# Doctrinal differences in the definition of the principles of public international law

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***Abstract***

*The ambiguity of scholars' vision of the content of the principles of international law and their corresponding definition in doctrinal discussions can be reduced to two main directions. First, it is a problem of coverage of the concepts of principles of international law of generally accepted principles of law, and, secondly, the problem of limiting the category of principles of public international law to only ten basic principles of international law. These discussions confirm the relevance and urgency of its solution.*

*The general principles of international law, as the inheritance of all mankind, are the result of the development of all legal systems of the world in its legal unity. These principles represent the unity of the general principles of international law, which are inherent only in the international legal system; general principles of law inherent in both national and international legal systems, as the ideological foundations of law; and common principles of national legal systems, which with certain comments can be applied to international legal relations.*

*If we take as a basis Art. 38 of the Statute of the UN ICJ as a conditional list of sources of international law, where generally accepted principles of international law are not provided as such, the interpretation of this article can be imagined as conclusions that the principles of international law as special to general principles of law are norms of international law its reflection in any of the sources of international law, including those, which are unforeseen articles 38 of the Statute of the UN ICJ. The main difference between the principles of international law and general principles of law is that they contain specific rights and obligations for subjects of international law and are directly a regulator of international relations.*

*Such unity can be deduced from the normative interpretation of Art. 38 of the UN Statute, in particular: the sources of enshrining the general principles of*

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*international law are customs and international treaties in accordance with paragraph a and paragraph b of Art. 38; the source of the general principles of law is paragraph c of Art. 38 of the Statute of the UN ICJ (general principles of law recognized by civilized nations); the source of identification or the legal basis for the application of the common principles of national law is paragraph d - ex aequo et bono, their application by an international court on the basis of the principle of justice.*

***Keywords:*** *international law, the theory of international law, the general principles of international law, the features of principles of international law, the classification of characteristics the principles of international law, Art. 38 of the Statute of the UN ICJ.*

**Introduction.**

The current state of the problem of the doctrinal definition of the concept of the principle of international law, namely the multiplicity as a result of the subjective formulation of the definition, is the reason for the urgency of solving the problem of developing criteria for determining the existence of the principle of international law. It is the absence of these criteria that leads to the fact that different authors put forward different definitions and, accordingly, a different number of basic, among the whole set, principles of international law. The lack of doctrinal unity on this issue forces us to look for characteristics of the concept of the principle of international law. However, neither the Declaration of Principles of International Law of 1970, nor the UN Statute, provide a normative definition of either the basic principles or the principles of international law in general. The absence of a single legislative international body assigns the main role in identifying the principles of international law to the bodies of international justice, while the doctrine has an undeniable right to develop the best methods and criteria for this process. Of course, doctrine does not always coincide with practice, but the categorical differences between them have an extremely negative effect on the integrity of the system of international law.

**Theoretical Background.**

The problem of the principles of international law has always been relevant in both modern Ukrainian [6] and foreign [1,2,5] international legal doctrine. Of particular interest in the principles of international law in the 60s and 90s was the adoption of the UN Statute. At this time, the main doctrinal provisions on the principles of international law have been developed, which have not changed radically even at the present stage of development. It should be noted that all theoretical developments on the concept of principles of international law of both the Soviet and modern Ukrainian periods are characterized by many definitions of the principles of international law, which are mainly based on listing a number of features of the latter. Each of these definitions is criticized or denied by giving specific arguments at the expense of one or another feature.

**Argument of the paper.** Therefore, the purpose of this article is to analyze the interaction of various social systems in the process of ensuring the observance of universally accepted principles of international law and their role for international law and order in general.

Arguments to support the thesis. As is well known, the systemic factor of the existence of the system of international law is its principles, which act as the material carrier of the rules of structural organization of the system of international law, is a reflection of the objective conditions for the existence of this set of legal rules. Principles are external catalysts for the unification of international legal norms to the branches and institutions, while at the same time guaranteeing the internal unity of the international law system as a whole, as a concentrated entity and a substantive focus on international legal regulation.

Principles are the fundamental norms of international law, through which the foundations of the modern system of international relations and international law are fixed, which contribute to the normal functioning and development of these systems. Forming the main thing in international relations and in law, the basic principles are the most general norms, which in a concentrated form express the essence of international law. Forming the main content of international law, its principles reflect all its characteristic features, perfectly revealing the place of international law in the social life of mankind and its development.

The doctrinal differences in the determination of the principles of international law are the reason for the ambiguity of the scientists' view of the meaningful filling of this category, as discussed above. However, all discussions generally boil down to two major issues. The first is whether the concept of principles of international law covers the category of generally recognized principles of law, and therefore the question of the validity of principles of domestic law in the international arena. Second, by shedding light on the problem of general principles of law in international law, scholars tend to speak only of the concepts, nature and characteristics of the generally recognized basic principles of international law fixed in the United Nations (sometimes called the principles of international relations). Equally important is the need to formulate the concept of the principle of international law as a legal category, which would allowed the specificity of the action of a particular category of norms-principles in the international legal area, but not limited to the concept of universally recognized basic principles of international law, known as the Ten Commandments of international legal coexistence humanity. Of course, these discussions are as eternal as the phenomenon that is their object. The conclusion of the systematic knowledge acquired over the millennia is, as we see, relevant and urgent at the same time.

It should be noted that the concept of the principles of international law can be applied in a broad (that is, taking into account generally recognized principles of law) and in a narrow (i.e. purely international legal system principles) sense.

The principles of international law are the norms of international law, although the statement of principles as a source of international law is widespread. Consequently, the principles have acquired characteristic features of the rules of international law, but specific ones, which have special features, are inherent only in the principles.

The formation of modern international law constantly requires that the general principles of international law be textually reflected in international treaties of various levels (in particular, at the supranational level in the EU example).

Since Art. 38 of the UN Statute does not envisage the principles of international law as a source of law, but with the "c" referring to the general principles of law,

such normative consolidation can be interpreted as confirming that the principles of international law, as specific to the general principles of law, are rules that can be reflected in any of the sources assigned to Art. 38 and not provided for in it (decisions of international bodies and organizations). Similarly, V. Degan jus gentium is "not a set of legal norms or regulations governing relations between equal and independent nation-states, as in the case of modern international law, but a part of Roman law with some general principles of law, which today are a specific source contemporary international law" [1, p. 20].

Principles of law (international or domestic) represent the kind of norms that, in O. Lutkov's opinion, "can be objectified in two main forms: written (in the wording of Article 38 of the Statute - "international convention") or unwritten (in formulation of Article 38 of the Statute - "international custom"), but not the kind of source of international law "[343, p. 103]. However, we argue that the principles of international law can be objectified in other modern sources of international law, including those not enshrined in the list of Art. 38 of the UN Statute.

In the doctrine of international law, the debate about the concept of the source of international law remains open. So, for our study, a few points are important in this discussion. First of all, the normative concept of sources of international law is underdeveloped, and so the theory and doctrine prevail here, where the concept of a source is rather metaphorical, and is generally rejected or replaced by other concepts, such as "normative process", "modes of lawmaking", since the source is where the formation of the rule of international law begins. In the current doctrine of international law, the three most common concepts are the concept of the source of international law: formal, substantive, and cognitive. In the latter, the meaning of a source means documents and materials that allow in the process of cognition to derive or formulate a rule of international law. However, the first two values ??are important to us. Formal sources are legal procedures, methods of creation that make the rules mandatory, while material sources serve as proof of their existence and determine their actual content. In this context, we can consider the thought that the principles of international law serve as a formal source for all rules of international law, but not as a source, but as a criterion of lawfulness in the process

of international lawmaking. This view can also be traced to the normative concept of sources of international law, which presupposes the existence of a basic fundamental norm from which other norms of international law originate; and in the concept of natural law, under which "fundamental rights in international law ... constitute the minimum necessary rules for the existence of legal relations between subjects of international law (eg rules: pacta sunt servanda, liability for the offense committed, the right to defend their rights against the offender and others)" [4, p. 16]. Natural-law principles are now considered to be general principles of law, and in international law are recognized as a source of international law, but the principles of international law are rules of international law, which have a special character - they are a criterion of lawfulness and legitimacy in the process of international lawmaking.

Therefore, our research should be based on the international legal doctrine of the rules and sources of international law and the general theory of law on the rules of law, so that they can be distinguished from other rules of international law.

In forming the main meaning of international law, the general principles reflect all its properties and functions. This means that: a) they are regulatory, universal, mandatory, objectively conditioned, historical and ideologó-political categories; b) their social function is to regulate and protect international social relations; c) they are an independent legal category, that is, they have separate features from all others. These attributes include obligation and unconditionality, a concentrated reflection of the most important regularities of the international community. The principles of law bring uniformity to the whole system of international norms and the international system as a whole, ensure the unity of legal regulation of international relations.

The principles of international law give rise to action and give synchronicity to the whole mechanism of international legal regulation, which is the criterion of legitimacy of action of all subjects of international law.

Our task is to analyze the characteristic features of the system of principles of international law and to derive on their basis the definition of the concept - principles of international law.

Of course, the first and historically confirmed feature is the objective determination of the laws of development of the most important, vital international relations. From the earliest origins of international law, principles emerged as a result of the objective development of the most important social relations as a result of public practice. In their totality, only the principles of international law as a whole can form a qualitative vision of the current state of international law, its essential properties, the nature and content of international legal regulation.

From the epistemological point of view, the category of principles is closely related to the categories of regularity, nature, and sometimes philosophers see the law of the existence of an object under the concept of principle. Such features are also inherent in the principles of international law.

The principles of international law are a system of the most general rules that govern the behavior of subjects in a generalized form, and therefore are concentrated governing content and purpose of international law. Although the principles provide for specific rules of conduct and specific rights and obligations, their general content allows international law to take on a dynamic character. They are binding on all subjects of international law, provided that the latter are competent to exercise the legal capacity, capacity or tort required by a particular principle. On the basis of this formulation of the rights and obligations of subjects of international law, the general principles, as a rule, are specified (in terms of subjects, rights, obligations, legal facts, etc.) in other international legal acts. Based on the principles of modern international law, the theory and practice of evolutionary "living" interpretation is developed and approved. In addition, the principles carry out their functions both in law-making and law-enforcement processes, they can directly regulate international relations, and may be the basis for subsequent law-making as a guiding principle for interpretation. The main difference between the principles of international law and the general principles of law is here, they contain specific rights and obligations for subjects of international law and can directly act as a regulator of international relations.

A unique opportunity and at the same time a characteristic feature of the principles of international law is the combination of elements of stability,

programmability and the vanguard of legal regulation. The stability of the principles is confirmed by historical predisposition and social practice, while the element of programmability manifests itself in the content of the principle of the important goals necessary to achieve it.

The task of the principles is to bring concrete norms to the level of real relations, and to reach them - to develop further. In particular, the principles of the law of war reached the principles of humanizing military relations and evolved into the principles of humanitarian law. The principles not only certify the current state of international relations, but also determine the main directions of their development, that is, formulate a program of development for the future.

The principles of international law are its legally established principles, which are normative in nature and are defined mainly in international customs, treaties and other sources of international law. The principle was taken over from the norms of international law, but the key here is not normativity, but above all the positioning of the principle as norms of the highest order. These principles differ from other principles-ideas, principles-slogans that have no legal formulation.

Most principles have a common origin, because custom is an experience tested by practice, and only social practice can prove to the foremost priority, regularity, essence, as the main characteristics of the principle-norm. The custom feature also indicates the natural-law nature of the principles of international law. Considering the principles of international law from the point of view of natural law, it would be easier to deal with a unified approach to understanding the content of natural law, but because of its ambiguity most researchers-apologists agree only «… that the value idea underlying the natural law understanding is a system of principles, rights, values, the existence of which does not depend on the will of the subjects»[3, p. 77], or «natural law expresses universal moral and ethical principles that are independent of national and cultural characteristics» [6, p. 31]. «The primary value of natural-law scholars is to identify those norms and principles that unite all people». [6, p. 38].

Among the basic features of natural law that determine the nature, social nature of its forms and principles, it is worth noting the dual nature of natural law -

objectively subjective. The objectivity of the principles of natural law is manifested in the fact that they arise and are implemented regardless of the will of the subjects of international law. Subjective feature is that such rights are belong to the subject, regardless of the will of other subjects, «they are objective because of the conditionality of their valid economic, social, national and other social relations. However, since the principles of law and the formal and legal sources, which are fixed them, are the result of deliberate willful activity, law-making, in this respect they are subjective» [8, p. 513].

The principles of international law are vested with a similar subjective feature. The objectivity of the principles of international law is that they are born and formed impartially in the international coexistence of mankind, regardless of the will of the subjects of international law. To obtain a certain idea of the status of a fundamental principle of international law, a subjective criterion is required - a universal recognition of the principle by all subjects of international law. At the same time, the process of recognition of principles in international law (universal recognition) is also sociological and natural in nature, since recognition itself does not necessarily fixing a positive consolidation in law. Sufficient proof of the existence of a fundamental principle of international law is its application to such a role in international judicial practice.

The basis of natural law is not the norms of positive law, but the principles, ideals, requirements. At the center of attention of positive law is on the relationship that exists between the law, that created by the subjects, on the one hand and the objective ideas that exist regarding moral rights and obligations on the other.

The general principles of international law are formed on the basis of current international customs and international treaties, and the general principles of law are based on the functioning of legal systems as normality. Thus, in the first and second cases, a natural-law source of the formation of principles is attested. Confirmation of this position is the opinion of the international law scientist J. Brierly, who said: «... the treaty and custom oblige because such a need for a reasonable world, the principles of which are not dependent on the will of the state» [2, p. 17].

It is generally accepted that the principles of international law function only in interaction, are complex in nature, mutually reinforcing. While applying the principles, they have a different nature of obligation. Some are absolutely imperative, others allow the possibility of deviation from the rule by mutual agreement in accordance with the imperative principles and rules of international law. But together they form a coherent system, which is the basis and framework of all international law, guided by general principles. In this system, all principles are mutually agreed, specific and regional principles are subordinate to the universal, and within the subsystems the principles are the basis for all norms of international law at this level. Consequently, the principles of international law have the character of systemic governing norms, violations of which can lead to the destruction of the whole system of international law. In spite of the varying force of legal obligations, all principles are endowed with the nature of a special legal force which can be called higher or highest order.

A. Ferdros considered that the general principles of law in the hierarchy of sources of international law occupy the highest level. The same opinion is followed by V. Degan [1, p. 16], justifying the fact that formal (customs) and positive (international treaties) sources are grounded, based on general principles of law, and therefore cannot be abolished. The general principles of law are the cementing framework that brings closer international law into line with national law, thus achieving the unity of all legal systems of humanity. Thus, the system-forming feature of the principles of international law also indicates the inseparable link between the generally recognized principles of international law and the general principles of law, as a holistic complex, which allows to achieve the goals of international law through the legal support of national legal systems.

The principles of general international law can be compared with the constitutional principles of the national legal system. They, as in the national system, can be general and branch, and comprehensively form the public order of the state, and at the international level they are called as the international public order. Therefore, universality cannot be a feature of the general principles of international law, if it is considered as an indication of the sphere of influence by

subject criterion. For example, just as in domestic law, the principle of monogamy or polygamy of marriage constitutes an internal public order of the state, but in scope it is an branch principle; in international law, the principle of prohibiting the use or threat of force has its own subjective dimension in international security, but is part of international public policy. Therefore, the basic principles are more universal by subjective criterion, then by subjective criterion, they apply to all subjects of international law. Although such a vision cannot be absolutized. In particular, the regional principle of territorial integrity (which is positively recognized within Europe), cannot be universal, but it is widely recognized around the world. Sometimes the principles of international law, which are considered as branch, must be respected by all subjects of international law because they are so fundamental to human personality and elemental humanity, that is, based on the generally recognized principle of law - humanity, and form the fundamental non-violent principles of international law. It is about, in particular, the principles of international humanitarian law as fixed in the Hague and Geneva Conventions.

**Conclusion:**

Thus, the principles of international law have their own specific sphere (subject) of regulation, but, because of the universality of recognition as a principle, they get features of fundamentality.

Thus, one can distinguish the following characteristic features of the norm-principle of international law:

— rules that have a concentrated content that gives legal regulation the dynamic by combining elements of stability and programmability;

— the complex feature of the norm-principle gives the system of international law unity and stability, is the basis for the whole system of international law. Such complexity of principles of international law is characterized by their equality with each other and excludes any subordination or hierarchy;

— fundamentality of principles-norms - manifested in the preference (supremacy) over other norms of international law, these are norms of the highest rank in the system of international law;

— violations of the norms of international law must be regarded as an attempt on the integrity of international law as a united system of legal regulation of relations in the international community, since the violation of one of the principles entails violations of others, as a united system and basis of all international law.

Based on the features we have drawn up, we can propose the following definition of a principles-norm of international law. The principles of international law are basis and generally recognized norms of international law, which directly regulate the most important and vital necessary relations between all subjects of international law, which in a complex form the basis for the legitimacy of the functioning of the whole system of international law.

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