alcoholic beverages to children

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Summary

Overweight and obesity in children is rising at the global level, particularly in low- and middle-income countries. Among the causes for this increase is the marketing of unhealthy food and beverage products, which affects children's food preferences, purchasing requests and consumption patterns. The need to address harmful marketing to children has been recognized at the World Health Organization, with Member States having agreed in 2010 to implement a set of recommendations to restrict such practices. Concurrently, there is an increasing understanding of unhealthy food and malnutrition as human rights concerns. This paper explores the potential of existing legally and non-legally binding human rights instruments for accelerating the implementation of comprehensive restrictions to reduce harmful marketing of unhealthy foods and beverages to children. Four relevant themes were identified in existing human rights instruments: (i) the best interest of the child should be considered above all other interests; (ii) the rights to health and adequate food cannot be realized without supportive healthy environments; (iii) children should be protected from economic exploitation; and (iv) the persuasive marketing of unhealthy food and beverage products is explicitly recognized as a threat to the rights to food and health. In conclusion, existing human rights instruments could be harnessed to advance public health measures to restrict the marketing of unhealthy food and beverage products to children. Policy-makers and advocates should draw from these instruments and refer to State's obligations within international and domestic human rights law to strengthen their efforts to restrict harmful marketing practices to children.

Key words: right to health, right to food, marketing, children, unhealthy foods

INTRODUCTION

Globally, about 42 million children under 5 years of age and 155–200 million school-aged children are overweight or obese (Ng *et al.*, 2014; United Nations

Children's Fund, World Health Organization and World Bank, 2016). The rapid increase in the prevalence of overweight and obesity among children in low- and middle-income countries is particularly concerning

(Lobstein *et al.*, 2015). Cumulative evidence shows that the marketing of unhealthy food and beverage products to children affects their food and drink preferences, purchasing requests and consumption patterns (Boylard *et al.*, 2016; Cairns, Angus *et al.*, 2013; Emond *et al.*, 2016; Hastings *et al.*, 2006; Longacre *et al.*, 2017), which in turn affect their health and nutritional status.

In May 2010, 192 Member States of the World Health Organization (WHO) endorsed Resolution WHA63.14 (World Health Organization, 2010), agreeing to take action to restrict the marketing of food and non-alcoholic beverage products high in saturated fats, trans fatty acids, free sugars and/or salt to children and adolescents. Global progress to implement the Resolution has however been slow and insufficient (Kraak *et al.*, 2016). No country to date has fully implemented comprehensive regulations to prohibit the marketing of fatty, salty and/or sugary food and non-alcoholic beverage products to children and young people, though recent progress towards this goal has been observed in few countries, e.g. Chile (see Box 1). Among the reasons why progress has been scarce are: the prioritization of self-regulation schemes by the industry rather than regulatory measures; the lobby by transnational food companies opposing marketing restrictions; the lack of a global commitment from transnational food

companies to adopt responsible marketing that covers all practices described by WHO; the restricted ability or willingness of governments to implement such measures; and the weak action from civil society organizations to demand action from governments and hold them accountable (Kraak *et al.*, 2016; Roberto *et al.*, 2015).

Unhealthy food and malnutrition are increasingly recognized as human rights concerns. There is growing momentum for a human rights lens to be used to address malnutrition and diet-related noncommunicable diseases (NCDs), as seen in the WHO Global Action Plan for the Prevention and Control of NCDs 2013–2020 (World Health Organization, 2013), the Rome Declaration on Nutrition (Food and Agriculture Organization of the United Nations and World Health Organization, 2014), the Report of the WHO Commission on Ending Childhood Obesity (World Health Organization, 2016), the First Draft Work Programme of the UN Decade of Action on Nutrition 2016–2025 (United Nations, 2017) and the WHO report Advancing the right to health: the vital role of law (World Health Organization, 2017). The former UN Special Rapporteur on the Right to Health highlighted in 2014 the pressing need for States to address structural changes in the food environment, which negatively impact individuals' enjoyment of the rights to health and adequate food (United Nations

Box 1: Progress towards comprehensive restrictions to the marketing of unhealthy food and beverage products to children: the case of Chile

The Chilean Government approved a Law of Nutritional Composition of Food and Advertising in 2012 (Ley 20.606) (Corvalán *et al.*, 2013; Ministerio de Salud, 2012), followed by regulatory norms for its implementation in 2015 (Decreto 13) (Ministerio de Salud, 2015). The regulatory norms define limits for calories, saturated fat, sugar and sodium content considered “high” in food and beverage products. All food products that exceed these limits need to have a front-of-package black and white warning message inside a stop sign that reads “HIGH IN” followed by CALORIES, SATURATED FAT, SUGAR or SODIUM, as well as “Ministry of Health”. A warning message has to be added to products for each nutrient of concern exceeding the limit (e.g. a product high in saturated fat and sugar will have two stop signs). The regulatory norms provide specifications for the size, font, and placement of the warning message on products.

The law restricts advertising directed to children under the age of 14 years of foods in the “high in” category. Advertising is defined as all forms of promotion, communication, recommendation, propaganda, information or action to promote the consumption of a particular product. The regulatory norms consider advertising targeted to children when the audience comprises at least 20% of children, and according to the design of the advertisement. Promotional strategies and incentives, such as cartoons, animations, children’s music and toys that could attract the attention of children are included in the ban. Advertising of these foods may not use interactive applications, games, contests or other similar items, aimed at children under 14 years. Kinder Surprise eggs and toys in McDonald’s ‘Happy Meals’ are also prohibited as part of this law.

General Assembly, 2014 b). In addition, the former UN Special Rapporteur on the Right to Food indicated that food systems must be reshaped to address not only undernutrition and micronutrient deficiencies, but also overweight, obesity and NCDs – all these conditions require prioritizing access to adequate healthy food to promote health (United Nations General Assembly, 2014a). The current UN Special Rapporteur on the Right to Food indicated in her 2016 Interim Report that the unregulated marketing of unhealthy food and beverage products has harmful effects and is a major underlying factor of malnutrition, stating that aggressive marketing is ‘fostering unhealthy eating habits and creating a dependence on highly processed, nutrient-poor foods’ (United Nations General Assembly, 2016).

A human rights perspective can be a way to increase traction for food policies and healthier environments, as it requires a better recognition of the States’ obligations (under international and domestic human rights law) to implement strong measures that respect, protect and fulfil the rights to health and adequate food. For instance, Mikkelsen *et al.* (2016) have previously given an account of provisions in the framework of international human rights and intergovernmental policy agreements that can be invoked to improve healthy eating in school settings.

In this context of growing attention to all forms of malnutrition as human rights issues, the purpose of this paper is to explore the potential of existing legally and non-legally binding human rights instruments for accelerating the implementation of comprehensive restrictions to reduce harmful marketing of unhealthy food and beverage products to children.

HUMAN RIGHTS FRAMEWORK: A BRIEF OVERVIEW

There is a robust body of legal instruments protecting and promoting human rights at international and national levels. For this paper, the rights to health and adequate food are of particular relevance. The *right to health* is the entitlement of every individual to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The *right to food* is the right of every man, woman and child, alone or in community with others, to have physical and economic access at all times to adequate food, or means for its procurement. These human rights are recognized in the 1948 Universal Declaration of Human Rights (Article 25) (United Nations, 1948) and in international treaties such as the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (Articles 11 and

12) (United Nations, 1966) and the 1989 Convention on the Rights of the Child (CRC) (Article 24) (United Nations, 1989).

States that have ratified these treaties have a legal obligation to respect, protect and fulfil (facilitate, promote and provide) the rights to health and adequate food for everyone under their jurisdiction. This means States must:

- refrain from interfering with the enjoyment of these rights (e.g. by not depriving certain groups of the population of access to health services) [*respect*];
- enact laws and regulations that create mechanisms to prevent violation of these rights by state authorities or by non-state actors (e.g. by prohibiting the use of misleading claims to promote sales of food products, supplements and others) [*protect*]; and
- implement good policies, institutions and procedures to enable people to enjoy their rights (e.g. through facilitating access to healthy foods and promoting increased health and nutrition literacy) [*fulfil*].

In addition to international treaties, which have been ratified by the majority of countries in the world (see Table 1), the rights to health and adequate food are also recognized in several national constitutions and other country-level legislation.

Other than these legally-binding instruments, comprehensive interpretations of the rights to health and adequate food and what they mean in practice for policy and action are provided in important non-binding instruments such as General Comments and Guiding Principles. A list of the binding and non-binding instruments considered in this paper (those of relevance for the rights to health and adequate food) is provided in Table 1.

Importantly, even though General Comments are not legally-binding and do not require ratification by treaty parties (States), they are comprehensive interpretations of the content of the legally-binding conventions and covenants, developed and published by the treaty bodies, with a highly authoritative character. They are, therefore, a crucial component of the existing human rights framework.

OPPORTUNITIES TO USE A HUMAN RIGHTS APPROACH FOR RESTRICTING THE MARKETING OF UNHEALTHY FOOD AND BEVERAGE PRODUCTS TO CHILDREN

Legally and non-legally binding human rights instruments offer important opportunities to strengthen and accelerate state implementation of restrictions on

Table 1: Human rights instruments considered in this study

Abbreviation	Document title	Year	Document type	Legal status
UDHR	Universal Declaration of Human Rights (United Nations, 1948)	1948	Declaration	Not legally binding
ICESCR	International Covenant on Economic, Social and Cultural Rights (United Nations, 1966)	1966	Covenant	Legally binding (signed and ratified by 165 countries)
CRC	Convention on the Rights of the Child (United Nations, 1989)	1989	Convention	Legally binding (signed and ratified by 196 countries)
GC12	CESCR General Comment 12: The Right to Adequate Food (Art. 11 of the ICESCR)(United Nations Committee on Economic, Social and Cultural Rights, 1999)	1999	General Comment	Not legally binding
GC14	CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR) (United Nations Committee on Economic, Social and Cultural Rights, 2000)	2000	General Comment	Not legally binding
GC15	CRC General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24 of the CRC) (United Nations Committee on the Rights of the Child, 2013a)	2013	General Comment	Not legally binding
GC16	CRC General Comment 16 On State obligations regarding the impact of business sector on children's rights (United Nations Committee on the Rights of the Child, 2013b)	2013	General Comment	Not legally binding
GPBHR	Guiding Principles for Business and Human Rights (United Nations, 2011)	2011	Guidelines	Not legally binding

marketing of unhealthy food and beverage products to children. We identified four relevant themes:

- (i) The best interest of the child is above all other interests.

Mother and child are priority groups and therefore entitled to special protection (UDHR, Art. 25, Para 2) ([United Nations, 1948](#)). According to CRC, the best interest of the child always comes first:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (CRC, Art. 3, Para 1) ([United Nations, 1989](#))

This gives precedence for policies and laws to be enacted prioritizing children's rights and promoting the best possible outcome for children, above commercial or other interests or other desired outcomes. Importantly, CRC defines children as those under the age of 18 years, providing therefore broad coverage for children and adolescents.

- (ii) The rights to health and adequate food cannot be realized without supportive healthy environments.

There is recognition, within human rights instruments, of the importance of actions to create health-promoting environments that can help people take care of their health and make informed choices. In this regard, CESCR General Comment 14 states that

"The obligation to fulfil (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. (...) The obligation to fulfil (promote) the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (...) (iv) supporting people in making informed choices about their health." (Para 37) ([United Nations Committee on Economic, Social and Cultural Rights, 2000](#))

This reaffirms the argument by two former Special Rapporteurs that fostering a broader healthy environment is of foremost importance to address all forms of malnutrition and promote health ([United Nations General Assembly, 2014a, 2014 b](#)).

- (iii) Children should be protected from economic exploitation.

Table 2: Reference to unhealthy food and beverage marketing in human rights instruments considered in this paper

Document	Mention
CESCR General Comment 12: The Right to Adequate Food (United Nations Committee on Economic, Social and Cultural Rights, 1999)	<i>“The strategy should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food (. . .)”</i> (Para 25).
CRC General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health (United Nations Committee on the Rights of the Child, 2013a)	<i>“States should also address obesity in children, as it is associated with hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death. Children’s exposure to “fast foods” that are high in fat, sugar or salt, energy-dense and micronutrient-poor, and drinks containing high levels of caffeine or other potentially harmful substances should be limited. The marketing of these substances—especially when such marketing is focused on children—should be regulated and their availability in schools and other places controlled.”</i> (Para 47) <i>“Among other responsibilities and in all contexts, private companies should: (. . .) comply with the International Code of Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions; limit advertisement of energy-dense, micronutrient-poor foods, and drinks containing high levels of caffeine or other substances potentially harmful to children (. . .)”</i> (Para 81)
CRC General Comment 16 On State obligations regarding the impact of business sector on children’s rights (United Nations Committee on the Rights of the Child, 2013b)	<i>“The activities and operations of business enterprises can impact on the realization of article 6 in different ways. For example, environmental degradation and contamination arising from business activities can compromise children’s rights to health, food security (. . .). The marketing to children of products such as cigarettes and alcohol as well as foods and drinks high in saturated fats, trans-fatty acids, sugar, salt or additives can have a long-term impact on their health.”</i> (Para 19) <i>“The mass media industry, including advertising and marketing industries, can have positive as well as negative impacts on children’s rights. (. . .) The media must be regulated appropriately to protect children from harmful information (. . .).”</i> (Para 58) <i>“Children may regard marketing and advertisements that are transmitted through the media as truthful and unbiased and consequently can consume and use products that are harmful. Advertising and marketing can also have a powerful influence over children’s self-esteem, for example when portraying unrealistic body images. States should ensure that marketing and advertising do not have adverse impacts on children’s rights by adopting appropriate regulation and encouraging business enterprises to adhere to codes of conduct and use clear and accurate product labelling and information that allow parents and children to make informed consumer decisions.”</i> (Para 59) <i>“Digital media is of particular concern, as many children can be users of the Internet but also become victims of violence such as cyber-bullying, cyber-grooming, trafficking or sexual abuse and exploitation through the Internet (. . .).”</i> (Para 60).

Two treaties, the CRC (Article 32)(United Nations, 1989) and the ICESCR (Article 10) (United Nations, 1966), explicitly recognize that children should be protected from economic exploitation. While these provisions have mostly been interpreted in the context of child labour, we argue that economic exploitation can take place in the form of other practices that promote economic gain at the expense of children’s vulnerabilities. Influencing children’s food preferences, purchasing power and consumption patterns through marketing techniques that take advantage of their emotions and limited ability to process and evaluate information, and which in turn lead to increased sales and

revenue for food and beverage companies, is arguably a form of economic exploitation.

- (iv) Persuasive marketing of unhealthy food and beverage products is explicitly recognized as a threat to the rights to health and adequate food in several human rights instruments

While not all instruments considered in this paper make explicit reference to marketing of unhealthy food and beverage products, several of them do so (see Table 2). This is particularly the case for recent documents, reflecting the evolving status of global discussions

Box 2: A human rights approach to protect children from advertising: the case of Brazil

The right to adequate food has shaped food and nutrition security policy in Brazil, and the country has included explicit recognition of the right to food in its national constitution in 2010 ([Constituição da República Federativa do Brasil de 1988, 1988, Emenda Constitucional nº 64, 2010](#)). In Brazil, children are defined as those up to 12 years of age, and adolescents those from 12 to 18 years of age (Law 8069 of 13 July 1990) ([Estatuto da Criança e do Adolescente, 1990](#)). Since 1990, the Consumer Protection Code (Law 8.078 of 1990) has prohibited *abusive advertising directed to children*, without specifying with enough detail what constitutes “abusive advertising” ([Código de Defesa do Consumidor, 1990](#)). Consequently, several types of advertising to children were allowed to continue. In 2014, the National Council for Children and Adolescents Rights (CONANDA) unanimously approved Resolution 163/2014 ([Conselho Nacional dos Direitos da Criança e do Adolescente, Secretaria de Direitos Humanos, 2014](#)), which defines what constitutes abusive advertisement to children and adolescents, describing examples of concrete cases where the Consumer Protection Code must be applied. CONANDA is a normative and deliberative body linked to the Special Secretariat of the Presidency for Human Rights, and is composed, in equal number, of government representatives and representatives of civil society organizations linked to the promotion and protection of children’s rights. CONANDA resolutions are legally binding and compliance is mandatory. Sanctions for non-compliance are described in the Consumer Protection Code, ranging from fines to the full suspension of the operation license for companies.

Resolution 163/2014 covers children and adolescents (those under the age of 18), different types of media, including but not restricted to printed media, television, radio, internet websites, packaging, merchandising, promotions, activities in events such as concerts, and point-of-sale promotion (Art. 1) ([Conselho Nacional dos Direitos da Criança e do Adolescente, Secretaria de Direitos Humanos, 2014](#)). It defines the following as abusive advertising to children (Article 2) ([Conselho Nacional dos Direitos da Criança e do Adolescente, Secretaria de Direitos Humanos, 2014](#)):

- Use of child language, special effects or excess colors;
- Children’s songs, or songs sung by child voices;
- Child representations of different forms;
- Use of people, such as celebrities, that appeal to children;
- Characters for children or presenters of children’s programmes;
- Cartoons and animations;
- Puppets, dolls and other similar items;
- Distribution of prizes or collectible gifts; and
- Competitions or games appealing to children.

Together with the legislation that came before it (National Constitution that recognizes the right to food and Laws 8069 and 8078 of 1990) the practical consequence of this resolution is that any advertising and marketing communication to children is illegal, on a human rights and ethical basis. All advertising (including those related to food and beverage products) that had until then targeted children must be changed and directed at an adult audience, as adults can make the necessary mediation of commercial messages to children.

Challenges

Since its release, the resolution has been disputed by the food industry, through claims that CONANDA does not have the legal authority to regulate advertising and that the regulation violates companies’ freedom of expression.

Additionally, enforcement and monitoring bodies in the country, including the National System for Consumer Defense, need strengthening to ensure implementation of the current legal framework, with adequate follow up and application of penalties when appropriate.

Recent progress

In 2016, the Superior Court in Brazil sustained the conviction of a food company for an advertisement directed at children (*Criança e Consumo*, 2016). In their marketing campaign, children were supposed to collect five cookie labels and add a certain amount of money (R\$5, approx. 2 USD) to collect a watch with licensed characters from the movie *Shrek*. The court case was opened in 2007 in São Paulo, and was disputed by the food company with claims that the promotion was directed at parents. However, the São Paulo Court of Justice deemed the marketing campaign unethical and taking advantage of the naivety of children, and convicted the company. The company appealed to the Superior Court, where the conviction was sustained. This was the first time that marketing of unhealthy food and beverage products to children reached the Superior Court, creating an important precedent for future cases. Nevertheless, future cases are to be judged individually and constant advocacy with the judiciary is necessary so that each case is analyzed from a human rights perspective.

on the topic. None of the legally binding instruments make explicit reference to marketing.

The CRC General Comment 15 clearly identifies state obligations and business responsibilities to restrict marketing of unhealthy food and beverage products (*United Nations Committee on the Rights of the Child*, 2013a). The Guiding Principles for Business and Human Rights (GPBHR) provide overarching guidance and principles on how business conduct should respect human rights and comply with existing state legislation (*United Nations*, 2011). This includes assessing their human rights impact (due diligence), avoid doing harm through their activities and remedying the human rights impact when it occurs. With the recognition that harmful marketing to children is a human rights violation, these principles should also be applied to marketing.

Added value of a human rights approach to support actions to restrict the marketing of unhealthy food and beverage products

Having harmful marketing recognized explicitly in human rights instruments is a powerful tool for accelerating the implementation of comprehensive restrictions on the marketing of unhealthy foods and non-alcoholic beverages to children. Human rights have a high position in the hierarchy of norms—politically, ethically and legally. The explicit recognition of *state obligations* and *business responsibilities* to restrict the marketing of unhealthy food and beverage products to children constitute strong arguments to encourage governments to take action. Regulation of harmful marketing to children will thus not only be part of governments' food and nutrition policies, but also an

important element in their efforts to fulfil their international human rights commitments.

In practical terms, relevant articles and paragraphs of the human rights instruments (such as those mentioned in *Table 2*) can be invoked when making the case for stronger implementation of the WHO Resolution WHA63.14 (*World Health Organization*, 2010), both in national and international fora. The description of state obligations is also a powerful tool for civil society organizations to hold states accountable for their actions (or lack of), and as an advocacy tool.

Additionally, a human rights approach provides a different lens that shifts the emphasis to the protection of children's rights, placing children at the center of decision-making. Some countries, such as Brazil, have seen the added value of a human rights approach and established legislation prohibiting all forms of marketing to children with a human rights basis. In 2014, a new regulation from the National Council for Children and Adolescent Rights in Brazil was approved, restricting all marketing to children (including food-related) (*Conselho Nacional dos Direitos da Criança e do Adolescente, Secretaria de Direitos Humanos*, 2014). The main argument for this restriction was that marketing of any product to children is in violation of their rights. Shifting the emphasis to children's rights allowed the country to be in a stronger position to counter efforts from the business sector to undermine the legislation—since all stakeholders are, at least in principle and at the discourse level, committed with protecting children's rights (see *Box 2*).

The 2017 WHO report *Advancing the right to health: the vital role of law* (*World Health Organization*, 2017) describes how domestic public health law can be revised to advance the right to health. The report mentions

specifically that the harmful marketing of unhealthy food and beverage products to children can be countered through legislation. Others have argued for an international legally binding treaty to protect and promote healthy diets, which would include marketing restrictions (Consumers International & World Obesity Federation, 2014). Along with human rights law, these measures would build a stronger legal framework to support state action and to guide business conduct. A dialogue between the human rights, law and public health communities is crucial to move such discussions forward.

CONCLUSIONS

Applying a human rights approach to actions to promote healthy food environments is a matter of urgency. There is increasing recognition of the marketing of unhealthy foods and non-alcoholic beverages to children as a threat to human rights, in particular the rights to health and adequate food, and the need to promote children's rights and protect them from economic exploitation.

Existing human rights instruments can be harnessed to advance public health measures to restrict the marketing of unhealthy food and beverage products to children. Policy-makers and advocates can draw from these instruments and refer to State's obligations within international and domestic human rights law to strengthen their efforts to restrict harmful marketing practices.

From a human rights perspective, States have the obligation to promote healthier environments that prevent diseases and promote health, and must protect citizens from harm by other actors (e.g. the food business sector) by establishing policies and laws to control such harmful practices.

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