Outline of the Framework Convention on Global Health (FCGH)

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The Framework Convention on Global Health (FCGH) Alliance has developed this initial overview to illustrate the possible contours and content of the proposed FCGH, which would be a global health treaty grounded in the right to health and aimed at achieving national and global health equity. Its raison d'être and core focus is to bring greater accountability to the right to health. The elements of FCGH described below are based on more than a decade of publications, consultations, and discussions around the FCGH, and aim to reflect the latest thinking on the FCGH.

This outline is not meant to establish what the articles or even parts would be, but rather illuminate the Framework Convention's potential content. Far broader and more inclusive discussion is needed. Rather, it is meant to illustrate the value of the FCGH, catalyze informed discussion, and offer a vision of how the FCGH could contribute to accountability to the right to health, with the immense contribution to people's health and well-being that would follow. This outline is meant to help launch a dialogue, not preclude one or purport to pre-determine the conclusion to the many issues that must be determined through broad, inclusive, and extensive participatory processes, with the perspectives and priorities of people most affected by health inequities particularly vital.

Why a Framework/Protocol Strategy?

A framework convention establishes a set of principles – which can both be broad and encompass precise standards and requirements – while leaving either particularly complex or controversial issues, or ones that emerge in the future, to separate protocols to the treaty. Protocols would need to be ratified separately from the FCGH itself.

This approach would enable the FCGH to proceed even without agreement on all issues within its ambit (i.e., those could become protocols), and without an unmanageable level of complexity. The framework/protocol strategy also establishes an expectation of continued dialogue of, and a process to address, these issues. Some issues might be readily foreseen, while others may respond to gaps in the FCGH that become apparent as the treaty is implemented, to emerging health needs, or to changing global health and development dynamics. Other treaties that have taken the framework/protocol include the Framework Convention on Tobacco Control and the UN Framework Convention on Climate Change. The Paris Agreement is a protocol of the climate change convention.

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<u>The Framework Convention on Global Health</u>

The FCGH would begin with the treaty's basic mission and standards. It would then address the health services to which everyone is entitled, including the underlying determinants of health, and the financing required to secure these services. The next parts of the FCGH would extend beyond health services to respecting and advancing the right to health throughout government policies, with respect to non-state actors (in particular, businesses), and in all international legal regimes and

institutions. After this, the FCGH would turn to core human rights principles that must run throughout all of these areas that implicate the right to health, in particularly equality, participation, and accountability. The last several parts of the FCGH would create an overall regime of accountability for the treaty and address other treaty mechanics, including the Secretariat and protocols.

I. The mission of the FCGH

1. Objectives, guiding principles, and foundational right to health obligations

NOTE: A discussion draft of this first part of the FCGH has been developed and is being made publicly availability in concert with this overview. The FCGH is also beginning to draft illustrative articles.

The first part of the FCGH would define key terms used in the treaty, delineate the mission and objectives of the FCGH, and offer guiding principles for the FCGH. Central to the FCGH's mission is closing domestic and global health inequities by creating greater accountability to and capacities to achieve the right to health for people everywhere. The FCGH does so by clarifying standards and establishing related mechanisms and processes towards rapid and sustained progress for realizing the right to health for all people, including ones to increase the capacity of states to implement the right to health and of people to claim it. Guiding principles include human rights and their principles of equality and non-discrimination, participation, and accountability; equity and universality; the importance of all human rights to realizing the right to health; shared responsibility and global solidarity; Health in All Policies and global governance for health, and; an enabling environment for all actors to contribute to the right to health.

The FCGH would bring central concepts of domestic and international right to health obligations developed through General Comments of the Committee on Economic, Social and Cultural Rights and other non-binding or non-internationally binding forums (e.g., national courts) into binding international law. These could include the need to emphasize marginalized population, to enable people to participate in health-related decisions at local, national, and global levels, and to have mechanisms to ensure state accountability. The FCGH could also clarify core concepts of the right to health and other economic, social, and cultural rights, such as progressive realization, maximum available resources, and the meaning of the "highest attainable" standard of health, as well as what steps states must take immediately towards realizing the right to health (e.g., non-discrimination, respecting the right to health, developing participatory mechanisms for health decision-making, developing health care quality improvement strategies). The FCGH would also explicitly establish the obligation to build public understanding on the right to health – including the requirements of the FCGH – which is central to accountability.

The FCGH elucidation of the right to health would also build on a growing understanding of extraterritorial obligations regarding economic, social, and cultural rights, clarifying obligations related to respecting, protecting, and fulfilling the right to health extraterritorially, along with establishing accountability for extraterritorial actions as they affect the right to health. The elaboration on extraterritorial obligations would be clear that extraterritorial obligations do not diminish domestic right to health obligations, and could address potential conflicts between

domestic and extraterritorial obligations. The FCGH could also establish a general obligation of cooperation towards the universal realization of the right to health, such as through information sharing and capacity building.

The FCGH would explicitly permit more protective right to health standards than may be included in the FCGH and direct that FCGH standards should be interpreted constant with the continued evolution of the right to health to the extent that they may offer a greater level of protection than the FCGH.

II. Accountability to right to health in all policies, sectors, and levels

2. Accountability to everyone's right to health services and underlying determinants

Central to what the right to health requires is the right of everyone to available, accessible, acceptable, quality health services, including the underlying determinants of health (defined by the Committee on Economic, Social and Cultural Rights in General Comment 14, such as access to safe and potable water, adequate sanitation and housing, and nutritious food).

The FCGH could take the approach of providing guidelines for inclusive, participatory, multi-sector processes – with standards to ensure meaningful participation including for marginalized and disadvantaged populations – and factors to consider in determining the health care services (including public health measures) and underlying determinants of health to which everyone is entitled (e.g., cost-effectiveness, particular attention to marginalized and disadvantaged populations), with state requirements linked to the maximum of their available resources. The FCGH could leave these determinations entirely to the national processes, or could establish an inclusive process for setting [non-binding] global guidelines.

This part of the FCGH could also require national health strategies to incorporate measures, targets, and metrics on progressively advancing the right to available, accessible, acceptable, and high quality health services (e.g., ensuring continuously improving health care quality).

3. Accountability to maximum of available resources and international assistance obligations

The right to health requires states to utilize the maximum of financial and other available resources towards the right to health and other human rights, as well as to provide international assistance. Meanwhile, many aspects of the right to health can have little meaning without necessary resources. Therefore, this part of the FCGH would provide greater accountability to the maximum resources requirement and the inextricable link between right to health accountability and resourcing the right. It could have the following three elements.

First, it could establish a framework for global health financing that is based on national and global solidarity, providing targets for domestic health financing and targets related to international health assistance. This financing framework would need to be located within the totality of investments contributing to health, including the social determinants of health, and human rights broadly, to avoid privileging health sector investments over other health-related investments or one human right over other rights.

Along with the targets, the FCGH could require countries to establish national participatory processes to develop and periodically update and enhance national needs-based, rights-based health budgets, guided by these targets and the health services (including underlying determinants) to which all people are entitled (i.e., those determined through the processes established in Part 2), with timelines for achieving these budgets. These could be linked to national public health strategies and health equity programs of action, which would also address the broader social determinants of health. States in a position to provide assistance might similarly develop timelines for achieving targets. The FCGH might include an outer time limit by which countries should achieve full funding for national needs-based, rights-based health budgets that meet certain criteria.

The FCGH could take a similar approach with respect to other resources, most notably human resources. For example, in parallel to needs-based, rights-based budgets, states could commit to development needs-based, rights-based plans on human resources for health.

Second, this part could provide both domestic and international health financing principles. Principles could include the primary financing responsibility of countries to meet the health needs of their populations with global financing supplementing national funding, revenue-generation and health spending that is progressive and equitable, prioritizing marginalized and disadvantaged populations, conform to national health strategies (unless these are inconsistent with human rights) and predictable, and sustained (as long as needed) global health funding. The FCGH could also establish limits on out-of-pocket payments, with the goal of ensuring that no one is impoverished by health spending or experiences catastrophic health costs. International health financing principles could also address criteria for determining which states have the responsibility to provide mutual health assistance and criteria for states to apply in prioritizing how they direct this assistance.

Third, to facilitate states achieving targets and spending the maximum of available resources towards health (and other rights), the treaty could require states to review the possibilities for additional revenue-raising (possibly specifying certain areas to examine, such as through additional or new tobacco, alcohol, and unhealthy food and beverage taxes, or redirecting funds from subsidies that harm health), and mandate the Secretariat to similarly study innovative international financing mechanism.

The resources section of the FCGH could potentially include other areas, such as delineating financing responsibilities for the right to health of refugees and internally displaced persons, and funding targets for research and development needed to meet the needs of marginalized populations and people in lower-income countries.

The FCGH could also help fortify funding for global health agencies, prominently WHO, and potentially others, perhaps particularly for their functions related to human rights and equity (e.g., creating a special fund these agencies could draw on for these functions). Any such provisions would be designed to complement and not usurp the responsibilities and roles of existing governing bodies for these agencies, such as the World Health Assembly.

4. Accountability to respecting and helping protect and fulfill right to health in all sectors

Even as the FCGH would be unable to thoroughly address all social determinants of health, given that they touch virtually every aspect of society, it can address these areas in specific ways. First, the FCGH could require comprehensive public health strategies developed through national, participatory processes, with targets, timelines, and participatory, inclusive monitoring and evaluation, and periodically updated and strengthened. The national needs-based, rights-based budgets, targets, and timelines referred to in Part 3 would be linked to these public health strategies.

Second, states could be required to review laws and regulations outside the health sector that may affect the right to health, and revise them where if they undermine health the right to health. Given the number of laws and regulations that would need to be reviewed, the FCGH would establish timelines (or countries would develop their own) or other mechanisms (such as a petitioning process) to ensure feasibility.

Third, the FCGH could establish inclusive, multi-sector processes to ensure a Health in All Policies approach, so that policies in all sectors are aligned with people's health. It could also require states to establish mechanisms and strategies (e.g., a national coordinator, point people in each ministry, education and training across sectors) to ensure the effectiveness of this approach.

And fourth, the FCGH could require countries to conduct right to health impact assessments, assessing the likely right to health impact of laws, policies, programs, and projects that may significantly affect the right to health, including transboundary effects. This information would in itself be important in driving policy change; the FCGH might further address the need to revise laws, policies, programs, and projects to ensure their consistency with the right to health.

5. Accountability for businesses [and other non-state actors]

The FCGH could establish rules to clarify state responsible for transnational actors (e.g., multinational corporations) as relates to protecting people's right to health, guided by the UN Guiding Principles for Business and Human Rights. It could also include other measures, such as establishing an ombudsperson or special rapporteur to monitor and facilitate corporate compliance with the right to health (including other rights that may affect health) and judicial standing requirements that facilitate citizen enforcement of FCGH rights against corporations. The FCGH may include measures that would bind non-state actors [businesses], such as state contracts with businesses, requiring them to conform to the right to health and the Guiding Principles for Businesses and Human Rights (linked to Guiding Principle number 6).

The treaty could extend to including specific standards or measures that states should take to [ensure healthy workplaces and] regulate businesses whose activities and products negatively affect health (e.g., unhealthy foods, fossil fuel production).

The FCGH could also specifically address the roles and responsibilities of the state to ensure that businesses involved in providing health services (including those related to the underlying determinants of health) are not impeding people's right to health, and to remedy the situation when

their activities threaten the right to health. These might include specific criteria or regulatory measures to protect the right to health in private health service delivery, management, and financing, ensuring that public-private partnerships protect the right to health, and avoiding water privatization schemes that threaten the right to health.

6. Right to health accountability in international laws and regulations, policies, institutions, and actions

The FCGH would raise the priority of health in international legal regimes that affect the right to health, including by specifying and developing processes to ensure that states do not undermine the right to health extraterritorially – and where possible, promote this right – and specifying states' intention that measures that advance the right to health shall be respected in other regimes (e.g., WTO). Other elements of this part of the FCGH could include requiring participation of the public health community in international agreement negotiations that may affect the right to health, educating negotiators on the right to health, conducting right to health impact assessments before entering agreements that may affect the right to health, and agreeing not to bring cases before international tribunals that could impair another country's ability to respect, protect, or fulfill the right to health. States could also review existing international agreements to which they are a part that may undermine the right to health, domestically or extraterritorially, and take measures to mitigate any such harm.

The FCGH might establish a new consortium to enhance right to health accountability among global health organizations, other health-focused UN or other global agencies (e.g., UNICEF, FAO), and institutions and regimes that are outside the health arena but impact health (e.g., WTO, ILO, UN Office on Drugs and Crime, UN Environmental Programme). States, civil society, and members of marginalized and disadvantaged communities would be part of such a consortium and its governing structures. This forum could help ensure that the policies of all global institutions that affect the right to health do not undermine, and as possible promote, this right, such as by assessing policies, offering recommendations, and monitoring responses.

The FCGH could also address specific international regimes and issues, such as international health worker recruitment (including to reinforce the WHO Global Code of Practice on the International Recruitment of Health Personnel) and investment and trade agreements (possibly discouraging or prohibiting TRIPS-plus provisions as they relate to medicines and other medical technologies and encouraging dispute resolution bodies to ensure their holdings adhere to the right to health).

III. Accountability to core human rights principles of equality, participation, and accountability

7. Accountability to non-discrimination and equality

This FCGH would create a range of obligations to advance health equity (substantive equality in human rights terms), with special focus on vulnerable, marginalized, or otherwise disadvantaged populations while closing health inequities throughout the spectrum of disadvantage and inequalities. The FCGH would expressly forbid direct and indirect discrimination in health based

on any status whatsoever, with states required to reform any laws and policies that do so discriminate.

The treaty could require states to develop health equity programs of action, which would be systematic, systemic, and inclusive sets of actions towards health, prioritizing empowering participation and inclusive leadership, and cutting across the health system and social determinants of health and the different populations experiencing health inequities. The health equity programs of action could be developed through the public health strategies referred to in Part 4.

While also part of the process of measures that would be taken through the health equity programs of action, the FCGH could also specify that states should review health laws and policies and revise them where they undermine health equity, and with the aim of affirmatively advancing health equity. .

The FCGH could also specifically address discrimination against populations at high risk of discrimination (though they would also receive considerable attention through the health equity programs of action). This could include requiring a comprehensive strategy on women's and gender equity and protections against discrimination against women or other discrimination based on gender, while also addressing gender-based violence. The FCGH would also specifically address discrimination against migrants (including forced migrants, i.e., refugees, asylum seekers, and internally displaced persons), including immigrants regardless of legal status, and stateless populations, with measures to ensure their equal access. The treaty may also include specific protections and requirements regarding non-discrimination for other specific groups, and possibly general measures for states to take to improve health equity (e.g., removing user fees, health worker training in non-discrimination). And the FCGH could require states to develop disaggregated data collection strategies, potentially extending beyond the health sector and underlying determinants of health to include other sectors affecting the right to health.

8. Participation and accountability

The FCGH would include a range of commitments to increase health accountability and ensure people's right to participate in health-related decisions. It could provide guidelines for participatory processes to develop, monitor, and evaluate health plans and policies at national and sub-national levels. The treaty could require states to develop mechanisms to enable members of the public to have meaningful avenues to influence health-related program and policy decisions, with special measures to ensure the inclusion of marginalized and disadvantaged populations,

The FCGH could require countries to develop, implement, and periodically update and enhance national health accountability strategies encompassing the legislative, executive, and judicial branches, and local, national, and global level, and encompassing at least the health sector and underlying determinants of health. These could include measures to combat corruption, provide right to health education and training (including in specific sectors, such as health), ensure transparency, strengthen or establish local and national level accountability mechanisms (including accountability of health workers to treat all of their patients respectfully and without discrimination), bolster the opportunities for and effectiveness of accountability through the legal system, and ensuring enabling environments for social empowerment.

As part of, or complementary to, such strategies, the FCGH could require measures to increase access to justice for the right to health, possibly requiring a strategy, specific actions, or a selection of possible actions (e.g., legal aid, community paralegals, broad standing requirements. The FCGH could also promote the norm that judiciaries should, within constitutional frameworks, interpret the right to health through a lens of health equity.

The treaty could provide establish a mechanism, such as a right to health capacity financing facility, to ensure adequate funding for right to health capacity-building activities, including for civil society organizations and community networks addressing the right to health, media activities, and relevant governmental bodies and functions (e.g., national human rights commissions and parliamentary oversight). This mechanism could help countries implement the national health accountability strategies referred to above.

IV. FCGH accountability and mechanics

9. FCGH compliance and enforcement

This FCGH would establish measures to support compliance with the FCGH, including indicators and reporting requirements, with civil society and community participation in developing these indicators and reports. Reports would include plans to overcome implementation gaps.

Mechanisms to promote compliance could include detailed implementation guidelines; a monitoring framework; regional special rapporteurs, who could facilitate compliance through regular country visits, while also responding to serious violations; joint external evaluations, and; a mechanism (whether the UN Committee on Economic, Social and Cultural Rights or a new body) through which individuals and groups can bring claims that allege violations of the right to health under the FCGH (this could also be established through a separate protocol).

The FCGH could provide incentives to countries demonstrating FCGH compliance right to health leadership, such as favoring them for global health leadership positions.
The FCGH could also include realistic sanctions. States with the poorest compliance may be subject to penalties (such as being disfavored for global health leadership positions) and targeted capacity building measures (such as funding for domestic NGOs that are responding to areas of right to health violations). Any sanctions would need to avoid undermining the right to health. States that make a good faith effort to comply and develop strategies to overcome compliance obstacles could be protected from any sanctions.

10. Treaty implementation structures and protocols

The FCGH would need to establish an FCGH Secretariat (whether WHO or a new entity), processes for amending the FCGH and for developing protocols, and the process for ratifying the FCGH.