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Global health rights: employing human rights to develop and implement the Framework Convention on Global Health

Lance Gable and Benjamin Mason Meier

Abstract

The Framework Convention on Global Health (FCGH) represents an important idea for addressing the expanding array of governance challenges in global health. Proponents of the FCGH suggest that it could further the right to health through its incorporation of rights into national laws and policies, using litigation and community empowerment to advance rights claims and prominently establish the right to health as central to global health governance. Building on efforts to expand development and influence of the right to health through the implementation of the FCGH, in this article we find that human rights correspondingly holds promise in justifying the FCGH. By employing human rights as a means to develop and implement the FCGH, the existing and evolving frameworks of human rights can complement efforts to reform global health governance, with the FCGH and human rights serving as mutually reinforcing bases of norms and accountability in global health.

Introduction

The work of the Joint Action and Learning Initiative on National and Global Responsibilities for Health (JALI) to advocate for a Framework Convention on Global Health (FCGH) represents an important effort to overcome an expanding array of governance challenges in global health. By addressing systems-based approaches to public health, the FCGH has mobilized diverse, multisectoral actors from around the world to develop and implement a framework for justice in global health policy in the years to come.[1,2] Explicitly framed "as a mechanism to channel more constructive and cooperative action to address...the health of the world's population," this initiative presents a unique opportunity to advance a rights-based approach to health, linking global health and human rights to realize the highest attainable standard of health for all.[3]

Codified in the WHO Constitution, memorialized in the Declaration of Alma-Ata, and framing contemporary global health governance, health-related human rights have flourished in recent decades with the expansion of treaty-based human rights obligations.[4] The human right to health in particular has seen extensive development in international law and implementation through domestic law as its normative content has matured and its implementation mechanisms have proliferated.[5] Yet as recognized by proponents of the FCGH, while significant gains for global health have accrued in some contexts through human rights law, broad recognition and enforcement of health-related rights and corresponding goals of global health justice have not been realized. At the intersection of global health policy and human rights law, the FCGH presents a path to advance public health systems as a means to realize human rights.

Looking to global health as a global moral imperative, the FCGH seeks to advance global health where existing systems—including human rights systems—have not made adequate progress in achieving good health outcomes, non-discrimination, and equality. In the conceptualization of the FCGH, its proponents argue:

> We believe the right to the highest attainable standard of physical and mental health can be a force to enable even the world's poorest people to benefit from the immense health improvements that we know to be possible—interventions that are proven and affordable.[6]

Realizing this conceptualization, a more thorough clarification of the role of human rights would prove beneficial in justifying the development and implementation of the FCGH. Whereas proponents believe that an FCGH could support human rights, we find correspondingly that human rights can support the FCGH. Despite the voluminous scholarship and discussion on the FCGH that has emerged in recent years, the link between FCGH and human rights remains tenuous and underdeveloped; elucidating this link would improve the development and implementation of the FCGH. Recognizing the mutually reinforcing complementarity of these approaches, we begin to clarify the human rights underlying the FCGH here, examining how human rights systems can provide this global health governance effort with the norms and mechanisms necessary to drive seminal advancements in both global health and human rights.

This article discusses the role of human rights as a basis to develop and implement the FCGH. Part I details the international human rights framework, outlining the foundations of human rights under international law and chronicling the evolution of human rights to realize global health. As a basis for global health justice, Part II highlights integral aspects of the proposed FCGH and the normative bases for its efforts to improve global health through an expansion of capacity, coordination, and equality. Presenting a path to employ human rights to justify the FCGH, Part III presents a detailed analysis of the human rights underpinnings of the FCGH and proposes several ways in which human rights can bolster the global health initiatives targeted by the FCGH.

Human rights in global health

With human rights offering a powerful policy discourse to advance justice in health, the health and human rights movement has sought to advance human rights under international law as a tool for public health. Construing health disparities as "rights violations" has offered international standards by which to frame government responsibilities and evaluate conduct under law, shifting the analysis from charitable responsibility to legal obligation.[7] Through the development and implementation of international law in recent decades, human rights has been elevated from principle to practice, clarifying norms through legal obligations and facilitating accountability for rights-based policy reforms.

The development of international human rights law: providing a normative basis for global governance

First elucidated by the 1946 Constitution of the World Health Organization, states would declare that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being," defining governmental obligations for specific health and social measures to realize for each individual "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."[8] Building from this expansive WHO standard, through the international legal institutions developed since the end of the Second World War and the founding of the United Nations (UN), international human rights law has sought to identify individual rights-holders and their entitlements and corresponding duty-bearers and their obligations to realize these entitlements.[9]

Human rights now impact health through a number of international treaties, regional instruments, and national laws and policies. Codified seminally in the 1966 International Covenant on Economic, Social and Cultural Rights—with states providing for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"—the human right to health has evolved in subsequent international instruments to offer strong normative guidance for health policy.[10] UN agencies, development organizations, and advocacy groups have increasingly invoked rights-based approaches to health as these approaches have gained legitimacy through the development of these international instruments.[11] The steady progression of internation-

al human rights law has come to solidify the right to health and health-related rights to various underlying and interdependent determinants of health.[12]

Where scholars and practitioners long debated the universal application of social and economic rights—with these debates grounded largely in the international relations of the Cold War—the 1990s brought with it a global consensus that all human rights are indivisible, interdependent, and interrelated.[13] The UN Committee on Economic, Social and Cultural Rights has documented this new consensus in a General Comment, drafted in 2000 to clarify the norms of these interconnected human rights and providing an authoritative interpretation of state obligations pursuant to the right to health.[14] According to the committee's articulation of these obligations in General Comment 14, the right to health depends on a wide variety of interconnected health-related rights—beginning in preventive and curative health care and expansively encompassing underlying rights to food, housing, work, education, human dignity, life, non-discrimination, equality, prohibitions against torture, privacy, access to information, and the freedoms of association, assembly, and movement.[15] In realizing collective public health obligations under the individual right to health, General Comment 14 articulates that both health care and underlying determinants of health should be assessed based upon their availability, accessibility, acceptability, and quality.[16]

Since the completion of General Comment 14 more than a dozen years ago, the application of human rights to global health has continued to evolve. The normative framework for global justice through interconnected determinants of health has since been extended by the UN Special Rapporteurs on the Right to Highest Attainable Standard of Health, the WHO Commission on Social Determinants of Health, and the UN General Assembly—with multisectoral cooperation moving the international system toward a rights-based "Health in All Policies" approach to improve the lives of those in greatest need.[17] In translating human rights into public policy and giving meaning to international treaty obligations, policymakers have sought to move from development of health-related rights under international law to accountability for the implementation of these normative standards.

Implementation of human rights in public policy: Providing a basis for accountability in global governance

Implementing these evolving norms for the public's health, states commit to respect, protect, and fulfill all health-related rights in their constitutions and laws, with human rights now understood to offer a framework for health policy. As states have moved to "constitutionalize" health rights under national law, this "rights-based approach" to health is explicitly shaped by human rights norms—legitimizing legal structures, framing policy processes, and evaluating health outcomes.[18] Although states long remained unaccountable for realizing health-related human rights, as there was no recourse for rights violations, the mid-1990s brought with it a movement toward legal enforcement of rights implementation. While critics continue to highlight weaknesses of contemporary human rights enforcement strategies—the discretion afforded to state resources under the principle of progressive realization, the complications of monitoring compliance with health-related rights, and the glacial pace at which enforcement mechanisms proceed—this enforcement movement has helped to make human rights a reality. Giving meaning to states' longstanding commitment to realize the highest attainable standard of health for all, such accountability mechanisms have empowered individuals to seek legal redress for health violations rather than serving as passive recipients of charitable donations.[19] Such a state-centric conception of human rights has, however, left an accountability gap at the national level for non-state actors, which can only be held accountable if states codify human rights obligations, and at the global level for international institutions, which are not party to human rights treaties or directly required to follow human rights obligations.[20]

To assess the implementation of human rights for global health, accountability mechanisms have been structured to commit national governments to health-related rights, maximize available resources through health policy, and optimize programmatic results in health outcomes. These mechanisms provide a means to benchmark government responsibilities, independently evaluate the progressive realization of rights, and ensure central principles such as equality and non-discrimination. With human rights influencing a wide range of national implementation efforts for underlying determinants of health, a

global accountability regime has evolved to encompass international monitoring bodies, human rights indicators, rights-based litigation, and political advocacy:[21]

International monitoring bodies – In addition to clarifying human rights norms (through general comments and recommendations), each human rights treaty body holds international legal authority for monitoring state implementation of its respective treaty obligations.[22] Facilitating accountability for rights-based policy implementation, these international monitoring bodies review state periodic reports on the human rights within their institutional purview, engage in formal sessions of "constructive dialogue" with state representatives, and issue concluding observations for public discourse and state response.[23] With these accountability efforts seeing prolific growth, monitoring bodies have expanded oversight by allowing nongovernmental organizations to submit independent "shadow reports" and allowing committee members to conduct country inquiries, providing alternative information on state progress for their progressive realization of rights.[24] Given the interrelated health-related rights implicated by interconnected determinants of health, such overlapping treaty-specific assessments have been made by, among other monitoring bodies: the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of Discrimination Against Women, and the aforementioned Committee on Economic, Social and Cultural Rights, with the international monitoring system currently seeking greater harmonization and efficiency through state reporting to a single, unified treaty monitoring body and a Universal Periodic Review (UPR) system.[25]

Human rights indicators – Framing policy evaluation through a normative lens, the global health community has embraced human rights indicators as part of a larger drive for scientific measurement and assessment of the realization of health-related human rights. While cautious of the moral reductionism inherent in describing individual human experiences through standardized quantitative and qualitative measures (such as maternal mortality, life expectancy, or water quality), this movement toward universal indicators has provided widely accepted tools to hold national governments accountable for realizing the minimum core content and progressive realization of rights.[26] Various international institutions have engaged social scientific inquiry for human rights accountability and sought to create methodologically rigorous bases to assess national policy in ways that would be objective in application, independent of country-specific benchmarks, and comparable across countries of similar resources and within countries over time.[27] Where detailed cross-national public health data already exist, rights-based practitioners have sought to utilize existing epidemiological, social, and development data but to interpret these data through the attributes of human rights norms and designate specific data as indicators reflective of rights realization.[28] With public health indicators conceptualized pursuant to the normative standards of the human rights to health, education, and water and sanitation, such indicators are being employed as a means to evaluate state obligations for global health.[29]

Rights-based litigation – Enforcing human rights obligations through individual causes of action, litigation has empowered individuals to raise human rights claims for health and has provided rights-based accountability in national and regional courts and quasi-judicial bodies.[30] By allowing individuals to seek impartial adjudication from a formal institution with remediation authority, litigation provides justice beyond the individual claimant, with tribunals expansively exercising their authorities to apply international human rights to individual health claims and consequently prescribe national health policies in response to public health threats.[31] As this jurisprudence flourishes for disease prevention and health promotion, these cases—spurred on by the rights-based response to HIV/AIDS—have increased dramatically throughout the world and especially in middle- and low-income countries. Driven by the South African Supreme Court's decision on access to medicines in the seminal 2002 case *Minister of Health v. Treatment Action Campaign*, which held the national government responsible for reducing the transmission of HIV from mother to child, this civil society-led litigation effort set a precedent for a wide range of health claims on all manner of powerful states, organizations, and corporations with the ability to support or impede access to medicines.[32] Extended to international forums, such causes of action are likely to accelerate given the creation of supranational individual complaint mechanisms under treaty monitoring bodies.[33] Indeed, tribunals have already enforced violations of health-related human rights claims by the U.N. Human Rights Committee[34] and the Committee on the Elimination of All Forms of Discrimination Against Women.[35]

Political advocacy – Nongovernmental organizations often employ strategies of political advocacy to pursue accountability for upholding human rights obligations, commonly employing informal mechanisms of "naming and shaming" to advance norm-driven advocacy, shape public opinion on national policies, and press governments to comply with rights-based obligations for health.[36] As a means to investigate, expose, and critique governments in the eyes of their public constituencies (whether domestic or global), international law endows this advocacy with normative authority and rights-based specificity to influence a state's internal politics in the implementation of rights. Through public education, coalition building, campaigning, and lobbying, nongovernmental organizations have created guides by which to "shame" governments into realizing health rights in national policy and to engage international donors and financial institutions to provide resources to support rights-based efforts.[37] The ability of organizations to shed light on human rights violations as a complement to formal avenues of legal accountability has led governments to acknowledge and address underlying determinants of health out of a sense of legal obligation.[38] With organizations dramatically increasing the use of naming and shaming as a means to health policy reform (abetted by international news organizations, social media sources, and human right ombudspersons), such advocacy has proven most effective in promoting rights-based reforms within democratic states that permit public opposition, ratify human rights treaties, and recognize rights violations.[39]

Given this development of health-related human rights and accountability for rights-based policy implementation, such human rights can provide a basis for developing and implementing the FCGH.

Modernizing and improving global health governance: the Framework Convention on Global Health

First proposed in 2007 as an international health treaty to coordinate global health governance, the FCGH was sought as a legal means to address the immense challenges of global health.[40] Shifting global health governance from the specific conditions that evoke the most public sympathy or sustained advocacy, the FCGH would establish priorities for addressing "basic health needs" and improving the public's health.[41] Such a shift would create a bottom up strategy based on consistent norms and modalities.[42] Through international treaty law, the development of the FCGH would create mechanisms to support health systems through a strong infrastructure at the national and local levels, coordinate the efforts and combine the strengths of governmental and nongovernmental actors, and develop financial support to solidify public health capacity. Evaluating progress in its implementation, with flexibility in local and regional implementation, the FCGH would advance transparency and accountability in global health monitoring and evaluation.[43]

In developing the normative framework for this grand challenge in global health, the initial conception of the FCGH declared human rights discourse to be a relevant but insufficient paradigm to improve health. Finding the right to health to be inadequate to addressing extremely poor health in the developing world, proponents noted human rights' limited applicability to international obligations, detrimental reliance on gradual steps through "progressive realization," and inadequate mechanisms for implementation and enforcement.[44] Although nominally grounded in the same core values of equality and nondiscrimination that animate the right to health, the FCGH did not adopt a rights-based approach to health, framing its call to action instead on social justice norms necessary to meet basic survival needs.[45]

As the proposal for the FCGH evolved through the establishment of JALI and the incorporation of participatory insights gained from global and regional consultations, the normative focus of the FCGH has gravitated toward the human rights paradigm.[46] The incorporation of human rights has given the FCGH a more expansive scope, reflecting the normative goals of an evolving health and human rights movement, seeking a normative framework for mutual responsibility in global health governance, and targeting the reduction of health disparities to improve health for all.[47] To specify the relationships between rights-holders and duty-bearers under an FCGH, proponents have sought to address four questions to clarify national and international responsibilities in achieving health:

> 1. What are the essential services and goods guaranteed to every human being under the human right to health?
> 2. What is the responsibility that all states have for the health of their own

populations?
3. What is the responsibility of all countries to ensure the health of the world's population?
4. What kind of global health governance is needed to ensure that all states live up to their mutual responsibilities?[48]

JALI addresses these questions by applying General Comment 14's delineation of states' core obligations as a starting point to develop the FCGH. Under this approach, these core obligations will be used to redefine health systems to respond to fundamental human needs, focusing health systems on public health services, well-functioning infrastructures, and socioeconomic conditions.[49] With a particular demographic focus on the health needs of low income countries and fundamental determinants of health, the FCGH additionally seeks to operationalize human rights norms to address equity and non-discrimination, with special attention being paid to reducing health disparities and raising up the least advantaged.[50] Implementation mechanisms will be crucial to assuring this focus, and proponents seek to create systems of accountability through consistent data gathering methodologies and benchmarking to ensure trustworthy, transparent, deliberative, and accountable governance, essential elements of states' human rights obligations.[51] Further, the JALI initiative will make use of a bottom-up, participatory process—described as "an inclusive and consultative process that amplifies the voices of the people who suffer most from national and global health inequities" —involving international organizations, national governments, and civil society consultations.[52,53] Through initial consultations that resulted in a 2012 Manifesto for Health Justice, which "highlights the historic opportunity for advancing the right to health [and] lays out key principles that a FCGH should incorporate," JALI has finalized a process by which to create the FCGH as a vehicle to advance the right to health.[54] Such coordination, however, requires a strong global leader, a space which the FCGH envisions for WHO, with the FCGH enhancing WHO's influence by establishing an intersectoral consortium on global health (including UN agencies and other global institutions that impact health, such as the World Trade Organization, International Monetary Fund, World Bank, International Labor Organization, UN Office on Drugs and Crime, and the UN Environmental Program) to ensure a sustained, high-level focus on a rights-based approach to health within multiple regimes.[55] With endorsements from the UN Secretary General and the UN Special Rapporteur on the Right to Health, support for the FCGH is growing among international institutions and nongovernmental organizations.[56]

As a basis for justice in global health, both JALI and the FCGH claim roots in human rights, especially the ICESCR's codification of the right to health, and seek to join multiple other human rights treaties that promote health-related rights. This incorporation of human rights, however, raises additional questions: What does the FCGH add to human rights discourse? What additional power does it provide to the claim and enforcement of human rights? JALI claims that an FCGH would articulate state obligations more clearly, thus strengthening their legal enforceability.[57] Other proponents praise the FCGH for its potential to "accelerate progress towards fulfilling the right to health" through the construction of four essential pillars: 1) national legal reform incorporating right to health obligations, using a whole-of-government approach, 2) right to health litigation, 3) civil society and community engagement and capacity building, and 4) stronger global governance for health.[58] This four-part strategy would be supported by the FCGH's ability to conduct impact assessments and monitor and enforce the right to health. Impact assessments would be used by the FCGH to ensure that policies in and beyond the health sector incorporate the right to health. To enforce the right to health, the FCGH would require state parties to contribute to a database on constitutions that embrace the right to health, with proponents arguing that such a database would aid the legal profession in adjudicating health-related rights. Lastly, an FCGH could monitor the right to health through a number of human rights indicators, assisting countries in developing right to health-based strategies.[59]

As a framework convention, the FCGH will follow a process of incremental development, with the States parties negotiating and agreeing upon an initial set of broad principles followed by specific protocols to be developed in subsequent stages.[60] This process allows for flexibility, deferring contentious issues to be dealt with in later protocols and thereby avoiding political bottlenecks. Additionally, by serving as a forum to "develop a shared humanitarian instinct," a framework convention protocol can "influence public opinion in favor of decisive action."[61]

Although the FCGH proposals recognize human rights norms of non-discrimination, equity, participation, and accountability in relation to the right to health, the proposals do not further elucidate how human rights can be integrated into JALI's efforts to facilitate the FCGH's development and implementation. The lack of specific human rights language within the FCGH may limit its applicability, as "using rights to advance…health…requires more than a reference to positive norms."[62] A truly rights-based understanding of health acknowledges that the right to health is interdependent and indivisible from the enjoyment of all health-related civil, cultural, economic, political, and social rights.[63] However, these rights are not mentioned in the normative language of the FCGH. Thus, human rights' limited incorporation into the FCGH does not yet provide the grand reform to global health that its proponents seek. While it is clear how the FCGH would further human rights, it is not yet clear how human rights could further the FCGH. Only through clarification on the specific role of human rights in the FCGH can its development and implementation be justified.

Human rights clarity and specificity could justify the development and implementation of the FCGH

The contemporaneous developments seen in human rights systems, in advancing the normative content and implementation mechanisms of health-related rights, are reflected in many ways through JALI's efforts to articulate a model for the FCGH. Even though the human rights and FCGH frameworks differ in concept, focus, and structure, they exhibit a substantial overlap in the normative content and accountability mechanisms underlying their development and implementation. Indeed, proponents of the FCGH have frequently noted their complementarity with rights-based approaches to health, articulating that human rights presents "a powerful platform upon which to base a new framework on shared global responsibility for health."[64]

Yet previous analyses of the relationship and ongoing interaction between human rights and the FCGH have focused primarily on how "an FCGH could further clarify ambiguities and respond to limitations" of human rights, particularly the right to health, with proponents looking to human rights largely as a beneficiary of the FCGH's norm-setting and accountability-generating features.[65] Rather than looking to established human rights systems as a contributor to the proposed FCGH, Friedman and Gostin conclude that the FCGH could further the right to health through its incorporation of rights into national laws and policies, using litigation and community empowerment to advance rights claims and "bringing the right to health to the center of global governance for health."[66] These are indeed laudable goals. Nevertheless, we find that human rights correspondingly hold promise in justifying the FCGH. By employing human rights as a means to develop and implement the FCGH, the existing and evolving frameworks of human rights can complement efforts to reform global health governance, with the FCGH and human rights serving as mutually reinforcing bases of norms and accountability in global health.

Development of the FCGH: clarifying norms through the right to health

The continuously evolving normative content of the right to health builds on the expanding framework of international human rights law and the compounding support of law, policy, and precedent, including, among other sources, General Comment 14, the reports of the Special Rapporteurs on the right to health, and the jurisprudence of courts. As the FCGH continues to develop, this normative wellspring can frame the development of norms for global health governance. With the renewed centrality of the right to health as a basis for the FCGH, we identify four areas where right to health norms can support public health through the FCGH: essential health needs and underlying determinants, interdependence of rights, focus on equality in health policy, and promulgation of international and non-state normative obligations.

Human rights paradigms have evolved under international law to address the collective public health systems integral to realizing essential health needs and underlying determinants of health. Through the UN's human rights mechanisms, human rights norms have been clarified to solidify the public health underpinnings of the right to health.[67] As noted in General Comment 14:

> The right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to

> health-related education and information, including on sexual and reproductive health.[68]

In expounding on the obligations necessary to fulfill these constituent rights, General Comment 14 speaks not only to the individual as a bearer of rights, but also specifically to a state responsibility to assist "communities," "groups," and "populations." Moreover, in addressing the subject of public health directly, even if not explicitly naming it a right, General Comment 14 observes that:

> States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.[69]

Linking the individual right to health and disease prevention and health promotion, the twin hallmarks of public health practice, these formulations of international law indicate an expansiveness of international law to include far more specific public health mandates on states than just individual health care, looking to an expansive public health system to realize the civil, cultural, economic, political, and social rights that underlie health.[70] Thus, in emphasizing the goal of satisfying "basic survival needs," the FCGH echoes the normative framework of the right to health. Basic survival needs under the FCGH include "sanitation and sewage, pest control, clean air, and water, tobacco reduction, diet and nutrition, essential medicines and, vaccines, and well-functioning health systems."[71] These underlying determinants of good health are in fact strikingly similar to the core obligations of the right to health as articulated by General Comment 14. The ongoing efforts of human rights actors continue to define and refine the right to health, whether through the decisions of regional and national human rights tribunals or the invaluable ongoing efforts of the Special Rapporteur on the Right to Health to link the right to health with areas as diverse as HIV, neglected diseases, mental health, access to medicines, poverty, clean water and sanitation, maternal mortality, reproductive and sexual health, trade, injury prevention, and health systems, among others.[72] Taken together, these sources of norms as well as their substantive content can bolster complementary efforts toward the development of norms under the FCGH.

While global health policy has long pursued a reductionist view of health, engaging in vertical interventions for discrete health harms, the evolution of human rights has long sought to emphasize the interdependence of health-related rights. As a basis for this human rights consensus, the 1993 Vienna Declaration and Programme of Action explicitly recognized the pervasive interconnection of human rights, looking to all rights as "universal, indivisible and interdependent and interrelated."[73] Importantly, the full range of rights—civil, cultural, economic, political, and social—as well as their interconnection, must be considered in assessing the impact of rights violations on health. The implications of interlinked human rights have been widely explored in relation to health through demonstrations of the inextricable linkage of health and human rights generally and in relation to specific areas such as mental health or reproductive health.[74,75,76] With the FCGH looking to intersectoral interventions to address underlying determinants of health, this focus on health in all policies aligns with an international legal focus on the interdependence and interconnection of rights. The arguments about the interdependence of rights and the underlying determinants of health are linked by a common conception of the multiple factors that contribute in an interconnected way to public health. The FCGH may be able to draw from the rich literature on rights interdependence to situate its own normative connections for multifactoral global health governance.

As a basis for equity in the FCGH, norms of equality, non-discrimination, and equity pervade discourse surrounding the right to health. The right to health has long focused on the most marginalized, with General Comment 14 calling for the elimination of discrimination against vulnerable populations in access to health services, addressing underlying determinants of health, and taking affirmative steps to enact public health policies and systems that foster equal opportunities for good health.[77] While global health policy has focused on national health averages, such a focus on averages obscures the distribution of progress across a nation and incentivizes health interventions for easy-to-reach populations. Where the FCGH seeks to move away from a such a focus on national averages and aggregated assessments of health status, human rights provides a basis to consider the health of the most marginalized and ensure

that equality is a focus of health policy. Accordingly, General Comment 14 calls for the disaggregation of data to assess issues of equality in rights realization, with the Special Rapporteur on the right to health extending this by calling for disaggregated human rights indicators to "reveal whether or not some disadvantaged individuals and communities are suffering from de facto discrimination."[78,79]

Framing normative obligations on international and non-state actors, proponents of the FCGH additionally seek to overcome what they see as a perceived weakness of human rights systems—their focus on the state as the principal duty bearer under international law and the responsible provider of health services.[80] Given a weakening of state influence on health in a globalizing world and the limitations on national resources for public health, proponents look to an FCGH as a means of clarifying international and non-state obligations. Yet human rights instruments have proclaimed obligations for international "assistance and cooperation" since at least the birth of the UN system and have sought to address international obligations and accommodate non-state actors.[81] Under such frameworks for international obligations, the right to health has been recognized to create a duty for developed countries to not harm the right to health in developing countries by depleting the skilled health worker sector through emigration.[82] This "duty to protect" could conceivably be extended to apply in other settings where the actions of or incentives created by developed countries—including unbalanced trade agreements and unfair financial conditions on development assistance—undermine the right to health in developing countries.[83] The FCGH aims to establish binding rules and responsibilities for non-state actors with respect to health.[84] Recognizing that the applicability of human rights instruments on non-state actors is limited, the FCGH could nevertheless draw on human rights precedents to formulate and support these obligations. Governments may also employ political persuasion or economic means when seeking to pressure or incentivize other governments to comply with human rights norms. Using intergovernmental political influence for human rights has important potential implications for global health and may address the concern that governments will only safeguard their own citizen's rights and neglect the rights and health interests of people living in other states. Indeed, political and economic power has been used far too often by governments and transnational corporations to pursue ends detrimental to global health.[85] Political advocacy from other states or nongovernmental organizations can marshal normative arguments from human rights to influence behavior despite this seeming structural limitation on human rights applicability.

The normative frameworks of health-related human rights provide a strong basis for developing an FCGH. Proponents of the FCGH acknowledge that "what makes the right to health a compelling framework for holding states accountable is that it has wide international acceptance as binding law."[86] Just as the FCGH could facilitate a focus on human rights, so too could the FCGH draw on rights to support its normative evolution and act as a conduit for applying these norms to entities traditionally outside the jurisdiction of human rights treaties or resistant to following human rights norms because of relative political, economic, or military strength.[87] Employing this binding law as justification for the development of the FCGH would allow this effort to move forward with strong and evolving normative support in international law.

Implementation—accountability mechanisms

With human rights implementation engaging a wide range of accountability mechanisms for the progression of global health justice, human rights systems can facilitate the realization of both state and non-state obligations through mechanisms that would be central to the implementation of the proposed FCGH, such as the intersectoral consortium on global health, which, under the leadership of the WHO, would establish health-in-all policies, ensuring the fulfillment of health related rights. With regard to non-state actors, the FCGH remains silent, save an objective of articulating state accountability for actions of transnational corporations.[88] Whereas proponents of the FCGH have criticized human rights for bearing "broad aspirations, failing to structure obligations with sufficient detail to render them susceptible to rigorous monitoring and enforcement," the normative clarity addressed above has provided the detailed obligations necessary to support FCGH implementation through human rights accountability mechanisms.[89] In realizing international human rights standards, human rights practitioners have looked to treaty monitoring bodies, human rights indicators, rights-based litigation, and political advocacy in leading to tangible reforms in national health policy. To the extent that these mechanisms flourish in the

FCGH, human rights can assure implementation of the FCGH, applying human rights accountability to facilitate global health justice.

International monitoring bodies – By signing human rights treaties, state obligations to respect, protect, and fulfill health-related rights are subject to periodic review by international monitoring bodies, which seek to monitor the implementation of core international human rights treaties and ensure that human rights are protected both in law and in practice.[90] Although proponents of the FCGH are concerned that these oversight bodies "possess[] few enforcement powers beyond reviewing state reports on treaty implementation and making recommendations," these powers of periodic review have proven instrumental to the implementation of rights and will be supported by complementary human rights systems in the years to come.[91,92]Assessing state reports on the rights within their respective purview, these overlapping treaty-monitoring bodies provide international accountability for national policy, working with governments to review state reports, conduct constructive dialogue, and issue concluding observations on health-related rights.[93] As a mechanism to assure implementation of the FCGH, treaty bodies could look to the FCGH as a clarification of obligations pursuant to health-related rights and a basis to highlight state reports and individual complaints where those obligations have not been met. With the addition of the Universal Periodic Review (UPR) process, providing periodic review of the human rights records of all UN member states, the UN has created multiple, complementary systems for the independent evaluation of human rights realization. Notwithstanding the lack of sanctions for states that fail to comply with international monitoring bodies, these accountability mechanisms provide a means for independent research, objective analysis, and greater transparency in the assessment of national government policy and public health data in furtherance of the FCGH.[94]

Human rights indicators – Whereas global health policy has come to focus on goals as a means to conceptualize progress—with goals politically attractive for their clarity, measurability, and time-bound nature, allowing political leaders to receive recognition for advancements—these goals have proven under-ambitious. By setting the full realization of human rights as the ultimate objective, human rights indicators of structure, process, and outcome can be employed to set national benchmarks and interim targets (based on national plans) in assessing the implementation of human rights norms and giving meaning to the minimum core content of rights and principle of progressive realization.[95] Where the FCGH considers the national codification of the right to health to be central to implementation, accountability for such reforms, whether under national constitutions or health legislation, can be assessed through structural indicators for implementing health-related rights. Whereas FCGH proponents claim that it would set "clearer standards for the progressive realization and maximum of available resource obligations," it is unclear how such rights-based standards would be assessed in the absence of human rights indicators, with process and outcome indicators already paired with public health data reflective of human rights norms.[96] Moving beyond existing indicators, human rights can influence the development of health indicators as part of the Post-2015 Agenda, framing the collection of data that has not been collected thus far, disaggregating those data to assess equity in the realization of rights, and providing a human rights basis to examine implementation of the FCGH.[97]

Rights-based litigation – National litigation in accordance with human rights offers the possibility of concrete enforcement mechanisms for health, providing causes of action for the public's health and empowering individuals to raise human rights claims for disease prevention and health promotion.[98] An "integrated approach" to rights-based freedoms and entitlements has led to the adjudication of health issues pursuant to an expanding range of health-related human rights claims—from freedom from discrimination in the health sector to fulfillment of the right to water and sanitation.[99] Incorporating determinants of health, litigation for health-related human rights have allowed for the enforcement of rights even in their progressive realization.[100] Often in contentious dialectic with the political branches of government, judgments have advanced the interests of resurgent social movements against recalcitrant government actors, creating accountability for health-related rights that would have application in the implementation of policy reforms in accordance with the FCGH. Yet with a clear trend toward more (and more progressive) cases, there is increasing criticism that this rights-based litigation may distort national health governance—subverting population-level allocations and denying justice to the most marginalized.[101] Given scarce empirical research on the scope, content, and effect of legal claims pursuant to

these human rights standards, there arises an imperative for interdisciplinary analysis—to survey these rights-based claims, compare divergent legal strategies conducive to the realization of human rights, and assess the effects of this litigation on public health outcomes before incorporating litigation as a principle accountability strategy under the FCGH.[102]

Political advocacy – Human rights would improve political advocacy through the FCGH, empowering civil society through a rights-based approach to community participation. There is increasing evidence that human rights can facilitate health participation and that rights-based participation can lead to improved public health.[103] As seen in advocate efforts to spotlight the public health neglect of "AIDS orphans," persons with mental disabilities, injection drug users, and tobacco control, the ability of organizations to shed light on human rights violations has led governments to acknowledge and address underlying determinants of health.[104] Whereas the FCGH envisions a rights-based approach to health participation, the implementation of the FCGH must grapple with the strategies necessary to translate rights-based obligations for health participation into public policy reform.[105] Apart from naming and shaming—which is most effective when focusing on specific obligations of states—human rights organizations can employ the FCGH to build systems that support and fulfill rights, advocate for resources, and employ shadow reporting, revealing issues left out or ignored in state monitoring, and recommending actions to stem future rights violations.[106] With civil society movements increasingly turning to human rights as a basis for political advocacy, such human rights advocacy could be successful in leading to the desired policy goals of the FCGH, with this rights-based political advocacy serving as an effective accountability mechanism in the implementation of the FCGH.

The implementation of the FCGH will necessitate the accountability mechanisms that have long existed under the human rights system. The FCGH should consider structuring the intersectoral consortium on global health to further enhance the accountability mechanisms described above and provide an institutional support mechanism to ensure sustainability of state-level initiatives. To the extent that these systems meet their promise and can be successfully leveraged by the FCGH, it is far more likely that the proponents' rights-based vision of justice can become a reality.

Conclusion

A rights-based approach to developing and implementing the FCGH

Seeking a normative basis to frame global health governance, the FCGH draws on a rich history of initiatives that have sought to incorporate human rights as a framework for global health policy. As with these prior efforts, the relative presence or absence of human rights will be reflected in the development and implementation of the FCGH. Looking to human rights in the creation of the FCGH, advocates might harness human rights explicitly to clarify norms and derive accountability mechanisms. This involves moving beyond the mere mention of human rights and toward the holistic incorporation of human rights as a basis for the development and implementation of the FCGH. Both the tenets of the FCGH and the underlying structural and normative components of human rights systems can foster normative specificity and policy accountability for national governments to advance the public's health. The integration of these two paradigms can produce complementary systems that create multiple mechanisms for public health improvements and ensure that governments take the necessary steps to progressively realize the conditions necessary for the public's health. As human rights continue to evolve as a basis for global health, the FCGH presents a unique opportunity to link these institutions in facilitating the highest attainable standard of health for all.

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