The Framework Convention on Global Health: Addressing Frequently Raised Issues

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The FCGH can build on existing treaties that codify the right to health to better implement rights-based approaches to health.

The FCGH intends to complement and reinforce strategies and tools to implement the right to health, not replace them. The FCGH could open new possibilities to advancing the right to health and speeding its implementation, and by so doing, closing unconscionable gaps in national and global health equity by:

- Making the norms of the right to health, and the broader economic, social, and cultural rights norms that the right to health incorporates, legally binding: Many economic, social, and cultural rights norms, such as their emphases on participation, accountability, and equity, are not in globally binding law. Nor are specific right to health standards and obligations elucidated in General Comment 14 of the Committee on Economic, Social and Cultural Rights, and elsewhere.[1] The FCGH could codify these right to health elements, making them binding like such human rights and health treaties as the International Covenant on Economic, Social and Cultural Rights and the Framework Convention on Tobacco Control, contributing to accountability for the right to health.

- Clarifying human rights norms: The FCGH would clarify right to health and economic, social, and cultural rights norms, such as obligations to spend the maximum of available resources towards fulfilling human rights commitments, progressive realization, and even more straightforward principles such as non-discrimination, expressly prohibiting discrimination against routinely excluded populations such as undocumented immigrants, or discrimination based on people's wealth.

- Providing specific pathways: The FCGH would provide specific strategies to implement the right to health, such as national health accountability and equity strategies and factors to take into account in ensuring universal health coverage. Such specific measures should enable states to more effectively implement their health and human rights obligations, while enhancing accountability. Including these pathways will strengthen norms around these strategies, helping to ensure their widespread adoption, and bring them within the ambit of national and international accountability mechanisms.

- Strengthening human rights mechanisms: The FCGH could establish additional mechanisms to enhance right to health compliance, including by opening additional space for dialogues around the health. For example, regional (or sub-regional) special rapporteurs could be charged with monitoring state compliance with the FCGH and engaging all stakeholders on how to enhance compliance. FCGH institutional structures would be harmonized with existing rights infrastructure and procedures.

- Empowering communities: Processes mandated throughout the FCGH would empower communities to engage political processes, helping to institutionalize democratic decision-making through inclusive participation to enable even the most marginalized

[1] The health mandates in World Health Assembly resolutions, including the emphasis on participation, accountability, and participation in these, are also not legally binding.

communities to participate. The FCGH could advance public and targeted health and human rights education and establish a right to health capacity funding mechanism, building civil society and state capacity to better advance the right to health.

- Adapt to increasingly globalized world: The FCGH could clarify extraterritorial right to health obligations in these areas, from international health financing to demanding respect for the right to health in other international regimes (e.g., trade, investments, narcotics, migration) and mandating right to health assessments. Moreover, the FCGH could enhance businesses' right to health accountability through states requiring respect for the right to health in government contracts with businesses.

- Providing an equity lens to guide courts decisions. Judicial decisions that provide individuals expensive treatments and questions of disproportionate access by wealthier people have raised widespread concern that the right to health legislation undermines equity. The FCGH's equity-focused approach could help guide courts to interpret an individual's right to health entitlements in the broader context of health equity.

- Learning from experience. The FCGH could incorporate the past half century's experiences in its guidance and innovative approaches to national accountability and treaty compliance, such as drawing on the accountability framework of the Global Strategy on Women's, Girls' and Adolescents' Health.

The value of the FCGH as a binding legal instrument.

Supporting accountability: Binding international law should enhance civil society advocacy for compliance with the FCGH, guide courts beyond non-binding instruments, and empower national officials in internal policy and resource allocation debates.

Protecting the right to health in other sectors: Ensuring everyone the conditions for good health and achieving health equity requires Health in All Policies, and respect for the right to health across international legal regimes. Other sectors internationally that may interfere with the right to health, such as trade, intellectual property, and investment, are grounded in treaties. The right to health can be best protected in these regimes if the FCGH has an equivalent status, as a binding treaty, such as interpretations of legal obligations in other regimes that are consistent with the right to health and state commitment not to undertake actions in other regimes that could undermine the right to health.

Ensuring strong norms: A legally binding instrument has the greatest potential to establish widely respected norms. For example, the Framework Convention on Tobacco Control (FCTC) has powerful informed tobacco control norms and policy, even without strong enforcement mechanisms.[1]

Providing confidence for reciprocal measures: Treaties can create the confidence in reciprocal action by other states parties. This will be important in the context of financing framework that the FCGH would include, with both domestic and international health financing commitments.

States providing assistance can be confident partner governments will provide significant resources of their own and ensure accountable use of funds, while those countries will know that their own domestic efforts will help ensure international support. Such a shared commitment is similarly important for global health security, as well as regulating businesses to protect public health. States may be more willing, for example, to regulate the contents of food (for example, limiting sodium content) if they are confident that food imports will not provide the unhealthy foods that they are protecting against, even at a possible cost to local businesses.

Bolstering government efforts to ensure public health in the face of opposition: The FCGH could include measures that are unfavorable to certain companies or industries, such as by safeguarding people's health against unhealthy food and beverages, and ensuring access to medicines, with implications for patent protections. Government officials may come under pressure from businesses to weaken legislative or regulatory proposals. A legal mandate may help officials proceed with their public responsibilities despite this pressure.

Providing an equity lens to guide courts decisions: In some countries, courts decisions requiring the state to provide individuals expensive treatments may have reduced state budgets for public health measures, contributing to health equities.[2] A binding equity-focused interpretation of the right to health could change this dynamic and help guide courts to interpret an individual's right to health entitlements in the broader context of health equity.

The FCGH could complement other tools to address systematic governance issues.

We propose the FCGH as a valuable tool to address systematic shortcomings in global and national governance for health. We do not suggest that it is the only tool to address issues of global governance for health, much less national governance aimed at realizing the right to health. Yet while many other proposals exist, and could proceed alongside an FCGH or independently, none would take the systemwide approach of the FCGH.

The FCGH, by contrast, could establish norms that cut across all health activities and actions outside the health sector that have right to health implications. It could be an organizing framework with principles that all other proposals should be consistent with. Further, the FCGH would address other fundamental, systematic issues to advance equity, participation, and accountability at all levels of the health system, from local to global.

The feasibility of the FCGH.

Even as states increasingly use international legal instruments other than treaties, treaties remain important. Most significantly, less than a year ago, the world's nations adopted the Paris Agreement, under the auspices of the UN Framework Convention on Climate Change, which is one of the world's most ambitious treaties in history – is even more far-reaching than the FCGH.

Meanwhile, it is notable that the WHO Framework Convention on Tobacco Control (FCTC) initially faced considerable resistance, yet ultimately gained strong support from the WHO

Director-General[3] and the vast majority of the world's countries. While the FCGH is more ambitious than the FCTC in terms of its scope, the FCTC represented the first time that WHO used its treaty-making powers, a significant hurdle that the FCGH does not face, and was adopted in the face of the powerful tobacco industry.

Meanwhile, major human rights treaties continue to be adopted, most significantly the Convention on the Rights of Persons with Disability in 2006, now with 162 states parties.[4]

Thus, recent experience demonstrates that bold binding agreements are possible. States will need to see the FCGH in their interest. Along with its potential for catalyzing more effective responses to global health inequities and global health insecurities, health investments often yield significant economic returns. If states are convinced of the contributions of the FCGH, propelled by support from civil society organizations, grassroots networks, and global heath leaders, the FCGH could secure political support.

The need for an ambitious treaty.

The FCGH is ambitious – but the scale of the health inequities and insecurities it seeks to help resolve are themselves great, from 18-20 million deaths annually linked to health inequities[5] to the risks of global pandemics. An ambitious treaty is consistent with its purpose.

Yet even as its proposed reach is broad, the FCGH could have a limited set of core components. Central elements would be establishing standards, processes, and a financing framework to ensure everyone universal health coverage, including the underlying determinants of health, and with pathways towards equity; ensuring respect for and, as possible, the advance of the right to health in other sectors and international legal regimes, through strengthening Health in All Policies and global governance for health approaches, and; enhancing participation and accountability at all levels.

Stakeholders will seek additional components. These should be seriously considered, particularly those proposed through bottom-up processes. How such proposals are ultimately incorporated into the FCGH would be decided through negotiations – which ought to enable full participation of civil society organizations and members of marginalized communities – and subject to state agreement.

Connections between the FCGH and other international law.

The FCGH would be consistent with existing international law, including the obligations in the International Covenant on Economic, Social and Cultural Rights. For example, FCGH stipulations that implicate access to medicines may lead states to more readily issuing compulsory licenses, but this is within the boundaries of the TRIPS Agreement, as clarified by the Doha Declaration.

The FCGH could also affect how states approach new international agreements, such as by requiring right to health assessments before entering into such agreements, and ensuring that these agreements do not undermine the right to health.[6]

The FCGH would add to the current response to global health priorities.

- ***Sustainable Development Goals (SDGs)***: The SDGs establish universal targets for health care and underlying determinants of health, encompass social determinants of health, and emphasize equality. Yet they lack independent accountability mechanisms. The FCGH would bolster SDG accountability with independent, transparent, and rigorous monitoring, reporting, and redress mechanisms, while facilitating community and national health accountability. Further, the FCGH could include measures to protect health in other legal regimes (e.g., intellectual property, trade), filling in SDG governance gaps. Infusing attention to health and health equity throughout the Goals, through standards on Health in All Policies and strengthened global governance for health, the FCGH would bring greater coherence to the disparate Goals, with their many intersections with health. The FCGH would ensure that health remains a top priority in the expanded global sustainable development agenda.
- ***Universal health coverage***: Health systems required for universal health coverage are often under-financed, lack sufficient capacity, and struggle to overcome entrenched inequities. The FCGH could establish a national and global health financing framework, building resources and capacity. And it could break down barriers to equity – within the health sector and across sectors – clarify the scope of non-discrimination, ensure participation, and strengthen accountability.
- ***Global health security***: The FCGH would reinforce the International Health Regulations, including by contributing to stronger overall health systems. The enhanced participation in health-related decisions and effective community-level systems the FCGH would help engender should build trust and empower communities. The FCGH could also enhance principles of benefit sharing by expanding the Pandemic Influenza Preparedness Framework on sharing vaccines, therapies, and diagnostics.
- ***Health inequity***: Domestic and global health inequities have been calculated as responsible for approximately 18-20 million deaths every year.[7] The FCGH could catalyze domestic strategies to counter discrimination, address the social determinants of health as part of health equity strategies, and promote gender-sensitivity, equitable health financing, and pro-poor pathways towards universal health coverage. Further, it could include directives on ensuring people's empowered participation at all stages of health-related decision making.
- ***Health in All Policies***: The FCGH could provide for comprehensive public health strategies and institutionalize right to health impact assessments to ensure the right to

health is taken into account in policies and projects that may affect the right to health, including outside the health sector and with respect to actions with extraterritorial effects.

- ***Trade and intellectual property***: The FCGH would address many sectors that can thwart health justice, including trade and intellectual property regimes that may impede access to medicines or national efforts to regulate unhealthy foods and beverages.
- ***Migrant and refugee health***: The rapidly growing number of voluntary and forced migrants requires new strategies to safeguard their health, at their point of origin, during their transit, and at their destiny. The FCGH would clarify the obligation of non-discrimination, strengthening a norm of health care for all migrants, and could establish an equitable framework for shared responsibility for migrants' health.

The FCGH would build on and relate to existing accountability mechanisms, particularly human rights and SDG accountability mechanisms, and would include measures to help achieve impact at country level.

The FCGH could establish a multi-layer, multi-dimensional, and inter-sectoral "web of accountability,"[8] incorporating and adding to present SDG and human rights accountability regimes. Unlike for the SDGs, FCGH accountability mechanisms would be mandatory, and would include multiple processes that ensure independent monitoring.

Where consistent with human rights principles, SDG national review processes[9] could feed into FCGH monitoring and reporting. The FCGH could also utilize elements of the human rights accountability regime. The Committee on Economic, Social and Cultural Rights (CESCR) may be its treaty body, or a new treaty body, following UN processes, might be created to ensure sufficient right to health expertise. FCGH reporting process may include identifying obstacles to FCGH implementation and plans to overcome them.

The FCGH could include additional forms of accountability, likely focused on empowering domestic accountability mechanisms. The treaty could require national health accountability strategies, encompassing courts, community and national-level mechanisms (e.g., community audits, village health communities, national human rights commissions, parliamentary oversight), transparency and access to information, and social empowerment and right to health education.

In addition, the FCGH may include sanctions, and incentives, such as linking global health leadership positions to right to health implementation, regional special rapporteurs, and peer review of state reports.

None of these mechanisms can ensure compliance. Yet collectively, these approaches and the treaty's practical guidance on right to health implication and the norms that the FCGH helps clarify offer considerable promise for improved right to health implementation.

Possible FCGH mechanisms and institutional set-up.

The FCGH would include a Secretariat and a Conference of the Parties, whose functions would include negotiating protocols. The FCGH Secretariat could be an independent entity or one housed in WHO. One key function of the FCGH Secretariat would be to provide guidance to support countries in implementing treaty provisions.

Like other human rights treaties, the FCGH would have an associated treaty body, which could receive reports on treaty implementation, hold dialogues with states, and hear individual petitions on FCGH (right to health) violations. The FCGH might utilize the Committee on Economic, Social and Cultural Rights (CESCR). Or it could establish a separate treaty body, as the Convention Against Torture established the Committee Against Torture, even though the ban on torture is part of the International Covenant on Civil and Political Rights, with its own treaty monitoring body. This would allow for interpretations of the right to health requirements that may be more progressive than those of the CESCR. A dialogue among treaty bodies could gradually shift all right to health interpretations to FCGH standards. A separate treaty body would also allow for greater right to health expertise, and avoid substantially increasing the CESCR's workload.

Other FCGH mechanisms that have been proposed include:

- A right to health capacity funding and technical mechanism:[10] A right to health capacity funding mechanism could support civil society organizations, especially at the grassroots level, that work to ensure accountability and rights-based policies. Funds could also extend to right to health education initiatives and government rights to health-related functions and institutions. This mechanism might also provide technical support and guidance on a rights-based approach to health. Financing for the fund would not be limited to FCGH state parties.

- A global fund for health:[11] Such a fund could channel international health assistance for health care (including health systems) and the underlying determinants of health. It could complement or replace existing global health funds.

- A multi-sector forum to better integration the right to health into other international regimes: The FCGH could establish a multi-sector, multi-stakeholder, WHO-led consortium to promote global governance for health. It could evaluate policies in other international legal regimes (e.g., trade, investment, narcotics) for right to health consistency, offer recommendations, and identify risks to the right to health. The consortium could assess implementation of its recommendations, contributing to an inter-sector dialogue and greater accountability. It could also be a forum for sharing lessons on integrating the right to health in different sectors.

- A code of practice for global health organizations: The FCGH could catalyze a rights-based code of practice for global health organizations, ensure that their actions are consistent with and promote the right to health and other rights.

- Regional special rapporteurs: The FCGH accountability system could include regional special rapporteurs, linked to the current system of UN human rights special rapporteurs. Drawn from the region to foster trust and ensure regional understanding, they could visit states to foster dialogue, monitor FCGH compliance, offer recommends, and contribute to regional learning.

- Regional right to health leaders and peer review: The FCGH could have a process to designate a regional right to health leaders. These states could lead regional right to health capacity building, such as through regional exchanges and trainings, and review FCGH implementation reports, offering recommendations.

- National strategies: The FCGH could require strategies, developed through inclusive, participatory processes, in several areas. These could include national health accountability strategies, covering transparency, access to information, and anti-corruption measures; access to courts; community and national accountability and participation mechanisms, and; an enabling environment for social empowerment. Another could be a national health equity strategy, requiring countries to identify each marginalized population and obstacles to their health; develop a budgeted, targeted, time-bound plan of action addressing each identified population, and; undertake rigorous, participatory monitoring including data disaggregation.[12]

Models of treaties that the FCGH could draw from.

The FCGH could combine elements of several recent landmark treaties. Like the Framework Convention on Tobacco Control, it might be adopted through WHO, using the framework-protocol approach, reinforcing WHO's global health leadership and mandate to engage other sectors. The FCGH could borrow from the Paris Agreement on climate change the idea of progressively strengthening nationally determined targets, with national strategies and targets in specified areas (e.g., universal health coverage), developed through inclusive, participatory processes and consistent with right to health standards. The FCGH could provide accountability for these targets and strategies. Like International Labour Organization treaties, a key component of the FCGH could be ensuring inclusive, participatory decision-making in all realms of health-related policies, with particular assurances on including civil society and marginalized communities. As with the Convention on the Rights of People with Disabilities, civil society organizations, including grassroots organizations, should be directly involved in developing and negotiating the FCGH. And it could borrow the possibility from the Pandemic Influenza Preparedness Framework, which is not itself a binding treaty, of using international law to directly apply its mandates to corporations, and possibly other non-state actors.

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[1] Tobacco Free Kids, *WHO Framework Convention on Tobacco Control* (2015), http://global.tobaccofreekids.org/files/pdfs/en/tobacco_control_treaty_en.pdf.

[2] O. L. M. Ferraz, "The right to health in the courts of Brazil: Worsening health inequities?" *Health and Human Rights* (2009) 11(2): 33-45, 40-41, http://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2013/07/4-Ferraz.pdf.

[3] Ruth Roemer, Allyn Taylor, and Jean Lariviere, "Origins of the WHO Framework Convention on Tobacco Control," *American Journal of Public Health* (June 2005) 95(6): 936-938, http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2003.025908.

[4] The Convention on the Rights of Persons with Disability had 162 states parties as of February 2016. UN Division of Social Policy and Development, "Disability," "https://www.un.org/development/desa/disabilities/, accessed February 23, 2016.

[5] Juan Garay, *Health Equity: The Key to Transformational Change* (2015).

[6] While there is no specific requirement at present for right to health impact assessments, under current right to health obligations, when "entering into international agreements, States should ensure that such agreements do not negatively impact on the enjoyment of the right to health." Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover: Unhealthy Foods, Non-Communicable Diseases and the Right to Health*, UN Doc. A/HRC/26/31, April 1, 2014, at para. 56, http://www.unscn.org/files/Announcements/Other_announcements/A-HRC-26-31_en.pdf.

[7] J. Garay, L. Harris, M. Beam and S. Zompi, "Global Inequity Death Toll: Targeting Global Health Equity and Estimating the Burden of Inequity," 141st American Public Health Association Annual Meeting, Boston, MA, USA, November 2-6, 2013, Abstr 291133 *cited in* David Chiriboga et al., "Investing in Health," *Lancet* 383 (March 15, 2014): 949, http://www.researchgate.net/publication/260839151_Investing_in_health.

[8] Eric A. Friedman, "An Independent Review and Accountability Mechanism for the Sustainable Development Goals: The Possibilities of a Framework Convention on Global Health," *Health and Human Rights* 18(1) (published online January 20, 2016), http://www.hhrjournal.org/2016/01/an-independent-review-and-accountability-mechanism-for-the-sustainable-development-goals-the-possibilities-of-a-framework-convention-on-global-health/. Quoting Paul Hunt, "SDGs and the importance of formal independent review: An opportunity for health to lead the way," *Health and Human Rights* SDG Series blog, September 2, 2015, http://www.hhrjournal.org/2015/09/sdg-series-sdgs-and-the-importance-of-formal-independent-review-an-opportunity-for-health-to-lead-the-way/.

[9] United Nations General Assembly. *Transforming our world: the 2030 agenda for sustainable development*. UN Doc. A/RES/70/1. September 25, 2015. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1, at para. 74(e).

[10] Eric A. Friedman, Lawrence O. Gostin, and Kent Buse, "Advancing the Right to Health Through Global Organizations: The Potential of a Framework Convention on Global health," Health and Human Rights 15(1) (2013): 71-86, 83-84, http://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2013/06/Friedman-FINAL.pdf.

[11] Gorik Ooms and Rachel Hammonds, "Financing Global Health Through a Global Fund for Health?" *Chatham House Centre for Global Health Security Working Group Papers* (2014). http://www.chathamhouse.org/publications/papers/view/197444.

[12] Eric A. Friedman, "National Health Equity Strategies to Implement the Global Promise of SDGs," *Health and Human Rights* SDG Series Blog, October 5, 2015, http://www.hhrjournal.org/2015/10/sdg-series-national-health-equity-strategies-to-implement-the-global-promise-of-sdgs/.