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 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 to appoint Mr. 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 very timely contribution, for the audience of dispute settlement practitioners and academics, explicitly pin-pointed in the subtitle, as well as those who will reflect upon, and participate in the work of the ILC for 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 comparison with Bin Cheng's 1953 *General Principles of Law as Applied by International Courts and Tribunals*. Kotuby and Sobota address the issue squarely, and Judge 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 debt owed to Cheng's *General Principles* is structural and semantic. Chapter 2 of the book under review ('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. It parallels, both in substance and terminology of headings and sub-headings, Parts Two and Three 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 Four ('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 treatment of aliens, which Cheng dealt with in Chapter 1, are addressed, but most of the other topics discussed under 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 (2017): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat, UN Doc A/CN.4/713 [83].

rubric of self-preservation, like self-defence, are not. In yet other ways, they have gone 'onward or upward' (Schwebel, at x) – or perhaps downward, depending upon how one visualises the interaction between legal orders – by engaging with rules and practices in domestic legal orders that sometimes do not obviously touch upon international law. At the end, the volume under review is rather slim (perhaps surprisingly, in light of the broader substantive and temporal scope): 281 pages (with 210 pages of text), against respectively 490 (408) pages in Cheng.

To put the book in perspective, 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 consensus on the concept still relevant (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 Sixth Committee regarding ILC's proposal suggest that assumptions of contemporary consensus may be overstated, showing significant disagreements among key participants in the international legal process regarding their formation, role, and interaction with other sources.[3] The background should temper the critical ire of international lawyers who find that an argument about general principles ventures outside the expected structure and methodology: even in its orthodox sense this is a broad church, to mix the metaphors somewhat.

Where do Kotuby and Sobota fit within the broader discussion? There is 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 inter-State dispute settlement as the traditional authority support this reading. The choice of fields of contemporary international law to consider -- or not -- is interesting but somewhat uneven: investment law is a prominent source of authority for recent practice while other fields where general principles play particular role are treated with a light touch, like international criminal law (noted only at 16)[4] or international environmental law (apparently not discussed at all).[5] Authors also rely on authorities that less obviously fit the mainstream international law argument: the more obvious example is 'norms'

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

[4] N Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 Harvard J Int'l L 111.

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

from the subtitle; not a technical term that positive international law (peremptory norms aside) is familiar with. The substantive scope of the argument also seems to be less finely delineated than Cheng's. For example, Cheng's discussion of general principles of judicial proceedings (Part Four) is directed at 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 treatment of individuals in 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 authors draw between their work and Cheng's as focusing on principles applicable to private rather than sovereign conduct (at xiv) will not persuade everybody: after all, rules on treatment of aliens are 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 inter-War mixed commissions, some of which had individual access. The basic building blocks of international law have not changed as much as the authors assert, and it is not obvious that 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, and illustrated through authorities that one would expect from the professional background of the authors as US-based practitioners of commercial and investor-State arbitration.

There are many fine technical points in the book that are worth reflecting upon but in 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 the clarity and likely influence of their argument, it is important to consider why general principles might be both less important and desirable that 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 existence and application of general principles, particularly if put forward in isolation from the broader international legal argument. First, general principles undoubtedly play an important role in the international legal process by filling in the gaps but, to the extent that the issue addressed through principles is not irrelevant in 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 example, Hersch Lauterpacht's *Private Law Sources and Analogies of International Law,* a quotation from which opens the book (Schwebel, at ix), is a landmark argument about the nature of international law *and* irrelevant as authority for modern international law, since most of its subject-matter is now

regulated by rules established through inter-State practice, whatever their pedigree was a century ago.

Secondly, there is a danger in relying on classic authorities for 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 II.3) is an example of a topic where a great deal of practice now exists at the inter-State level, and reliance on general principles might be harder to justify. [6] In the book under review, rules on the treatment of aliens and foreign investors in 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 inter-State practice and dispute settlement before World War Two,[7] and even within investor-State procedural framework the rule is still directly influenced by State practice, articulated in terms of customary law.[8] Unless treaty provisions themselves refer back to general principles, the added value of characterising the argument as relating to general principles is not obvious. Another example is the law of State responsibility, which in current international law is on most issues expressed through 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). In all these cases, the pedigree of general principles can be of interest for historians of international law but may mislead a tribunal interested in the source and authority of a rule in a particular contemporary dispute.

Thirdly, 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 effect. For example, arbitral tribunals and writers support a broad reading of legitimate expectations in application of fair and equitable treatment in investment protection law (at 123-5) – yet State practice, including through recent multilateral treaties, is moving in an apparently different direction,[9] and the International Court of Justice is quite unimpressed.[10] General principles on evidence (Chapter 3.E) is another example: while it is usually viewed as a particularly fruitful topic for general principles (Cheng, Chapter 16), States reacted in a markedly lukewarm manner when the ILC proposed it as a new topic, emphasising the degree of variety between rules and tribunals cautioning against taking it up. [11] It

[6] I Brownlie, *International Law and the Use of Force* (Clarendon Press 1963).
[7] AV Freeman, *The International Responsibility of States for Denial of Justice* (Periodical Service Co 1938).
[8] *Italba Corporation v Uruguay,* ICSID Case no ARB/16/9, Submission of the US, 11 September 2017 [19]-[20].
[9] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, in force 30 December 2018), art 9.6(4).
[10] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* [2018] ICJ Judgment of 1 October 2018 [162].
[11] Report (n 2) [84].

does not mean, of course, that the particular criticisms of general principles capture the elusive legal consensus better than arbitral or judicial decisions themselves. But the broader dynamic of international legal process has to be taken into account when evaluating the validity of an argument for general principle of a particular kind at a particular point in time. Some readers will therefore wonder whether the methodology underpinning the list of free-standing general principles drawn from authorities over the decades that is provided in the annex (at 201 et seq.) is sufficiently attuned to the malleability of real life of international law.

I have discussed so far whether Kotoby and Sobota are correct, but there is also the question whether their argument for general principles is *desirable* -- a slightly different point. 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 decolonisation, and their effect on international law-making. Writing in 1961, Robert Jennings described leading early 20th century decisions in the following understated terms:

> They are not for that reason [a case of the strong enforcing a solution on the relatively weak] necessarily bad law; but the criticism heard from time to time that parts of the law of the responsibility of States may sometimes have the appearance if not the substance of a rationalization of the policies of European powers at a period of European dominance and expansion is a criticism that cannot be left out of account.[12]

And indeed it could not. As we now know, the efforts of FV García-Amador of the time in the International Law Commission to achieve consensus by partially building on the same classic authorities were to be unsuccessful, to a significant part due to concerns about the same authorities that Kotuby and Sobota rely on to demonstrate the traditional position. The broader point is that, from 1960s onwards, international law has increasingly dealt with its key issues in a manner focused on generating inter-State consensus, particularly by newly independent States, be that through international conferences, submissions to the ILC, and discussions in the Sixth Committee. The successful law-making efforts on law of treaties, law of the sea, international criminal law, or international responsibility are characterised by such inclusiveness in the legal process. Classic authorities relied upon and developed by Kotuby and Sobota are therefore not the 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, and contemporary legal questions are better answered with an eye to consensus of the contemporary community. The second concern is a comparatively pedestrian and relates to the practice of international dispute settlement, particularly in investor-State arbitration. The less charitable readers of some awards may say that tribunals are

[12] RY Jennings, 'State Contracts in International Law' (1961) 37 BYBIL 72, 159.

confusing genuinely hard questions of treaty interpretation or identification of customary law, vexing but perfectly capable of being answered in technical legal terms, with gaps or other reasons that call for the application for 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, with associated problems of correctness, consistency, and predictability. The quality of the argument makes its likely effect all the more concerning.[13]

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 authorities in international and domestic law relied on (particularly for going beyond the usual suspects in the choice of domestic legal orders). Of course, it is a daunting challenge to write in the shadow of Cheng's *General Principles*, and, just like a cinematic version of the beautiful friendship with Louis, the piece will not persuade all the fans of the original. But even those disagreeing with the broader argument or its particular elements will have reflected upon and refined their own position. Surely, that is a contribution that authors of any academic book should be pleased to have had on the debate.

Martins Paparinskis

Reader in Public International Law
University College London, United Kingdom
Email: m.paparinskis@ucl.ac.uk

[13] Cf. D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857.