

## INTERNATIONAL LAW AND POLICY

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# CONCEPT OF INTERNATIONAL LEGAL POLICY IN FOREIGN COMPARATIVE LEGAL STUDIES

**INTRODUCTION.** *International legal policy is a new object in international legal studies, although this phenomenon exists as long as the external relations of States. International legal policy is a rare case of research subject, which remains unexplored. International legal policy as a Concept of State's policy towards legal aspects of international relations was formed in the 80-s of last century. Earlier the questions and their particular aspects now embraced by international legal policy were divided between international lawyers and international relations researchers. However international legal policy is an integral system of State's approaches to international legal matters, therefore its punctual research is relevant only from comparative point of view. It would be interesting to compare States' positions on concrete issues or States' tactics at different stages of realization of international legal norms. This article concerns the question whether comparative studies of international legal policy can be integrated into existing fields of comparative foreign relations law or of comparative research of international law.*

**MATERIALS AND METHODS.** *The article surveys theoretic questions primarily on the base of doctrinal sources. The retrospective analysis of the comparative method in international law is based on works published by Russian and foreign experts during the XX century. Particular attention is drawn upon works of founders of comparative research in international legal studies. The concept of foreign relations law in the scholarship and practice of the U.S. is researched on the base of national case law, which for-*

*mulated the principle of executive exceptionalism in State foreign policy. Research work is realized with the use of analysis, synthesis, systematisation, as well as methods of historical and comparative method.*

**RESEARCH RESULTS.** *The Article consistently reveals meaning and the content of international legal policy as one of the authors of the concept, French lawyer and diplomat G. de Lacharrière, presented it. The Article examines the history of foreign relations law in the U.S. and presents its doctrinal estimations from viewpoint of American constitutional law. The research work specifies different points of view on content of foreign relations law and approaches to its justification. Indeed international legal policy and foreign relations law can be compared as two types of State's approach to its legal position on the international scene. There are six parameters for comparison: sources, functions, subjects of both concepts, questions on allocation of foreign powers in the State, on relationship between international and national law, on the role of national courts in interpretation and application of international norms. In consideration of "national interest" concept the attribution of international legal policy to international organisations or supranational association is judged as incorrect. The article examines the question of applicability of comparative method in the international law within the discourse among scholars on how differently modern States evaluate international legal norms. Analysis of the tendency to contrasting States' approaches to the international law encompasses its development from notions "international law of transitional period",*

“international legal systems”, to notions “national approach”, “legal style”, “legal culture”. Brief survey of comparative international law gives perspective on diversity of approaches to comparable aspects of the international law. Comparative studies of international legal policy could get consolidated among them.

**DISCUSSION AND CONCLUSIONS.** At first sight the comparative method is hardly applicable to the international law. However the universality of the international law doesn't exclude variety of approaches to it. The research into international legal policy determined by national interests of every State allows to systemize positions of a State into a single strategy. At the same time comparative method doesn't only provide classical comparison of States' positions by issues, but also offers to compare inner-workings of the international legal policy and shaping factors. Nowadays in the context of trends on diversification of international relations (fragmentation, regionalisation), growing popularity of the comparative method translated into comparative foreign relations law and

comparative international law. However international legal policy doesn't correspond with categorial apparatus of comparative foreign relations law. International legal policy is nor able to apply methodological tenets of comparative international law due to its multivalued content. Most likely comparative studies of international legal policy can become a new approach within comparative international law, which should be based on the principles of concreteness and consistency.

**KEYWORDS:** international legal policy, foreign relations law, comparative international law, comparative method, national interests, national approaches to international law, contemporary legal studies.

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## МЕЖДУНАРОДНОЕ ПРАВО И ПОЛИТИКА

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# КОНЦЕПЦИЯ МЕЖДУНАРОДНО-ПРАВОВОЙ ПОЛИТИКИ В ЗАРУБЕЖНЫХ СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЯХ

**ВВЕДЕНИЕ.** Концепция международно-правовой политики стала разрабатываться в международно-правовых исследованиях относительно недавно, хотя сам феномен международно-право-

вой политики государства существует столько же, сколько само государство в его отношениях с внешним миром. Международно-правовая политика как политика государства в отношении

правовых аспектов его международных отношений была концептуально оформлена только в 80-е гг. XX века. Прежде круг ее вопросов или их аспекты разделялись между юристами-международниками и исследователями международных отношений. Однако международно-правовая политика - это цельная система подходов государства к вопросам международного права. Большой интерес представляет сравнение позиций государств по конкретным вопросам или сравнение тактики государств на отдельных этапах реализации международно-правовых норм. Данная статья посвящена вопросу о том, можно ли интегрировать сравнительные исследования международно-правовой политики государств в рамки уже существующих сравнительно-правовых исследований подходов государств к международному праву (проект так называемого сравнительного международного права) и сравнительно-правовых исследований нормативного оформления межгосударственных отношений (проект сравнительного права внешних сношений).

**МАТЕРИАЛЫ И МЕТОДЫ.** В статье рассматриваются теоретические вопросы преимущественно на основе доктринальных источников. Для ретроспективного анализа сравнительного метода в международном праве используются работы, опубликованные на протяжении XX в. отечественными и зарубежными правоведами. Уделяется внимание основоположникам компаративистской практики в международно-правовых исследованиях. Поскольку проект сравнительного права внешних сношений был разработан американскими правоведами на основе национальной правовой доктрины и практики, в исследовании также используются материалы национальной судебной практики 30-40-х гг., в которой был сформулирован принцип исключительности полномочий исполнительной власти во внешней политике страны. В исследовании применялись методы анализа, синтеза, систематизации, а также историко-правовой и сравнительно-правовой методы.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** В статье проводится краткий обзор идей концепции международно-правовой политики государства, с учетом того, что одним из первых авторов такой концепции считается французский юрист и дипломат Ги де Лаишаррьер. Рассматривается история становления права внешних сношений в США и её доктринальная оценка с точки зрения конституционных основ в государстве. Обозна-

чаются различные точки зрения на содержание и подходы к обоснованию права внешних сношений. Проводится сравнительный анализ концепции международно-правовой политики государств и понятия права внешних сношений, как двух подходов к оценке государством своей правовой позиции на международной арене. Различия выявляются по шести параметрам: источники, функции, субъекты двух концепций, внимание к распределению внешнеполитических полномочий в государстве, вопрос о соотношении международного права и национального права, значение национальных судов в толковании и применении международно-правовых норм. На основе отсылки к понятию "национального интереса" констатируется некорректность приписывания международно-правовой политики международным организациям и надгосударственным образованиям. В работе отражается развитие тенденции к противопоставлению подходов государств к международному праву, начиная с понятий "международного права переходного периода", "международно-правовых систем" и обращаясь к понятиям "национального подхода к международному праву", "правового стиля", "правовой культуры". Краткое исследование формирует представление о разнообразии подходов к сравнимым аспектам международного права, среди которых могут утвердиться и сравнительные исследования международно-правовой политики государств.

**ВЫВОДЫ И ОБСУЖДЕНИЕ.** На первый взгляд сравнительный метод малоприменим к международному праву. Однако универсальность международного права не исключает расхождений в подходах к нему. Если исследование международно-правовой политики, определяемой национальными интересами каждого государства позволяет систематизировать позиции государства в единую стратегию, то сравнительный метод допускает как классическое тематическое сравнение взглядов государств, так и открывает возможности сравнить внутренние закономерности международно-правовой политики и определяющие её факторы. Тенденция к исследованию международно-правовых вопросов с точки зрения проблем макро-социальной идентичности государств выразилась в растущей популярности сравнительных международно-правовых исследований (проект сравнительного международного права), и выдвигении проекта сравнительного права внешних сношений (под руководством американского правоведа К.А. Бредли). Для разработки концепции международно-правовой политики

государства не применимы методологические установки проекта сравнительного права внешних сношений. Но при этом сходство основных тезисов концепции и проекта сравнительного международного права подсказывает, что дальнейшие разработки концепции могут стать новым направлением проекта.

**КЛЮЧЕВЫЕ СЛОВА:** международно-правовая политика, право внешних сношений, сравнительное международное право, сравнительный метод,

национальные интересы, национальные подходы к международному праву, современные правовые исследования.

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## Introduction

Since international law is an integral legal system that regulates relations within the international community, for a long time the application of the comparative method in international legal researches seemed inappropriate. Indeed, it was assumed that States are guided by the same principles and norms. All the while, studies of States' controversies in the settlement of some matters show that States interpret the content of international legal norms differently, understand their applicability to particular situations also in different ways, and participate in the coordinated development of norms with different motivations. Such discrepancies are usually considered within the analysis of concrete problems, but within the framework of the concept of international legal policy of State (thereafter – ILP concept), these disagreements are not treated as special cases of diverging opinions among sovereigns, but as natural manifestations of differences in international policies in general. In Russian literature on International Law the ILP concept is considered first and foremost as evaluating “legitimate possibilities for a state to defend its national interests through making proper choice between different International Law sources and particular rules and interpretations of relevant rules and also by creation of special expertise” [Vylegzhanin, Dudykina 2016:36]. In this context relevant international documents on politi-

cal involvement in International Law are scrutinized in the context of the term “les politiques juridiques extérieures”.

At the same time, the ILP concept offers a systematic approach to the analysis not only of various international legal positions of States; since the concept is interdisciplinary, its development stands out in the international legal research and foreign legal scholarship has gradually developed the research field of “comparative international law” [Comparative International Law 2018; Roberts, Stephan 2015:467-474], based on the idea of national approach, which also underlies the ILP concept. The project<sup>1</sup> of “comparative international law” rationalizes the use of the comparative method in international legal research, without denying the fundamental theses about the integrity of this legal system. In addition to that, some legal scholars draw attention to the project of “comparative foreign relations law” (in development of which both legal scholars and international lawyers from different countries are involved)<sup>2</sup>, which won the support of the Carnegie Foundation for elaboration at the Duke Law School. This field of research focuses more on the institutional organization and normative design of States' policies on international legal issues, and generally goes for comparative studies of national legal systems. The question arises whether the study of the ILP concept which is based on legal methodology can be attributed to one of the new comparative legal research projects<sup>3</sup>.

<sup>1</sup> For the purposes of the present research paper the term ‘project’ should be understood as synonymous to ‘research field’.

<sup>2</sup> Presentation of the Oxford Handbook of Comparative Foreign Relations Law. URL: <https://web.law.duke.edu/cicl/oxford-handbook-comparative-foreign-relations-law/> (accessed 15.08.2020).

<sup>3</sup> By familiarization with the ILP concept it can be seen that the concept is mostly focused on national differences, which cause to discord among States and at the same time drive them to development of international law through the continuing coordination of wills. Naturally the case studies of national ILPs imply application of comparative method. The question, which has inspired this article is “Should the ILP concept be developed independently or it can be elaborated within emerg-



The present article makes an attempt to work out this issue.

## 1. Concept of international legal policy

### 1.1. Brief introduction into the concept

The relationship between national policy and international law is one of the most challenging questions in international legal theory. How national foreign policy of States and the international law can affect each other? Which of them determinates the other? French lawyer Guy de Lacharrière supposed, that the most plausible relationship between them is 'politique à l'égard du droit' (policy towards international law), which translates into the concept of "politique juridique extérieure". The term literally means "external legal policy", however in non-francophone scholarship the term is translated as "international legal policy" or "politics of international law". In French as in Russian the term "politique" (rus: *politika*) is equally applicable to what is embraced by the term "politics" (with the meaning of "statecraft") and by the term "policy" (synonymous to "strategy" or "plan of action"). The collocation "politics of international law" is more common in foreign international legal studies [Koskenniemi 1990:4-32; Koskenniemi 2009:7-19; Koskenniemi 2019:17-52; The Politics of... 2004; Koskenniemi 2011]. Nevertheless the "international legal policy" would be closer to the meaning assigned by prof. Lacharrière. In his work of 1983 the concept of "politique juridique extérieure" is formulated by analogy with foreign military, economic, cultural policies. Once the 'politique juridique extérieure' means the way how the State can handle various issues of "legal aspects of international relations", its better english equivalent is 'international legal policy' (thereafter – ILP).

At the appearance the idea of G. de Lacharrière was surprising. It's common to think that the State's policy is always directed at the questions fully covered by the State's power. For instance, the State has the rights to choose its economic system, to regulate activities of foreign investors or transnational corporations. It's obvious as it's a matter of nation-

al jurisdiction. At once the same goes for foreign policy, as the State has equally the right to engage in any form of economic cooperation, to associate with international organizations, to participate in international decision-making process<sup>4</sup>. In other words States are free to determine the content of issues which they will have to handle in their policies. However in regards of the international law the extent of State's power is limited. The content of rules regulating international relations of all States was gradually shaped by interstate consents and practice on the basis of essential principles. Hence the State has only to meet and respect existing international legal rules. G. de Lacharrière contrives to use this collision for justification of the ILP concept. To his point of view, the international legal policy is most pronounced at tentative of States for modification of the international law [Lacharrière 1983:6]. It should be explained by the contrast with the national law. As the State creates itself its national law and politics, there can be no contradictions between them. In case of international legal policy the State's policy is directed at the independent object. That can lead to discrepancies. For this very reason the State strives to refine the content of international legal rules with its own interpretations and suggestions about new rules. Within the ILP concept, such refining endeavours cannot be spontaneous, as all positions and actions of State present integral elements of its consistent systemic policy<sup>5</sup> of positioning itself in different issues of international law.

### 1.2. The scope of ILP concept

The international legal policy is expected to embrace the standpoints on the sources of the international law, including approaches to the use of general and special rules and attitude to legal gaps or ambiguity of rules; the conduct towards interrelated operations of interpretation and application, including recognition or reject of the legal force of rules, ways of suitable interpretation, evaluation of the international judgements and the general attitude to the international justice. Clearly every State determines its own content of its policy and sets its own objec-

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ing research fields also based on the comparative method?" Consequently the present work does not pretend to encompass fundamental theoretic issues, or to review matters profoundly elaborated by Russian and foreign legal scholars. The objective of the article is to determine whether the development way of the author's specific concept lines up with trending projects initiated by foreign scholars over the last ten years.

<sup>4</sup> Charter of Economic Rights and Duties of States. GA Resolution 3281(XXIX), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50. Art. 1, 2, 10.

<sup>5</sup> The ILP is considered as systemic, though it does not prevents it from dynamism. As far as the ILP gets realized in the system of international relations, the ILP should be responsive and sensitive to the system-related changes. The system-like character of interstate interactions is elaborated in works of Je.A. Pozdnjakov and G.I. Tunkin [Pozdnjakov 1976; Tunkin 1975:56-76].

tives governed by national interests [Lacharrière 1983:13]. However the introduction of “national interests” into the evaluation of relationship between States’ foreign policy and international law can undermine the authority of the latter. G. de Lacharrière made a point: “Qui relativise le droit le désacralise. Si le droit devient l’objet de stratégies, les règles en vigueur ne correspondent plus qu’à une stratégie qui a réussi»<sup>6</sup> [Lacharrière 1983:10]. The suggestion on political dependence of international rules is rather popular among proponents of the critical theory of international law. It follows from the assumption of the legal scholarship of the 19<sup>th</sup> century about procedural character of the law. The international law “of civilized nations” embodied diplomatic practice of the European States, i.e. procedures for entering into and serving diplomatic relations, attaining sovereign status, establishing the status of territory or the neutrality. If not “procedural” argument, the international law is deemed to carry political traces, as it never completes its objectivity [Koskenniemi 1990:6, 28].

The question though arises whether the international legal policy includes internal legal aspects of foreign relations? Introducing the ILP concept Lacharrière didn’t distinguish particular legal aspects of international relations and thereby allowed the suggestion on its dichotomous nature. The understanding of the essence of the international legal policy clears up uncertainty. It should be kept in mind that the international legal policy deals exclusively with the content of the international law. For instance, the exercise of extraterritorial criminal jurisdiction does not fall within the scope of the international legal policy, since its legal framework is provided by norms of national law. In this regard the allocation of foreign policy power among national authorities, procedures of implementation of international rules into the national legal system, they all constitute a kind of frame of the international legal policy’s operations, but don’t determine it as such. The analysis of the international legal policy excludes the question on the choice between monistic and dualistic approaches to the international law. It’s necessary to understand whether the international legal policy covers matters of the national legal system, such as direct or conditioned applicability of international rules by national judges or the possibility of citizens to invoke those rules in national courts. On the one

side, these matters belong to internal legal affairs of State, to the effect that their settlement is not intended to have an effect on the content of international legal rules. But on the other side, national judges, as representatives of State’s judicial power, also communicate State’s international legal policy in the work. It’s notable that the thesis on national approaches to international law underlying the idea of comparative international law originated with examination of national judgements on the same international legal question [Roberts 2011:64-67].

### ***1.3. Factor of internal changes as exemplified by the ILP of the U.S.***

Nevertheless the international legal policy is first of all a part of the foreign policy. Consequently the international legal policy undergoes the influence of changes in the internal political course of the State as its foreign policy in whole. This phenomenon can be observed through the example of every State. However the most outstanding illustration is the U.S. foreign policy since D. Trump acceded to presidency in 2016. Over the last four years the American international legal policy endured wide fluctuations, which are examined in works of international law scholars [Koh 2017; Bellinger 2019; Talmon 2019]<sup>7</sup>. Under the motto “America first” the U.S. foreign policy became extremely unilateralist. If earlier the term “unilateral policy” went for the actions based on the preventive war doctrine of G. Bush, today the American unilateralism is strongly associated with the economic nationalism expressed in escalated trade disputes with China, trade tensions with the EU and economic measures imposed against Iran, Nicaragua, North Korea, Russia, Venezuela in contravention to all WTO procedures. Another series of unilateral actions considerably revised the U.S. obligations assumed under the international treaties. The U.S. announced its withdrawal from several vital agreements, such as Paris Agreement on Climate change of 2015 (withdrawal will take effect one year after notification in November 2020), Trans-Pacific Partnership Agreement of 2016 (letter to each TPP signatory was sent in January 2017), Joint Comprehensive Plan of Action on Iran’s nuclear programme endorsed with the UN Security Council resolution 2231 of 2015 (withdrawal was announced by the president on 8 May 2018), Treaty of Amity, Economic Relations,

<sup>6</sup> Translated as: “Who makes the law relative - desacralizes it. If the international law becomes the object of State’s strategy, valid international rules will be considered as results of the winning strategy”.

<sup>7</sup> See also Mulligan S.P. *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*. Congressional Research Service. May 4, 2018. URL: <https://fas.org/sgp/crs/row/R44761.pdf> (accessed 15.11.2019).

Consular rights with Iran of 1955 (withdrawal was stated on 3 October 2018), Intermediate-Range Nuclear Forces Treaty with Russia of 1987 (withdrawal was noticed in February 2019, and the Treaty ceased to be effective 6 months later conforming to article XV) as well as abandonment of UNESCO (notification took effect on 31 December 2018). In the light of Iran's claim in front of the International Court of Justice the U.S. announced its intent to review all international agreements with jurisdiction clauses in favour of the ICJ<sup>8</sup>. By means of Article 2202 of the NAFTA the U.S. initiated the large overhaul of its provisions, which resulted in the United States – Mexico – Canada Agreement (USMCA), signed in November 2018. It's noticeable that most of concerned actions were undertaken without full accord among power branches. The known inner struggle baffles the realization of adopted policies. For instance, the USMCA Protocol met major difficulties in ratification due to the Congress' general opposition to the president's project on replacement of the quarter-century-old NAFTA. The international legal policy is inseparable from the mechanisms which serve its operation, therefore discords among national political forces or different authorities affect not only the choice of international legal position, but also its realization.

#### 1.4. *The ILP as an object of legal studies*

Guy de Lacharrière admitted that the proposed concept is vulnerable to critical attacks. Those, who regard the international law as sacred, can't tolerate that it can become the target for national policy. Otherwise, the policy which objectifies the international law would be considered amoral. On the contrary, those, who deny the significance of the international law, would challenge vain efforts of States to form their international legal policy [Lacharrière 1983:9].

The international legal policy necessarily implies some manipulations, which would allow balancing between self-interested conduct and the absolute commitment to the international law<sup>9</sup>. This balance is attained through endeavours to justify State's actions with legal rules. Therefore inconsiderate opinions on the concept could blame it for reducing the meaning of the international law to the simple tool in the State's hands. Is justification of State's actions the only role of the international law in the eyes of the sovereign? Actually prof. Lacharrière's idea is far from the so-called instrumentalist approach to the law. The very fact that by forming the international legal policy the State seeks certain balance instead of falling into self-indulgence – is the evidence of a significant value of the international law. The fact that the State strains after legitimization of its adopted decisions and undertaken steps by international rules proves that the international law has the authority [Cazala 2013:415]. First, the authority to make action legitimate or unlawful, second, the moral authority in the international community. The weight and the force of international law make the State to adopt particular policy. This circumstance contributes into the research value of the ILP concept.

First of all, the concept of international legal policy integrates the questions traditionally examined separately by international lawyers and political scholars, or at least in the interdisciplinary research works. It proposes an elegant way to transfer sheer political conduct into the field of international law in order to compose its comprehensible analysis without blending dissimilar factors. Furthermore, the research of the concept is a gratifying experience given the number and diversity of holders of the international legal policy. If the international law can be figuratively considered as a language for international relations<sup>10</sup>, every State speaks it with its

<sup>8</sup> Rampton R., Wroughton L. Van den Berg S. U.S. withdraws from international accords, says U.N. world court 'politicized'. 3 October 2018. URL: <https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP> (accessed 15.11.2019).

<sup>9</sup> Lacharrière wrote: "Des raisons de nier complètement la pertinence du concept pourraient venir de deux conceptions [...]. Selon la première conception, le droit, dont le rôle serait grossi sans mesure serait reconnu comme étant d'une nature sacrée qui le voue au respect des gouvernements et le met au-dessus des manipulations politiques. Considéré sous l'angle d'une telle dévotion, il ne pourrait être l'objet de politiques gouvernementales. [...] selon la seconde conception : les considérations juridiques ne joueraient aucun rôle dans les conduites des États, ni au niveau de la détermination de celles-ci ni à celui de leur justification. [...] en réalité, aucun État ne manifeste à l'égard du droit ce respect totalement dévot ni ce nihilisme radical". Translated as: "Reasons to completely deny the relevance of the concept could come from two conceptions [...]. According to the first conception, the law, the role of which would be increased without measure, would be recognized as being of a sacred nature that governments would respect and put it above political manipulation. From the perspective of such devotion, it could not be the subject of government policies. [...] according to the second view, legal considerations play no role in the conduct of States neither in determining them nor in justifying them. [...] in reality, no State manifests this totally devout respect for the law or this radical nihilism" [Lacharrière 1983:9].

<sup>10</sup> *International law as a language for international relations*. Materials of the United Nations Congress on Public International Law. Kluwer Law International. 1996.

national accent. In this sense international legal policy is a highly prolific subject for comparative studies. The international legal policy of different States can be compared in content of structural elements, in standpoints on concrete questions, in intensity of appealing to the international law, in quality of justification of steps and decisions, in determining factors, in preferred methods of adoption to the international legal requirements and many other criteria. This is a great domain for exploration especially with the comparative method. In this context it's worth noting two emerging legal research projects based on the comparative method – project of comparative international law (developed by A. Roberts, P.B. Stephan, P.H. Verdier, M. Versteeg, K. Linos, D. Abebe) and that of comparative foreign relations law (developed by C.A. Bradley, C. McLachlan, O.A. Hathaway, J. Galbraith). [Comparative International Law 2018; Oxford Handbook... 2019] This poses the question whether comparative research into the ILP of different States can be conducted within these developing research fields. The answer demands analysis of premises of each research field.

## 2. Project of comparative foreign relations law

### 2.1. Notion of foreign relations law

As all kinds of terms generated first in practice and then becoming a doctrinal research subject, the foreign relations law doesn't have an explicit generally recognised definition. As every State necessarily participates in the international life, rules governing external relations of State with the others seem essential to exist. American international lawyer prof. C. A. Bradley proposes to consider foreign relations law as domestic legal rules which govern "interactions" of a Nation with the rest of the world [Bradley 2019:3]. These interactions include interconnections as such between the international law and domestic law of a State, so *the foreign relations law does not address the substance of concerned international nor municipal rules*. Nevertheless questions falling into the field of foreign relations don't leave the law-zone. Rather, they become a matter of particular legal reg-

ulation. How these questions are regulated (in the framework of which law branch, to what extent, what their scope is) depends on the assumed position of every State. The Foreign Relations Law as a separate integral concept was developed in the U.S. precisely due to its essential attitude towards external relations. Therefore brief pointlike retrospective into the development of the international legal scholarship of the U.S. would allow understanding background of the project of comparative foreign relations law.

### 2.2. Development of the foreign relations law of the U.S.

Being an emerging nation, fighting for independence, the U.S. of the late XVIII century strived to enter international scene acting as a free sovereign state [McLachlan 2012:24]. Besides the task to find its niche in the world of present powers, the new nation was at the same time concerned with internal allocation of competence among branches of power as well as between united states and federal government. Therefore organisation of external interactions was closely related to inner political processes. The framework of these authoritative workings is determined by the U.S. Constitution<sup>11</sup>: the power of Congress to declare war, to regulate commerce with foreign Nations, to define and punish offences against the Law of Nations (Art. I, section 8), the power of President to make treaties (conditioned by the advice and consent of Senate), to appoint ambassadors, to be the Commander in Chief of the Army and Navy (Art. II, section 2)<sup>12</sup>. However, the realities of international politics revealed the lack of more detailed rules in the field of foreign affairs.

The Neutrality Proclamation issued by President Washington in 1793 in response to the outbreak of war between the Great Britain and revolutionary France caused the first considerable dispute on powers in exercising foreign policy. Despite reasonable objective to prevent fragile State from getting involved into an European conflict, the legitimacy of the adopted decision was fiercely contested. In a series of letters published in the Gazette of the United States, two founding fathers A. Hamilton<sup>13</sup> and

<sup>11</sup> Campbell T. J. *An Understanding of the Constitution's Foreign Affairs Power*. The Heritage Foundation. November 18, 1986. URL: <https://www.heritage.org/political-process/report/understanding-the-constitutions-foreign-affairs-power> (accessed 15.11.2019).

<sup>12</sup> Constitution of the United States. 1787. URL: [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm) (accessed 15.11.2019).

<sup>13</sup> Holloway C. Alexander Hamilton and American Foreign Policy. The Heritage Foundation. No 57. September 15, 2015. URL: <https://www.heritage.org/political-process/report/alexander-hamilton-and-american-foreign-policy> (accessed date: 15.11.2019)



J. Madison contended whether the U.S. had the right to recuse itself from another war with the Great Britain notwithstanding its obligations under the Treaty of Alliance with France concluded in 1778. Madison considered the proclaimed neutrality not only as a betrayal of the old ally, but as a breach of constitutional principle of separation of powers. In his opinion, unspelled powers in foreign affairs should have pertained only to Congress. Hamilton advocated the executive authority's power (namely, the President's one) while strictly construing Senate's participation in making international treaties. Defending the president's decision in substance, Hamilton advanced the concept of national interest, destining the whole further foreign policy of the U.S.<sup>14</sup>

The discourse in *Pacificus-Helvidius Letters*<sup>15</sup> reflected a delicate intertwinement of internal issues with questions of foreign policy. As to the constitutional norms in the dispute, the opposite sides based their arguments on their alike interpretation of these norms without impinging upon their normative value. But the situation which had come about due to the Chaco war between Bolivia and Paraguay (1932-1935) necessitated a true divergence from explicit constitutional provisions. Being landlocked countries, both belligerent parties heavily relied on foreign armament supplies, they chiefly resorted to American manufactures. In order to terminate arms trade as a main source for continuing violence, the

Congress invested the president with a discretionary power to take steps towards establishment of peace or *de facto* authorized him to put an embargo on arms shipments from the U.S.<sup>16</sup> When the Curtiss-Wright Export Corporation was charged with violating the President's proclamation, the company contended the invalidity of this proclamation on the grounds of unconstitutional delegation of powers by Congress to the President<sup>17</sup>. Then the Supreme Court confirmed the president's exclusive power over foreign affairs due to their specific complicated character. The adopted decision introduced a new order in exercise of foreign policy, which can be characterised as "dichotomy of internal and external powers" [Purcell 2013:663] or "foreign affairs exceptionalism" [Bradley 1999:1096]. Either definition comes down to the statement about less extent of constitutional restraints on executive power in foreign policy in contrast to domestic issues.

The executive domination in determination of foreign policy was then reasserted in the cases concerning the President's power to recognise the Soviet government (*United States v. Belmont* (1937)<sup>18</sup>, *United States v. Pink* (1942)<sup>19</sup>), and in cases concerning the recognition of foreign state's immunity (*Ex parte Republic of Peru* (1943)<sup>20</sup>, *Republic of Mexico v. Hoffman* (1945)<sup>21</sup>). The constitutional regime of foreign relations saw the triumph of executive discretion [White 1999:134]. Probably the judicial reasoning on

<sup>14</sup> It should be noticed, that Hamilton didn't campaigned for the "self-interested" foreign policy, as for him policy guided by the own interest of nation "is and ought to be prevailing" "as far as justice and good faith permit". [Beitzinger 2011:253]

<sup>15</sup> In the American history the dispute around the Neutrality Proclamation is usually referred to as "*Pacificus-Helvidius Letters*"; as publishing their letters A. Hamilton and J. Madison used pseudonyms "*Pacificus*" and "*Helvisius*" correspondingly. URL: <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/pacificus-helvidius-letters/> (accessed 15.11.2019).

<sup>16</sup> A Joint Resolution of May 28, 1934, provided: "That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if (...) he makes proclamation to that effect, it shall be unlawful to sell (...) any arms or munitions of war in any place in the United States (...)" Joint Resolution. May 28, 1934. Congress Session II. Chapter 365. H.J. Res. 347. Pub. Res., No. 28.

<sup>17</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). URL: <https://supreme.justia.com/cases/federal/us/299/304/> (accessed date: 15.11.2019)

<sup>18</sup> *United States v. Belmont*, 301 U.S. 324 (1937): "the President recognized the Soviet Government and normal diplomatic relations were established between the two Governments, followed by an exchange of ambassadors"; "The international compact was within the competency of the President, and participation by the Senate was unnecessary"; "The external powers of the United States are to be exercised without regard to state laws or policies". P. 331.

<sup>19</sup> *United States v. Pink*, 315 U.S. 203 (1942): "The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees". P. 229; "The power of the President in respect to the recognition of a foreign government, includes the power to remove such obstacles to full recognition as the settlement of claims of our nationals". P. 229.

<sup>20</sup> *Ex parte Republic of Peru*, 318 U.S. 578 (1943): "That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations." P. 588

<sup>21</sup> *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945): "It is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the Government, though it has had numerous opportunities, has not seen fit to recognize". P. 324 U.S. 38.

extra-constitutional executive powers could provide the groundwork for generation of foreign affairs law apart from constitutional one. Nevertheless foreign affairs law didn't intend to deny the explicit constitutional rules, as it's primarily based on them. Louis Henkin comprehensively studied the constitutional foundation of modern foreign policy of the U.S. in his "Foreign Affairs and the Constitution" of 1972 and a range of consequent articles. There he highlighted the fact that despite seeming prevalence of politics over law in the conduct of foreign affairs, this is "the law of the Constitution that gives the politics its form and much of its content" [Henkin 1976:4-5].

### 2.3. Significance of foreign relations law

The idea of the executive supremacy in foreign affairs sowed certain concerns about the general American approach to external relations and the international law. The spring of legal realism anchored by H. Morgenthau's "Politics among nations" of 1948, the uprise of the policy-oriented approach with the lead of M. S. McDougal, H. D. Lasswell and formation of the New Haven School, persistent scepticism about foreign policy's subjection to normative rules strikingly exposed in "Limitations of International Law" by J. Goldsmith and E. Posner. Finally, the inner cultivation of foreign relations law (as zone for executive 'law-making') shouldn't translate into "unilateral replacement" of international law in regulation of the U.S. external relations [McLachlan 2012:25]. Definitely these trends are not imputed to the foreign relations law as such, but they present the other side of this phenomenon inside the U.S. The legal handling of the foreign affairs by other nations will be different. It's not only the matter of how every nation builds up and manages its relations with other nations in terms of its normative or institutional workings. The differences begin with the status of foreign relations law and its scope. C. Bradley counts the foreign relations law as domestic law, which encompasses specific questions as entering international agreements, participating in international organisations, using armed forces and incorporating international law into domestic legal system [Bradley 2019:4]. Therefore foreign relations law isn't a separate legal field with its own sources, rather it draws on legal materials from constitutional law, statutory law (for countries of common law), administrative law and established jurisprudence. So international legal scholars unambiguously qualify the foreign relations law as a domestic field [Bradley 2019:3, Levin 1981:35, McLachlan 2012:24, Sitaraman, Wuerth 2015:1911].

C. McLachlan considers the central function of the foreign relations law as allocative. The foreign relations law is meant to resolve four principal questions on relationship between international and domestic law, extent of foreign power for every of three branches, implications of foreign relations for private rights and treatment of foreign state in municipal law [McLachlan 2012:4]. So the researcher delineates cases of immediate treatment of foreign relations by domestic authorities from cases in which it comes to incorporated international legal norms. But it generates more questions on the nature of norms of the foreign relations law, whether they are substantive or procedural, or how they relate to rules concerning conflict of two domestic legal systems. D. Abebe emphasizes the same function of the foreign relations law with use of other terms. In his opinion the allocation of foreign affairs powers among different branches serves as an 'internal constraint' on the authoritative unilateralism in the international field [Abebe 2009:128]. Introduction of the notion of "internal constraint" as opposed to "external constraint" of international politics conducted by other States allows to build-up a dichotomous scheme how the foreign affairs policy ploughs its way between two fires. However, in this model only one side of the foreign relations law comes into focus, namely policy-related side.

### 2.4. Two concepts about State's conduct in the international legal field

The meaning of foreign relations law is different to that of the international legal policy, despite seeming resemblance of covered questions. Actually they can't be directly compared as they don't belong to single category: foreign relations law is a legal issue, international legal policy is a tactic matter of State's conduct. Nevertheless each of them represents a *particular State's apprehension* how and what determines the way, which this State lives in the international legal order. Concepts of "foreign relations law" and "international legal policy" should be distinguished by their content.

*First distinction* concerns sources. Due to its legal nature "foreign relations law" derives its substance from legal sources, like norms of constitutional law; executive regulations, including so-called extra-constitutional norms (notion related to the phenomenon of "foreign relations exceptionalism"), jurisprudence (relevant for countries of common law). The international legal policy doesn't rely on legal norms as such, but on the content of legal provisions. From viewpoint of international legal policy legal norms reflect

approaches and visions of a State how to regulate particular matter in this moment. Therefore international legal policy can meaningfully match with the content of legislation, but it's not bound with it. The policy's substance is essentially composed of definite standpoints and perspectives on international legal issues.

*Second distinction* bears upon question of power allocation in State. The concept of foreign relations law places major focus on volume and content of allocated powers, processes of their delegation, whereas international legal policy leaves it out. This is because foreign relations law is first of all, national law, which regulates institutional mechanisms of realisation of foreign policy. Furthermore the whole history of the U.S. foreign relations law developed through legal reasoning on legitimacy of foreign powers of different branches. The international legal policy isn't charged with questions about work of internal scheme, its scope begins with the products of these work, exact positions, and destines outwardly.

*Third distinction* refers to 'non-treatment' of the issue of relationship between domestic and international law. Although this issue looms large in the theory of international law (it was developed D. Anzilotti, S.V. Chernichenko, H. Kelsen, J. Kunz, A. Lasson, D.B. Levin, A.N. Talalyev, H. Triepel, E.T. Usenko, A. Verdross, A. Zorn and many other researches), *neither* ILP concept nor concept of foreign relations law concerns this matter, but for different reasons. As has been noted above, international legal policy doesn't tackle procedural matters of implementation of international rules, as it's concentrated on substantive questions how State understands those rules, whether it finds them relevant, how it justifies their particular use etc. The foreign relations law seems destined to embrace this matter. However C. Bradley explains, that national doctrines on implementation of the international law are not the subject-matter of foreign relations law, as they constitute a part of foreign relations law itself. In this context dualist, monist, mixed and other approaches are incorporated in existing national rules, like rules of ratification procedure [Bradley 2019:8].

Herefrom follows the *fourth distinction*, which is in the role of national courts. The foreign relations law includes treatment of international norms in national courts. The practice of interpretation and application of international rules doesn't distinct from practice with domestic rules neither in status nor in value. Within the international legal policy of State courts' practice also reflects fundamentals of State's policy. Judgements of special meaning, for instance, in case of submission of ambiguous question to the Supreme Court, they could play the role of considerations in formation of international legal policy, but they don't make up its content.

The *fifth distinction* follows from the nature of featured approaches. The objective of foreign relations law is to regulate steps on building and maintaining foreign relations from inside, whereas the international legal policy doesn't have regulative functions. It embraces concrete patterns of conduct with fixed approaches to their justification in international legal terms.

Finally, the *sixth distinction*, which could bring closure to this inquiry, relates to subjects or originators of laws and policies. First distinction relates to subjects or originators of laws and policies. It's true that foreign relations law and international legal policy have a notable trait in common – both of them are founded on the *notion of "national interest"*<sup>22</sup>. This term has been generally equated with 'self-interest' as an advantage pursued for own benefit<sup>23</sup>. Back in the day this term had a particular value in the positivist theory, which interpreted conflict of norms as a conflict of interests [Rovira 2014:766]. The main points of foreign relations law of the U.S. were introduced on the ground of their conformity to "national interests of the country". For the international legal policy "national interests" play the double role of motivation and of determinant of pursued objectives. Consequently foreign relations law or the international legal policy can appertain only to keeper of national interests, sovereign state, state-like formations, or nations struggling for self-determination. The question whether supranational authorities can bear "national interests" is an outstanding matter. There are works

<sup>22</sup> The concept of 'national interest' is elaborated by numerous researches, including G. Kennan, W. Lippman, K. Waltz, J.N. Rosenau, E.S. Furniss, N.N. YI'yanov, G.H.Shakhnazarov, U.A. Tikhomirov, O.N. Khlestov and others.

<sup>23</sup> The conviction in the equation between 'national interest' and 'self-interest' seemed natural within Machiavellianism, Realpolitik theory, realism. However, on the back of movements towards global tasks and collective settlement of more and more questions, such equation can lead even to denial of the 'national interest' as an archaic concept reducing complicated conduct to primitive self-interested motives, according to the D.E. Furman. As cited in Mezhuiev B.V. 2000. Ponjatie nacional'nyj interes v rossijskoj obshhestvenno-politicheskoy mysli [Notion of national interest in Russian sociopolitical scholarship]. – *Politicheskaja nauka v Rossii: intellektual'nyj poisk i real'nost': Hrestomatija*. Moscow. P. 441–488.

on international legal policy [Gouttefarde 2004:33-79] and on foreign relations law of the EU.<sup>24</sup> [EU Foreign Relations 2008; Larik 2017:321-325] As far as this policy or law should have some 'interests' in their base, what is meant here is "common interests". Hereof the question follows, whether notion of "common interests" is compatible with the substances of foreign relations law and international legal policy, which come from ideas about individual needs and aspirations. If the former is considered as a system of norms regulating interactions of the subject with its peers, the foreign relations law indeed fits into the legal order of the European Community. However "common interests" are not applicable to the concept of international legal policy, as even position of the State what "interests" it's ready to regard as common would form an integral part of its own international legal policy. Therefore it would be incorrect to speak about international legal policies of integration associations or of international organisations.

In view of the aforementioned differences, the methodological framework of the project 'comparative foreign relations law' is not applicable for research of the ILP. Nevertheless it would be more rational to consider the ILP within legal studies of national approaches to the international law. The State doesn't step on the field of international law with its own rules, it comes there with a solid background constituting its vision of international law. If these visions are at variance, they might be comparable by certain characteristics. That raises the suggestion about the research field of comparative international law.

### **3. Project of comparative international law**

#### **3.1. Applicability of the comparative method in the international legal field**

The common association of universality of international law with the notion of "uniqueness" calls into question applicability of the comparative method in the researches of international law. In opinion of H.C. Gutteridge, famous British comparativist, the universal character of international rules doesn't allow them to "lend themselves to comparison" [Gutteridge 1980:13-25]. For him, international

law is, first of all, "principles of justice" which govern interstate relations due to "common consent of mankind". Understanding of international law as a kind of global morality besides its legal constraining function sends back to ideas of natural or divine law, hence, undivided. H. Lauterpacht underlined, that the nature of international law is inherently international, it cannot have separate domestic conceptions in essence [Lauterpacht 1937:200]. The universality of international law can be found in its fundamental principles. Principle of sovereign equality of States, peaceful disputes settlement, non-intervention, prohibition on the threat or use of force and the other, are recognised as universal in that sense that they're applicable in every sphere of international law and need no special normative consolidation for it<sup>25</sup>.

At the same time the universality hasn't been always regarded as an absolute feature of international law. A.B. Lorca argues that the international law has become 'universal' only recently [Lorca 2010:476]. In his vast research into evolvement of the international law through the XIX century, he contends the "expansion of European international law" to "semi-peripheral" nations<sup>26</sup>. Describing mental premises of nations unfamiliar with imported order, Lorca uses the notion of "legal consciousness" and establishes the doctrine of "particularistic universalism". Lorca explains that semi-peripheral scholars appropriated the international law, not only for learning play rules of dominating powers, but also with the purpose of "changing their content". Acceptance of the international law was understood as a chance for their states to obtain legal personality in the minds of European nations that is to become on a par with those who postulates "equal sovereignty". For the same reason non-western states were prone to live up to foreign standards more than to evaluate commonalities with their neighbours and other regions [Lorca 2010:482, 521-522]. Without the struggle for recognition, former "semi-peripheral" states adapt assumed tenets of international law to their particular visions. The historic researches can invite the assumption about international law as a normative system, which was designed for the comfort of privileged actors. This idea underlies the so-called Third World approaches

<sup>24</sup> Cremona M. External Relations and External Competence of the European Union: The Emergence of an Integrated Policy. – *The Evolution of EU Law*. Eds. by G. de Búrca, P. Craig. 2nd edition. Oxford University Press. 2011. P. 217-268.

<sup>25</sup> *Mezhdunarodnoe pravo*. Pod red. A.N. Vylegzhanina [International Law. Ed. by A.N. Vylegzhanin]. Moscow: Yurait Publ. 2012. P.103.

<sup>26</sup> The "semi-periphery" is a figurative term derived from the idea that modern international law is a globalized legal order, which was initially developed in seventeenth-century Europe. However, Umut Özsu suggests, that this term is based on the considerations of ethnicity, territory, and politico-economic power alike. [Özsu 2010:59] Anyway the author of the term doesn't define it outright.



to International Law (TWAIL). The TWAIL scholars stand out for review of legal order, which in their opinion, subordinates the Third World countries to the Western States. The aim of revision is to remove colonial foundations of the international law, as they continue to make people of the Third World sensitive to injustice of imposed rules [Anghie 2003: 80]. In some non-optimistic views the imposed belief into universality of international law is used to “mask its logic of unipolar power” [Megret 2012:85]. This is what D.F. Vagts calls “Hegemonic International law” [Vagts 2001:843-848], or in more popular terms, imperialistic tendency [Kapustin 2014:13]. In light of this appealing to the comparative method can be mistaken for tentative to play on current interstate divergences on doctrinal level. Apparently wrong actions of States shouldn’t be justified by “national vision” of international law. Conversely comparative studies of international law are capable to mitigate effects of frequent oscillations in the international legal field.

### **3.2. Experience in application of the comparative method**

According to M. Forteau over the last seventy years the International Law Commission has been successfully using the comparative method in its work [Forteau 2015:500]. Setting the objective to “promote the progressive development of international law and its codification”<sup>27</sup>, the Commission receives the task not only to bring the outcomes of States’ practice to normative form, but also to embrace the fields in which there is still no full agreement among nations. Faced with the insufficiently general practice the Commission has three options: first, to reject any

development or codification; second, to opt for the major practice; finally, to favour one version over the other [Forteau 2015:507]. Besides grading “justified” and “deviated” variants, Commission is armed with so called “accommodating tools”, like recourse to linguistic tools, drafting general rules (leaving room for marge of appreciation) or providing normative flexibility. Using these instruments the Commission seeks to reconcile diversity of opinions with unity of international values. It’s worth noting that Commission doesn’t have to comfort much with different approaches to international law, rather with normative discrepancies [Forteau 2015:507]. Probably, differences in legal conceptions are destined for doctrinal comparative studies.

Comparative legal studies are believed to be so aged as national law itself, though the science of comparative legal studies took its shape only in the latter half of the nineteenth century<sup>28</sup>. When it comes to the comparativist research in the field of international law, its origins seem to be hidden in the epoch of power polarization in the world. Actually the tradition of applying the comparative method to international law arose in the Soviet Union in its early years<sup>29</sup>. It resulted from the urgent need to counterpose fledgling Soviet view of international law against old imperialistic pre-setting in this field. “International law of transitional period” stood out from “the law of civilized nations”. Russian international lawyer E. Korovin was the first who tried to analyse how emerging Soviet republics were going to “communicate” with their bourgeois partners given their unlike viewpoints<sup>30</sup>. Nonetheless, comparative international law sought to develop in the XX century beyond fierce camps’ rivalry<sup>31</sup>. E. McWinney introduced the

<sup>27</sup> Statute of the International Law Commission 1947. Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended. Art.1(1).

<sup>28</sup> Saidov A.Kh. 2003. *Sravnitel’noe pravovedenie (osnovnye pravovye sistemy sovremennosti)* [Comparative legal studies (main legal systems of the present time)]. Ed. by. Tumanov V.A. Moscow: Yurist Publ. P. 23.

<sup>29</sup> In the retrospective analysis of CIL’s foundations, prof. B.N. Mamlyuk suggests to reckon the history of comparative international legal studies from the establishment of soviet international legal scholarship, while also admitting, that the comparative method could have been used in international law since the very birth of the latter [Mamlyuk, Mattei 2011:389]. The introduction of the term “tradition” should justify this approach. By tradition we mean purposeful research efforts to differentiate international legal knowledge or to identify existing dissimilarities in its understanding. Taking into account the existence of “so called anglo-american and continental schools of thought in international law” at that time, it should be underlined, that these schools didn’t go in for opposing their views to others, nor for sustained comparison. [Lauterpacht 1931:31].

<sup>30</sup> “Intellectual communication implies certain solidarity of estimates, unity of convictions on the law, ethics, politics. Is it possible and to extent to suggest such unity (...) between soviet socialistic republic and the other states with bourgeois system? (...) However, it doesn’t exclude the possibility of partial legal communication on the grounds of universal human values, independent from the epoch and political systems (...)”. Korovin E.A. *International law in transitional period* [Mezhdunarodnoe pravo perekhodnogo vremeni]. Institute of Soviet Law; 2nd edition. Moscow. Gosudarstvennoe izdatel'stvo Publ. 1925. P. 12, 16.

<sup>31</sup> Under the bipolarity even the idea of “inter-camp international law” sounded rather feasible. See McWhinney E. 1963. *International Law in the Nuclear Age: Soviet-Western, Inter-Bloc, International Law*. Proceedings of the American Society of International Law at Its Annual Meeting. No. 57. P. 68-72.

notion of international legal systems with the aim to illustrate the development of different outgrowths of the international law. For instance, he ranged the Socialist international law among the traditional international law (meaning customs and general treaty rules), the UN law<sup>32</sup> (first of all, resolutions of the Security Council and General Assembly, as well as the judgements rendered by the ICJ), the 'regional' international law [McWhinney 1964:36]. In the same decade W. Butler started his course "Soviet, Chinese and Western Approaches to International Law" at the Harvard Law School. The years of his comparative studies resulted in the widely-known collection of essays, which came out in 1980 as a stand-alone volume titled "International Law in Comparative Perspective". Except numerous single works on treatment of international law inside domestic legal systems it can be seen that by the end of the XX century comparative international law has obtained the robust analytical experience (but appearingly still lacks methodological one).

### 3.3. Focus at national approaches to international law

Today we observe the new splash of interest to the comparative method in the context of intensifying discourse on national approaches. Some scholars aim for overriding commonplace Eurocentrism and draw attention to diverse regional and national traditions. For instance, the aforementioned TWAIL school insists that pre-colonial Third World states had their own rules of interstate conduct, laws of treaties and laws of war [Anghie 2003:80]. International scholars frequently speak about national conceptions of international law [Messineo 2013:879-905], legal traditions [Abdulqawi 2013:681-703], particular legal thinking [Lorca 2006:283] or legal cultures [Jouanet 2006:292.]. Another path involves the research into the role of different actors in forming any particular attitude to international law, like national scholastic approaches to international law<sup>33</sup>. Nowadays the subject of 'diversified' international law appears in works on separate national perspectives as wells as in integral research papers [Roberts, Stephan 2015: 467-474]. It should be noted, that the object of such comparative legal studies does not confine

itself to normative materials or mental conceptions on law. For instance, W. Butler includes into their scope differences and similarities in legal schools, historic regularities, extra-legal factors of differences, particularities of law created by international institutions, special considerations in international adjudication, regional ideological, theological sub-systems, cultural patterns and national approaches [Butler 1986:32-44]. By the term "national approach" W. Butler understood the State's attitude towards international law expressed in the assembly of words, documents and gathered experience. Their accumulation form policies on concrete matters of international law [Butler 1986:44]. From this point of view, the national approach is tantamount to Lacharrière's concept of international legal policy. However, it's not the only perspective on its definition.

In the work "Russian approaches to international law" Estonian scholar L. Mälskoo analyses early Russian theories of international law, soviet and contemporary thinking and seeks to determine how these ideas shape modern State's practice. But thereby he narrows down complete national approach to the scholastic one. Viewed in this way national approach won't be an equivalent to international legal policy. Such national approach would have to embrace divergent or even contradictory opinions of national scholars on one question, while international legal policy is singular and unambiguous. In international studies the term "national approach" is often applied for description of State's positions on concrete matters, like attitudes to the rule of law, to compliance with international norms etc. Besides notion of "national approach", comparativists appeal to "national style" and "legal culture". W. Butler presents *national style* as an aggregation of extra-legal, quasi-legal and legal factors, including State's historical experience and mode of foreign relations, geopolitical frontiers, links to foreign communities, sense of mission, extent of power of influence, techniques of foreign policy, competences of national institutions, legal methodology [Butler 1986:80]. Legal culture seems even more focused on extra-legal elements, as it embodies a national identity of State just in legal terms. In the context of international law "legal culture" is a kind of an individual voice in the choir of those who cre-

<sup>32</sup> The idea to mark out the UN law might have been one of the first steps anticipating the phenomenon of fragmentation, which was determined in international scholarship only in the new millennium. See: Fragmentation of International law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. April 2006.

<sup>33</sup> See: Mälskoo L. 2015. *Russian Approaches to International Law*. Oxford University Press. 240 p.; Roberts A. 2017. *Is international Law international?* Oxford University Press. 432 p.

ate legal norms. In other words “legal culture” pre-determines the national vision of international legal order, which by extension to global level can intersect and conflict with other visions [Joannet 2006:295]. After a quick glance on potential objects for comparative studies of international law the impression is that everyone feels the dissemblance of States, but can't find a right term to express it. Herefrom we get so many words, which overlaps in meaning, but are not identical to each other. Thuswise the object of comparative international law is either too vague or too extensive.

Without prejudice to comparativists' capacities, it would be more appropriate to specify their agenda. A. Roberts first concentrated on the role of national courts in a process of nationalizing international law through its interpretation and application (instead of impartial enforcement). In this context she characterizes the ‘comparative international law’ as “loosely fusing international law substance with comparative law methodologies” [Roberts 2011:73-74]. B.N. Mamlyuk finds comparative studies more fruitful in the research of the soft law. In his view problems of positive law across jurisdictions are enough covered by existing international and inner research fields, while institutional projects are little addressed [Mamlyuk 2011:441]. In a climate of growing vogue of interdisciplinary research, the policy-oriented mode from half a century ago is constantly at play. The authors of the policy-oriented approach to international law (which was then developed to the New Haven School), M.S. McDougal and H.D. Lasswell effectively embraced the comparative method for consistent description of power-processes. In their view it could contribute to clarifying differences and enabling cooperation among authoritative decision-makers [McDougal 1952:57].

It seems that project of comparative international law encompasses every research into dissimilarities or contradictions of States' positions on international legal matters. The comparative method allows to lift researcher's viewpoint slightly over examined objects and thereby to provide a full sight of the problem. In case of States' standpoints on particular matters the substance of differences is generally intelligible. For instance, different positions on the status of the Arctic and its continental shelf, on the status of natural

resources of the Moon and other celestial bodies, on legitimacy of support to local producers by means of investment measures, on the meaning of public interest exception and many other more or less obvious controversial questions. *The problem is that these positions haven't yet been systemised in the context of international legal policy.* The Chinese foreign policy can serve a good illustration. It's widely known that China regards the Arctic as a region where «community with a shared future for mankind» should be built in contrast to its «original inter-Arctic States nature». This position is plainly declared in its Arctic Policy of 2018, in the terms of “near Arctic State” status, “win-win result”, “multi-level, omni-dimensional and wide-ranging cooperation”<sup>34</sup>. The same discourse on the ‘shared future’ and ‘mutual benefit’ is applied in the “Belt and Road” Initiative<sup>35</sup>. Thereby it can be seen that the State adopts its international legal policy, which is formed by one logic and based on one mechanism. Therefore international legal policy is supposed to be coherent and consistent in every aspect of State's external interactions. It allows to reveal the policy's inner-workings. Once they are revealed, comparativist can get down to work.

## Conclusion

The international legal policy is a system of non-legal elements directly tied to the legal aspects of international relations. While legal framework is inherently constant, its multi-faceted substance varies on individual basis, therefore presents a special interest for comparative studies. It would be better to examine a new research subject with the established methodology. However the comparative studies in the field of international law hasn't yet formed their precise methodological tenets, so as to provide international legal policy with systemic treatment. We certainly know where the comparative research of international legal policy cannot be inserted: the framing field of comparative foreign relations law treats a categorially different subject. Within comparative international law the research of international legal policy will benefit from creative freedom. But international legal policy's nature and its scope of questions should be clearly distinguished from contiguous terms. The most important moment about

<sup>34</sup> China's Arctic Policy. The State Council Information Office of the People's Republic of China. January 2018. URL: [http://english.www.gov.cn/archive/white\\_paper/2018/01/26/content\\_281476026660336.htm](http://english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm) (accessed 15.11.2019)

<sup>35</sup> Exploring Public International Law Issues with Chinese Scholars. International Law Programme Roundtable Meeting Summary. 2-3 June 2018. Chatham House The Royal Institute of International Affairs. P. 4.

comparative research of international legal policy is that the inter-structural comparison shouldn't break the inner links of policy. Comparison of approaches

and attitudes to particular international legal matters demands caution about their integral nature.

## References

1. Abebe D. Great Power Politics and the Structure of Foreign Relations Law. – *Chicago Journal of International Law*. 2009. No. 10. P. 125-141.
2. Abdulqawi Yu. Diversity of Legal Traditions and International Law: Keynote Address. – *Cambridge Journal of International and Comparative Law*. 2013. No. 24. P. 681-703.
3. Anghie A., Chimni B.S. Third World Approaches to International Law and Individual Responsibility in International Conflicts. – *Chinese Journal of International Law*. 2003. Vol. 2. Issue 1. P. 77-103. DOI: <https://doi.org/10.1093/oxfordjournals.cjilaw.a000480>
4. Beitzinger A.J. *A History of American Political Thought*. Wipf and Stock Publishers. 2011. 640 p.
5. Bellinger III John B. Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse? – *51 Case Western Reserve Journal of International Law* 7. 2019 URL: <https://scholarlycommons.law.case.edu/jil/vol51/iss1/20/> (accessed date: 15.08.2020).
6. Bradley C.A. A new American Foreign Affairs Law? – *University of Colorado Law Review*. Vol. 70. No. 4. 1999. P. 1089-1108.
7. Bradley C.A. What is Foreign Relations Law? – *The Oxford Handbook of Comparative Foreign Relations Law*. Ed. by Curtis A. Bradley. Oxford University Press. 2019. 856 p.
8. Butler W.E. Comparative Approaches to International Law. – *Recueil des Cours*. Hague Academy of International Law. Martinus Nijhoff Publishers. 1986. P. 9-90.
9. Cazala J. Retour sur un Classique: Guy de Lacharrière, La politique juridique extérieure. – *Revue générale de droit international public*. 2013. No. 2. P. 411-416.
10. *Comparative International Law* (eds.) A. Roberts, P.B. Stephan, P.H. Verdier, M. Versteeg. Oxford University Press. 2018. 640 p.
11. *EU Foreign Relations Law – Constitutional Fundamentals*. Eds. by M. Cremona, B. de Witte. Hart Publishing. 2008. 328 p.
12. Forteau M. Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission. – *The American Journal of International Law*. 2015. Vol. 109. P.498-513.
13. Gouttefarde F. Les Communautés Européennes et les Retorsions Croisées à l'OMC: Aspects de la Politique Juridique Extérieure de l'Union Européenne. – *Revue Québécoise de Droit International*. 2004. Vol. 17.2. P. 33-79.
14. Gutteridge H.C. Comparative Law and the Law of Nations in *International Law in Comparative perspective*. Ed. by W.E. Butler. 1980. 305 p.
15. Henkin L. *Foreign Affairs and the U.S. Constitution*. 1976. 666 p.
16. Jouannet E. French and American Perspectives on International Law: Legal Cultures and International Law. – *Main Law Review*. 2006. No. 58. P. 291-336.
17. Kapustin A.Ya. Mezhdunarodnoe pravo i vyzovy XXI veka [International Law and Challenges of the 21st century]. – *Journal of Russian Law*. 2014. No. 7. P. 5-19. (in Russ.)
18. Koh H.H. The Trump Administration and International Law. – *Washburn Law Journal*. 2017. Vol 56. P. 413-469.
19. Koskeniemi M. Imagining the Rule of Law: Rereading of the Grotian 'Tradition'. – *European Journal of International Law*. 2019. Vol. 30. No. 1. P. 17-52. DOI: <https://doi.org/10.1093/ejil/chz017>
20. Koskeniemi M. The Politics of International Law. – *European Journal of International Law*. 1990. No. 4. P. 4-32.
21. Koskeniemi M. The Politics of International Law. – *European Journal of International Law*. 2009. Vol. 20. No. 1. P. 7-19.
22. Koskeniemi M. *The Politics of International Law*. Bloomsbury Publishing. 2011. 371 p.
23. Lacharrière G.L. *La Politique juridique extérieure*. Economica. Enjeux internationaux. 1983. 236 p.
24. Larik J. EU Foreign Relations Law as a Field of Scholarship. – *AJIL Unbound*. 2017. Vol. 111. P. 321-325. DOI: [doi:10.1017/aju.2017.88](https://doi.org/10.1017/aju.2017.88)
25. Lauterpacht H. The So-Called Anglo-American and Continental Schools of Thought in International Law. – *British Yearbook of International Law*. 1931. No. 12. P. 31-62.
26. Lauterpacht H. *Règles générales du droit de la paix*. Recueil des Cours. 1937. Vol. 62. P. 95-422.
27. Levin D.B. *Mezhdunarodnoe pravo, vneshnaja politika i diplomatiya* [International Law, Foreign Policy and Diplomacy]. M.: Mezhdunarodnye otnosheniya Publ. 1981. 144 p. (in Russ.)
28. Lorca A.B. Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation. – *Harvard International Law Journal*. 2010. Vol. 51. No. 2. P. 475-552.
29. Lorca A.B. International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination. – *Harvard International Law Journal*. 2006. No. 47. P. 283-305.
30. Mälskoo L. *Russian Approaches to International Law*. Oxford University Press. 2015. 240 p.
31. Mamlyuk B.N., Mattei U. Comparative International Law. – *Brooklyn Journal of International Law*. 2011. Vol. 36:2. P. 386-452.
32. McDougal M.S. The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order. – *The American Journal of Comparative Law*. Vol. 1. 1952. P. 24-57.
33. McLachlan C. The Allocative Function of Foreign Relations Law. – *The British Yearbook of International Law*. 2012. P. 1-32.
34. McWhinney E. Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems. – *Virginia Law Review*. 1964. No. 50. P. 36-57.
35. Megret F. International Law as Law – *The Cambridge companion to International Law*. Eds. J. Crawford, M. Koskeniemi. Cambridge. 2012. 471 p.
36. Messineo F. Is There an Italian Conception of International Law? – *Cambridge Journal of International and Comparative Law*. 2013. Vol. 4 No. 2. P. 879-905. DOI: [10.7574/cjicl.02.04.13](https://doi.org/10.7574/cjicl.02.04.13)
37. *Oxford Handbook of Comparative Foreign Relations Law*. Ed. by C.A. Bradley. Oxford University Press. 2019. 896 p.



38. Özsu U. Agency, Universality and the Politics of International Legal History. – *Harvard International Law Journal Online*. 2010. Vol. 52. P. 58-72.
39. Pozdnjakov Je.A. *Sistemnyj podhod i mezhdunarodnye ot-nosheniya* [Systemic approach to international relations]. Moscow: Nauka Publ. 1976. 159 p. (in Russ.)
40. Purcell E.A. Understanding Curtiss-Wright. – *Law and His-tory Review*. November 2013. Vol. 31. No. 4. P. 653-715. DOI: <https://doi.org/10.1017/S0738248013000461>
41. Roberts A. Comparative International Law? The role of national courts in creating and enforcing international law. – *International and Comparative Law Quarterly*. 2011. Vol. 60. P. 57-92.
42. Roberts A., Stephan P.B., Verdier P.H., Versteeg M. Compar-ative International Law: framing the field. – *The American Journal of International Law*. 2015. Vol. 109. P. 467-474.
43. Rovira M. G.-S. The Politics of Interest in International Law. – *The European Journal of International Law*. 2014. Vol. 25. No. 3. P.765-793.
44. Sitaraman G., Wuerth I. The Normalization of foreign re-lations law. – *Harvard Law Review*. 2015. Vol. 128. No. 7. P. 1900-1978.
45. Talmon S. The United States under President Trump: Gravedigger of International Law. October 7, 2019. – *Chinese Journal of International Law*. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3465460](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465460) (ac-cessed date: 15.08.2020). DOI: <http://dx.doi.org/10.2139/ssrn.3465460>
46. The Politics of International Law (ed) C. Reus-Smit. Cam-bridge University Press. 2004.
47. Tunkin G.I. International Law in the International System. – *Recueil des Cours de l'Academie de Droit International*. 1975. Vol. 147. P. 1-218.
48. Vagts D.F. Hegemonic International Law. – *American Jour-nal of International Law*. 2001. No. 95. P. 843-848.
49. Vylegzhanin A.N., Dudykina I.P. The Ponyatiye vtzhdun-arodno-pravovaya politika gosudarstva [Politics of Inter-national Law as a Concept]. – *Moscow Journal of Interna-tional Law*. 2016. No. 4. P. 21-37. (in Russ.)
50. White G.E. The Transformation of the Constitutional Re-gime of Foreign Relations. – *Virginia Law Review*. 1999. Vol. 85, No. 1. P. 1-150.

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