Reviewer's report

Title: Under the (legal) radar screen: Global Health Initiatives and International Human Rights Obligations

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Reviewer: Benjamin Meier

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This manuscript presents an insightful empirical analysis of international obligations pursuant to the right to health, and I recommend its publication in BMC International Health and Human Rights. Where others have conceptualized international obligations under the right to health, the authors have advanced this research by examining the operationalization of such international obligations through interaction with the Global Fund. I believe that this manuscript requires only minor revision prior to publication, and while detailed in my comments below, these comments should be seen as more suggestive than prescriptive.

In considering the background that is necessary to understand the results -- particularly the background on international obligations -- it would be useful for the authors to examine the 2010 special issue on the topic (of international assistance and cooperation) in Health and Human Rights: An International Journal. This issue captures some of the complexity of extraterritorial obligations in a global health landscape of state and non-state actors (a policy landscape that is not being driven exclusively by international law). Furthering this background (as an organizational matter), I would recommend that some of the sub-sections of the results section (e.g., the development of the right to health) be included as background (in a condensed evolution leading up to General Comment 14 and Hunt's report on international assistance). In this enlarged background, it would be beneficial to draw on scholarship concerning "international assistance and cooperation" generally -- i.e., for all economic, social and cultural rights -- as this debate on international obligations is not confined to the right to health.

In developing the theoretical framework (which deserves greater attention), it would be helpful for the reader to understand more of the theory underlying constructivism -- situating social constructivism in international relations and describing the ways in which this approach addresses weaknesses in the neorealist descriptions of global health governance (cf. Fidler). Moving beyond Koh's approach to 'interaction, interpretation and internalization,' it would be useful to the development of the results to know more about normative theories in human rights (as the authors begin in their discussion of Finnemore), how the end of the Cold War led to the rise of constructivism (as the authors begin in their discussion of Wendt), and how norms come into being and evolve through interaction/engagement (Sunstein). The authors begin to do this with interview questions -- distinguishing the Global Fund from the IMF and World Bank -- but
this could come out earlier and more explicitly.

Focused on the process of conducting this research, the methods section would benefit from a description of the topics covered in the semi-structured interviews. (Note how Finnemore does this in her study of the World Bank.) The issues addressed in the thematic analysis are the most compelling reasons to accept the authors' conclusion, and the authors should expand this methods decryption to clarify how these themes flow from the attributes of the right to health. Finally, it would be helpful in writing up the methods to explain the focus of interviews on Belgium and the United States (outside of convenience).

Considering the results, much of the normative analysis rests on 'general principles of international law,' and it would be helpful to the argument to explain the normative value of such principles and how they differ in effect from non-legal norms in the ethics literature (e.g., Pogge's work on a duty to rescue, Ruger's focus on capability, and Schrecker's views on distributive justice). Without such clarification, the reader is left to consider why the language of human rights is even necessary to the development of global health initiatives - rather than the non-human-rights-based norm cascade described by Finnemore.

In developing the analysis further, the focus on core obligations and the principle of progressive realization is key to the authors' argument for international obligations, and it would benefit the reader if the authors more clearly define the shifting core content of the right to health that is central to the need for obligations on high income states (what the authors call the 'trigger' for obligations) and how to assess when domestic resources cannot realize this core content (e.g., how to know if a failure to realize the core content of the right to health is due to the state's inability or unwillingness). This focus on domestic capacity seems to be key in the interviews, but it is unclear what normative standards the interviewees are referencing in their assessments for Global Fund financing and country ownership (mutual accountability) for results.

Reviewing the creation of the Global Fund, it is surprising that the analytic narrative leaves out the seminal role of human rights in raising global consciousness around the three disease model -- from WHO's Global Programme on AIDS (Mann), to the notion of an inextricable linkage between health and human rights (Gruskin), to the access to treatment campaigns (Heywood). (Spelling correction: Kofi Annan.) Focusing on the rights-based approach that drove the creation of the Global Fund (even if the Global Fund's mandate does not include the right to health), this historical lens can clarify the authors' analysis of the financing decisions of the Global Fund in compliance with human rights norms. Through a focus on the 'transnational legal process,' applying Koh's theory to the Global Fund, states should not be seen as merely interacting with the Global Fund but in creating the Global Fund. This admittedly creates a 'chicken or the egg' problem, but it is one that the authors should consider -- i.e., is the Global Fund changing the norms of stakeholders or did stakeholders create the Global Fund as an embodiment of their changed norms (and undertake the activities that states could not do through WHO)? (While the manuscript asserts that 'our research suggests that different stake holders have,
to differing degrees; come to internalize these new norms through ongoing engagement with the Global Fund, there does not appear to be much support for this statement in the description of the results.)

In analyzing the implications of this research, it would be beneficial for the authors to consider whether the Global Fund's practice is indicative of a larger trend toward international obligations. Some might argue that the Global Fund is unique among global health initiatives -- with its inclusiveness and transparency making it more amenable to normative guidance and less affected by state power considerations. To test this, the authors should consider in their conclusion what future studies would be necessary to give credence to what appears to be a growing acceptance of international obligations (even in the midst of a global economic downturn). With apologies for self-promotion, I would recommend that the authors review my forthcoming work in the Yearbook of International Law (available on SSRN), which draws out a number of other global health initiatives that could form the basis of future constructivist research to confirm the authors' conclusions.

As the authors consider this future research to assess the role of international obligations on global health initiatives, it would be enormously beneficial to consider how such effects could be assessed (particularly given the authors' focus on 'transparency' and 'results' in the Global Fund). Given a growing consensus on the development of indicators for accountability under the right to health, it will be enormously important to consider how such indicators could be employed to measure realization of international obligations and monitor the practices of global health initiatives.

Overall, I think this is extremely provocative research that raises a number of interesting questions for the future development of the discipline and future accountability for the right to health. With select changes to the flow of the argument and description of the research, this manuscript has the potential to become a key study in the constructivist turn in global health scholarship.

**Level of interest:** An article of outstanding merit and interest in its field

**Quality of written English:** Acceptable

**Statistical review:** No, the manuscript does not need to be seen by a statistician.

**Declaration of competing interests:**

I declare that I have no competing interests.