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Book Reviews

Charles T. Kotuby Jr and Luke A. Sobota, ***General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes.*** Oxford: Oxford University Press, 2017. Pp. 304. £68. ISBN: 9780190642709.

In the late 2010s, the topic of general principles of law in public international law appears to have come of age. In 2018, the International Law Association's Study Group on Use of Domestic Law Principles for the Development of International Law submitted its final report.[1] In the same year, the International Law Commission (ILC) decided to include the topic 'general principles of law' in its programme of work and appointed Marcelo Vásquez-Bermúdez as special rapporteur. General principles plainly constitute an issue of current scholarly interest, and this focus is also generally welcomed by states.[2] The 2017 publication of *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* by Charles T. Kotuby Jr and Luke A. Sobota is therefore a timely contribution, both for the audience of dispute settlement practitioners and academics, explicitly pinpointed in the subtitle, and for those who will reflect upon, and participate in, the work of the ILC in the next few years. I am confident that Kotuby and Sobota's *General Principles* will be widely cited by varied participants in the international legal process; therefore, it is helpful to reflect upon the character of the legal argument that the book makes.

It is impossible for an anglophone book-length treatment of general principles to evade the comparison with Bin Cheng's 1953 *General Principles of Law as Applied by International Courts and Tribunals.*[3] Kotuby and Sobota address the issue squarely, and Judge Stephen Schwebel in his foreword describes their approach as 'an update of Cheng's' (at x) – an interesting and probably not entirely common technical term for engaging with the work of a living author by a different publisher. The most obvious debts that the book under review owes to Cheng's *General Principles* are structural and semantic. Its Chapter 2 ('Modern Application of the General Principles of Law' [at 88–157]) has a particular focus on good faith, abuse of rights and principles of responsibility and parallels, both in substance and the expression of headings and subheadings, Parts 2 and 3 of Cheng (respectively 'The Principle of Good Faith' and 'General Principles of Law in the Concept of Responsibility'). Chapter 3 ('Modern Applications of the Principles of Due Process' [at 158–165]) similarly parallels Cheng's Part 4 ('General Principles of Law in Judicial Proceedings'), and addresses, among other topics, jurisdiction, impartiality and equality.

In other ways, Kotuby and Sobota have taken a narrower view of the argument; certain aspects of the treatment of aliens, which Cheng dealt with in Chapter 1, are addressed, but most of the other topics he discussed under the rubric of self-preservation, like self-defence, are not. In yet other ways, they have gone 'onward and upward' (at x) – or perhaps downward, depending upon how one visualizes the interaction between legal orders – by engaging with rules and practices in domestic legal orders that sometimes do not obviously touch upon international law. For example, authors discuss the development of domestic judiciaries through the

[1] The reviewer was a member of the study group.

[2] Report of the International Law Commission on the Work Its Sixty-Ninth Session (ILC Report) (2017): UN Secretariat, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Seventy-Second Session, UN Doc. A/CN.4/713, 26 February 2018, para. 83.

[3] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

'halting work of millennia' (at 55; generally at 54–67), US judicial practice on the enforcement of foreign judgments (at 79–84) and *lex mercatoria* and private international law in the epilogue (at 203–210). Perhaps surprisingly, in light of its broader substantive and temporal scope, the volume under review is overall rather slim: 281 pages (with 210 pages of text), compared to the 490 (408) pages in Cheng.

Before addressing the book itself, it may be helpful to put the discussion in perspective and note that the conceptual nature and technical character of general principles is a contested matter in public international law. The confused exchanges in the summer of 1920 between the members of the Advisory Committee of Jurists on Article 38(1)(c) of the Statute of the Permanent Court of International Justice are often relied on to either suggest antediluvian and still relevant consensus on the concept (at 11–13), or to smugly contrast ancient uncertainties with the sophistication of contemporary argument. Both readings may be too optimistic. States' submissions in the 2017 United Nations General Assembly's Sixth Committee regarding the ILC's proposed new topic suggest that assumptions of contemporary consensus may be overstated, due to significant disagreements among key participants in the international legal process regarding the formation and role of general principles as well as their interaction with other sources.[4] This background should temper the critical ire of those who find that an argument about general principles ventures outside the expected structure and methodology, whether for principles derived from domestic law or existing at the international level. The extent of disagreement among states is greater than on comparable questions of sources regarding treaties and customary international law; therefore, even the orthodox international lawyer, who would evaluate legal arguments primarily by reference to the backdrop consensus by the community (of states), will have to tolerate a rather broad church.

Where do Kotuby and Sobota fit within the broader discussion? There are a number of normative strands to their argument. The dominant, more obvious elements are put forward in mainstream positivist terms. The description of the process of identification of general principles (at 17–35) as well as frequent nods to Cheng and classic decisions of interstate dispute settlement for the traditional authority support this reading. The choice of fields of contemporary international law for consideration of how general principles operate is also traditional, if somewhat uneven; investment law is a prominent source of authority for recent practice, but other fields where general principles play a role are treated with a lighter touch, like international criminal law (noted only at 16)[5] or international environmental law (apparently not discussed at all).[6]

The authors also rely on authorities that less easily fit the mainstream international law argument, as I have noted regarding domestic judicial practice in the third paragraph of this review. The technical terminology will also raise some eyebrows among the invisible college; the more obvious example is 'norms' from the subtitle (not a technical term that positive international law, peremptory norms aside, is familiar with as a noun).[7] Another instance is *lex mercatoria*,

[4] *Cf.*, in particular, the views of Sweden on behalf of the Nordic countries, UN Doc. A/C.6/72/SR.18, 23 November 2017, para. 63; Austria UN Doc. A/C.6/72/SR.18, 23 November 2017, paras 80–84; India, UN Doc. A/C.6/72/SR.19, 24 October 2017, para. 15; El Salvador, UN Doc. A/C.6/72/SR.19, 24 October 2017, para. 33; Chile, UN Doc. A/C.6/72/SR.19, 24 October 2017, para. 87; the Netherlands, UN Doc. A/C.6/72/SR.20, 25 November 2017, para. 24; Japan, UN Doc. A/C.6/72/SR.20, 25 November 2017, para. 67; the USA, UN Doc. A/C.6/72/SR.21, 25 October 2017, para. 32.

[5] Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law', 57 *Harvard Journal of International Law* (2016) 111.

[6] UN Secretary General, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment, UN Doc. A/73/419, 30 November 2018, 6–13.

[7] The adjective 'normative' is a different matter altogether. *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) (not yet published), paras 151, 153, 155.

memorably described by one of the greatest contemporary figures as a sort of natural law without divinity (at 34, 205). The substantive scope of the argument also seems to be less finely delineated than Cheng's. For example, Cheng discusses general principles of judicial proceedings (Part 4) in the sense of general principles of international procedural law, applicable to international courts and tribunals, while Kotuby and Sobota use the same headings to also address primary rules on the treatment of individuals by domestic courts. Good faith in treaty relations (Cheng, Chapter 3) is now expressed as good faith in contractual relations (Chapter 2.A).

The distinction that the authors draw between their work and Cheng's as focusing on principles applicable to, respectively, conduct regarding private rather than sovereign entities (at xiv) will not persuade everybody. After all, rules on the treatment of aliens (and investors) were a classic feature of international law (addressed by Cheng in Chapter 1), and general principles of international dispute settlement identified by Cheng relied to a considerable extent on interwar mixed commissions, some of which also had individual access. Some readers will think that the basic building blocks of international law have not changed as much as the authors assert, and will wonder why primary rules in particular fields and broader structures of dispute settlement should necessarily be animated by the same principles. Perhaps the best way to describe the argument as a whole is as formally positivist, but with heavy naturalist undertones regarding principles inherent in every legal order and type of rule, illustrated through authorities that one would expect from the professional background of authors as US-trained practitioners of commercial and investor–state arbitration.

There are many fine technical points in the book that are worth reflecting upon, but, in the remainder of this review, I want to focus on what I take to be the main claim of the authors: that general principles are an important thing and a good thing. Precisely because of the clarity and likely influence of their argument, it is important to consider why general principles might be both less important and desirable than Kotuby and Sobota suggest. I will address these points in turn, starting with their proposition that general principles 'hold vital importance for the rule of law in international relations' (at xiii). There are a number of reasons to be cautious about arguments for the existence and application of general principles, particularly if put forward in isolation from the broader international legal process, which would also (and, in most instances, primarily) develop through treaties and custom.

First, general principles undoubtedly play an important role in the international legal process by filling in the gaps left by other sources of international law. However, to the extent that the issue addressed through principles is not irrelevant in international practice, the rule will be eventually adopted, reshaped or rejected by state practice or treaties. That is what matters at the end of the day for the legal argument. Take the well-known example of Hersch Lauterpacht's *Private Law Sources and Analogies of International Law*, whose quotation opens the foreword (at ix).[8] This book is a landmark argument about the nature of international law *and* irrelevant as an authority for modern international law since most of its subject matter is now regulated by rules established directly at the interstate level, whatever their pedigree may have been a century ago. For example, Lauterpacht makes a general principles argument on state responsibility (Chapter III.VII), interest and damages (Chapter III.VIII) and treaties (Chapter IV). Since his book was published in 1927, the law of treaties and state responsibility have somewhat moved on and been shaped by a great deal of interstate interaction at the international level, through international conferences, various projects of codification and formalized dispute settlement. As a result, the general principles pedigree will often be several layers removed from the current form and expression of the rule, which more often than not will reflect technical distinctions and terminology attuned to the structure and needs of the international society. The same proposition applies to principles of international procedural law, essentially for the reasons that Angelo

[8] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

Piero Sereni put forward a few years after Cheng's *General Principles*.[9] There may, of course, be discreet gaps in these areas that have not been filled either by codification efforts or state practice, and where general principles could still be relevant (for example, espionage as a ground for invalidity and termination of treaties), but, otherwise, international law authorities should be capable of providing the answer.

The second point follows from the first one; there is a danger in relying on classic authorities for the existence of general principles if international law has moved on and filled the gap directly at the international level. Cheng's discussion of *jus ad bellum* (Chapter 2.C) is an example of a topic where a great deal of practice now exists at the interstate level, and reliance on general principles might be harder to justify.[10] In the book under review, discussion of rules on the treatment of aliens and foreign investors in a judicial setting, commonly addressed under the rubric of 'denial of justice' (Chapter 3), raise a similar question. Denial of justice was shaped by a very traditional process of interstate practice and dispute settlement before World War II,[11] and even within the contemporary investor–state procedural framework the rule is still directly influenced by state practice, explicitly articulated in terms of customary law.[12] Unless treaty provisions themselves refer back to general principles, the added value of characterizing the argument in these terms may not be obvious.

A similar concern applies to generalist topics. In current international law, the law of state responsibility on most issues is expressed through rules of customary international law, to a significant extent reflected in the 2001 ILC Articles on State Responsibility for Internationally Wrongful Acts (a point apparently acknowledged in somewhat curious phrasing at 155).[13] Within the law of treaties, principles of treaty interpretation may raise hard questions, but it is doubtful that too many states or adjudicators will nowadays set aside materials related to Articles 31–33 of the Vienna Convention on the Law of Treaties,[14] and search for answers in domestic consensus instead (at 92–96). Estoppel is a more particular instance of a rule of international law superficially similar to domestic legal concepts and traditionally identified on their basis,[15] but also one that, in modern law, 'differs from … its municipal law counterpart', since 'its frequent invocation in international proceedings has added definition to the scope of the principle'.[16] Judge Christopher Greenwood has recently made the point in very clear terms, when discussing *res judicata*, that establishment of a principle at the international level makes it unnecessary to examine the different national legal systems from which it once originated.[17] In all of these cases, the plates of domestic and international law have moved further apart than they were a century ago, and domestic consensus on, say, estoppel or *res judicata* is less likely to illuminate than before (respectively at 119–121, 126–127, 129–130, and at 197–202). In short, the pedigree of general principles can be of interest for historians of international law,

[9] A.P. Sereni, *Principi Generali di Diritto e Processo Internazionale* (1955).

[10] I. Brownlie, *International Law and the Use of Force* (1963).

[11] A.V. Freeman, *The International Responsibility of States for Denial of Justice* (1938).

[12] ICSID, *Italba Corporation v. Uruguay – Submission of the USA*, 11 September 2017, ICSID Case no. ARB/16/9, paras 19–20.

[13] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001.

[14] Berman, 'Why Do We Need a Law of Treaties?', (2017) 385 *Recueil des Cours* 17. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[15] Lauterpacht, *supra* note 8, sections 87–88.

[16] *Award in the Arbitration Regarding the Chagos Marine Protected Area between Mauritius and the UK*, Award, 18 March 2015, reprinted in UNRIAA, vol. 31, 359, paras 436, 437.

[17] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, ICJ Reports (2016) 100, 177, paras 2–4, Separate Opinion of Judge Greenwood.

but may mislead a tribunal interested in the source and authority of a rule in a particular contemporary dispute.

Third, authors may have underplayed the phenomenon of resistance by states to adjudicative elaboration of general principles, which – objections to *jus cogens* aside, which do not feature prominently in the book – could have considerable legal effect. For example, in the field of investment law many arbitral tribunals and writers support a broad reading of legitimate expectations in application of fair and equitable treatment in investment protection law, sometimes explicitly invoking general principles (and often, one suspects, drawing upon more or less diverse domestic legal traditions by necessary implication) (at 123–125). Yet state practice, including through recent multilateral treaties, is moving in an apparently different direction,[18] and the International Court of Justice has been distinctly unimpressed when presented with arguments referring to such arbitral practice.[19] General principles on evidence (Chapter 3.E) provide another example; while evidence is usually viewed as a particularly fruitful field for general principles,[20] states reacted in a markedly lukewarm manner when the ILC proposed it as a new topic, emphasizing instead the degree of variety between rules and tribunals as a reason for not exploring it.[21] It does not mean, of course, that governmental criticisms of judicial and scholarly elaboration of general principles necessarily capture the positive rule more accurately. But the broader dynamic of international legal process has to be taken into account when evaluating the validity of an argument for a general principle of a particular kind at a particular point in time. Some readers will therefore wonder whether the methodology that underpins the list of free-standing general principles provided in the annex (at 201ff), supported by authorities drawn from the 1870s to the 2010s, is sufficiently attuned to the malleability of the real life of international law.

I have discussed so far whether Kotoby and Sobota are correct in stating that general principles 'hold vital importance for the rule of law in international relations' (at xiii), but another and different question is whether their argument for general principles is desirable. It seems to me that there are two reasons to be cautious about endorsing a broad approach to general principles. The first relates to the broader shifts in the international legal community, particularly decolonization, and their effect on international law-making. From 1960s onwards, international law has increasingly sought to deal with its key challenges in a manner capable of generating consensus of the expanded international community (of states). A particularly important consideration has been the inclusion of newly independent states in the process, be that through international conferences, submissions to the ILC or discussions in the Sixth Committee – as opposed to the formulation of rules by a reliance on the pedigree of earlier decisions reflecting the (then) consensus of a much smaller number of countries. The successful law-making efforts on the law of treaties, law of the sea, international criminal law and international responsibility are examples of such inclusiveness in the legal process. Classic authorities relied upon, and developed by, Kotuby and Sobota are therefore not natural, if ancient, predecessors of current law – quite to the contrary, the current legal order may be read as a critique and rejection of that particular pedigree, with contemporary legal questions better answered with an eye to the consensus of the contemporary community and its similarly constituted predecessors.

The second concern is comparatively pedestrian and relates to the practice of international dispute settlement, particularly in investor–state arbitration. The less charitable readers of some

[18] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and Its Member States, of the other part, signed 30 October 2016, provisional application 21 September 2017, Art. 8.10(4); Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed 8 March 2018, in force 30 December 2018, Art. 9.6(4).

[19] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018, ICJ Reports (2018) (not yet published), para. 162.

[20] Lauterpacht, *supra* note 8, ch. 5; Cheng, *supra* note 3, ch. 16.

[21] ILC Report, *supra* note 2, para. 84.

awards may say that tribunals confuse hard questions of treaty interpretation or identification of customary law, which are vexing but perfectly capable of being answered in technical legal terms, with gaps or other reasons that call for the application of general principles. The clarity, elegance and authority with which Kotuby and Sobota express their principles may further nudge such tribunals in the direction of easy and clear solutions to fill such apparent gaps, with associated problems for correctness, consistency and predictability. The quality of the argument makes its likely effect all the more concerning.[22]

Kotuby and Sobota have written a very interesting book on an important topic that will certainly be cited as an authority, particularly in international dispute settlement. They are to be commended for squarely addressing the impact of shifts in the structure of international dispute settlement on sources of international law as well as for the breadth of the authorities in international and domestic law relied on (particularly for going beyond the usual suspects in the choice of domestic legal orders). It is, of course, a daunting challenge to write in the shadow of Cheng's *General Principles*, and, just like the beautiful friendship with Louis promised by the final sentence of *Casablanca*, the new piece will not appeal to all of the fans of the original. But even those who are not persuaded by the broader argument or its particular elements would have reflected upon and refined their own position. Surely, that is a contribution that any author should be pleased to have had on the debate.

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Mihir Kanade. ***The Multilateral Trading System and Human Rights: A Governance Space Theory on Linkages.*** Oxford: Routledge, 2018. Pp. 282. £100. ISBN: 9781138280014

Mihir Kanade's book is a refreshing addition to the voluminous literature on how to deal with two key phenomena in international law: fragmentation and the enhanced influence of developing countries. Its focus on the linkages between the World Trade Organization (WTO) and human rights is timely as both regimes face important questions concerning their legitimacy and universality. The WTO has become increasingly politicized in recent years and faces significant challenges regarding, *inter alia*, the conclusion of trade negotiations, the unilateral use of trade remedies and the functioning of the dispute settlement mechanism. Towards the end of his term as the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein described the situation of human rights in alarmingly negative terms, emphasizing factors such as zero-sum nationalism, short-term interests of individual leaders, the targeting of civilians in military operations, the use of chemical weapons, racism and xenophobia and the criminalization of human rights activism.[1]

One of the key contributions of Kanade's book is its explanation of why the challenges faced by the two regimes cannot be seen in isolation. Kanade proposes a 'governance space theory'

[22] *Cf.* Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96 *American Journal of International Law* (2002) 857.

[1] Zeid Ra'ad Al Hussein, 'Human Rights Are Not a Luxury', 15 June 2018, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23275&LangID=E.