The Case Law of International Public Health and Why its Scarcity is a Problem

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Abstract

This systematizing article spotlights the virtually absent case law in international infectious disease governance. In a first step, it describes the phenomenon and inventories the scarce and scattered case law. This small body of case law consists of rulings tackling international infectious disease governance using the entry doors of the law governing international public servants, international aviation law, and some regional human rights law. Yet, no coherent body of case law appears. The article continues to show that the phenomenon of virtually absent case law is a common feature of international public health law more generally. In a second step, it analyses the functional loss that international public health law generates without coherent case law against the backdrop of restatements of current legal theory. Especially highly scientific disciplines such as public health, which is dominated by empirical methodology, are prone to natural fallacy arguments,

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i.e. deducing normative reasoning from facts.[1] An established judicial discourse would counter-balance such tendencies. Vice versa, judicial application of the law to concrete facts would filter relevant empirical scenarios for international lawyers. While commenting on the dormant International Health Regulations (IHR) dispute settlement, the article also promotes several doctrinal proposals, especially to interpret the wording of the IHR in analogy to the World Trade Organization Dispute Settlement Understanding.

I Introduction

Between 1974 and 1978 *Joseph Toa Ba*, who was born in 1952, served as a so-called "blackfly collector" with the United Nations (UN) World Health Organization (WHO) in Côte d'Ivoire. Blackflies are the vector for onchocerciasis, a neglected tropical disease (NTD) also known as river blindness. This skin and eye disease, which can even lead to permanent blindness, is caused by a parasitic worm, whose larvae are transmitted to humans by the bites of infected blackflies. It can take many months until the symptoms develop, i.e. when the larvae have developed into worms in their human host.[2] In the 1970s, river blindness affected up to 50 % of adults in some Western African areas, and economic losses were estimated at US $30 million. In 2015, 11 million persons worldwide were still in need of onchocerciasis drug treatment.[3] International efforts to control onchocerciasis can briefly be summarized as follows: WHO and the World Bank initiated the Onchocerciasis Control Program (OCP), which lasted between 1975 and 2002. OCP was succeeded by the African Program for Onchocerciasis

1 Petersen, N, "Avoiding the common-wisdom fallacy: The role of social sciences in constitutional adjudication" (2013), 11 *International Journal of Constitutional Law (I-Con)*, 294 (296).

2 For more disease-specific information see for example Taylor, M, Hoerauf, A & Bockarie, M, "Lymphatic filariasis and onchocerciasis" (2010), 376 *The Lancet*, 1175.

3 The information stems from the most recent WHO factsheet and online information covering onchocerciasis (last updated in October 2016, and available at http://www.who.int/mediacentre/factsheets/fs374/en/ next to http://www.who.int/apoc/onchocerciasis/disease/en/). For a scientific public health introduction to onchocerciasis see for example Richards, F, Boatin, B & Sauerbrey, M et al., "Control of onchocerciasis today: status and challenges" (2001), 17 *Trends in Parasitology*, 558.

Control (APOC). APOC ran between 1995 and 2015, and was supported by the (non-binding) 2006 Yaoundé Declaration on Onchocerciasis Control by African Ministers of Health. Since 2016, onchocerciasis control is part of the WHO Expanded Special Project for the Elimination of NTDs in Africa (ESPEN).[4] Back to *Joseph Toa Ba* who continued to work as local staff in international health projects until 1994, when weakening eyesight made him incapable of working. Today he is considered seriously disabled. His communication in 1994 already revealed that he believes he contracted his illness during his time as blackfly collector. A complex series of internal WHO proceedings was kick-started. And because international labor law disputes are exceptionally justiciable within international administrations generally and international public health law specifically, he could seek judicial recourse to the competent International Labour Organization Administrative Tribunal (ILOAT) on several occasions.[5] In 2016, the ILOAT sentenced WHO to pay the plaintiff's medical expenses plus potential interests as well as compensation amounting to US $30,000. WHO also had already paid him 10,000 Swiss francs for the length of proceedings. All four relatively short judgments leave many questions open: Facts were difficult to establish in the course of decades, and documents not well archived (see for example the claims in section D. of Judgment No. 3012). The plaintiff had difficulties in understanding procedural steps (Judgments No. 2017 and 2434), but he was also not correctly instructed on his rights of appeal (§ 6 of the Considerations in Judgment No. 3012). Further, the dilemma of NTDs (the main public health argument is in a nutshell that they receive

4 See again the WHO factsheet, above Fn. 3.

5 In chronological order these are Judgments No. 2017 *In Re Toa Ba* (January 31, 2001), No. 2434 (July 6, 2005), No. 3012 (July 6, 2011), and No. 3689 *T. B. (No. 4) v. WHO* (July 6, 2016). ILOAT judgments are final and without appeal pursuant to Article VI, para. 1 of the Statute and Rules of the Administrative Tribunal. In light of the fact that all legally contentious procedural and substantial issues have now been addressed by the ILOAT, the series of cases should be closed. The WHO is recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT) with currently 461 judgments available in total. See http://www.ilo.org/dyn/triblex/triblexmain.showlist. For an overview of such procedures more generally see Thévenot-Werner, A, *Le droit des argents internationaux à un recours effectif: Vers un droit commun de la procédure administrative internationale*, 2016 and Ziadé, N (ed.), *Problems of International Administrative Law – On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal*, 2008 as well as Amerasinghe, C, "International Administrative Tribunals" in Romano, C, Alter, K & Shany, Y (eds.), *The Oxford Handbook of International Judicialization*, 2013, 316.

disproportionately little attention, because they only affect the world's poorest populations)[6] seems to materialize: Expert knowledge was needed, but experts were difficult to find, and the impartiality of one of the few available experts was questionable (§ 3 of the Considerations in Judgment No. 2434). Beyond this fog of open questions the main legal question to answer was: Was *Joseph Toa Ba*'s weakened eyesight caused by onchocerciasis contracted during his performance in the 1970s as a blackfly collector, and thus legally attributable to WHO? WHO Staff Rule 730 entitles staff members to compensation for illness attributable to the performance of official duties on behalf of WHO. Broadly speaking, the internal WHO review mechanisms distinguish between two tiers: Staff decisions can either be challenged on medical grounds, or as breach of administrative rules. So far, *Joseph Toa Ba* had to present his claims only before medical experts, because empirical causality had to be determined (§ 6 of the Considerations in Judgment No. 2017). In its most recent judgment, the ILOAT points out that it cannot substitute its own opinions for those of medical experts (§ 3 of the Considerations in Judgment No. 3689). Yet, when confronted with diverging medical opinions, the Tribunal can judicially balance spheres of responsibility. It ruled that the existence of an empirical link was more probable than not (ibid.), especially in light of the fact that *Joseph Toa Ba* was instructed not to wear protective clothing. On the contrary, he was asked to wait until the blackflies settled on his body, so he could better catch them, which exposed him to a high risk of contracting river blindness (§ 5 of the Considerations in Judgment No. 3689). This concrete case is an exception, because few cases can be found tackling the international governance of infectious diseases, i.e. there is no developed judicial discourse. This shows that the proliferation of international courts and tribunals has not (yet?) led to a thorough judicialization of public international law,[7] to the degree that areas of international administrative law are scarcely justiciable. The introductory case also serves to introduce various abstract aspects of this article: First, it demonstrates that there are hidden areas of neglected case law in international public health. Second, the clash between the empirical determination of facts and their normative evaluation is the key issue of this case: Whether and how judges are competent in handling empirical evidence, although they are neither medical nor public health experts? And third, the

6 For an introduction to NTDs see for example Feasey, N, Wansbrough-Jones, M & Mabey, D, "Neglected tropical diseases" (2010), 93 *British Medical Bulletin*, 179.

7 Alvarez, J, "The New Dispute Settlers: (Half) Truths and Consequences" (2003), 38 *Texas International Law Journal*, 405 (411 et seq., especially 413).

case constellation is not specific to onchocerciasis but can be transferred to virtually any infectious disease. It can then function as precedent providing a pattern for ruling on disease control projects generally. The international health personnel meant to control infectious diseases are always themselves at high risk of contracting them; this is an important issue for the Ebola case study of this edited volume, too.[8]

This article will highlight the absence of a coherent body of case law within the sub-field of the international public health law governing infectious disease control – as an example for the wider field of international public health law. Particular attention will initially be paid to commenting on the dormant dispute settlement mechanism contained in the (revised) IHR, which were adopted by the WHA in 2005.[9] This mechanism currently has no practical relevance, while there are scholarly and practice calls for its activation.[10] To found its claim and describe the phenomenon, the article then continues to take stock of existing case law in the field. A relatively eccentric case collection surfaces from the peripheries of public inter-

8 In this respect, community workers during the Ebola crisis adhered to the motto "Do or die", see Jung, A, "Cured but not in good shape" (2016), 8 *D+C (Development and Cooperation) e-Paper*, 23, available at http://bit.ly/2m2qAHM. A recent presentation on "Aid Worker Safety in the Context of Health Crisis: The Example of the Ebola Pandemic in Liberia and Sierra Leonie" by *Joachim Gardemann* shed additional light on the subject. The presentation was part of the conference "Protecting the Unprotected – Humanitarian Action and Human Rights after the WHS", which took place between September 21 & 22, 2016 at the Institute for International Law of Peace and Armed Conflict (IFHV) at the Ruhr University.

9 For an introduction to the IHR and its contextual relevance during the Ebola crisis see the contribution of *Pedro A. Villarreal*, "The World Health Organization's Governance Framework in Disease Outbreaks: A Legal Perspective" in this volume. The contributions of *Mateja Steinbrück Platiše*, "The Changing Structure of Global Health Governance", *Robert Frau*, "Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it Make Sense for Health Governance?" and *Ilja Richard Pavone*, "Ebola and Securitization of Health: UN Security Council Resolution 2177/2014 and its Limits" analyze additional links to international public health security. For a comparative perspective on domestic laws governing infectious diseases see Koyuncu, A, "Infectious Disease Control Law" in Kirch, W (ed.), *Encyclopedia of Public Health*, 2008, 770.

10 Gostin, L, DeBartolo, M & Friedman, E, "The International Health Regulations 10 years on: the governing framework for global health security" (2015), 386 *The Lancet*, 2225. In this line also again note the call for effective IHR sanctions in the *WHO Final Report of the Ebola Interim Assessment Panel* (July 2015).

national case law. It consists of rare, hidden, and unconnected judicial components. This shows that the fragmentation or domain specialization of public international law is institutionally mirrored by a fragmented or decentralized arrangement of (quasi-)judicial bodies.[11] While the international law governing infectious disease control can be analyzed in greater depth, this phenomenon is pertinent to international public health law more generally. The primary focus on case law is also not to deny non-judicial enforcement mechanisms, which will loom in the background of this article. It is rather to collect the rare instances of case law, and understand the function of the virtual absence of an established judicial discourse.

By analyzing positive law and practice at its core, the article is rooted in doctrinal constructivism as far as it lists judicial mechanisms and systematizes them, while no new legal concepts are introduced.[12] Although it understands that the law is embedded in a social reality beyond it, it does not blur the positivistic line between facts and the law.[13] It does not construe public international law from the State perspective, but understands that governance activities by international institutions can be exercises of international public authority (IPA) in need of legitimacy determined by internal legal approaches.[14] When later looking at the function of international adjudication, this article does not engage in theory building, but enquires into

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11 Oellers-Frahm, K, "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions" (2001), 5 *Max Planck Yearbook of United Nations Law (UNYB)*, 67 (75).

12 For an accessible introduction to the method see Bogdandy, A von, "The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship in Europe" (2009), 7 *I-Con*, 364.

13 On today's debate of positivism in international law see recently Kammerhofer, J & D'Aspremont, J, *International Legal Positivism in a Post-Modern World*, 2014.

14 For an introduction to IPA see Bogdandy, A von, Wolfrum, R & Bernstorff, J von et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, 2010. For parallel research streams also concerned with international administrative authority, see Krisch, N & Kingsbury, B, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006), 17 *The European Journal of International Law*, 1, and the contribution of *Edefe Ojomo*, "Fostering Regional Health Governance in West Africa: The Role of the WAHO" in this volume for an application of the Global Administrative Law (GAL) approach. For the Italian comparative administrative approach see Napolitano, G & Cassese, S (eds.), *Diritto amministrativo comparato*, 2007.

the functional loss of coherent case law in international public health.[15] Building upon the concrete regime at hand, the idea is thus rather to restate theory, and test it as appropriate. The phenomenon of scarce case law is also regime specific - due to the technicality of the field, the discourse is limited to public health and medical experts who dominate international public health bureaucracies.[16] The introductory case for example illustrates how the Tribunal needs to justify its entering into a discourse which so far was labeled as strictly medical or empirical, and not administrative or legal.

The case referred to is the Ebola crisis as the case study selected for this edited volume.[17] Next to the factual descriptions provided by *Marx* and *Hein* in this edited volume, this article builds upon the *WHO Final Report of the Ebola Interim Assessment Panel* (July 2015) and the *WHO Secretariat response* to it dating from August 2015 and the *Report of the Review Committee on the Role of the IHR (2005) in the Ebola Outbreak and Response* (May 2016) as authoritative sources.[18] The executive summary of the first report already mentioned flags three major and continuous shortcomings: Member State incapacities (1), travel bans and especially trade-restrictive measures exceeding WHO recommendations under the IHR by 25 % (2), and significant and unjustifiable delays (3). The report notably calls for an IHR review as concerns sanction mechanisms drawing comparisons to the World Trade Organization (WTO) system (marginal numbers 17 and 19). The WHO response specifically welcomes potential IHR revisions in this respect (marginal number 8). The report also notably calls for an institutional re-arrangement for dealing with public health emergencies (marginal number 26). It is relatively easy to imagine hypothetical case

15 For theory-building of full-fledged systems of international adjudication see Bogdandy, A von & Venzke, I, *In Whose Name?: A Public Law Theory of International Adjudication*, 2014.

16 See Stein, E, "International Integration and Democracy: No Love at First Sight" (2001), 95 *The American Journal of International Law (AJIL)*, 489 (499). Note that this article is outdated as concerns WHO's use of legal instruments. Following this thought further could lead to anthropological analysis of bureaucracies, see for example Douglas, M, *How Institutions Think*, 1986.

17 For a more comprehensive conception of the broader policy and (project) management issues of the Ebola crisis see Halabi, S, Gostin, L & Crowley, J (eds.), *Global Management of Infectious Disease Control after Ebola*, 2016.

18 For a critique on the Interim Assessment Panel documents see for example Fidler, D, "Ebola Report Misses Mark on International Health Regulations" (July 17, 2015), *Chatham House Expert Comment*, available at http://bit.ly/2lSS2Yk. *Fidler* especially dismisses any institutional analogy to the WTO system from a legal standpoint.

scenarios for example as regards travel bans between States, but also involving private air carriers and affected travelers.

II Case Law in International Public Health Governance is Scarce and Scattered

Now, the article will provide an assessment of the scarce, scattered islands of case law in international public health governance. With a view to the Ebola case, the focus will rest on the international governance of infectious disease control. However, the broader field of international public health governance will quickly be screened in order to demonstrate that the finding ("adjudication is scarce, scattered, and generally off the beaten track, which results in a lack of established judicial discourse") is by and large the same. The selection criteria for this inventory can be presented as follows: In a first step, the dormant IHR dispute settlement mechanism is commented upon, because it is the judicial mechanism originally foreseen for international infectious disease governance. In a second step, borrowed judicial mechanisms are screened. They are borrowed, because they are primarily established in a different international legal regime, but can connect to international infectious disease governance. The introductory case for example deals with an issue of the employment law governing international public servants, but substantially covers an issue of international infectious disease governance. The case selection is also limited to the Ebola case study chosen as a common theme for this edited volume, and thus to the West-African region. Also note that the interest of this article rests on describing the judicial review of the international infectious disease governance structure. In terms of a conceptual clarification however, the legal regime governing international infectious diseases does not distinguish between bilateral and multilateral disputes. For instance, the IHR dispute settlement mechanism treats disputes between Member States and disputes between (a) Member State(s) and the WHO alike. When transferring the argument that no coherent body of case law appears in international infectious disease governance to the wider field of international public health, this article is confronted with the fact that is not governed by a single and clearly recognizable set of public international law treaties. Applicable international norms are rather bound together by a conceptual definition. The article thus rests on a leading scholarly contribution by *Allyn Taylor*

defining this particular field of public international law in order to screen dispute mechanisms.[19]

1 Systems of WHO Adjudication and Dispute Settlement Under the IHR

a The Wider Field of WHO Adjudication

Although originally rooted in the international public law governing the United Nations UN WHO and the multilateral treaties negotiated within the WHO system,[20] international public health law can largely be characterized as a fragmented body of public international law inclusive of WHO law, but also reaching beyond it. It spans across diverse regimes of public international law, and consists of many "soft law" sources next to several, often highly technical treaties.[21] Multilateral cooperation in infectious disease control is a particularly old concern of diplomacy and public international

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19 Taylor, A, "International Law, and Public Health Policy" in Quah, S & Heggenhougen, K (eds.), *International Encyclopedia of Public Health*, 2008, 667 (668).

20 Article 19 of the WHO Constitution grants the World Health Assembly (WHA) representing the WHO Member States the authority to adopt conventions by 2/3 majority concerning any matter within WHO competence. Disagreeing Member States can furnish statements of non-acceptance to the Director-General pursuant to Article 20. Article 21 proceeds to grant the WHA the specific authority to adopt regulations in matters of international disease control, disease nomenclatures, diagnostic standards, medical product standards, and advertising and labeling of products of public health relevance. Member States can again notify the Director-General of rejections or reservations pursuant to Article 22. In order to capture the difference between constitutive and regulative legal rules, the social philosopher *John Searle* provides a catchy definition for distinction: Only constitutive rules contain social status function declarations following the pattern "X counts as Y in the context C". In very short terms, societies impose functions on objects and people independent of their physical structure. By contrast, regulation covers action that can exist independently of the rule. Here, the logical pattern is "Do X". Searle, J, *Making the Social World: The Structure of Human Civilization*, 2010, 9-10. The mentioned articles provide for good examples of this distinction. Here, Article 20 sets constitutive rules and is visibly distinguished from Article 21 on regulations.

21 For a similar assessment see Taylor, A & Bettcher, D, "Editorials: International law and public health" (2002), 80 *Bulletin of the World Health Organization*, 923. *Matthias Goldmann* shows how "soft law" by creating normative expectations can be legally construed beyond the classical sources canon contained in Article 38 para. 1 ICJ Statute: *Internationale öffentliche Gewalt: Handlunsgformen internationaler Institutionen im Zeitalter der Globalisierung*, 2015, 3 & 4, 387 et seq.

law, and the IHR can be traced back to the first International Sanitary Conference in Paris in 1851 following a European cholera crisis. According to Article 75, the WHO Constitution refers dispute settlement to the International Court of Justice (ICJ) if negotiation fails and no other mode of settlement is agreed upon. In analogy to similar provisions in the constituent documents of other international institutions, such referral to the ICJ or arbitration is not interpreted as determining the (in-)validity of acts of an organ of an international institution beyond interstate disputes.[22] Article 76 stipulates that the WHO may also request ICJ advisory opinions with the Director-General representing the WHO before the Court (Article 77). However, the two readily available advisory opinions initiated by the WHA bear political or institutional character,[23] and do not substantially engage with international public health law. In terms of sanction regimes, this article leaves aside the connection with Chapter VII UN Charter resolutions by the Security Council (SC, in the case of Ebola *Resolution 2177 (September 18, 2014)*).[24]

b The Dormant IHR Dispute Settlement

The IHR provides for a dispute settlement mechanism, which is basically unrecognized in practice.[25] The contribution of this article is the commentary on the mechanisms, which has not yet produced any case law. Like

22 Vos, J., *The Function of Public International Law*, 2013, 234 with further references and within the context of a classical understanding of international institutional authority stemming from Member State powers solely. Else, the book is a peculiar theoretical endeavor on the multi-polarity of public international law between classical and critical theory – but also a solitaire, because it does not integrate into a school of thought, and challenges school leaders such as Lauterpacht, H, *The Function of Law in the International Community*, 2011 (first published in 1933) already in its title.

23 These are Legality of the Use by a State of Nuclear Weapons in Armed Conflict, (1996) ICJ Reports 66 (July 8), and Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt, (1980) ICJ Reports 73 (December 20) on the possible transfer of a WHO regional office.

24 The conceptualization of infectious disease outbreak as a threat to international peace and security is extensively dealt with by *Frau* and *Pavone* in this edited volume.

25 See Fidler, D, "Return of the Fourth Horseman: Emerging Infectious Diseases and International Law" (1997), 81 *Minnesota Law Review*, 847-849 with a reference

many recent UN instruments, the 2005 IHR take a principal international arbitration approach when it comes to compulsory jurisdiction.[26] This fosters a trend within the UN system of proliferating judicial institutions beyond the ICJ.[27] Consensual means of dispute settlement grant special roles to the Director-General of the WHO and the WHA. Article 56 is the applicable norm dealing with the settlement of disputes, and provides for a relatively complex system.[28] Legal action is the last resort. According to the newly introduced para. 1, State Parties are first meant to settle any dispute concerning the IHR interpretation through peaceful means of their choice. The State Parties shall also re-enter bilateral dispute settlement, even if it failed the first time. The non-exhaustive list provided includes negotiation, good offices, mediation, or conciliation. Negotiation understood as the direct bilateral discussion between the parties is substituted by good offices, mediation, or conciliation involving a third party on different degrees.[29] The latter are the same instruments as listed in Article 5 of the Dispute

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to Roelsgaard, E, "Health Regulations and International Travel" (1974), 28 *WHO Chronicle*, 265 (266).

26 Notably see the difference with the 1946 WHO Constitution, which refers contentious cases to the ICJ. And indeed Article 93 para. 3 of the former IHR 1969 ultimately referred cases to the ICJ. For another arbitration example in the founding documents of a UN entity see Article XVIII of the *Agreement between the UN and the Food and Agriculture Organization (FAO) of the UN on the one part and the Government of the Italian Republic on the other part regarding the Headquarters for the World Food Programme (WFP)* from 1991. Interestingly, the ICJ plays a second-tier role, here: The WFP and Italy would both select an arbitrator, and these two arbitrators would agree on the nomination of a third one. Should they fail to agree within six months, the President of the ICJ would appoint the third arbitrator. Of course, these examples are of doctrinal, and systemic interest, and not relevant in international administrative practice, which is not shaped by a vivid legal discourse.

27 Kingsbury, B, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1999), 31 *International Law and Politics*, 679 (693 & 694). For details see above Fn. 26.

28 Article 93 of the IHR 1969 as the preceding rule created a simpler system with the Director-General being entrusted with an initial responsibility. If settlement was not reached, the Director-General or a State concerned could refer the case to any committee or organ within the WHO, thus rendering the dispute more technical. However, the ultimate responsibility of the ICJ would entail a full-fledged judicial solution.

29 This resembles a slow handing over of control as a demarcation line between negotiation and adjudication. Merrills, J, *International Dispute Settlement*, 2011, 16.

Settlement Understanding (DSU) of the WTO. Their specific legal interpretation can thus follow the distinctions of the DSU by analogy (with only a slight difference in the sequencing of the list). Good offices then are a traditional diplomatic instrument with a third party involved that facilitates negotiations without substantial interference.[30] UN good offices can mean involving the capacity of the UN Secretary General especially with a view to convening power in settling the dispute.[31] Sometimes, such decisions can come close to adjudication.[32] Conciliation involves direct interference by the third party, while a mediator may even go further and propose a concrete solution to end the dispute between the parties.[33] Second, the State Parties can refer the case to the WHO Director-General according to para. 2. In the case of disputes between the WHO and Member States, the quasi-judicial function moves to the WHA as the plenary body, which makes sense because the Director-General represents the WHO as its executive body, and thus cannot be deemed sufficiently neutral. It is, however, questionable if the WHA is sufficiently neutral based on the political power of Member States to conceptually fulfill this function. Rather, this power should have been assigned to a body within the wider UN system such as the Secretary General. Interestingly, as a result of this system, the executive and decision-making functions of both the Director-General of WHO and the WHA are complemented by quasi-judicial functions in the black letter law. Para. 3 then proceeds to regulate arbitration. Legal action can be sought for dispute over the interpretation or application of the IHR or for specific disputes between two States. Concerning proceedings, Permanent Court of Arbitration (PCA) rules are applicable.[34] The WHA is granted a discretionary right to information, which also means that arbitration proceedings cannot remain

30 Schorkopf, F, "Article 5 DSU" in Wolfrum, R, Stoll, P & Kaiser, K (eds.), *WTO Institutions and Dispute Settlement*, 2006, 331 (332).

31 Traditionally, the role of the Secretary-General's good offices lies in peacemaking, see http://www.peacemaker.un.org/peacemaking-mandate/secretary-general, and Franck, T, "The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture" (1995), 6 *The European Journal of International Law (EJIL)*, 1. However, an extension into the field of human rights and humanitarian action have become an established field of the Secretary-General's mandate for a long time, see Ramcharan, B, "The Good Offices of the United Nations Secretary-General in the Field of Human Rights" (1982), 76 *AJIL*, 130.

32 Alvarez, "The New Dispute Settlers", above Fn. 7, 413.

33 Schorkopf, F, "Article 5 DSU", above Fn. 30, 332.

34 For an introduction see Daly, B, "Permanent Court of Arbitration" in Giorgetti, C (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, 2012, 37 (42 et seq.).

completely confidential. With a view to institutional fragmentation, para. 4 states that State Parties can resolve their dispute by resorting to dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement. The IHR thus create an open system for dispute settlement, which lists offers to the parties, but does not restrict them in their choice. The paramount interest seems to be that the conflict should be solved at any cost. This also explains the detailed introduction of peaceful means of dispute settlement. IHR dispute settlement has until now almost no visible relevance as law in practice (see *Appendix III* of the *WHO 2016 Ebola Review Committee Report* noting that the mechanism has not been formally invoked yet), adding to the partial confidentiality of proceedings. However, leading scholars in the field call upon States to consider dispute settlement through the Director-General or international arbitration.[35] The motivation behind this call is to push compliance by precedent, especially with a view to economic losses caused by IHR travel or trade restrictions or IHR non-compliance also amounting to human rights violations.[36] In order to illustrate the latter aspect in the case of Ebola, one can for example turn to the delays in WHO notification, which were a factor for the unchecked spread of Ebola (*Report of the Review Committee on the Role of the IHR (2005) in the Ebola Outbreak and Response (May 2016)*, §§ 56-62, suggesting to tie aid flows to IHR notification). This could amount to a violation of the obligation to respect the right to control of diseases as enshrined for example in Article 12 §2 (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in parallel to a potential non-compliance with Article 6 §1 IHR laying down notification requirements. Beyond hypothetical legal review as established in Article 56, the IHR also contain a reporting mechanism to the WHA by both, States and the WHO Director-General in Article 54 para. 1.[37]

This article does not deal with the classical debate resulting from the fragmented order of public international law, of whether WTO dispute settlement could piggyback international health law, and equip it with partial

35 Above Fn. 10.

36 Ibid.

37 In the broader picture, such IHR mechanisms have been described as increasingly transparent in terms of WHO political accountability and distinguishing it from its former technical medical role: Bruemmer, E & Taylor, A, "Institutional Transparency in Global Health Law-making: The World Health Organization and the Implementation of the International Health Regulations" in Bianchi, A & Peters, A (eds.), *Transparency in International Law*, 2013, 271 (292 & 293).

jurisdictional mechanisms. While the limited jurisdiction of WTO panels is not contested, the applicable law "[…] is not to be read in clinical isolation from public international law".[38] In other words, WTO law is substantially not a self-contained regime.[39] Procedurally, the WTO legal system is described elsewhere as a fine example of potential use for other special legal regimes, especially international environmental law.[40] However, it is likewise a clear result of the differing legal opinions surrounding this matter that the legal claims as such will follow the particular regime, in this case the covered WTO agreements and not claims based on international public health law. By and large, the IHR try to correspond with the WTO system judging from WHO policy documents exploring this direction, but this is still seen as a one-way street with the WTO not adopting the IHR – they are still parallel legal systems.[41] The WTO Appellate Body case *Brazil* –

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38 See WTO Appellate Body, *United States – Standard for Reformulated and Conventional Gasoline* (complainants: Venezuela and Brazil), WT/DS2/9, May 10, 1996, 17. This was the first case actually reported by the Appellate Body.

39 Generally, while including an evaluation of the WTO see Simma, B & Pulkowski, D, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006), 17 *European Journal of International Law*, 483. This raises the additional question of state responsibility in case of breach of international public health norms. This - until now largely hypothetical – substantial question is beyond the scope of this article focusing on (the absence of) international judicial settings. For some evaluation see the contribution of *Elif Askin*, "Extraterritorial Human Rights Obligations of States in the Event of Disease Outbreaks" in this volume.

40 See UN International Law Commission Report (finalized by Koskenniemi, M), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (April 13, 2006) §§ 165 et seq. Fragmentation as a phenomenon is understood as "[…] the emergence of specialized and relatively autonomous spheres of social action and structure." (§ 7) *Koskenniemi* distinguishes three types of conflict between general and special laws: (1) the conflict between the general law, and a particularly unorthodox interpretation of it, (2) the conflict between the general law, and a special law as an exception to it, and (3) the conflict between special laws. (§ 47) Here, types (2) and (3) are in play, and especially type (3) with a view to conflict between international economic and environmental law.

41 See also the restatement of the main conclusions of the *WHO Final Report of the Ebola Interim Assessment Panel* (July 2015) above Fn. 10 and further strong calls in the *WHO 2016 Review Committee Report* favoring WTO dispute settlement over an activation of the consensual IHR dispute settlement (marginal number 84 and its Appendix III). The focus on international trade and the role of the private sector in international public health law is too complex to fully cover within the cut of this article, but potential jurisdictional points of convergence with international economic law can briefly be sketched. Rich literature exists on inter-

Measures Affecting Imports of Retreaded Tyres (complainant: European Communities), WT/DS332/AB/R, December 3, 2007, is illustrative in this respect. The import restriction was justified as a public health necessity, because waste tires are *inter alia* breeding grounds for mosquitos transmitting dengue, yellow fever, and malaria (§ 153). Yet no reference is made to international public health sources. Also, note that eventually, the import ban was not upheld for a different reason, namely arbitrary Mercado Común del Sur (MERCOSUR) exemptions.

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national trade law and public health focusing on domestic regulative restrictions of trade liberalization. For an overview see WHO & WTO, *WTO Agreements & Public Health: A joint study by the WHO and the WTO Secretariat*, 2002, and the critical scholarly appraisal by Howse, R, "The WHO/WTO Study on Trade and Public Health: A Critical Assessment" (2004), 24 *Journal of Risk Analysis*, 501. A relatively low-threshold introduction is provided by Labonte, R & Sanger, M, "Glossary of the World Trade Organisation and public health: parts 1 & 2" (2006), 60 *Journal of Epidemiology & Community Health,* 655 & 738. With a view to infectious diseases the prime entry point is the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) whereby trade-restricting public health measures such as travel bans must meet justification. For a description of this link and the IHR connection to WTO law more generally see Fidler, D, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations" (2005), 4 *Chinese Journal of International Law*, 325. *Fidler* makes a clear point in demonstrating how the WHO takes in WTO references, but the WTO by and large ignores the IHR regime (see especially 341). WTO law also protects intellectual property rights. Here, international WTO governance overlaps with the World Intellectual Property Organization (WIPO). For the latter aspect, see Abbott, F, "Distributed governance at the WTO-WIPO: an evolving model for open-architecture integrated governance" (2000), 3 *Journal of International Economic Law*, 63. For the substantial law see for example Mitchell, A & Voon, T, "Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law" (2009), 43 *Journal of World Trade*, 571 and Abbott, F & Reichman, J, "The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patent Medicines under the Amended TRIPS Provisions" (2007), 10 *Journal of International Economic Law*, 921. For a focus on non-communicable diseases see for example McGrady, B, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet*, 2011. Interestingly, the connection between international public health law and investment law and arbitration has not yet received as much attention. For an in-depth exception see Vadi, V, *Public Health in International Investment Law and Arbitration*, 2013. Case types especially include tobacco control regulation, and intellectual property rights. See Mercurio, B, "International investment agreements and public health: neutralizing a threat through treaty drafting" (2014), 92 *Bulletin of the World Health Organization*, 520.

2 Human Rights Case Law in the Context of the Ebola Crisis

As concerns international human rights protection, the respective UN treaty bodies offer quasi-judicial proceedings for individual complaints, which result in so called "considerations". The database for these considerations does not include any on a human right to health complaint from the West-African region (where Ebola's impact was greatest, providing the case study of this edited volume).[42] While the health security nexus is dealt with in other contributions of this edited volume, it should be quickly mentioned that the discourse around UN human rights accountability particularly centers on peacekeeping missions, and can correlate with infectious disease outbreak, although no case law is yet particularly pertinent.[43] As concerns the African Court on Human and People's Rights (within the African Union system), no relevant case law on the merits exists.[44] Next to it, the sub-regional Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) was originally only designed as a pure

42 UN treaty body jurisprudence is searchable at http://juris.ohchr.org/. However, even beyond legal consideration human rights fact-finding (also as an advocacy tool) is gaining attention in legal scholarship: Alston, P & Knuckey, S (eds.), *The Transformation of Human Rights Fact-Finding*, 2016. Especially see the contribution from Mégret, F, "Do Facts Exist, Can They Be 'Found', and Does it Matter?" in Alston, P & Knuckey, S (eds.), *The Transformation of Human Rights Fact-Finding*, 2016, 27 critically challenging the notion of facts as existing, and assessing (strategic) productions of truth.

43 See especially the contribution of *Mateja Steinbrück Platiše*, "The Changing Structure of Global Health Governance" in this volume detailing the allegation that the UN Stabilization Mission in Haiti (MINUSTAH) based on UN SC Resolution 1542 (April 30, 2004) is responsible for a 2010 cholera outbreak. US courts rejected claims due to immunity. For an overview to the complex human rights accountability of peacekeeping troops see Dannenbaum, T, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers" (2010), 51 *Harvard International Law Journal*, 113.

44 However, see the Decision of the Application No. 005/2011 in the matter of *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines* on claims concerning alleged hardships following a 26 days' flight delay, which the Court had to dismiss on procedural grounds, because Mozambique had not yet recognized the Court's jurisdiction. For an introduction to the matter see Ssenyonjo, M (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, 2012.

regional economic integration court, but later incorporated human rights jurisdiction through case law and a 2005 Protocol (apparently struggling with the European Court of Justice (ECJ) in its judicial discourse).[45] The CCJ case ECW/CCJ/APP/01/07 *Emmanuel Akpo & Anor v. G77 South-South Healthcare Delivery Programme & Anor* (October 16, 2008) is a curious case in many respects, although it does not rule on the merits. In it, two medical doctors seek access to court following termination of their employment contracts subjected to arbitration (this is common practice, and also *Joseph Toa Ba*'s last WHO 1993 and 1994 service contract in the introductory case was subjected to arbitration only, and thus beyond the ILOAT's jurisdiction, see § 2 of the Considerations in Judgment No. 2017). The G77 as a non-formal institution (and the counter to the G7 from the global South) is the employer within the context of a health development project. It is rare to have a court deal at all with questions of development administration. This is due to lack of fora and diplomatic privileges and immunities in multilateral development cooperation and the fact that bilateral development cooperation is mediated through the recipient state for those individuals affected, while taxpayers usually lack standing *vis-à-vis* their donor states,[46] or even legal standards can be difficult to determine like in Germany where development cooperation is not based on a parliamentary law.[47] Through an extensive argumentation, the CCJ finally reaches the conclusion that contractual arbitration clauses as such do not exclude its jurisdiction, because the complaint alleges human rights violations (§ 63), which cannot be sub-

45 See Alter, K, Helfer, L & McAllister, J, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013), 107 *The American Journal of International Law*, 737. On the governance of regional African institutions during the Ebola crisis see also the contribution of *Edefe Ojomo*, "Fostering Regional Health Governance in West Africa: The Role of the WAHO" in this volume. Despite the existence of these regional African protection mechanisms, the adherence to the public international rule of law is described as only skin-deep for the African elites in power, see Romano, C, "The Shadow Zones of International Judicialization" in Romano, C, Alter, K & Shany, Y (eds.), *The Oxford Handbook of International Judicialization*, 2013, 90 (99).

46 A notable popular action exception is the British case *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* (November 10, 1994) where a Non-Governmental Organization (NGO) was granted spending in order to review an extraordinarily expensive dam funding in Malaysia without sufficient prove of socioeconomic impact.

47 See Dann, P, *The Law of Development Cooperation – A Comparative Analysis of the World Bank, the EU and Germany*, 2013, 341 et seq.

jected to (diplomatic) arbitration (§ 89). However, the relief sought for termination of contract and access to a Court concerns the application of the principle of rule of law but not human rights in the view of the court (§ 95).[48] The CCJ only has jurisdiction over employment contracts with ECOWAS (§ 93). This last point illustrates again that contentious issues of international health governance can be justiciable, if they constitute a conflict over an international employment contract (in this variation in form of the preliminary human rights question of access to court).

3 International Aviation Private Law

With a view to the Ebola crisis as the concrete case at hand, and the IHR more generally, one could also take into account the body of international

48 By means of comparative regional human rights law, it is interesting to note that the European Court of Human Rights (ECtHR) currently interprets the right to fair trial as enshrined in Article 6 of the 1950 Convention of the European Convention of Human Rights (ECHR) covering access to court as well. For a right to access to court in the case of civil proceedings this interpretation is built on case law stemming from the decision *Golder v. The United Kingdom*, ECtHR February 21, 1975. The case concerned a prisoner, Mr. *Golder*, who wished to initiate civil proceedings against an officer, but was not permitted to contact a solicitor. Mr. *Golder* believed that the officer had wrongly accused him of participating in a serious disturbance in the prison recreation area one evening, which had led to additional proceedings against him. In its Article 6 para. 1, sentence 1 the ECHR specifically grants a fair, and public hearing within a reasonable time by an independent and impartial tribunal established by law for determining civil rights. The ECtHR consequently asks if access to court is one factor or aspect of these rights? (§§ 27 & 28) The ECtHR develops a lengthy argumentation comparing language versions, international human rights law, and is particularly struggling with the fact that the ECHR preamble does not explicitly reference the rule of law principle. However, it then contextually demonstrates how the signatory governments to the ECHR embraced the rule of law principle. The final sentence of § 34 follows this line of reasoning: "And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts." In his separate opinion, it is *Alfred Verdross* himself attacking exactly this line of reasoning by underlining the selective ECHR approach in granting human rights – next to similar separate opinions by judges *Mehmed Zeika*, and *Sir Gerald Fitzmaurice*. The ECtHR finally arrives at the conclusion that access to court must also be an inherent right of Article 6 with regard to its context and object and purpose as a law-making treaty (§ 36).

aviation law, which is described as a legal labyrinth.[49] Any domestic private liability lawsuit issued by individuals against airlines[50] would ultimately follow substantial rules defined in international public law conventions creating private transnational rights and obligations, and interpreted by civil courts across diverse legal traditions.[51] During a public health emergency, attribution of damages to the carriers would be an obvious difficulty but interesting in cases of State travel bans exceeding WHO recommendations under the IHR.[52] It is impossible to screen all West-African domestic jurisdictions for the purposes of this article, and the article also leaves aside a potential supra-regional applicability of air passenger rights as contained in EU Regulation (EC) No 889/2002. However, for the substantial international law regulating damages due to delay see for example Article 19 of the Montreal Convention. Here, the carrier is not liable for damages if it

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49 Havel, B & Sanchez, G, *The Principles and Practice of International Aviation Law*, 2014, 3. Besides, the author speaks out against the notion of the distinction between private and public international law (13) following a new trend to render this classical distinction obsolete. See for example Muir Watt, H, "Private International Law Beyond the Schism" (2011), 2 *Transnational Legal Theory*, 347. Through the prominent ICJ ruling *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 1992 ICJ Reports 114 (April 14) the basic entanglement between both fields in international aviation law became highly visible. Yet, it remains a blind spot. For a perspective from international private law see Weller, M-P, Rentsch, B & Thomale, C, "Schmerzensgeld nach Flugzeugunglücken" (2015), 27 *Neue Juristische Wochenschrift*, 1909, and for an expanded English version Thomale, C, "Harmonization over Maximization: European choice of law solutions to aviation accidents" (2015), XIV *The Aviation & Space Journal*, 2.

50 Reported airlines affected by Ebola were Air France, Arik Air, Asky Airlines, British Airways, Emirates Airlines, Gambia Bird, Kenya Airways, Korean Air, and Senegal Airlines according to Geier, B, "Which airlines have been affected by Ebola?" (October 27, 2014), *Fortune*, available at http://for.tn/2m33EIp. Emirates Airlines was for example the first international airline to shut down a route to West Africa completely, see Withnall, A, "Ebola outbreak: Emirates becomes first major international airline to suspend all flights to virus-affected region" (August 3, 2014), *The Independent*, available at http://ind.pn/2n9Oxih. A huge expert debate surfaced on the pros and cons of flight bans, see for example Berenson, T, "Why Airlines and the CDC Oppose Ebola Flight Bans" (October 17, 2014), *Time*, available at http://www.time.com/3517197/ebola-frieden-travel-ban/.

51 Havel & Sanchez, *The Principles and Practice of International Aviation Law*, above Fn. 49, 12-14, 22 & 23. Relevant conventions are especially the 1929 Warsaw and the 1999 Montreal Conventions.

52 See above Fn. 17.

proves to take all measure that could reasonably be required to avoid. The "unavoidability" criterion is implicitly interpreted as a *force majeure* clause, thus potentially covering public health emergencies: If a carrier is not liable when having taken all reasonable measures, this must be true *a fortiori* when any such measure is senseless in the first place. Air carriers can also exculpate themselves when an independent third party was responsible for the loss, and the air carrier had no means of influence on them.[53] Hypothetical liability for death or injury due to transmission from one passenger to another would follow for example Article 17 of the Montreal Convention, but is unlikely with a view to the burden of proof and because it would be difficult to legally qualify such a transmission as an "accident".[54] In terms of actual cases for example the Kenyan Consumer Federation reportedly went against Kenya Airways before Court in order to cut off flights to Nigeria during the Ebola crisis for public health reasons, although they were in line with WHO recommendations under the IHR.[55] It seems that the case has not been concluded yet according to Kenyan lawyers. The complainant might have withdrawn the case.

The Chicago Convention which established the International Civil Aviation Organization (ICAO) within the UN system responsible for codification and standardization in the field also knows of an interstate dispute settlement body, which has been largely dormant until recently.[56] Other intersections with international public health are not visible apart from the international trade association IATA (International Air Transport Association) collaborating with WHO and ICAO.[57]

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53 See Schmid, R, "Article 19 – Delay" in Giemulla, E & Schmid, R (eds.), *Commentary on the Montreal Convention*, 1999, 2008, 15.

54 See Masutti, A & Laconi, A, "Ebola Outbreak: Are Air Carriers Liable?" (November 23, 2014), *Mondaq*, available at http://bit.ly/2na3Asf.

55 See Thome, W, "Consumer organization goes to court to stop Nigeria flights" (August 19, 2014), *eTN – Global Travel Industry News*, available at http://bit.ly/2mKi70e.

56 Havel & Sanchez, *The Principles and Practice of International Aviation Law*, above Fn. 49, 22.

57 See IATA, *Air Transport & Communicable Diseases*, available at http://www.iata.org/whatwedo/safety/health/Pages/diseases.aspx. These actors also formed the informal Travel and Transport Task Force on Ebola virus disease outbreak in West Africa, also including the UN World Tourism Organization (UN WTO), the Airports Council International (ACI), and the World Travel and Tourism Council (WTTC), see Masutti & Laconi, "Ebola Outbreak", above Fn. 54.

4 Conclusion: The Absence of Established Judicial Discourse is a Phenomenon Common to International Public Health Governance

Focusing on international infectious disease governance with a view to the Ebola case study underlying this edited volume means dealing with a relatively small body of law. Nevertheless, this sub-thematic field of international public health governance is by no means an exception to the rule. The absence of coherent case law is a phenomenon common to international public health governance, and potentially international administrative law in general. In order to substantiate this claim, adjudication in other subfields of international public health governance needs to be analyzed. How is international public health law then defined? This body of law is extremely fragmented and scattered with no umbrella treaty, but rather a concept ("international public health") at its core.[58] In order to structure the legal data, this article departs from a 2008 article by *Allyn Taylor* allocating international agreements to categories of public health concern in its "Table 1".[59] Next to communicable disease control, these are: disability, global tobacco control, human rights, arms control, environmental health, international narcotic drug control, occupational health and safety, and international trade law. Human rights mechanisms including the quasi-judicial UN bodies, and among them the Committee on the Rights of Persons with Disabilities have been tackled above. The same is true for international trade law. For occupational health and safety,[60] the relevant umbrella legislation is especially the International Labour Organization (ILO) Occupational Safety and Health Convention (C155) from 1981. Articles 26 through 34 of the ILO Convention install a formal complaint mechanism, which can be triggered by ILO Member States, its tripartite Governing

58 For broader conceptualization of the fragmented body of international public health law in the context of globalization see Toebes, B, "International health law: an emerging field of public international law" (2016), 55 *Indian Journal of International Law*, 299. The lack of coherence and the absence of a meaningful dispute settlement mechanism in global health law are addressed by Gostin, L & Taylor, A, "Global Health Law: A Definition and Grand Challenges", 1 *Public Health Ethics*, 53 (59). The authors, however, flag that the IHR are an important case of concrete normative standards for national epidemiological surveillance (ibid.).

59 See Taylor, "International Law, and Public Health Policy", above Fn. 19.

60 Apart from such legal aspects, *Christian R. Thauer* deals with a South-African case illustrating the role of the private sector in workplace health in this edited volume.

Body, or any Conference delegate (thus allowing employer or worker representatives the same right). None of the several complaints has yet dealt with C155.[61] As concerns global tobacco control, the 2003 WHO Framework Convention on Tobacco Control (FCTC) provides for a dispute settlement mechanism similar to the IHR in its Article 27, which has met almost no State acceptance yet.[62] Likewise, the refined dispute settlement mechanisms provided in Article 32 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances granting a potentially prominent role to the ICJ has not been accepted by States in practice.[63] The category of environmental health leads to the international environmental law, but international environmental adjudication usually takes place before borrowed fora.[64] Last but not least, it is necessary to highlight the specific intersection between international public health law, and the regimes of international humanitarian and international criminal law, often integrating standards of medical ethics. Here, individual criminal prosecution of medical war crimes is a real option.[65]

Next to the categories *Taylor* uses, there are still more technical areas of high importance in international public health practice, for example food safety. Here technical standardization can be fairly legalistic, and adjudicated through WTO dispute settlement.[66] *Taylor* also does not distinguish

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61 By comparison and in terms of broader reporting obligations, which do not tackle concrete cases, the ILO Committee of Experts on the Application of Conventions and Recommendations, comprised of jurists, has so far issued 27 recommendations on matters of occupational safety and health.

62 Jarmann, H, *The Politics of Trade and Tobacco Control*, 2015. At the same time, the FCTC monitoring mechanism has been characterized as strengthening surveillance, but not compliance. See Taylor, A & Thorpe, J, "Strengthening the Framework Convention on Tobacco Control's Monitoring Mechanism: An Agenda for Reform" (2014), *Report on behalf of the O'Neill Institute for National and Global Health Law at the Georgetown University Law Center*.

63 Gurulé, J, "The 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?"(1998), 22 *Fordham International Law Journal*, 74 (117).

64 Dupuy, P-M & Viñuales, J, *International Environmental Law*, 2015, 243 et seq. (especially 247). This subject is not dealt with in depth, because it essentially concerns another highly complex area of public international law.

65 For an overview see Mehring, S, *First Do No Harm: Medical Ethics in International Humanitarian Law*, 2014, 148-175.

66 See Pereira, R, "Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission" (2008), 9 *German Law Journal*, 1693.

the important practitioner field of sexual and reproductive health and rights, which is not highly legalized despite its wording.[67]

Note that this categorization builds upon substantial public international law regimes. Another way of structuring the positive law material would be to categorize according to institutions. This would allow highlighting issues such as the proliferation of international institutions beyond the WHO involving innovative governance structures across public and private, international and national categories.[68] Their legal status can change flexibly,[69] and any adjudication is often limited to complaints from individuals with a contractual relation to the institution.[70] Yet, nowhere will we find a comprehensive system of adjudication in the forefront of international public health governance.

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67 For an introduction see Gebhard, J & Trimiño Mora, D, "Reproductive Rights, International Regulation" in Lachenmann, F & Wolfrum, R (eds.), *The Max Planck Encyclopedia of public international law*, 2013, available at http://opil.ouplaw.com/home/EPIL. On the distinct practical nature of human rights based approaches (here with a view to the notion of sexual and reproductive rights) to be distinguished from the normative sphere see later Fn. 85.

68 On the competitive institutional pressures that the WHO is facing see Hanrieder, T, "Die Weltgesundheitsorganisation unter Wettbewerbsdruck: Auswirkungen der Vermarktlichung globaler Gesundheitspolitik" in Dingwerth, K, Krewer, D & Nölke, A (eds.), *Die organisierte Welt – Internationale Beziehungen und Organisationsforschung*, 2009, 165. For a comparative institutional study of the WHO by the same author see *International Organization in Time: Fragmentation and Reform*, 2015. From a legal perspective see Clarke, L, *Public-Private Partnerships and Responsibility under International Law: A Global Health Perspective*, 2014.

69 See for example Triponel, A, "Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid" (2009), 35 *North Carolina Journal of International Law*, 101, describing how the Global Fund (GFATM) was founded as a Swiss foundation first administratively hosted by WHO, and then expanded its status as a quasi-International Organization, especially through negotiating privileges and immunities equal to an International Organization.

70 See for example the GFATM's recognition of the jurisdiction of the ILOAT pursuant to its Governing Body decision GB.303/11/2, 303rd session (2008), Reports of the Programme, Financial and Administrative Committee, marginal numbers 45-48 following the decision memo GB.303/PFA/15/2 (2008). The ILOAT case-law database indicates sixteen judgments as of September 1, 2016, available at http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_org_id=83.

III What Does the Absence of Coherent Case Law Mean?

The thrust of this article rests on the description of the phenomenon that no thorough judicial discourse has yet been established in international public health. At the same time, the absence of a coherent body of international case law in the technical field of international disease control, and the fragmented body of international public health law more generally requires one to investigate its function and meaning. Here the article now proceeds to restate some theoretical frameworks – while being aware that an in-depth theoretical contribution is beyond its means. It cannot contribute to the foundational tension between law and facts in legal theory, let alone given the fact that international adjudication is a challenging subject for legal philosophy.[71] Instead, it departs from the concrete phenomenon just described, namely the virtual absence of case law in international public health law.[72] In order to do so it is important to preliminarily remark that this article does not disqualify the legal nature of public international law, because of this incoherent enforcement structure.[73] International (health) law might well be described as "inherently imperfect"[74] – but there is no better coordination mechanism currently. This is why it is more interesting to enquire into the

71 Besson, S, "Legal Philosophical Issues of International Adjudication" in Romano, C, Alter, K & Shany, Y (eds.), *The Oxford Handbook of International Judicialization*, 2013, 413 (416). For further overview see Kammerhofer & D'Aspremont, *International Legal Positivism*, above Fn. 13.

72 Another factor in the case of the Ebola crisis could be that access to adjudication is *per se* limited in and for developing countries. For a case study see for example Romano, C, "International Justice and Developing Countries: A Quantitative Analysis" (2002), 1 *The Law and Practice of International Courts and Tribunals*, 367.

73 For an introduction to the debate between international relations and law see Koh, H, "Why Do Nations Obey International Law?" (1997), 106 *The Yale Law Journal*, 2599. At the extreme, the anthropologist, *Susan L. Erikson* strikes down the quality of international health law as such in this edited volume, because of the highly visible absence of a coherent enforcement mechanism. Suffice it to add that post-colonial theory goes one step further, and questions the substantial foundations of public international law in any development context. For a review essay see Riegner, M, "How universal are international law and development? Engaging with postcolonial and Third World scholarship from the perspective of its Other" (2012), 45 *Verfassung und Recht in Übersee (VRÜ) / Law and Politics in Africa, Asia and Latin America*, 232. For a postcolonial account from a medical perspective see Chakrabarti, P, *Medicine and Empire 1600-1960*, 2013.

74 Taylor, "International Law, and Public Health Policy", above Fn. 19, 672.

function of adjudication. As concerns the theories offered, this article adheres to a constructivist perspective, but will also recognize more radical voices from empirical and critical legal theories. With a view to the application to the international legal public health system, the article will point out the type of communication that is missing between technical experts and lawyers prior to the establishment of a coherent judicial discourse, and the underlying threat to subjective rights in the absence of case law.

In order to find a constructivist response, the multi-functional understanding of international judicial institutions exercising international authority by, and not limiting it to the single function of adjudication proposed by *Armin von Bogdandy* and *Ingo Venzke* gives first clues. They distinguish the following functions: dispute settlement or adjudication in individual cases (1), stabilization of normative expectations (2), law making (3), and control and legitimation (4). A single-function understanding of adjudication focuses on the classical promise of international Courts to bring about peace between States in a concrete case.[75] A multifunctional understanding of international adjudication can be able to embrace international administrative adjudication beyond interstate adjudication, and systematically embed it into its social context. Adjudication then also serves to reconstruct social realities by establishing the facts of a concrete case. International administrative processes are difficult to understand, especially in highly technical areas such as international public health. Coherent case law would make it easier to understand central issues for lawyers by delivering critical facts.

Acknowledging the communication between the spheres of international law and empirics must not blur their lines. However, there are more radical approaches calling to blend law with empirical findings. Empirical legal studies are for example a popular approach in the US.[76] Another, related

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75 Bogdandy & Venzke, *In Whose Name?*, above Fn. 15, 5-19. Note that also this dimension can be conceptually extrapolated, for example to assigning the international judicial system as a whole the functions "[…] to provide an institutional framework for cooperation, to promote compliance with international law, and to reinforce rights-respecting democracy on the national level." Martinez, J, "Towards an International Judicial System" (2003), 56 *Stanford Law Review*, 429 (463). The latter article is a liberal call for a coherent international judicial system, and provides an analytical framework.

76 For public international law see for example Chilton, A & Tingley, D, "Why the Study of International Law Needs Experiments" (2013), 52 *Columbia Journal of Transnational Law*, 173. On the different legal cultures in the US and Germany see Towfigh, E, "Empirical arguments in public law doctrine: Should empirical

approach is the new legal realism advocated for by *Andrew Lang*.[77] He describes the clash of the "relative objectivities" of both legal formalism and scientific empiricism. Applying his approach to WTO disputes, he shows how much this clash can be about control: Are empirical findings applied within the controlling framework of legal concepts or vice versa?[78] The result is a complicated "mode of mixed legal-scientific techno-governance".[79] Without buying into the foundations of empirical legal approaches, this description fits with the struggle in the introductory case of this article to acknowledge medical causality and legal qualifications of causality alike.

In critical legal studies, the objectivity of law as such is refused. Law is instead described as pure fiction. The function of the law is the fictional but necessary re-construction of a social conflict in order to handle this conflict, which is perceived as beyond the control of the real world. The resource of this legal production machinery would be the passion to fight by the parties before an independent umpire.[80]

While upholding the distinction between the legal and the empirical sphere, this article argues that case law is key to understanding the fragmented field of international public health law. It processes factual accounts and helps lawyers to shape their argumentation. The mere existence of dispute settlement mechanisms is practically insufficient as long as they are

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legal studies make a 'doctrinal turn'?" (2014), 12 *I-Con*, 670. On infusing law with the specific empirics of (behavioral) economics and psychology see Aaken, A, "Behavioral International Law and Economics" (2014), 55 *Harvard International Law Journal*, 421.

77 Lang, A, "New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science" (2015), 28 *Leiden Journal of International Law*, 231.

78 Ibid., 248 & 254.

79 Ibid., 241.

80 These are thoughts from the article "Rechtsentfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels"/"Alienating Justice: On the Social Surplus Value of the Twelth Camel" by *Gunther Teubner & Peer Zumbansen*. The German version was published in (2000), 21 *Zeitschrift für Rechtssoziologie/The German Journal of Law and Society*, 189. The English translation can be found in Nelken, D & Pribán, J (eds.), *Law's New Boundaries: Consequences of Legal Autopoiesis*, 2001, 21. I am leaning on the German original. *Teubner & Zumbansen* build on an essay by *Niklas Luhmann* narrating the inheritance battle of three sons over their dead father's camel. Essentially, one camel is missing, which blocks the sons from managing their conflict. Finally, a kadi guides them to controlling the situation by providing for a twelfth camel, which is as real as it is fictional in serving as a necessary projection for the sons in the very process.

dormant: The example of the IHG has just been mentioned above. The legal argument becomes vivid and strong when there are actual cases.[81] Case law would create what is labeled as "judicial governance" entailing a system-building function in the fragmented international legal order by stabilizing expectations.[82] Judicial decisions can have what is labeled as interpretative authority beyond mere decisional authority.[83] This is not a formal claim for the common law doctrine of precedent in the international legal order, but for recognition of the function of case law. Case law also makes the normative sphere visible for natural and social scientists. Public health is a discipline rooted in medical science as a foremost natural, empirical science, and reaches out to social science methods as well acknowledging the "social determinants of health".[84] It is prone to natural fallacy arguments when normative statements are inferred from descriptive statements: If publications are concerned with international norms, they consequently tend to capture the normative sphere with quantitative and/or qualitative social science methodological sets, often without being aware of the normative argument as such. For example when public international law treaties are only understood as a "type of global intervention" from this perspective meant to create impact.[85] At the same time, there are relevant voices in the international

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81 Jacobs, M, "Precedents: Lawmaking Through International Adjudication" in Bogdandy, A von & Venzke, I (eds.), *International Judicial Lawmaking – On Public Authority and Democratic Legitimation in Global Governance*, 2012, 35 (43).

82 Ibid., 49 & 51.

83 Besson, "Legal Philosophical Issues of International Adjudication", above Fn. 71, 420.

84 For an account of the disciplinary development see for example Rosen, G, *A History of Public Health*, 1993, and more tailored to the case study at hand Rhodes, J, *The End of Plagues: The Global Battle against Infectious Disease*, 2013. In Germany, the 19th century physician *Rudolf Virchow* was one of the founders of "social medicine", see Ackerknecht, E, *Rudolf Virchow: Doctor, Statesman, Anthropologist*, 1953. For an introduction to the discipline as such see Detels, R, Gulliford, M & Karim, Q A et al., *Oxford Textbook of Global Public Health*, 6th edition, 2015.

85 See for example Hoffman, S & Røttingen, J, "Assessing the Expected Impact of Global Health Treaties: Evidence From 90 Quantitative Evaluations" (2015), 105 *American Journal of Public Health*, 26. According to these authors, publications on the subject-matter are still few, while they perceive an international policy-making trend in international public health treaty negotiation. They contrast potential policy and economic impact to missing social impact. Their approach is described as a qualitative summary of quantitative impact, and is proposed to be extended in detail according to Hoffman, S, Hughsam, M & Randhawa, H et al.,

public health community now highlighting this gap between empirical evidence, and a (conscious) normative position, and calling for improved dialogue.[86] Other voices attribute the infrequent use of any WHO dispute settlement in part to its domination by personnel trained in public health and medicine only.[87] This leads to the conclusion that the technocratic nature of international public health administration is a strong factor in explaining the domain-specific absence of established judicial discourse.

This article does not offer a contribution to legal theory on its own. However, within the sketched field of diverse approaches that legal theory offers, this article can take a position. While it does not argue for blending the normative and the empirical sphere, the virtual absence of case law results in a loss of a filtering mechanism for facts. The absence of coherent case law in international public health, and specifically as concerns disease control, shows how this supportive function of case law is missing. Arguably,

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"International law's effects on health and its social determinants: protocol for a systematic review, meta-analysis, and meta-regression analysis", 5 *Systematic Reviews*, 64. Note that international human rights protection as a public international law regime is similarly contrasted by a human rights-based approach in health (and even more generally in international development aid and humanitarian assistance). For an introduction to the normative analysis of the human right to health see the contributions of *A. Katarina Weilert*, "The Right to Health in International Law – Normative Foundations and Doctrinal Flaws" and *Elif Askin*, "Extraterritorial Human Rights Obligations of States in the Event of Disease Outbreaks" in this volume. By contrast, Risse, T, Ropp, S & Sikkink, K (eds.), *The Power of Human Rights: International Norms and Domestic Change*, 1999 manage to bridge human rights advocacy and the normative sphere. Again in this edited volume, *Christian R. Thauer* references their work, and *Hunter Keys, André den Exter & Bonnie Kaiser* deal with specific questions involving NGOs.

86 In particular, see the contribution by Ooms, G, "From international health to global health: how to foster a better dialogue between empirical and normative disciplines" (2014), *14 BMC International Health and Human Rights*, 36. For *Ooms*, public health should inter-disciplinarily be able to comprise both, the empirical and the normative level. His main concern is, how to improve fruitful dialogue between different disciplinary backgrounds. In a nutshell, he argues that empirical researchers are to reflect their normative assumptions, and normative researchers are to consider more standardized paper structures in order to translate their line of reasoning. For a splendid (because it is as short as it is correct) overview on how to carry out inter-disciplinary research from a legal perspective see Taekema, S & Klink, B van, "On the Border. Limits and Possibility of Interdisciplinary Research" in Klink, B van & Taekema, S (eds.), *Law and Method. Interdisciplinary Research into Law*, 2011, 7.

87 Stein, "International Integration and Democracy", above Fn. 16, 499.

adjudication can function as a transmission belt between both spheres. Normative decisions predispose a basic understanding of facts.[88] In the case of adjudication, these facts are to an extent brought to the lawyer. The court or tribunal is a place where the facts and the norms must meet. Questions of legality often do not form in the abstract alone, but rely on empirical assumptions.[89] *Sabino Cassese* points to a different, individual dimension of the absence of case law: With the absence of an international rule of law, he argues, and global governance phenomena thus little structured by coherent international case law, individual procedural rights and obligations such as participation come under threat.[90]

IV Conclusions

Case law in matters of international public health law can be described as scarce and scattered, summing up the cursory inventory provided within this article. In terms of the international public health law governing infectious disease control, and particularly the Ebola crisis, the following picture evolves: The IHR provide a dispute settlement mechanism, which is by and large unused and forgotten. The WTO dispute settlement does not piggyback international public health law governing infectious disease control. Borrowed fora for the international law governing infectious disease control exist for employment contract claims of international public servants, human rights case law, and international private aviation law (substantial assessment of damage claims issued against aircraft carriers would principally stem from public international law conventions). This picture does not differ drastically from other areas of international public health law.

The article also includes a proposal to legally interpret the wording of IHR dispute settlement in analogy to the WTO DSU. In commenting on the IHR dispute settlement mechanism, it argues that the WHO Director-General and the WHA are assigned a quasi-judicial function. However, in the cases foreseen for the WHA concerning contentious disputes with the WHO itself, the drafters of the 2005 IHR should have placed this function in the wider UN system, for example with the Secretary General. The article does

88 Petersen, N, "Braucht die Rechtswissenschaft eine empirische Wende?" (2010), 49 *Der Staat*, 435 (437).

89 Petersen, "Avoiding the common wisdom fallacy", above Fn. 1, 304 et seq.

90 Cassese, S, *Chi governa il mondo?*, 2012, 92-96.

not entail a legal policy call to increase litigation. However, dormant dispute settlement mechanisms such as the one provided by the IHR should not pass by unnoticed, and thus become a real policy option for actors concerned.[91]

The described virtual absence of a coherent body of case law demonstrates that the proliferation of international courts and tribunals is regime-specific. In fields such as international public health law, which are highly driven by empirical science, this leads to increased invisibility of the legal argument and natural fallacy arguments. Functionally, lawyers lack a mechanism opening the door to relevant empirical data at the same time: Case law can filter facts and co-condition legality decisions – even while upholding the separating lines between the normative and the factual spheres. In the absence of case law, lawyers cannot develop a basic understanding of the empirical sphere through the facts as established in (leading) cases. Instead, lawyers need to develop a basic understanding of the discipline of public health in order to apply the law to hypothetically relevant case scenarios.

91 See above Fn. 10.

The Role of the Human Right to Health