Buchbesprechungen

***Polčák, Radim/Svantesson, Dan Jerker B.*: Information Sovereignty. Data Privacy, Sovereign Powers, and the Rule of Law.** Cheltenham UK: Edward Elgar Publishing Ltd., 2017. ISBN 978-1-78643-921-5. xviii, 268 S. £ 85,-

Ein in vielfacher Hinsicht ungewöhnliches, aber auf jeden Fall höchst lesenswertes Buch, nicht allein wegen seiner Widmung an den verstorbenen britischen Fernsehkoch und Buchautor *Keith Floyd* – dessen "Weisheit" über die Disziplinen hinweg sogar in Philosophie, "cybernetics" und Recht übertragen werden könne (demonstriert auf S. 134). Hingegen unterstreicht EU-Kommissarin *Jourová* im Vorwort vor allem die Bedeutung der "sehr aktuellen Einsichten" der Autoren für die neue EU-Datenschutzgrundverordnung, aber auch für "key policy challenges facing Europe's justice ministers today" (S. ix). Der Personen- und Sachinformationen kombinierende, verlässliche Index reicht von *Robert Alexy* und *Aristoteles* über *Ronald Dworkin*, *Thomas Hobbes* und *Rudolf Jhering* bis hin zu *Gustav Radbruch*, *Norbert Wiener* und *Mark Zuckerberg*; am häufigsten zitiert wird freilich *Antoine de Saint-Exupéry* mit dem "Kleinen Prinzen", und zudem verweisen *Polčák* und *Svantesson* an zwei zentralen Stellen (S. 120 f., 157) auf *Ovids* Metamorphosen.

In der Einführung, dem ersten von zehn Kapiteln, halten beide fest: "the real-world implications of activities in the cyberworld are indisputable", "the concepts of individual data privacy and information sovereignty are not only similar, but essentially equivalent", so dass sie darlegen wollen "that it is possible not just to name their common principles but even to identify a common method to tackle the problems that arise from their inevitable collisions". Zudem möchten sie veranschaulichen "that it is possible to mutually transfer or transplant existing experiences between these two areas of law to resolve some of their contemporary 'hard cases' or fundamental controversies" (S. 2). Letztlich könnte eine vertiefte Analyse der "true nature of individual and international 'information sovereignty'" nicht nur "solutions of existing problems (e.g. of territoriality)" lösen, sondern auch Wege zeigen "to answer new questions yet to arise in the future" (S. 2). Um die "analogy between information sovereignty and data privacy" zu demonstrieren, haben die Autoren "some of the most significant emerging issues of contemporary cyberlaw" ausgewählt "including cross-border discovery, cybersecurity and cyber-defense operations, and legal regimes for cross-border data transfers" (S. 3). Dabei wird für beide Konzepte (d. h. "information privacy" und "information sovereignty") erstmals die gleiche

"core method" bzw. "methodological paradigma" benutzt (S. 4), und "information" werde nicht statisch, sondern als "process" verstanden, mit dem Ziel "establishing a proper legal understanding of meanings and functions – namely of the core natural concepts of information and data" (S. 4). Bevor dann aber die Untersuchung (mit "*Potemkin's* laws", Kap. 2) startet, schieben die Autoren noch einen "User guide" in sieben Punkten (S. 5) ein – nicht alle sind ganz ernst gemeint, aber gerade dann überaus hintergründig!

Ausgehend von den *Potemkin'schen* Dörfern (und deren letztendlichen Anlass, den Vorgaben – "ought" – der *Kaiserin Katharina II.*) und diese mit dem "is", der "philosophy of life" als Basis der "cybernetics" kontrastierend, halten *Polčák* und *Svantesson* fest "the primary ambition of the law" sei "to serve as an information system, i.e. to counter the entropy" (S. 13). Um "good law" zu schaffen bzw. zu erkennen, genüge es aber nicht, auf Logik abzustellen, sondern auf "the intuition fuelled by a divinely complicated mixture of experience, intelligence, talent" und nicht zuletzt "good luck" (S. 16). Am Beispiel der *Google*-Entscheidung des EuGH (Rs. C-131/12) wird erläutert, dass die Frage "as to when truthful statements do good, including what 'doing good' (S. 17) with regard to statements actually means" ebenso schwierig zu beantworten wie wirtschaftlich bedeutsam ist. Nach Diskussion der unsinnigen Vorschrift, die "sunsets" befehlen wolle, wird als "spatial paradigm" konstatiert, das einzige Problem, welches "traditional legal structures related to data" *Potemkin'schen* Dörfern ähneln lasse, sei der technologische Wandel "that made data unrelated to space" (S. 24) und "time" (S. 26). Daher funktioniere der "frontal approach" des europäischen Datenschutzrechts mit dem Ziel "to directly regulate the existence of personal data without primarily focusing on procedures or effects of their processing" nicht "in real life" (S. 26). Als Schluss hieraus skizzieren die Autoren eine "negative ontology of information law" (S. 27 f.), benennen nämlich insbesondere drei Punkte, wo Recht nur "noise" mache, aber "does not do good": "(1) laws that objectivize information because information can be regarded only as an aim (not an object) of law; (2) laws that primarily aim to limit the availability of use of data, except for cases when data are firmly and uniquely fixed to their carriers; and (3) laws that obviously have no potential of being factually effective due to the technical impotence of respective state authorities" (S. 28 f.). Das letzte meint schlicht solche Bestimmungen "that are not only unenforceable but also have obviously no other implicit organizing effect due to there being no substantive relation between the sovereign and the governed" (S. 31), bei denen es sich also um "bullshit" handle (S. 31).

Es lohnt sich, dieses 2. Kapitel sehr intensiv zu lesen, weil es in der Tat das Fundament für alle weiteren Überlegungen bildet – zusammen mit einem der Kernsätze des folgenden Kapitels (3) über "international information sovereignty", für die Internetgesellschaft sei grundlegend, dass "many people want many forms of information to be free – free, not necessarily as in accessible without charge, but free as in capable of being circulated without restrictions". Eine "tendency to move around" werde ergänzt durch eine "ability to cater for information circumventing 'roadblocks'" (S. 32). Während aus einer "network perspective" grenzüberschreitender Datenverkehr "completely normal" und "typically unnoticed" sei, habe dies aus rechtlicher Sicht "tremendous legal and political implications", weil es zu einem "potential loss of direct, and/or indirect, control" führe, einer "tension", die stets bedacht werden müsse (S. 32 f.). Die Frage heute sei nicht mehr "to regulate or not to regulate", der gegenwärtige Zustand einer "hyper-regulation" sei jedoch ein "real concern, arguably undermining the legitimacy of law" (S. 40). Die Unterscheidung zwischen (nationalem) Internationalen Privatrecht und Völkerrecht ("public international law") werde, soweit es um "jurisdiction" gehe, zunehmend künstlich; "data privacy" gehöre zu beidem, und der Einfluss der Internet-Technologie sei ähnlich (und unabhängig von "perceived public/private divide", S. 42). "Jurisdiction" habe "multiple meanings" (S. 43), gerade für das Völkerrecht sei aber neben "prescriptive", "adjudicative" und "enforcement jurisdiction" ein vierter Bereich bedeutsam, nämlich "investigative jurisdiction" (S. 43). Vorstellungen der "offline world" seien nie zu 100 % auf die "online environment" übertragbar, wohl aber für andere internationale Räume entwickelte Grundsätze auf den "cyberspace" (S. 50 f.). Jedoch verliere eine strikte Trennung von "territoriality" und "extraterritoriality" ihre Bedeutung und werde nicht einmal zur Sicherung von "technology-neutral consistency" benötigt (S. 58); vielmehr sei anzuerkennen "that jurisdictional claims with an extraterritorial effect are a natural consequence, if not a necessity, where we have cross-border activities" (S. 57). Souveränität hänge eng mit "human dignity" zusammen; letztlich sei "privacy" ein "right to be 'let alone' for individuals while sovereignty is the right to be 'let alone' for states" (S. 65). Das Internet sei einem Ozean ähnlich, die Internet-Giganten (wie Google, Facebook und Co.) glichen "Göttern", die das Meer kontrollierten; der Blick auf die "interest matrix of the parties concerned" zeige ein Ökosystem, in dem "state sovereignty is not such an absolute control as it may have been in the past" (S. 66). Aus der spezifischen Rolle von "code" (im Sinne von *Lessig*) als alternativer Regelungsstruktur folge, dass "the Internet truly challenges sovereignty" (S. 67), während das Prinzip der Nichteinmischung

als andere Seite der "sovereingty coin" nicht ohne Weiteres verschwinde (S. 69) und zudem "comity" wichtig werde (S. 70) und auch "due diligence" im Kontext des Schädigungsverbots zu berücksichtigen sei (S. 72). Angelehnt an *Dworkin*, fragen die Autoren sodann, ob "consent" wirklich das "central concept it is assumed to be" sei (S. 73 ff.), und halten fest, dass eine "balanced consideration of multiple factors" (S. 79) angemessen sei. Sie sehen selbst, dass "some of the ideas presented probably still fall under the label of 'unorthodoxy'" (S. 80). Diese Einschätzung trifft sicherlich auf die Ausführungen über "private information sovereignty" in Kap. 4 zu, wo es zunächst um "privacy" als Konzept in Abgrenzung zu Eigentum geht (S. 81), um den Unterschied zu einem Recht "to be left to one's self" (S. 86) und die Nähe zum (Recht auf) Frieden und der menschlichen Würde als abwägungsfestem Kern (S. 92). Trotz etlicher Unterschiede erscheine die "substantive basis" des "regulatory concept of sovereignty" dem der "privacy" ähnlich, zum einen im Hinblick auf die *erga omnes*-Wirkung, sodann als Rechtsgrundsatz, schließlich bezüglich der "core teleology" – Gewährleistung äußeren und inneren Friedens (S. 96) – sowie dem "fundamental reasoning of restrictive regulatory action that defends the private domain of an individual and of a state" (S. 94). Unterschiede seien irrelevant "when it comes to data or information"; vielmehr bestehe eine "nearly perfect correspondence – and analogy" zwischen "information" (bzw. "data") "sovereignty" und "information" (bzw. data) "privacy" (S. 96); leider wird jener zentrale Terminus aber weder hier noch an anderer Stelle genauer definiert! Implikationen dieses Zusammenhangs bildeten "independent existency of privacy", "limitation or justified infringement" und schließlich "carving one out of another", als vierte dann "consent" (verstanden als Selbstbestimmung und gegründet auf Willensfreiheit, S. 104 f.). Anders verhalte es sich bei persönlichen Daten: "There is nothing like a concept of public international law that would acknowledge the protection of data independent of sovereignty" (S. 112). Insofern genüge eine "proper virtualization of what we already have and what represents the defining aspect of the legal existence of a nation, i.e. the concept of sovereignty" (S. 112).

In den meisten folgenden Kapiteln (außer dem 6.) spielen schon im jeweiligen Titel Pferde und vor allem Igel eine zentrale Rolle. Das Internet habe eine "specific legal culture" geschaffen, die "lex informatica" sei effektiver, aber durchaus ähnlich zur herkömmlichen "lex mercatoria", auch bei der Streitbeilegung (S. 117 f.), und anders als bei einer "horse culture" bestehe hier ein direkter philosophischer Zusammenhang zwischen Vergangenheit und Gegenwart (S. 123). Dieses Phänomen – "end of the law as we know it" – erfülle meist nur einen der drei Zwecke *Radbruchs*, nämlich (aus Sicht der

Internet service provider) "economic profit", d. h. "utility" i. S. v. "economic efficiency" (S. 126), sei daher nicht mehr "law of Man", sondern "a simple set of instructions" (S. 127). Solange jedoch die "form of law" gewahrt werde, werde "an extreme or fatal substantial deficit of values such as freedom or dignity" kaum eintreten – zumindest solange Juristen bei der Abfassung solcher "laws" beteiligt seien (S. 130). Eine hierarchische Struktur sei hierbei nicht nötig, solange "mutual communication" erfolge, denn dies "*per se* eliminates or at least mitigates a number of substantive conflicts" (S. 132 f.). Auf den zu Beginn gepriesenen Starkoch rekurrierend, heben *Polčák* und *Svantesson* hervor, die zu leistende Arbeit betreffe "an unpredictable and highly complex regulatory environment", das sich in absehbarer Zukunft wohl kaum in "any strictly hierarchical structure" entwickeln werde (S. 135). Bevor sie aber (in Kap. 6) die dazu passende Methode näher erläutern, wird noch das Dilemma zwischen positivistischen und naturalistischen Ansätzen diskutiert und letztlich (wieder am Beispiel des "Kleinen Prinzen", S. 137 f.) für Pragmatismus votiert: Die richtige Lösung sei "the one that will work most efficiently in the real world" (S. 137), der Fokus solle "on the practical usefulness of respective outcomes, be they legislation or judicial decision" (S. 139) liegen. Eine "possible method for solving sovereignty clashes" wird relativ kompakt skizziert, mit Bezug auf die "Harvard Principles" (1935) und das Restatement (Third) of U.S. Foreign Relations Law (1987), dabei drei frühere Vorschläge (in Bezug auf Völkerrecht wie Internationales Privatrecht) als "alternative jurisprudential core" (S. 141) vertiefend: "In the absence of an obligation under international law to exercise jurisdiction, a State may only exercise jurisdiction, where: 1) there is a substantial connection between the matter and the State seeking to exercise jurisdiction, 2) the State seeking to exercise jurisdiction has a legitimate interest in the matter; and 3) the exercise of jurisdiction is reasonable given the balance between the State's legitimate interests and other interests" (S. 140). Hierbei erläutern die Autoren zunächst "common origin and similarity" von "legitimate interest and substantial connection" (trotz notwendig je unterschiedlicher Bewertung) und geben Beispiele für relevante Aspekte der beiden Kategorien, um hiernach das "interest balancing" näher zu betrachten; so gelangen sie am Ende zu einer nicht erschöpfenden Liste von sechs Faktoren (S. 152) – und schließen zugleich aus, dass vorweggenommene Ergebnisse beachtlich seien. Ihr für "data privacy" vorgeschlagener Rahmen ("nothing new or revolutionary useful", S. 153) sei immerhin geeignet "to resolve mutual conflicts between sovereignty and privacy" (S. 153), wobei die drei Grundsätze ("substantial connection as a matter of facts", "legitimate interest as a matter of law" und "interest balan-

cing") sowohl den (prozeduralen) "jurisdictional" als auch den (inhaltlichen) "privacy context" erfassten (S. 154).

Die nächsten (und vor der "conclusion" abschließenden) drei Kapitel wollen, weil die Anwendung des aufgezeigten Rahmens "context-dependent" sei, das damit gegebene "große Versprechen" im Detail veranschaulichen. "Hedgehogs" sind dabei maßgeblich, weil sie anders als Füchse nur e i n e Sache kennen – "the one that truly matters" (S. 187). In Kap. 7 geht es zunächst um "cybersecurity" (unter Berücksichtigung des einschlägigen Tallinn Manual zum "cyber warfare"); behandelt werden "virtualized", "privatized" und "delocalized security", die Unterscheidung zwischen "home" und "abroad", die fehlende direkte Verknüpfung von Territorium und Daten, die wesentliche Bedeutung von "procedure" (gegenüber "object"), die von Vernunft und Machbarkeit geprägte "due diligence" von Souveränen und das geeignete Vorgehen bei der Wahl des "information sovereign", schließlich für diese geltende Bindungen und Handlungspflichten. Sicherheit allein sei kein Wert, sondern legitim ("valuable") nur "either if it directly serves the purpose of securing information self-determination or if it protects human dignity through protection of vital societal functionalities (namely critical infrastructures)" (S. 187).

Zu wirksamem "law enforcement" (Kap. 8) gehörten "adequate access to evidence, both in the form of what is ultimately presented to the court and, more broadly, 'clues' that are useful for investigative work" (S. 188). Da ein Überblick über geltende Regeln deren Unzulänglichkeit zeige, betrachten *Polčák* und *Svantesson* "what type (of jurisdiction) and over what" hier passen könnten und führen als vierte Kategorie die früher schon erwähnte "investigative jurisdiction" ein (S. 194). Auch und gerade hier seien "single-factor tests" (elf Anknüpfungspunkte sind auf S. 195 aufgelistet) eher eine "obsession", "territoriality" dürfe nicht zum "stranglehold" werden (S. 197), zumal dieser Ansatz auch in der realen Welt (Beispiel Umwelt- oder Weltraumrecht) nicht immer besonders gut funktioniere (S. 199). Daher erläutern die Autoren am Beispiel des Konflikts zwischen Microsoft und der U.S.-Regierung ihr eigenes Konzept im Hinblick auf "law enforcement access to data" und postulieren am Kapitelende "achieving change" sei "a task for us all", weil etwa mehr Harmonisierung zu mehr Vorhersehbarkeit für alle Beteiligten führe (S. 207). In Kap. 9 widmen sich *Polčák* und *Svantesson* abschließend einem "sad state of affairs", dem Fehlen zufriedenstellender Lösungen dazu, ob das Internet wirklich reguliert werden "kann" – wie dies vor allem auf dem Feld des "cross-border data privacy law" deutlich werde (S. 207). Sie führen mehrere Modelle an, halten aber eine "main dividing line" für wesentlich, zwischen Staaten, die dem EU-Vorbild (seit der Richt-

linie 95/46) folgen, und anderen (wie vor allem die USA). Wie "data privacy law" mit grenzüberschreitendem Datenverkehr umgeht, wird im Hinblick auf hierfür zulässige Begrenzungen und dann in Bezug auf die Anwendung auf Ausländer diskutiert. Recht plakativ befassen die Autoren sich hiernach (wieder am Beispiel Google Spain) mit der europäischen "data colonization through global delisting orders" und entwerfen (und kommentieren) mit Blick auf das "right to be forgotten" einen "model code determining the geographical scope of delisting" (S. 227 ff.). Klargestellt wird aber auch, Europa solle sich nicht scheuen "as a leading light" zu handeln, welches "a 'gold standard' of data privacy" gestalte (S. 232), auch wenn es bei dieser Materie um das "ugly duckling" der Menschenrechte gehe: "The right to privacy is more important in our current privacy-hostile technological environment than it ever has been before" (S. 232). Erforderlich seien – so die "conclusions" – "a greater degree of conceptual clarity" und die Korrektur falscher (oder fehlender) "factual assumptions" (S. 234). Auch müssten "protective legal tools" vor allem auf die Prozesse abzielen "in which data are used for different purposes" (S 234). Letztlich gebe es *einigen* Grund zu Optimismus; es sei doch so einfach, wie die Autoren *John* und *Yoko Lennon* paraphrasierend formulieren (S. 238): "Territoriality (as the jurisprudential core of jurisdiction) is over if we want it!"

Polčák und *Svantesson* wissen, dass ihre Überlegungen zu einem "emerging extra-spatial concept of information sovereignty" ein "work in progress" sind, viele Facetten nur angerissen werden und sowohl im klassischen (öffentlichen) Völkerrecht als auch im (zivilen) Internationalen Privatrecht traditionelle Strukturen vorhanden sind, deren "Aufhebung" im *Hegel'schen* Sinne einen eher langen Atem benötigt. Die individuelle, intensive Kooperation von zwei Wissenschaftlern aus unterschiedlichen Rechtsdisziplinen und verschiedenen Rechtskulturen im Kontext einer für beide nicht-nativen Sprache zeigt freilich, wie fruchtbar solch' dialogische Kommunikation (offline und online) ausfallen kann, wenn ein goldener Mittelweg gesucht wird ("balancing"). Ungeachtet der diversen Ausflüge in die "schöne Literatur" ist das Werk überdies redaktionell höchst solide und akribisch, bis auf zwei eher irreführende Querverweise auf S. 215 und 222 sind allein die eingestreuten lateinischen Neuschöpfungen fragwürdig (etwa S. 119), und es wäre schön gewesen zu erfahren, was eine "lex nulla" (als Gegenstück zur "lex informatica" (s. S. 113) denn sei.

Fazit: Gerade auch für Völkerrechtler eine seriöse Streitschrift, die (hoffentlich) zu einer Rückbesinnung auf die Wechselbeziehungen und -wirkungen zwischen Recht, Kultur, Gesellschaft/Gemeinschaft, Technik bzw. Technologie herausfordert und nicht zuletzt auch Wege für effizientes

Recht im Zeitalter der Globalisierung und Digitalisierung zeigt – nutzenorientiert, pragmatisch, im Sinne der Sicherung äußeren und inneren Friedens für Menschen im Informationszeitalter.

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***Vierck, Leonie/Villarreal, Pedro A./Weilert, A. Katarina* (eds.): The Governance of Disease Outbreaks. International Health Law: Lessons from the Ebola Crisis and Beyond**. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017. ISBN 978-3-8487-4328-5. 393 S. € 79,-

As we write, a major outbreak of Ebola Virus Disease (EVD) is engulfing the Democratic Republic of Congo (DRC). The World Health Organization (WHO) has responded with great vigor, fully funded by the international community and also deploying Ebola vaccines. What a difference a few years makes. The 2018 DRC Ebola outbreak is reminiscent of the Ebola epidemic that devasted West Africa between 2013 and 2015. That epidemic exposed glaring weaknesses in global preparedness for the prevention, detection, and response of major infectious disease threats. It particularly illuminated the fragmentation and indecisiveness of the WHO. Following major post-Ebola commissions, WHO fundamentally reformed, and thus far it has performed well in the DRC.

Leonie Vierck's, *Pedro Villarreal's* and *Katarina Weilert's* "*The Governance of Disease Outbreaks*" uses the world's experience with EVD in West Africa to understand a wide range of issues related to the exercise of international public authority in the context of international health governance (p. 11). The book is an edited volume resulting from "an institutional collaboration between Forschungsstätte der Evangelischen Studiengemeinschaft e.V. (FEST) and Max Planck Institute for Comparative Public Law and International Law (MPIL)".

The editors view the volume as a multi-methodological resource. The book makes two major contributions and a third less emphasized one. First, it provides an important resource for researchers and policy makers looking into the problems raised by the 2013-2015 Ebola epidemic. The world witnessed lack of state compliance with the major international treaty addressing pandemic preparedness — the International Health Regulations. The WHO also encountered difficult relationships and poor communication with its country and regional offices. The United Nations (UN) Secretary General and the UN Security Council also became closely involved in the response, prompting a subtle tension with the WHO. Second, the volume applies the expanding literature on international public authority, i.e. the exercise of powers conventionally thought of under international law as un-

dertaken by the state, in the context of global health. In the editors' terminology, this second contribution is referred to as global health governance or GHG. Third, the book provides a rich, multidisciplinary approach to the problem of basic health infrastructure deficits in low- and middle-income countries. All of these are interrelated because governance, international law, and strong national health systems are all needed (and to work harmoniously) in pandemic preparedness.

The book is divided into four sections: "Framing the Field", "The Role of the Human Right to Health", "International and Regional Organizations and the Securitization of Health", and "Governance Beyond the Law". The editors acknowledge that these groupings are pliable. The section on international and regional organizations, for example, contains four chapters, one committed to the West African Health Organization (a specialized institution of the Economic Community of West African States [ECOWAS]) responsible for health issues, one committed to WHO's legal authorities, and two devoted to the UN Security Council's actions during the Ebola outbreak. The former two cover the securitization of health only peripherally while the chapters by *Robert Frau* and *Ilja Richard Pavone* thoroughly cover both section themes. The chapters are not numbered, so the ordinal system adopted here is ours.

In Chapter 1, *Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?*, *Michael Marx* addresses the international, regional, and national weaknesses leading to the unprecedented outbreak and recommends several changes consistent with international frameworks like the International Health Regulations (IHR), including the integration of WHO, WHO in African Region (WHO-AFRO), ECOWAS, and West African Health Organization (WAHO) planning and activities (pp. 43-60). *Marx* identifies in particular the relevance of investments in the training and increase of healthcare workers and primary health care made in past decades. Consistent with other contemporary criticisms, *Marx* notes that while there are large investments in vertical programs devoted to HIV/AIDS, malaria and tuberculosis, more widespread investments in preparedness and access have been "almost completely ignored" (p. 56). The primary lesson, according to *Marx*, is the importance of comprehensive national health planning and capacity, and the misdirected expenditure of resources on disease-specific interventions. With the WHO spearheading a campaign for Universal Health Coverage (UHC), a key target of the UN Sustainable Development Goals, *Marx's* observations are important.

In Chapter 2, *Wolfgang Hein* addresses the *The Response to the West African Ebola Outbreak (2014-2016): A Failure of Global Health Governance?* with special emphasis on recommendations and retrospectives issued by the major expert panels after the outbreak's containment (pp. 61-82). He focuses on the broader set of actors – Médecins Sans Frontières (MSF), other Non-governmental organizations (NGOs), public health agencies like the U.S. Centers for Disease Control and Prevention (CDC) – that comprise the universe of global health governance. Using a carefully constructed chronology, *Hein* challenges the conventional wisdom that the global response was slow or weak. In March 2014, he argues, WHO activities in the three most affected countries were strong, cases in Guinea between April and May had declined, and financial assistance increased significantly well before WHO's August 8 declaration of a Public Health Emergency of International Concern. According to *Hein*, the IHR are the more blameworthy culprit, oriented as they are toward rich countries' interests. Poor countries' lack of capacity to comply with the IHR is a product of political will, a problem that could be addressed without many of the time-consuming, complex changes at the WHO level advocated by post-Ebola critics. Still, in retrospect, judging by WHO's response to the 2018 DRC outbreak, many of the post West Africa reforms have been quite important, not the least of which are the WHO Emergency Contingency Fund and the WHO Emergencies Program. Both were deployed with strong effect in the DRC.

In Chapter 3, *The Changing Structure of Global Health Governance*, *Mateja Steinbrück Platise* analyzes the structure of global governance actors with special emphasis on international organizations (pp. 83-112). She assesses how the entry of new players in global health has caused fragmentation, donor-driven regulation, and structural deficiencies (p. 83). She notes that one of the trends in governance is the entrustment of policy to regional and local authorities and actors, de-emphasizing the traditional role played by states. This trend is also away from public actors to private and semi-private organizations with technical expertise in specific aspects of global health. International organizations such as WHO, United Nations Children's Fund (UNICEF) and other arms of the UN risk diminishing influence because of the ascent of private and public-private actors. This is a loss for global health because these organizations work under a health-as-human-right mandate. *Platise* identifies ways in which international organizations can remain primary actors including serving as crucial fora for all stakeholders, use of their distinct legal capacity (especially leveraging their legal immunity and capacity for public private partnerships) and service as models of accountability in the health sector.

In Chapter 4, *Leonie Vierck* analyzes the scant case law falling under the subject of international public health governance. That case law falls within three broad categories: duties owed to international public servants, international aviation law, and some regional human rights decisions (pp. 113-144). The chapter studies dispute resolution mechanisms under the major instruments that affect international public health law and determines that the dearth of case law results from those mechanisms' disfavor of litigation and promotion of consultations. The IHR's dispute resolution mechanism, for example, favors non-adversarial approaches. Those regimes that do produce case law such as the World Trade Organization (WTO), often do so without reference to international public health legal authority. International public health case law is spread across fragmented regimes like human rights, tobacco control, arms control, and international environmental law. This lack of case law, according to *Vierck*, means we lack the ability to "understand […] the fragmented field of international public health law". Without a threshold body of case law, we lack mechanisms to "process […] factual accounts and help […] lawyers to shape their argumentation." (p. 137). She proposes interpretation of the wording of the IHR dispute mechanism as the WTO has interpreted its Dispute Settlement Understanding to facilitate promotion of case law, but ultimately concludes that international public health lawyers must ultimately resort to other legal sources to shape facts and argumentation.

In Section II, the Role of the Human Right to Health, *A. Katarina Weilert* introduces the section by providing a comprehensive overview of the international legal instruments that inform the human right to health (pp. 145-174). In addition to identifying and analyzing the major instruments, *Weilert* argues that the multiplicity of instruments should be recategorized into coherent approaches of duties and rights. It does not make sense, under *Weilert's* analysis, to think of the state's obligation to protect public health in terms of the justiciability of individual rights. Individual rights to health should be understood primarily as claims to individual medical care. The right to health is complex, in part, because it is both a national security issue as well as a human rights issue. Within this latter category, rights to health fall in part into all generations of rights – liberty rights, social rights, and group rights. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the most important instrument defining the content of the human right to health, blurs the lines between rights, calling for individual freedoms but also state responsibility for the promotion of public health. The way to reconcile difficult decisions about resource allocation is to articulate concrete remedies for individual

persons. *Weilert* concludes that "the right to medical treatment should be guaranteed by each state including the possibility to take legal action" to effect such a right (p. 171). This would free the state to define its public health obligations, like immunizations, "as a separate field with overlapping edges" (p. 172). The fight against epidemics, like Ebola, fall squarely within the second category under this analysis. *Weilert* concludes with some enforcement possibilities that might be tailored to the classification she offers.

In Chapter 6, *Elif Askin* analyzes the extent to which a right to health right might apply extraterritorially – a critical inquiry given the weaknesses in the international response to the Ebola outbreak (pp. 175-212). Applying Article 2(1) and Article 12 of the ICESCR, respectively the right to health and the duty of international assistance and cooperation, *Askin* sketches the outlines of what may be an international obligation to assist another state endeavoring to meet its own human rights obligations. Initially, a state must prove that its resources restrain it from progressive realization of the right to health, that it has achieved minimum core obligations (e.g. equal treatment and non-discrimination), and has not regressed on rights already extended. In order to make that showing, the state must prove that it has sought international support. At that point, General Comment No. 14, the comprehensive elaboration of Article 12 principles, requires State Parties to give special consideration to the control of infectious disease outbreaks, corresponding to their potential to threaten the right to health for states collectively. Unlike the International Covenant on Civil and Political Rights and the European Human Rights Convention, the ICESCR contains no jurisdictional clause and emphasizes international cooperation and assistance, as do Articles 55 and 56 of the UN Charter. Recent judgments from the International Court of Justice have emphasized that the ICESCR and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) have suggested the plausibility of extraterritorial application. Common Article 1 of the Geneva Conventions similarly contain both negative and positive extraterritorial obligations from Member States.

Askin understands that an extraterritorial obligation, even anchored in existing instruments represents a new development in international law. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Social, Economic, and Cultural Rights, for example, dates only to 2011. Relationships that might trigger extraterritorial obligations include an act or omission within a state that renders an extraterritorial effect or where an act inside a state affects a treaty relationship like trade or investment law. Article 11 of the International Law Commission (ILC) Draft Articles on the Protection of Persons in the Event of Disasters expands the traditional terri-

torial scope of duties to that of seeking assistance should national capacity be exceeded. Historical links between countries facing threats like Ebola might add other obligations, such as that between France and Guinea, Britain and Sierra Leone, and the U.S. and Liberia. *Askin* concludes that even under current law, there are obligations to render extraterritorial assistance, although specific nuances like positive and negative obligations emanate from factors like national capacity, nature of an international emergency, and geographic proximity of states that might render aid.

In Chapter 7, *Hunter Keys*, *Bonnie Kaiser*, and *André den Exter* explore the right to mental healthcare as it was shouldered by NGOs during the Ebola outbreak (pp. 213-242). The chapter is a case study of an NGO that assisted the Liberian Ministry of Health administer Inter-Agency Standing Guidelines on Mental Health and Psychosocial Support in Humanitarian Settings during the Ebola outbreak. NGOs and governments have long known of the emotional and mental cost humanitarian (including armed conflict) crises impose, and the Guidelines were an effort to assess that cost and adopt some approaches that might be applied during the course of rendering humanitarian assistance. Liberia adopted mental health as part of its National Health Policy, and aimed to implement it through County Mental Health teams and Wellness Units. After Ebola was confirmed in March 30, 2014, the government closed nonessential operations of existing healthcare units, thus adversely affecting mental health programs. The authors identify aspects of the response that depended upon mental health care workers like fear-based behavior (e.g. hiding sick relatives or spreading rumors about the disease's etiology and means of transmission). Although county mental health teams were eventually contacted and a workshop on the issue was convened, psychosocial workers who were available and deployed for mental health purposes were diverted by a prominent NGO working on Ebola to a hospital run by a different NGO. The authors highlight how different principles within the guidelines (e.g. do not harm and build on available resources) came into tension during Ebola. The authors conclude that the practical effect of the guidelines is likely to be limited, proportional to the severity of the humanitarian emergency in which they are applied.

In Chapter 8, *Pedro Villarreal*, introduces the third section, International and Regional Organizations and the Securitization of Health. He analyzes the WHO's governance structure during Ebola, paying special attention to the IHR, the Director-General's (D-G) authority, and the use of the Emergency Committee. *Villarreal* recounts how WHO authority after the 2002-2003 SARS outbreak led to the adoption of the IHR (2005), and how the Director-General's failure to make public the names of Emergency Com-

mittee members during H1N1 brought the legitimacy of the D-G and the Public Health Emergency of International Concern mechanism into question, although not the IHR themselves. Ebola magnified the controversy over these structures and led to UN Security Council's establishment of an entirely separate body, the UN Mission for Ebola Emergency Response (UNMEER). After describing other organs like the World Health Assembly and the Secretariat (including the D-G), and its system of regional organizations, *Villarreal* argues that it is possible to predetermine or provide more defined criteria for the D-G and the Emergency Committee to use to avoid the missteps made during H1N1 and Ebola.

In Chapter 9, *Edefe Ojomo* analyzes the role of the WAHO, the regional health arm of ECOWAS, during the Ebola outbreak (pp. 273-300). *Ojomo* is particularly concerned with the possibility that regional organizations, especially in places like West Africa where national (health) institutions are weak, may play a particularly influential role in responding and coordinating international responses to security threats like Ebola. *Ojomo* compares the capacity to respond in Nigeria and Senegal with that in the three most affected countries, which lacked necessary medical facilities and were characterized by urban slums and isolated rural communities cut off from aid after the epidemic became emergent. After providing a brief history of ECOWAS, *Ojomo* recounts WAHO's response, which was authorized in July 2014. The ECOWAS Commission authorized a regional response to Ebola and its health ministers together with NGOs attempted to develop a regional response. However, in violation of ECOWAS's principle of free movement, national level border closures, quarantines and travel bans prohibited this regional approach from working. Before December 2014, late in the epidemic's course, WAHO sent only ten technical experts. It eventually sent 150 medical professionals. This minimal role explains WAHO's omission from most retrospective analyses. Although regional organizations can play an important role in developing healthcare, infrastructure, and financial security,
ECOWAS and WAHO were unable to do so during Ebola. *Ojomo* advocates rethinking incentives within ECOWAS, to align the interests of its larger and smaller states toward the construction of issue-specific responses that might be better managed at the regional level.

In Chapter 10, *Ilja Richard Pavone* assesses the specific importance of the UN Security Council's decision (Resolution 2177/2014) to declare Ebola – the first time for an infectious disease – a threat to international peace and security (pp. 301-326). Was it an isolated event, or did it represent the natural culmination of the global community's increasing attention to global

health security starting in 2000? *Pavone* highlights the weaknesses Ebola revealed for the IHR and the success of the Ebola response after UNMEER and WHO worked together to address it. The declaration represented the increasing securitization of health which, according to *Pavone*, began with Security Council resolutions on HIV/AIDS in 2000 and 2011. Yet Resolution 2177/2014 did little to change the international structural system of health threat response, since it did not invoke the right to protect those threatened by Ebola, nor did it invoke its wide authority to Act under Articles 41 and 42 of the UN Charter. In context, Ebola does represent the new kinds of threats the UN Security Council must face – disaggregated, non-state threats like climate change, infectious diseases and cross-border militarized actors. Resolution 2177 therefore acknowledges a move away from security as a breach of territory from an armed attack and far more likely to affect so-called "Human Security" or safety from chronic threats, hunger, disease and repression. Similarly, the Security Council in the same session adopted Resolutions 2134 and 2136 concerning, respectively, the conflict in the Central African Republic and in the Democratic Republic of Congo emphasizing linkages between wildlife poaching, criminal networks and cross-border armed groups. Yet the widening concern with human security also means the increasing "securitization" or militarization, of those threats. *Pavone* returns the discussion to the early 2000s when the UN Security Council acknowledged the unique threat that HIV/AIDS posed to security and development in Africa. *Pavone* concludes that while Resolution 2177 is traceable to widening Security Council recognition of threats to human security, it cannot be construed as a new norm as to the responsibility to protect populations.

In Chapter 11, *Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it Make Sense for Health Governance?*, *Robert Frau* analyzes how UN Security Council measures might substitute for the temporary recommendations that the IHR authorizes during a public health emergency of international concern (PHEIC) (pp. 327-350). States largely ignored WHO's temporary recommendations during the Ebola outbreak. After describing the outbreak of the Ebola epidemic and the legal authorities enjoyed by WHO, *Frau* discusses the non-legal character of temporary recommendations issues pursuant to the declaration of a public health emergency of international concern. *Frau* argues that making the recommendations binding might be done through WHO's Constitution (Article 19 or 21) or through the UN Security Council acting to make those recommendations enforceable under the UN Charter. *Frau* also argues that WHO may make more aggressive use of its IHR

Article 43 authority to review measures taken by states pursuant to a PHEIC, effectively shaming them if they fail to meet the IHR standard for restrictiveness. With respect to the UN Security Council, *Frau* argues that it could have requested concrete actions on trade and travel restrictions, border management, or access of healthcare workers to affected countries. Instead of using its Article 39 authority to address the "extent" that Ebola destabilized West Africa, *Frau* argues that the UN Security Council might, in the future, interpret the epidemic itself to be a threat to peace and thus justify stronger Article 41 and Article 42 measures. The UN Security Council could also establish a Global Health Committee. *Frau* concludes by arguing that the human right to the highest attainable standard of health and Article 12 of the ICESCR specifically may help the UN Security Council and WHO cooperate more effectively in constructing solutions that involve their legal authority.

In Chapter 12, the first of the final section, Governance Beyond the Law, *Susan L. Erikson* addresses the fundamental lack of basic healthcare infrastructure as one of the issues contributing to the severity of the Ebola outbreak (pp. 351-372). *Erikson* was conducting ethnographic research on the use of health data in Sierra Leone when the first Ebola cases were made public. The team adapted its mission to observe the "local health sector's initial efforts to manage the Ebola outbreak" (p. 352). Her chapter largely uses her ethnographic observations to criticize the functioning of the IHR. According to *Erikson*, the IHR provides a set of documents and checklists that take the place of actual preparedness. Because the IHR provided no mechanism for rich countries to help poor countries meet their obligations, it effectively distracts from the investment in infrastructure for them to work as intended. The vacuum is filled with NGOs that often lack local knowledge and willingness to tailor their programs to benefit local populations. For example, donors set up their headquarters in places like Freetown that required transportation of patients from east to west through the most impoverished and densely populated parts of Sierra Leone because that is where the donors wanted them. *Erikson* faults post-outbreak retrospectives on again focusing on the sanctity of the IHR, rather than national health infrastructure deficits. According to *Erikson's* research, Sierra Leoneans knew how to contain the epidemic – e.g. through targeted quarantine and contact tracing – but lacked the resources and the empowerment to act on their knowledge. *Erikson* concludes that the IHR should be understood as guidelines and from there focus on national healthcare infrastructure.

In the concluding chapter, *Christian R. Thauer* studies the Ebola outbreak as a function of global health governance in what he calls "limited

statehood" or the inability of public authorities to play their traditional roles (pp. 373-393). He calls for a "conceptual change in international law to account for the fact that private actors may fulfill public functions in situations in which the state is limited in its ability to govern" (p. 373). According to *Thauer*, population density of impoverished and urbanized humans is increasing in the very places where states lack the ability to implement health policies or health access. International organizations, development agencies, NGOs, tribal actors, and local communities fill this governance gap. *Thauer* draws upon his own work on HIV/AIDS in South Africa, where he explains that addressing HIV/AIDS requires complexity and continuous presence best undertaken by a state, but the most afflicted states cannot. For-profit actors may play that role in some circumstances. *Thauer* describes Mercedes Benz manufacturing facilities in South Africa and how they rolled out a comprehensive HIV/AIDS workplace program there to protect their investment in employees with specialized skills. *Thauer* explains that this model might be replicated by offering the right incentives and constructing the right conditions. Mercedes Benz was a large company with a stake in the health of its specialized human assets. By contrast, Crossley Carpets, a South African woven carpet firm, did not do so because of its relatively small size and thin administrative infrastructure. In addition to scale and employee specialization, *Thauer* acknowledges that firms must be cognizant of local circumstances. BMW, running a similar program to Mercedes, initially confronted opposition from local healers about its HIV/AIDS program, but made a deal with them to refer employees for nutrition and well-being advice if they'd leave HIV/AIDS matters to the company. Nevertheless, *Thauer* sees large businesses as a part of the solution to the governance gap.

Overall, The Governance of Disease Outbreaks is an important resource for researchers seeking solutions to the problems unmasked by the 2013-2015 West African Ebola outbreak. This volume shows the vital importance of strong governance, robust institutions, and compliance with international law as a basis for outbreak detection and response, especially the International Health Regulations. Notwithstanding its stated mission to take a broad view of international public authority and global health governance, the volume is primarily an asset to those studying problems in international law. *Askin's* construction of an extraterritorial duty as to the human right to health, *Frau's* analysis of how UN Security Council and WHO legal powers might be better aligned, *Weilert's* recharacterization of duties and rights under the ICESCR, *Villarreal's* analysis of IHR legal architecture, and *Pavone's* study of UN Security Resolution 2177/2014 are all undertaken

using the orthodox methodologies of international law scholars. They do so with careful thought and insight. Those chapters will be invaluable to researchers working on international organizations and international legal authority. An equally important attribute of the book is that it raises old, complex questions, like the lack of basic health system infrastructure in much of the world, from the perspective of ethnographers (*Erikson*), physicians (*Marx*), and anthropologists (*Keys*) each of whom adds an important analysis to lawyers and legal scholars assessing the same problems. The volume ultimately makes the reader aware of the moral, political and legal dilemmas that the Ebola outbreak raised, even though most of the solutions advanced in the book are legal in nature. We strongly commend this volume for anyone interested in understanding the intersection of international law, governance, and institutions in national and global preparedness for public health emergencies of international concern.

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