

# Analysis of the General Principles of Law of Article 38 of the Statute of the International Court of Justice

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## Abstract

Article 38 of the Statute of the International Court of Justice provides for the expression of general principles of law as an independent source of international law, which also plays the role of supplementing treaties and international customs, and according to the Statute, general principles of law belong to the category of positive law. Even though some scholars have elaborated on general principles of law, they have misunderstood the concept, legal status and functions of general principles of law, which makes the connotation of general principles of law more ambiguous. Because the general principles of law are derived from the common provisions of the domestic law of each country, there are still questions in the academic circles as to whether the general principles of law belong to the sources of international law. In recent years, there are also scholars who believe that the Statute of the International Court of Justice is old and cannot reflect the new development of international law, and that the general principles of law should be treated as the category of natural law. It is wrong to view general principles of law as a category of natural law, on the contrary, despite the development of international relations, general principles of law play an increasingly important role in new developments in international law, such as human rights, climate change and outer space, etc. Therefore, the definition of general principles of law is not only of great significance to the theory of international law, but also has an immeasurable effect on the practice of international law. General principles of law exist in the legal systems of States, and general principles of law can be used to determine the actual effect of rules of international law. The purpose of this paper is to clarify various aspects of general principles of law on the basis of existing law and practice, and to assist international courts and tribunals in providing guidance for the settlement of international disputes using the sources of general principles of law international law.

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## Keywords

Sources of International Law, General Principles of Law, International Custom, Statute of the International Court of Justice

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## 1. Overview of General Legal Principles

### 1.1. The Concept and Meaning of General Legal Principles

The concept of general principles of law is divided into legal concepts and academic concepts, many scholars adopt a pragmatic attitude and their understanding of the general principles of law is no longer limited to the general principles of law in the sense of Article 38(1) of the Statute of the International Court of Justice. They also use the definition of the origin of international law to explain the general principles of law and form the academic concept of the general principles of law (Gao, 2010). Article 38 of the 1945 Statute of the International Court of Justice stipulates the legal concept of general principles of law, which stipulates that the common legal principles recognized by civilized countries constitute general principles of law. There is an inseparable connection between the theoretical concept of general principles of law and the concept of the origin of international law. To explore the theoretical concept of general principles of law cannot be separated from the definition of the source of international law. By defining the source of international law, the theoretical concept of general principles of law can also be determined, although there is no uniform definition of the source of international law. But generally speaking, the origin of international law can determine the actual existence and legal effect of the principles and rules of international law (Wang, 2017). Therefore, the academic concept of general principles of law refers to the common legal principles and legal effects that can be determined in the legal systems of various countries, and is the manifestation of the source of international law. General principles of law belong to the principles of international law (Zeng & Yu, 2003). Principles of international law refer to treaties, rules of customary law, and general principles of law as set out in Article 38(1) (3). In the 2019 ILC report, Chapter IX of the report notes the relationship between general principles of law and principles of international law. The Special Rapporteur notes that the term principles of international law clearly encompass general principles of laws (UN Doc. A/74/10, 2019).

### 1.2. Components of General Principles of Law

The two elements of “civilized nations” and “recognition” constitute general principles of law, but each element contains rich connotations.

The term “civilized nations” is a product of political and legal concepts that date back to the early history of international law. At that time, the view was that only so-called civilized nations were States that participated in the creation of international law and were bound by it (International Law Commission Doc,

A/CN.4/732, 2019). It was generally agreed that the term “civilized nations” under Article 38 of the Statute of the International Court of Justice did not have any special meaning (International Law Commission Doc, A/CN.4/732, 2019), but that the term “civilized nations” was an anachronism and that the term “civilized nations” in general principles of law should be amended. For example, the International Covenant on Civil and Political Rights, which has 172 States parties, and the European Convention on Human Rights both use the term “States” in their provisions. It is therefore suggested that the term “States” should be used instead of “civilized nations”. At the same time, the Special Rapporteur of the International Law Commission, Marcelo Vázquez-Bermúdez stated at the seventy-first session that the issue of general principles of law as a source of international law must be seen in the context of the fundamental principle of the sovereign equality of States and that the term “civilized nations” should therefore be avoided. “civilized nations” should in any case be interpreted as referring to States in general (International Law Commission Doc, A/CN.4/732, 2019).

The second constituent element of general principles of law: recognition. Although both general principles of law and international custom have two constituent elements, unlike the identification of the two elements of customary international law contained in Article 38(1)(b) of the Statute of the International Court of Justice, general principles of law, being derived from the provisions of national legal systems, naturally represent recognition by States and no longer require separate proof. The requirement for recognition is met when a principle exists in a sufficient number of national legal systems. In *Sea-Land Service v. Iran*, the Iran Claims Tribunal found that unjust enrichment had been codified or judicially recognized in the vast majority of domestic legal systems around the world and had been recognized as being included in a catalogue of general principles of law for application by international tribunal (*Sea-Land Service v. Iran*, 1984).

## 2. The Status of General Legal Principles

Since Article 38(1) of the Statute of the International Court of Justice stipulates general principles of law, domestic and foreign academic circles have been debating the status of general principles of law in the source of international law. There are mainly three views. The first view denies general principles as manifestations of sources of international law. The second view holds a completely opposite view to the first, which holds that a principle of law is not only an independent source of international law, but also falls within the realm of natural law. The third view holds that the general principle of law is an independent source of international law, but the nature of the general principle of law is positive law, and the following three claims will be analyzed:

### 2.1. The First View

The first view denies general principles of law as a source of international law. Professor Tong Jin believes that the legal system of socialist countries and the

legal system of bourgeois countries are different or even opposite, so it is impossible to have a common legal system between the two classes. He also believes that “the general principles of law stipulated in Article 38 of the Statute of the International Court of Justice are not a special source of international law, but are general principles of international law or are produced and developed through treaties and customs” (Tong, 1965). It can be seen from this that Professor Tong Jin advocates that the formation of international legal norms can only be done through treaties and conventions. He regards domestic legislation and the legal practice of judicial organs as auxiliary processes for the formation of international legal norms. Professor Kelsen also believes that due to the ideological antagonism between the legal system between communism and the bourgeoisie, autocracy and democracy, there are still doubts about whether general principles of law can be derived from international law. Professor Tong Jin and Professor Kelsen mainly analyzed general principles of law from the perspective of natural law, denying that general principles are the source of international law. Professor Zhou Kunsheng denies that general principles of law are the source of international law. Professor Zhou Kunsheng believes that the source of international law is only a way of forming law itself, including only two sources of customs and treaties (Zhou, 1981).

## 2.2. The Second View

The second view holds that a legal principle is not only an independent source of international law, but also falls within the realm of natural law. Domestic scholars agree with this view, and they believe that general legal principles belong to natural law. The general principles of law are derived from the principles of natural law and international law (Luo, 2010). As Professor Zhou Zhonghai also believes, no matter what individual positions take on the origin and basis of general principles of law, human beings all over the world agree to accept the existence of general principles of law and their application as a source of natural law (Zhou, 2008). He also believes that although the Statute of the International Court of Justice stipulates general principles of law as the source of international law and serves as the basis for the International Court of Justice to judge cases, in actual practice, the International Court of Justice only regards them as an integral part of judicial reasoning and is rarely formally mentioned. The real reason is that general principles of law belong to natural international law.

## 2.3. The Third View

The third agrees with the second view on the legal status of general principles of law, but believes that general principles of law belong to the category of positive law. This view is also accepted by most scholars. First, the Advisory Committee of Jurists of the International Court of Justice held 35 meetings when drafting and deciding on Article 38 of the Statute, each meeting stipulates that general principles of law and international treaties and customary international law

should be placed in the same position, and that the legal nature of general principles of law and treaties should be regarded as the same as customary international law. If the general principles of law do not have independent legal status, the Legislative Council of the International Court of Justice may enshrine the general principles of law in Article 38(2) of the Statute of impartiality and good faith (Song, 2019). Secondly, Feldros also found general principles of law as another legal basis for the source of international law from the preamble of the UN Charter, which mentioned “respect for obligations arising from treaties and other sources of international law”. “Other sources” is a polysemous term, so there are other sources of law, including general principles of law, in addition to treaties and international customs (Wang, 1998). Finally, by interpreting the text of Article 38(c) of the Statute, it can be explained that general legal principles are constituted by the domestic legal systems of various countries and recognized by countries, and the constitution of general legal principles is closely related to the domestic legal systems of various countries. Inseparable links, general principles of law were part of domestic law before they appeared, and are already a category of positive law.

This article supports the third view, because the first view and the second view misunderstand the status of general principles of law. First of all, it should be pointed out that different countries may form different ideologies due to different social systems, but they still have consistent regulations in terms of legal systems, such as the estoppel system in their legal systems. As Bodenheimer pointed out, “though the social and economic systems of countries are not exactly the same, the legal basis of these systems will always have something in common, and the law will determine these commonalities (Bodenheimer, 1999).” secondly, the legal status of general principles of law has been clearly stipulated in Article 38 of the Statute. Most domestic scholars of international law agree that general principles of law are an independent form of international law, such as Li Haopei and Zhou Zhonghai. The first view holds that general principles of law do not have independence, just because general principles of law originate from the domestic laws of various countries and belong to the principles of domestic law. However, it is worth noting that although general legal principles belong to domestic law, they have been recognized by various countries and become international law, which is essentially different from domestic law, or it can be expressed that domestic law is only the carrier of general legal principles.

### 3. Characteristics of General Principles of Law

Firstly, Independence. Article 38(1) of the Statute provides that the law on which the International Court of Justice relies in adjudicating disputes is treaties, national custom and general principles of law, and that there is no hierarchical relationship between treaties, international custom and general principles of law. According to Oppenheim, general principles of law are independent of custom and treaties (Lawrence, 1915). According to Professor Li Haopei, the provisions

of Article 38 of the Statute are merely for the sake of narrative convenience and do not provide for a hierarchy of meaning (Li, 1994). Professor Zhou Zhonghai also considers general principles of law to be an independent third source of international law (Zhou, 2008). Because of their independence, general principles of law can stand alone as principles for courts to decide cases, and they are more often applied by courts, especially in arbitration cases. For example, in the 1962 Temple of Preah Vihear case, the International Court of Justice applied the principle of estoppel to find that Thailand had recognised Cambodia's sovereignty over the Temple of Preah Vihear (*Temple of Preah Vihear v Thailand*, 1962). The general legal principle of estoppel was also applied by the Permanent Court of International Justice in the Legal Status of Eastern Greenland (*Denmark v Norway*, 1933).

The second is complementarity. Through the process of investigation of arbitral awards, general principles of law have a complementary role and a role in "filling gaps in international law". In the Walfish Bay boundary case, the arbitrators considered that "the dispute needed to be decided in accordance with the principles of public international law and the rules of positive law, and if these rules and principles did not resolve the dispute, the general principles of law should be followed" (*Germany v Great Britain*, 1911). Similarly, in religious property cases, the tribunal examines and settles the above claims in accordance with any applicable treaty law and, if it fails to do so, is guided by general principles of law and equitable principles and provisions (International Law Commission Doc, A/CN.4/742, 2020). By exploring the drafting process of general principles of law, the 1920 Statute of the Permanent Court of International Justice (hereinafter referred to as the "Statute") introduced general principles of law for the first time. In order to prevent the Permanent Court of International Justice from refusing to accept a case when it is ruled that there is no provision for disputes due to treaties and international customs, the Statute Drafting Committee proposed that the general principles of law recognized by countries should be used as a supplementary source of international law, so that the Permanent Court of International Justice could Exercise jurisdiction over international disputes. Although the Statute of the International Court of Justice does not prescribe the order of precedence used between treaties, international custom and general principles of law. However, when the International Court of Justice decides an international case, it generally gives priority to the provisions of treaties and international customs. When there are no provisions in treaties and international customs, it will rule on cases based on general principles of law. As Phidros also believes that treaty law and international customary law do not cover international law, therefore, they must be supplemented by general principles of law (Wang, 2015). To sum up, it can be seen that in the international judicial practice, when there is "unclear law" or "legal omission", general principles of law play an addendum role (Wang, 1996).

In addition to being independent and complementary, general principles of

law also play a role in interpreting customary international law and treaties. When international treaty law and customary law have multiple interpretations for a legal dispute, general legal principles can be used to interpret treaty law and customary law, so that the connotation of treaties and international customary law is clearer. In international cases, the International Court of Justice not only uses one source of international law to adjudicate cases, but generally cites two or more sources of international law, and usually applies general legal norms as supplementary sources. For example, in the *Fubini case*, which involved the coexistence of a government and an insurgent movement in one country, the Conciliation Commission held that the situation must be judged by applying the general principles of international law and its The impact of the provisions of the Peace Treaty (*Fubini Case, 1959*).

#### 4. General Principles of Law and International Customs

General principles of law differ from treaties and customs. Regarding the relationship between treaties, international customs and general legal principles, most scholars focus on describing the relationship between treaties and between treaties and international customs, and rarely mention the mutual relationship between general legal principles and international customs. The relationship between general principles of law and international custom is misunderstood. It is precisely because scholars have not conducted in-depth analysis of the difference between general legal principles and international customs. Many scholars misunderstand that general principles of law are integrated into international customs, and they cannot correctly understand the nature and legal status of general principles of law. This relationship deserves special attention. This article will next explore the difference between general principles of law and international custom.

##### 4.1. International Customs

According to Article 38(1)(b) of the Statute of the International Court of Justice, which defines international customs as “a person accepted as law as evidence of general practice”. After adopting the draft conclusions on the identification of customary international law, the International Law Commissioner believed that the formation of international customs consists of two elements: one is material elements, and international customs require the general practice of all countries. The second is the psychological element, the general practice of countries is accepted as law. When countries determine the formation elements of an international custom, there is almost a consensus on the theoretical point of view, that is, to determine the existence and content of a customary international law rule, it is necessary to find out whether there is a general practice that is accepted as law. For the specific meaning of “general practice”, the general practice comes from the repeated and consistent practice of the members of the international community within a considerable period of time, that is, the repeated similar

behavior of various countries.” There are three requirements for the generation of general rules. The first requires that after a long period of national practice, the second requires the number of State practice, the third requires consistency in state practice over a longer period of time. The data presented in the above three situations show the practice of the state, the practice of the state

#### **4.2. Distinguishing between General Principles of Law and International Customs**

The first difference is the constituent elements of the two principles. As mentioned above, general principles of law are the common principles and rules of the domestic legal systems of civilized countries, such as the principle of estoppel, the principle of limitation, and the principle of good faith. Since the general principles of law have been stipulated as domestic law and become part of domestic law (whether public law, private law or substantive law, procedural law), it naturally shows that the state has recognized its legal effect, and there is no need to make a separate recognition. It should be noted that recognition in general principles of law is the recognition of “national law”, not the determination of “rules of international law”. This is completely different from the international custom that requires countries to repeat the practice out of “international legal obligations”. To prove the existence of an international custom, it is necessary not only to prove that the conduct of States is part of the general practice among States (the material element), but also that States must recognize and feel that they are complying with their international legal obligations, the proof of an international custom must be accompanied by the existence of the subjective element of *opinio juris*, which is, of course, finally judged by international judicial organs. For example, In the Colombian and Peruvian Asylum Case of 1950, the International Court of Justice held that there was no regional or regular practice in Latin America concerning the right of asylum and territorial state obligations to unilaterally determine the nature of the crime. It was therefore concluded that Colombia, as the country granting asylum, had no right to determine the nature of the crime with a unilateral and binding final decision on Peru (*Colombia v Peru*, 1950). And in the North Sea Continental Shelf Case in 1969, the International Court of Justice also found that the principle of equidistance is not an inevitable result of the general concept of continental shelf rights, and has not been accepted by countries as a law, so it is not a rule of customary international law (*Federal Republic of Germany v Netherlands*, 1969).

The second difference is the legal effect of State practice. Although general principles of law are the common principles and rules of the legal systems of various countries, due to the differences in social systems, cultural environments and legal systems of various countries, even if the same rules exist in the legal systems of various countries, the courts of various countries apply the same rules to adjudicate the same In cases on the merits, the results of the ruling may be the same or different, so the implementation of the same legal principle in different

countries may have different effects. However, the “general practice” in international custom, that is, the practical effect of the state is universal and consistent. This is mainly because the “general practice” in international custom is the practice between countries, and this practice can be followed or tacitly agreed by other countries. In general, the consistency and universality of the effect of state practice in international custom will be higher than that of general legal principles.

## 5. Conclusion

Since the adoption of the Statute of the Permanent Court of International Justice in 1920, there have been various practical and theoretical issues related to general principles of law. There are a large number of literatures devoted to discussing general principles of law at home and abroad, and there are different definitions and understandings of general principles of law. But the nature, character and function of general principles of law remain unclear or ambiguous. Through the analysis of general legal principles, there are many disputes about the characteristics and nature of general legal principles, which need to be further clarified. There are three main reasons. First, when analyzing the expression of Article 38 (1)(4) of the Statute of the International Court of Justice, the description of the general legal principle is too vague, which is not conducive to the application of the principle. Secondly, compared with treaties and international customs, the application of general legal principles in the International Court of Justice is rare, and there is no clear standard of international practice. The third general legal principle and international custom have many similarities in practice and law, which makes the difference between the two principles not very obvious. Therefore, during the debate in the Sixth Committee on International Law in 2017, States emphasized the importance of general principles of law and included them in their long-term work programme. This article hopes to clarify the nature, scope and function of general principles of law and their connection to other sources of international law. While treaties and international custom serve as the primary sources of international law, general principles of law, as independent sources of international law, also serve as rules of interpretation and complementarity to treaties or international custom when appropriate.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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