Preliminary Answers to 5 Priority Questions on the Framework Convention on Global Health

The Joint Action and Learning Initiative on National and Global Responsibilities for Health (JALI)

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1. What are the shortcomings of the existing right to health framework laid out in a number of international treaties, primarily in ICESCR Article 12 and its elaboration in General Comment 14? What aspects of the current and evolving national and global environments, and their inter-relationships, need to be considered in ensuring that a rights-based approach responds to contemporary realities?

For decades, the right to health has been firmly embedded in international law. Yet the interpretations of the right, both in the authoritative General Comment 14 of the Committee on Economic, Social and Cultural Rights (CSECR) and through decisions of national courts, have advanced beyond its legally binding formulation. And even these interpretations do not fully meet the contemporary demands or respond to impediments to adequate accountability around the right to health.

It is time for a paradigm shift on the right to health, to:

- affirm in binding international law the right's immediate enforceability;
- incorporate into binding international law certain core obligations not subject to progressive realization;
- provide greater precision for obligations of progressive realization, maximum of available resources, and international cooperation and assistance;
- unambiguously cover the full range of health care services along with underlying determinants of health, including to clarify the exact relationship between these underlying determinants and the right to health, and whether the right to health includes underlying determinants beyond those listed in General Comment 14;
- respond to globalization, including the health impact of transnational corporations and the role of other non-state actors, and;
- incorporate into binding intentional law such principles as equality and non-discrimination, accountability, and participation, and the right's incorporation of underlying determinants of health.

2. What would be the advantages of a Framework Convention on Global Health?

- Create a unifying vision for civil society advocacy
- Place the right to health at the center of global health policy and global governance for health, while clarifying present ambiguities in the right to health
- Clearly link rights to resources and increase global health funding
- Govern issues that impact health that are beyond the control of any one country
- Create legally binding rules on global health
- Rectify shortcomings of MDGs

- Facilitate increased global cooperation on global health
- Contribute to broader improvements in national governance (e.g., democratic accountability, women's rights)
- Potential to reform global health governance to strengthen voice of communities and countries most affected by global health burdens and inequities
- Prioritize right to health in international legal hierarchy
- Ensure sustained global priority to global health
- Change the framing of global health to one based on mutual responsibilities and solidarity
- Potential to revamp global health governance institutions
- Bridge divide between health and human rights
- Facilitate global consensus through framework-protocol approach

3. What are the goals and building blocks of the FCGH?

Goals:

- To greatly narrow health inequalities, both among and within countries
- To ensure universal health coverage, including effective health systems and fundamental human needs (e.g., clean water, nutritious food)
- To develop greater accountability of governments and other global health actors to health commitments and the right to health
- To develop binding frameworks or mechanisms to ensure sustained, sufficient, and predictable funding for global health.
- To rectify present gaps and shortcomings of the right to health.
- To resolve structural problems in global governance of health (e.g., poor coordination)
- To raise the position of health within the hierarchy of international legal regimes
- To increase civil society and community participation in all areas and stages of health-related decision making

Building blocks:

- Human rights: The FCGH would be grounded in human rights, and include measures to promote equality and non-discrimination, participation, and accountability, while clarifying and filling present gaps and ambiguities on the right to health and promoting the justiciability of the right to health.

- Ensuring health services and goods to all people: The FCGH would establish health goods and services to which all people are entitled, including effective health systems and fundamental human needs, possibly by establishing international standards to be translated in a participatory manner at national level.

- Predictable, sustained, financing scalable to need: The FCGH would establish mechanism(s) to ensuring predictable, sustained, and sufficient global health financing to complement national health spending.

- National health funding commitments: The FCGH would clarify and establish national health funding commitments, covering health and related sectors.

- Strengthening WHO: The FCH would affirm WHO's role as the global health leader and include measures to support this role.

- Prioritizing underfunded health priorities: The FCGH would set global health priorities, including fundamental human needs.

- Improving global coordination, cooperation, and collaboration: The FCGH would establish processes that will improve global coordination, cooperation, and collaboration, including to improve alignment with national health strategies.

- Ensuring participatory decision-making and empowering civil society and communities: The FCGH would establish requirements regarding civil society and community participation in health planning, budgeting, programming, and monitoring and evaluation, while possibly including mechanisms to build the capacity of and increase funding for health-related civil society organizations.

- Improving accountability, compliance, and enforcement: The FCGH would incorporate innovative incentives and possibly sanctions, strengthen public and health worker knowledge on human rights, build government and legal profession right to health capacities, and possibly require countries to develop and implement strategies to improve health accountability.

- Ensuring transparency and stewardship: The FCGH would commit countries to transparency in health budgets and policies, transparent and competitive bidding processes, and include other measures to combat corruption and mismanagement.

- Establishing targets and benchmarks: Establish, or establish processes to develop, time bound targets and benchmarks to which states can be held accountable, including such areas as health outcomes, financing, coverage, and equity.

- Women: The FCGH would include measures to address gender-specific obstacles to women's health, within and beyond the health sector, such as by creating standards for women's participation in health-related planning and M&E and requiring comprehensive multi-sectoral women's health strategies.

- Marginalized populations: The FCGH would require states to develop strategies for removing obstacles to marginalized and vulnerable populations to full access to health services, including by developing targets and strategies to resolve national and local health equity gaps and creating enabling legal environments.

- Interaction with other legal regimes: The FCGH would ensure the priority of public health and the right to health in its interaction with other international legal

regimes (e.g., trade, agriculture), and may include measures related to these regimes (e.g., adaptation to climate change).

- Addressing underlying determinants of health: Along with encompassing fundamental human needs within universal health coverage, the FCGH would address other social determinants of health, such as by requiring comprehensive public health strategies, and possibly including measures related to broader social protection and policy requirements.

What elements of the FCGH are the most relevant in addressing the objectives of social movements around the right to health?

The FCGH should be at a level of precision that civil society and communities can effectively use it to hold governments accountable.

4. What are real or perceived potential weaknesses of the FCGH, and how can these be addressed?

- Potential weakness: International treaties, particularly current human rights treaties, are often ineffective and poorly implemented, in essence, just words on paper.
    - Response: We view the FCGH not in isolation, but as part of a process of helping nurture a strong social movement that helps develop and hold their governments accountable to the Convention. Engaged social movements are critical to the success of the FCGH. Further, a priority will be to incorporate innovative incentives and sanctions into the FCGH to encourage compliance, along with having publicity and reporting requirements to facilitate accountability. Meanwhile, we are seeing in the Framework Convention on Tobacco Control, which has created strong new norms and requirements, and is contributing to significant policy changes, that international conventions can lead to improved health.
- Potential weakness: The right to health already exists in multiple human rights treaties, and is detailed in General Comment 14 of the Committee on Economic, Social and Cultural Rights. Why do we need another treaty on the right to health?
    - Response: Current international right to health law contains gaps (e.g., its ability to reach transnational corporations) and imprecisely defined obligations. Specific standards that the FCGH would continue would be easily understood by the public and governments should lead to better implementation and greater accountability. The FCGH could make legally binding some of the elucidations on the right to health from the Committee on Economic, Social and Cultural Rights. Further, the FCGH would create incentives for states to meet their right to health obligations.
- Potential weakness: The FCGH is being driven by the global North.

- Response: While the idea of the FCGH may have first emerged from the global North, it is in the process of becoming owned, re-shaped, and advocated for by Southern civil society. JALI is committed to a Southern-led process. The two JALI consultations have been in South Africa and India, our consultations on developing the FCGH will focus on the South, and we envision Southern countries as having a leadership role. Still, recognizing the interconnected nature of North and South, the impact of often Northern-dominated processes, and the extreme internal health inequalities in Northern countries, the global North (including Northern civil society) also must be a part of the process of developing the FCGH.

- Potential weakness: The FCGH does not address the global economic structure, which is undermining the right to health.

    - Response: We agree with the need for broader reforms of the global economic and power structures, as well as the importance of fully addressing all social determinants of health. However, the potential to improve global health that the FCGH represents should not wait until larger reforms in the global economic arrangements can occur. Very significant progress on global health is still possible. Further, the FCGH could address economic policies and structures where they directly impact health, such as trade and intellectual property regimes and the lack of accountability of multinational corporations.

- Potential weakness: The FCGH does not address the global economic structure, which is undermining the right to health.

    - Response: We intend the FCGH to address, at the least, underlying determinants of health that are traditionally in the scope of work of public health authorities, such as food and clean water. It could require comprehensive public health plans that address broader social determinants of health, include mechanisms for inter-sector collaboration, and serve as a first step towards a system of universal social protection.

- Potential weakness: The FCGH and JALI inadequately focus on gender despite its enormous and many-dimensioned impact on health.

    - Response: We acknowledge our shortcomings, and are conscientious of doing a better job at incorporating gender issues, including the rights and needs of women at all stages of their lives, into our work on the FCGH, and into JALI's own processes. We agree with the need to address gender as a central social determinant of health, and welcome views on how to better incorporate gender into the FCGH and JALI's own functioning.

- Potential weakness: Focusing scare resources advocating for the FCGH will divert attention from more immediate (and local) health advocacy needs.

- Response: The FCGH has the potential to dramatically improve global health, address local health needs, and strengthen health campaigning as a powerful tool around which health-related campaigns can mobilize and come together. JALI and the process of developing an FCGH will place a premium on public education on the right to health, which should help people claim their rights.

- Potential weakness: The FCGH is unachievable, particularly in the present environment of tight budgets and budget cutting.

    - Response: Even short of a legally binding treaty, the movement towards an FCGH could lead to significant gains for health, including by influencing the post-MDG goal health agenda and serving as a powerful civil society advocacy tool. Moreover – with strong social movements behind it, from traditional health advocates to labor, environment, and other social justice movements– an FCGH is achievable. Countries might determine that an FCGH is worth supporting. Southern countries would benefit from provisions in areas such as trade, intellectual property, health worker migration, and international global health financing. Northern countries might view very positively commitments from Southern partners to increase their own domestic health spending – which, in time, will reduce the need for external support – while recognizing the many globally shared benefits of improved global health.

- Potential weakness: Framework conventions are too vague to have an impact.

    - Response: There is no single model for a framework convention. The Framework Convention on Tobacco Control includes considerable precision (e.g., requiring that health warnings cover at least 30% of tobacco product packages, while stating that they should cover at least 50% of the packages).

- Potential weakness: The United States, the largest actor in global health, would never sign and ratify an FCGH, thus undermining the treaty's value.

    - Response: It will be a challenge to get the United States to sign and ratify the FCGH, yet it is possible. As the largest provider of international health assistance is absolute terms, the United States might see benefits in a treaty that could lead to increased health spending domestically and from other wealthy nations. And because the United States does take seriously its international legal obligations, it could appreciate the clarity the FCGH builds into right to health obligations. If the United States does not adopt an FCGH, it could well adhere to many its norms. Even without U.S. support, the FCGH could still have far-reaching impact on global health.

- Potential weakness: The focus on an international convention seems misplaced when so much of what is needed – greater health funding, better governance, more accountability – is required at national level.

- Response: Many health issues require global cooperation to solve (e.g., health worker migration, the impact of trade on health). Many countries will also require international assistance to supplement domestic funds. Further the FCGH is envisioned to address and enhance accountability around national health actions, including funding and governance.

- In many countries, an FCGH would not be self-executing, meaning that unless countries enact separate legislation to implement the FCGH, courts will not enforce the FCGH.

    - Response: In many countries, ratification of the FCGH will make the treaty part of the law of the land and directly enforceable in the domestic courts. In some countries, national legislatures would need to to pass implementing legislation to "domesticate" the treaty before the treaty becomes enforceable through national courts. Whether or not countries domesticate the FCGH, social movements are likely to be necessary to pressure governments to effectively implement the treaty, which would include implementing legislation where required. Even where the FCGH is not self-executing, it would be legally binding for countries that ratify it, and national social movements and the treaty regime's compliance mechanisms would still encourage compliance. In addition, the FCGH could include provisions that encourage or require national measures that foster justiciability of the right to health.

- Potential weakness: A global health treaty opens the risk that countries hostile to women's rights will seek to use the FCGH to limit these rights.

    - Response: We are cognizant of these risks, and will do all within our power to safeguard against them and ensure that the treaty strengthens, rather than undermines the rights of women. We would not support a treaty that undermines women's rights, and will work closely with women's organizations and advocates.

5. How do we ensure an inclusive, participatory, people-driven process in building the FCGH?

Involving those whose health is at stake in building the FCGH is more than a technical issue. It is both the ultimate goal and of highest strategic importance. Improving health requires a social movement: Activism is a social determinant of health. Civil society and communities will have to be the driving force behind an FCGH, linking social movements across issues, such as women's rights, climate justice, labor, and tax justice.

JALI will ensure an inclusive, participatory, people-driven process by: organizing online and regional and international consultations, involving civil society groups and other stakeholders in a bottom-up research process, developing online and in-person forums for civil society to discuss and debate proposed answers, and initiating a process of surveys and interviews to ensure broad input.

Further, JALI will progressively widen its network and means of engagement, seek input about obstacles about the right to health in different settings, and strive to balance political exigencies with the need for a process that does not undercut people's voices.

How do we engage with and mobilize support of multiple stakeholders, particularly most affected communities, in realizing an FCGH?

JALI will mobilize support by disseminating the idea of the FCGH on-line tools, media work, and presentations; supporting efforts to educate people on the right to health; ensuring that the FCGH meets the civil society and community demands; support where capacity allows other right to health-related initiatives, campaigns, and social movements, including by facilitating connections among such campaigns and movements, and; developing manageable milestones on the way to the FCGH, such as a non-legally binding agreement.

We will directly engage country partners and civil society-based networks to increase their understanding of and to incorporate their perspectives into the FCGH, and encourage them to take leading roles in promoting the FCGH. And we will collaborate with partners to find like-minded states to promote an FCGH in inter-state forums, while seeking forums for developing an FCGH that involve civil society and communities in the treaty-negotiating process itself. We will also advocate in the FCGH itself significant roles for civil society and communities within any structures or processes that the FCGH establishes.