

**UNILATERAL SANCTIONS – A VESTIGE OF A UNIPOLAR WORLD:  
THE CONCEPTUALIZATION OF THE LEGAL POSITION  
OF THE BRICS COUNTRIES**

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<https://doi.org/10.21684/2412-2343-2019-6-4-67-94>

*The efforts of the BRICS countries to establish a fair international legal order determine the scholarly interest in conceptualizing the legal position on the inadmissibility of the use of unlawful unilateral coercive measures in international relations. This paper adopts an interdisciplinary approach to the study of the phenomenon of combating discriminatory sanctions policies of individual states and international organizations, including elements of economic, legal and international legal analysis. The subject of the authors' interest is not the methodology of "economic analysis" of legal phenomena, which is recognized in legal science; rather, it is an attempt to synthesize the methods of various disciplines, allowing a comprehensive assessment of the possibility of countering "sanctions threats" to the state sovereignty of Russia as one of the members of BRICS. The main directions of the economic policy of the state in the conditions of the "sanctions regime," the features of acts of Russian legislation aimed at protecting sovereignty from illegal unilateral restrictive measures, in the historical context, and taking into account modern views, the doctrinal approaches to the concept of "sanctions" in the science and practice of international law are all analyzed. As a result, it is found that the pluralism of approaches to the definition of "sanctions" is maintained, which is explained by the insufficient level of international legal regulation of international coercion and the continuing decentralization of the system of international law. The grounds for the legitimacy of sanctions mechanisms operate in the system of collective security of the U.N., based on the analysis of the provisions of the U.N. Charter and the normative array of recommendatory norms of the U.N. General*

*Assembly. The evolution of the mechanism of non-military coercive measures of the U.N. Security Council is analyzed, and the parameters of the legitimacy of sanctions by regional international organizations on the basis of the provisions of the U.N. Charter are determined. Normative contours of “soft regulators” of counteractions to illegitimate unilateral coercive measures are established.*

*Keywords: BRICS; unilateral restrictive measures; countermeasures; sanctions; U.N. Charter.*

**Recommended citation:** Anatoly Kapustin & Bulat Khabriev, *Unilateral Sanctions – A Vestige of a Unipolar World: The Conceptualization of the Legal Position of the BRICS Countries*, 6(4) BRICS Law Journal 67–94 (2019).

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## Introduction

Modern international relations are characterized by increased competition between the leading states and their unions. This competition manifests itself in various spheres (security, economy, information interaction, etc.) and often leads to the complication of bilateral inter-state relations, the aggravation of old contradictions and the emergence of new conflict centers. Increasingly, states and their associations use coercive means and methods in foreign policy to achieve their goals.

International law of the 20<sup>th</sup> century acquired its appearance largely under the influence of a number of global factors that manifested themselves during the century – two world wars, the collapse of the colonial system, the Cold War, the

collapse of the world socialist system, the scientific and technological revolution, etc. Along with the increase in the number of subjects of international law from among former colonies and the disintegration of certain federal and unitary states with a multinational composition, and a number of internal subjects, there was an increase in the number of international intergovernmental, supranational organizations, as well as various kinds of informal inter-state associations that had an impact on the development of international relations, international law and domestic law.

For centuries, legal theorists and other specialists in national law have been dismissive of the regulatory possibilities of international law in view of the almost complete absence in its system of “sanctions,” that is to say, a means of coercion to lawful behavior, which they attributed to the most significant characteristics of law as a social regulator. International lawyers responded with the idea of the “special nature of international law,” noting that this is not a flaw, but rather a fundamental virtue of international law, determined by its conciliatory nature and the decentralized character of its system, as well as the system of international relations, which allows the sovereignty of states, the main participants in international relations and the subjects of international law, to be maintained and preserved.

Structural changes in the world economy are gradually changing the weight and place of emerging economies, some of which are becoming drivers of economic growth. There is a tendency to move from a monopolistic to a multipolar world. There are new risks to the international legal order that the international community needs to learn how to manage. BRICS, an inter-state association established in the 21<sup>st</sup> century, is among the new institutions of global governance. BRICS opposes restrictive measures in the world economy that hinder the development of relations between states and the establishment of a fair law and order regime. In this regard, it is important to develop an interdisciplinary approach that encompasses economic, legal and international legal concepts to counter unfair and discriminatory international practices. One such practice is the recently negative policy of unilateral restrictive measures, often referred to as “sanctions.” At the same time, the subject of our interest is not the use of the methodology of “economic analysis” of legal phenomena, which is gaining recognition in legal science. Rather, it is the attempt to synthesize the methods of various disciplines, allowing a comprehensive assessment of the possibility of countering the “sanctions threats” to the state sovereignty of Russia as one of the BRICS member states.

This article examines the legal status and legal position of BRICS member states on the illegality of unilateral restrictive measures in international relations, the economic and legal measures taken by Russia in response to “sanctions pressure”; it describes the international legal characteristics of the various doctrines of sanctions, making it possible to differentiate legitimate sanctions from unlawful unilateral restrictive measures.

## 1. BRICS Is Against Unilateral Restrictive Measures

An important place in the contemporary international agenda is the activities of BRICS – the international association of countries that have, in the terminology of the experts of the World Bank, the largest and fastest-growing emerging markets.<sup>1</sup> Despite the fact that BRICS includes only five states (Brazil, Russia, India, China and South Africa), their economic potential gives analysts a reason to predict the transformation of this inter-state union into the largest global trade bloc by the middle of the 21<sup>st</sup> century. The presence of common interests in the world economy and trade has become an important factor in the search for forms of political dialogue between the BRICS member states.

An important characteristic of inter-state associations, which allows predicting with a high degree of reliability the degree of their influence on the legal systems of the state parties and the potential of their own legal regulation, is their international legal status. With regard to BRICS, we can state the following: on the one hand, the organizational and legal structure of BRICS does not even remotely resemble international intergovernmental organizations (IIOs), the form of which is often chosen by states to coordinate their activities in the foreign policy or foreign economic sphere. BRICS does not have the usual international legal features (a charter, a permanent organizational structure with a Secretariat as an expression of the administrative unity of the association, as well as a headquarters and other attributes of permanent international institutions). Clearly, therefore, there is no reason to assume possession of a BRICS international legal personality, which is characteristic of the vast majority of IIOs. Accordingly, BRICS does not have the authority to adopt its own international legal acts. This fact suggests the high status of the national legislation of the member states in the implementation of the stated goals of BRICS. Of course, at the international level, state parties can develop joint positions and coordinate their actions to implement them at the global and regional levels.

On the other hand, BRICS activities are not limited to occasional contacts. We can say with confidence that the annual format of the BRICS summits, as well as meetings and negotiations at other official and non-governmental levels, is clearly established and well developed. In the documents adopted at the summits, the participating states express their commitment to multilateral diplomacy with the central role of the United Nations in the fight against global challenges and threats. Without setting

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<sup>1</sup> More detailed information, in Jim O'Neill, *Building Better Global Economic BRICs*, Goldman Sachs Global Economics Paper No. 66, 30 November 2001 (Oct. 5, 2019), available at <https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf>. In April 2019, Jim O'Neill published an article in which he compared the initial forecast for 2001 (for 2001–2010) with the results of the past decade. Despite the contradictory tendencies that have occurred in world economics, he considers that mainly his forecasts have been confirmed and that they will be reliable for the coming decade (2021–2030). Jim O'Neill, *BRICS and the Future of Economic Growth*, BRICS Information Portal, 18 April 2019 (Oct. 5, 2019), available at <http://infobrics.org/post/28454/>.

the task of introducing any “near-legal” definition, we can propose to consider the BRICS to be a kind of institutional mechanism for inter-state cooperation<sup>2</sup> which is beginning to play the role of one of the leading institutions of global governance. In addition, BRICS cannot be positioned as a regional inter-state association, since it includes the states of three continents (Eurasia, Africa and South America), states which are the leaders of four economically important regions, and states which also have significant integration potential and opportunities for economic growth.<sup>3</sup>

In their official documents, the BRICS member states set out their own vision of the international legal foundations of the modern world order. In particular, starting with the joint statement of the leaders of these countries, adopted in Yekaterinburg in 2009 (then in the BRIC format, because South Africa joined the association later), BRICS has repeatedly confirmed its position about the need to establish a more democratic and just multipolar world order based on the international rule of law, equality, mutual respect, cooperation, coordinated action and collective decision-making by all states.<sup>4</sup>

The Johannesburg Declaration from the BRICS Summit of 2018 declared that cooperation between the participating states is developing in three key areas: economy, peace and security and humanitarian exchanges. In the same document, BRICS confirmed the recognition of the central role of the universal system of collective security, enshrined in the U.N. Charter, and stressed the importance of working on the formation of an international system based on international law, the cornerstone of which is the U.N. Charter, and which contributes to strengthening cooperation and stability in a multipolar world order.<sup>5</sup>

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<sup>2</sup> S.E. Naryshkin suggests that BRICS may be considered to be the progressive form of institutionalized international cooperation – like an intensively strengthened global forum of partner dialogue and interactivity of states. More detailed information, in *Нарышкин С.Е. К читателю // БРИКС: контуры многополярного мира: Монография* [Sergey E. Naryshkin, *To the Readers in BRICS: The Contours of the Multipolar World: Monograph*] 11, 11–12 (Т.Я. Khabrieva (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Yurisprudentsiya, 2015). G.D. Toloraya judges BRICS to be the first inter-civilizational project of implementation of norms of global coexistence. Additional information, in *Толорая Г.Д. Россия в БРИКС: перспективы и возможности* [Georgiy D. Toloraya, *Russia in BRICS: Perspectives and Possibilities*] in *BRICS: The Contours of the Multipolar World, supra*, at 50, 53.

<sup>3</sup> Russia is a leader in the Commonwealth of Independent States (CIS) and a participant in the European-Asian Economic Union; the Republic of South Africa is a member of the African Union, starting from 2020 it will chair this organization and use the opportunity to enter the African continental zone of free trade, the agreement of which was signed in 2019; Brazil is a participant in the Amazon Act, the Latin American Integration Association and MERCOSUR. China and India do not participate in any integration associations but are involved in cooperation with neighbor states and their international organizations (ASEAN and others).

<sup>4</sup> Совместное заявление лидеров стран БРИК // Президент России. 16 июня 2009 г. [The Joint Declaration of the BRICS Member States' Leaders, President of Russia, 16 June 2009] (Oct. 5, 2019), available at <http://www.kremlin.ru/supplement/209>.

<sup>5</sup> In the Johannesburg Declaration of 26 July 2018, the member states supported the main role of the U.N., its goals and principles, fixed in the U.N. Charter, observation of international law provisions and advancing democracy and the rule of law. They confirmed their support to promote the principles of versatility and also expressed their readiness to work together towards fulfilling the goals in the

In the face of international security challenges that require the joint efforts of the BRICS member states, they reiterated their commitment to the formation of a more honest, fair and representative multipolar world order for the prosperity of all mankind, one which fully complies with the universal ban on the use of force and excludes the use of unilateral coercive measures in violation of the U.N. Charter.<sup>6</sup>

It seems that the emphasis on the need to exclude unlawful unilateral coercion from inter-state relations is not accidental. The practice of recent years shows that a number of BRICS member states have been affected to some extent by the so-called sanctions of individual states and international organizations. Since 2014, Russia has been subject to sanctions pressure from the United States, other Western countries and the European Union. In September 2018, the USA imposed sanctions against China for the purchase of ten SU-35 fighter jets and S-400 missile defense systems from Russia.<sup>7</sup> In April 2019, India decided to acquire five S-400 systems and expressed the hope that the U.S. administration had heard and understood its position on the transaction and would not apply sanctions against it.<sup>8</sup>

In the scholarly and journalistic literature, unilateral coercive measures are often defined as economic sanctions because they most often affect the economic interests of states. This is rightly seen as a threat to sovereignty. Under recent circumstances, Russia has been at the epicenter of the struggle against unlawful unilateral coercion, referred to in the media as sanctions pressure. It was noted above that at the domestic level, BRICS member states have the right to introduce the necessary legislative, socio-economic and other measures to protect and strengthen their sovereignty in the economic sphere. Of course, these measures should be taken within the framework of existing international law in full compliance with the requirements of the U.N. Charter, which harmoniously fits into the normative and conceptual framework of the rule of law at the international and national levels, proclaimed in the Declaration of the High-level Meeting of the U.N. General Assembly on the Rule of Law at the National and International Levels in 2012.<sup>9</sup>

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field of stable development for the period up to 2030 and for advancing the establishment of a more presentable, democratic, equal, fair and honest political and economic order. 10<sup>th</sup> BRICS Summit Johannesburg Declaration, adopted on 26 July 2018 (Oct. 19, 2019), available at [https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th\\_BRICS\\_Summit\\_Johannesburg\\_Declaration](https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration).

<sup>6</sup> More detailed information, in 10<sup>th</sup> BRICS Summit Johannesburg Declaration. *Id.*

<sup>7</sup> More detailed information, in США ввели санкции против КНР за покупку вооружений у России // Российская газета. 21 сентября 2018 г. [The USA Applied the Sanctions Towards China for Purchasing Arms from Russia, Rossiyskaya Gazeta, 21 September 2018] (Oct. 5, 2019), available at <https://rg.ru/2018/09/21/ssha-vveli-sankcii-protiv-krn-za-pokupku-vooruzhenij-u-rossii.html>.

<sup>8</sup> More detailed information, in US “Heard, Understood” India on Russian Missile Deal: Nirmala Sitharaman, BRICS Information Portal, 17 April 2019 (Oct. 5, 2019), available at <http://infobrics.org/post/28459>.

<sup>9</sup> More detailed information, in U.N. General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/RES/67/1, 30 November 2012 (Oct. 5, 2019), available at <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

Here, it seems appropriate to analyze, at least briefly, the economic and legal possibilities of countering the illegal sanctions actions of Western states and a number of intergovernmental organizations on the example of domestic measures that the Russian Federation has been forced to take to protect its sovereignty.

## **2. Economic Measures to Counter the “Sanctions Challenges” to the Sovereignty of Russia**

Relations between major world players (primarily between the USA and China) have moved into the phase of hybrid wars (information, trade, financial, etc.), during which the interests of Russia are affected.

In addition, sanctions imposed by a number of foreign countries have created a problem vis-à-vis the state sovereignty of Russia due to a variety of factor components (including financial, technological, economic, information, scientific and educational).<sup>10</sup>

The fundamental question is whether Russia will be able to strengthen its state sovereignty in isolation. Another related task is to achieve the goals outlined in the Decree of the President of the Russian Federation of 7 May 2018,<sup>11</sup> including ensuring economic growth above the world average, contributing to Russia’s entry into the top five economies of the world, as well as accelerating the technological development of our country, in particular, a sharp increase in the number of organizations engaged in technological innovation.

In the work of V.L. Makarov, A.R. Bakhtisin and B.R. Khabriev,<sup>12</sup> it was shown that taking into account the current political situation, in which the prospect of lifting sanctions and ending the concomitant isolation, as well as the clearly insufficient volume of foreign direct investment necessary for the rapid development of our country, in order to strengthen state sovereignty it is extremely important to reorient to the search for domestic sources of investment and to the priority directions of socio-economic policy, among which are:

1. Diversification of the economy, including the development of the innovative sector of the Russian economy (additional funding for science and education, as well as enterprises and organizations engaged in technological innovation);

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<sup>10</sup> Якунин В.И., Багдасарян В.Э., Сулакшин С.С. Западная: новые технологии борьбы с российской государственностью [Vladimir I. Yakunin et al., *Trap: New Technologies in Combating Russian Statehood*] (Moscow: Nauchnyy ekspert, 2010).

<sup>11</sup> Указ Президента России от 7 мая 2018 г. № 204 «О национальных целях и стратегических задачах развития Российской Федерации на период до 2024 года» [Decree of the President of Russia No. 204 of 7 May 2018. On National Goals and Strategic Tasks of the Russian Federation Development for the Period up to 2024] (Oct. 5, 2019), available at <http://kremlin.ru/acts/bank/43027>.

<sup>12</sup> Макаров В.Л., Бахтисин А.Р., Хабриев Б.Р. Оценка эффективности механизмов укрепления государственного суверенитета России // Финансы: теория и практика. 2018. № 22(5). С. 6–26 [Valery L. Makarov et al., *Estimation of the Effectiveness of the Mechanism of Strengthening the State Sovereignty of Russia*, 22(5) Finance: Theory and Practice 6 (2018)].

2. Reduction of differentiation of regions in terms of socio-economic development (differentiated reduction of rates of basic taxes and increase in investment for a number of “problem” regions);

3. Increasing social protection of the population, including increasing benefits (e.g. temporary disability, pregnancy and childbirth) for the least-protected groups of the population;

4. Stimulation of domestic demand (reduction of the refinancing rate, as well as state-regulated prices).

This is not a complete list, but these priorities are quantitatively justified using a model complex.

The indicated directions of socio-economic policy of the state imply significant investments on the part of the state (the mechanisms of their attraction are described, for example, in the works of A.G. Aganbegyan<sup>13</sup>), and the main task of this study is to make a quantitative assessment of the implementation of these measures, which, as already noted, are aimed at strengthening the independence of the country.

All the priorities have been quantified using the model complex of the Central Economic and Mathematical Institute of the Russian Academy of Sciences, and calculations, in particular, show that the strengthening of state sovereignty is necessary to create effective mechanisms for the recovery of the monetization of the economy, and we are talking about significant financial investments (and not in differentiated support for individual enterprises), with the simultaneous introduction of exchange controls and reduction of the refinancing rate. The calculations also show that almost any monetary infusion into the real sector leads to an increase in GDP due to the significant demonetization of the Russian economy.

At the same time, due to increased external threats, the issue of developing software and analytical systems that allow analyzing social and economic processes for all the countries of the world (or most of them) at various levels (global, individual country, region or industry) and tracking the emerging multiplicative effects that are manifested for all countries involved in international relations is acute.

Taking into account the above, on 15 January 2019 in Guangzhou (China) an agreement was signed on the establishment of a multilateral international laboratory for assessing the consequences of inter-country trade wars. Among the signatories present were IT Company Guangzhou Milestone Software Co., Ltd., national supercomputer center of China, representatives of the Academy of Social Sciences of China and big business from Hong Kong, including the Managing Director of Fok Ying Tung Ming Yuan Development Co., Ltd. and the Managing Director of PricewaterhouseCoopers Ltd. in Hong Kong. From the Russian Federation, the agreement was signed by the staff of the Central Economic and Mathematical Institute of the Russian Academy of Sciences.

<sup>13</sup> Аганбегян А.Г. 25 лет новой России. Экономический и социальный уровень: топтание на месте // Экономические стратегии. 2018. № 1. С. 6–21 [Abel G. Aganbegyan, *Twenty-Five Years of New Russia, Economic and Social Level: Marking Time*, 1 Economic Strategies 6 (2018)].



The laboratory is expected to provide consulting services in the field of analysis of the consequences of inter-country trade wars. The coalition of the abovementioned organizations also plans to further develop software and analytical systems to assess the consequences of government management decisions taken during inter-country economic wars, and their use in the system of distributed situation centers of Russia, created in accordance with the Decree of the President of the Russian Federation of 25 July 2013 No. 648.

In this regard, the priority should also be the further development of the existing system of distributed situation centers of public authorities and local self-government, modernization of their functional and technological basis as the most effective tool for coordinating strategic planning and improving the efficiency of public administration, and monitoring the progress of national goals and the implementation of national projects. It is also extremely important to establish a standard set of models, algorithms, methods for solving problems of multivariate analysis, forecasting, current planning (sectoral and territorial), strategic planning, management of federal and regional programs, including quantitative assessment of the consequences of their implementation.

Thus, along with the adaptation of Russian legislation to the task of reorienting social and economic policy to priority areas that will allow neutralizing the negative effects of sanctions, it is also necessary to adjust the regulatory legal acts regulating the work of situation centers, designed, among other things, to become effective tools for quantifying the consequences of international legal sanctions.

### **3. Legislative Measures to Counter Sanctions Challenges to the Sovereignty of Russia**

International law and the doctrine of state sovereignty allow for situations in which, in response to unfriendly actions by other states or regional international organizations, states and other subjects of international law are entitled to take retaliatory restrictive measures (retorsions), which are generally considered to be lawful.<sup>14</sup>

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<sup>14</sup> A textbook prepared by the specialists of the Diplomatic Academy of the Ministry of Foreign Affairs explains that retorts are the response to restrictive measures. They may be used not only as the reply to international legal infringements, but also as a response to any unfriendly act which formally is not violating international law. *Международное право: Учебник [International Law: Textbook]* 294 (S.A. Egorov (ed.), Moscow: Statut, 2016). The authors of a private international law textbook confirm this point of view and say that retorts are legal according to international law because they are coercive acts of states in response to the acts of other states deliberately violating the rights and interests of persons and institutions. *Международное частное право: Учебник [Private International Law: Textbook]* 70 (N.I. Marysheva (ed.), 5<sup>th</sup> ed., Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Law Firm "Contract," 2018). According to the meaning put forward by T. Ruys, retorts consist of impolite or unfriendly measures vis-à-vis another state, but they are not incompatible with any international obligations of a state applied by it. He agrees with J. Crawford who, however, verifies the understanding of retorts as, under his meaning,

Faced with unprecedented sanctions pressure in the last decade, the Russian Federation has been forced to pay attention to improving its legislation on countering unfriendly acts in the political and economic spheres. Russian legislation provides in some cases for the application of restrictive measures (retorts)<sup>15</sup> in response to the actions of a foreign state that has taken discriminatory measures against the Russian state, its legal entities and citizens.

According to Article 1194 of the Civil Code of the Russian Federation, the government of the Russian Federation may establish retorts in respect of property and personal non-property rights of citizens and legal entities of those states that have established special restrictions on property and personal non-property rights of Russian citizens and legal entities.<sup>16</sup>

A number of other federal laws also provide for the possibility of retaliatory restrictive measures. Thus, according to Article 40 “Response Measures” of Federal Law of 8 December 2003 No. 164-FZ “On the Basis of State Regulation of Foreign

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a freedom but not a right of a state if there is the absence of a universal international treaty, and he admits that retorts are not regulated by international law in a decisive way. Such a broad and extensive understanding of retorts gives the opportunity to T. Giegerich to state that retorts contain the component of repression. Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework in Research Handbook on UN Sanctions and International Law* 19, 24 (L. van den Herik (ed.), Cheltenham: Edward Elgar Publishing, 2017). We think that the interpretation of the definitions of retorts created by Crawford and Giegerich are arguable at least, and they do not correspond to the points of view of the authors of the Commentary to the draft articles on the responsibility of states, who understand retorts as, so to say, “unfriendly behavior” which does not contradict the international legal obligations of a state if used as a reaction caused by international legal infringement. See International Law Commission, Report on the Work of Its Sixty-Third Session, U.N. GAOR, 66<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/66/10/Add.1 (2011), at 157.

<sup>15</sup> The definition of “retort,” according to the Russian Juridical Encyclopedia, has its origin in Latin and means reverse action, and thus explains the lawful coercive actions of a state carried out in response to the unfriendly actions of another state and not being an international legal infringement. More detailed information, in Российская юридическая энциклопедия [*Russian Juridical Encyclopedia*] 862 (A. Ya. Sukharev (ed.), Moscow: INFRA-M, 1999). At the end of the 19<sup>th</sup> century – beginning of the 20<sup>th</sup> century, the well-known Russian international lawyer F.F. Martens considered retorts to be less peaceful facilities of international coercion and said that, “This very facility means the application of the Tolion principle by one state towards the other one, the equal mutual payment, unfair acts for unfair acts, according to the Roman rule: *quod quisque in alterum statuerit, ut ipse eodem jure utatur*. Retort is used when one state has violated any interests of the other one, especially the economic ones, and it is aimed ... at reminding the state that its behavior was unfair and unfriendly by applying this retort which is uncomfortable for the said state.” Мартенс Ф.Ф. Современное международное право цивилизованных народов. В 2 т. Т. 2 [Fedor F. Martens, *Contemporary International Law of Civilized Nations. In 2 vols. Vol. 2*] 317 (V.A. Tomsinov (ed.), Moscow: Zertsalo, 2008). Incidentally, Martens himself was not very satisfied with the practice of applying retorts. He admitted that each time a state behaves according to its own laws and its undoubted rights, it does not violate the rights of another state, but only the interests of another state. But a retort cannot be protected and justified according to morality, because a state, using it, deliberately legalizes injustice and it contradicts the law, because a retort violates the rights of private persons and its action is directed against them. *Id.* at 317–318.

<sup>16</sup> Гражданский кодекс Российской Федерации (часть третья) от 26 ноября 2001 г. № 146-ФЗ // Собрание законодательства РФ. 2001. № 49. Ст. 4552 [Civil Code of the Russian Federation (Part Three) No. 146-FZ of 26 November 2001, Legislation Bulletin of the Russian Federation, 2001, No. 49, Art. 4552].

Trade Activity” (as amended on 13 July 2015),<sup>17</sup> the government of the Russian Federation may impose restrictions on foreign trade in goods, services and intellectual property (retaliatory measures) if the foreign state does not fulfill its obligations under international agreements with respect to the Russian Federation. This may be expressed in the fact that such a state takes measures that violate the economic interests of the Russian Federation, subjects of the Russian Federation, municipalities or Russian persons or the political interests of the Russian Federation, including measures that unreasonably close to Russian persons access to the market of a foreign state or otherwise unreasonably discriminate against Russian persons.

These measures are introduced in accordance with generally recognized principles and norms of international law, international treaties of the Russian Federation and within the limits necessary for the effective protection of the economic interests of the Russian Federation, the subjects of the Russian Federation, municipalities and Russian persons.

Federal Law of 30 December 2006 No. 281-FZ “On Special Economic Measures”<sup>18</sup> refers to special economic measures on the commission of actions against a foreign state and/or foreign organizations and citizens, as well as stateless persons permanently residing in the territory of a foreign state, and/or the imposition of obligations to commit these actions, and other restrictions. Such measures may be aimed at suspending the implementation of all or part of programs in the field of economics, technical assistance, as well as military-technical cooperation; the prohibition of financial transactions or the imposition of restrictions on their implementation; the prohibition of foreign operations or the imposition of restrictions on their implementation; termination or suspension of international trade agreements and other international treaties of the Russian Federation in the field of foreign economic relations; changes in export and/or import customs duties; prohibition or restriction of entry into the ports of the Russian Federation, the courts and the use of the airspace of the Russian Federation or its separate areas; the imposition of restrictions on the implementation of tourism activities; the prohibition or refusal of participation in international scientific and scientific-technical programs and projects of scientific and scientific-technical programs, and projects of a foreign state.

Special economic measures are temporary and are applied independently of other measures aimed at protecting the interests of the Russian Federation, ensuring the security of the Russian Federation, as well as protecting the rights and freedoms

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<sup>17</sup> Федеральный закон от 8 декабря 2003 г. № 164-ФЗ «Об основах государственного регулирования внешнеторговой деятельности» // Собрание законодательства РФ. 2003. № 50. Ст. 4850 [Federal Law No. 164-FZ of 8 December 2003. On the Basis of State Regulation of Foreign Trade Activity, Legislation Bulletin of the Russian Federation, 2003, No. 50, Art. 4850].

<sup>18</sup> Федеральный закон от 30 декабря 2006 г. № 281-ФЗ «О специальных экономических мерах и принудительных мерах» // Собрание законодательства РФ. 2007. № 1 (ч. 1). Ст. 44 [Federal Law No. 281-FZ of 30 December 2006. On Special Economic Measures, Legislation Bulletin of the Russian Federation, 2007, No. 1 (part 1), Art. 44].

of its citizens. They should not be more restrictive than necessary to address the circumstances that gave rise to their application.

If we turn to specific legislative acts adopted on the basis of this legislation, the latest example is Federal Law of 4 June 2018 No. 127-FZ "On Measures of Influence (Counteraction) on Unfriendly Actions of the United States of America and Other Foreign States."<sup>19</sup>

Measures of influence (counteraction) can be applied in respect of the USA and other foreign states performing unfriendly actions in respect of the Russian Federation, citizens of the Russian Federation or Russian legal entities, as well as in respect of organizations under the jurisdiction of unfriendly foreign states, directly or indirectly controlled by unfriendly foreign states or affiliated with them, officials and citizens of unfriendly foreign states in the event that these organizations, officials and citizens are involved in unfriendly actions against the Russian Federation.

The following are examples of measures of influence (counteraction) that can be applied: termination or suspension of international cooperation of the Russian Federation and Russian legal entities with unfriendly foreign states, the organizations which are under jurisdiction of unfriendly foreign states directly or indirectly under the control of unfriendly foreign states or affiliated with them according to the decision of the President of the Russian Federation; prohibition or restriction on the importation into the territory of the Russian Federation of products and/or raw materials whose countries of origin are unfriendly foreign states or producers of which are organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them; the ban or restriction on exports from the territory of the Russian Federation of production and/or raw materials by organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them, or citizens of unfriendly foreign states; prohibition or restriction on participation of organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them, or citizens of unfriendly foreign states in the privatization of state or municipal property, and also in performance of works by them, rendering services in the organization on behalf of the Russian Federation of the sale of federal property and/or implementation of functions of the seller of federal property; and other measures according to the decision of the President of the Russian Federation.

International practice proceeds from the fact that the introduction of retorts by a state is usually aimed at restoring the principle of reciprocity. From the point of

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<sup>19</sup> Федеральный закон от 4 июня 2018 г. № 127-ФЗ «О мерах воздействия (противодействия) на недружественные действия Соединенных Штатов Америки и иных иностранных государств» // Собрание законодательства РФ. 2018. № 24. Ст. 3394 [Federal Law No. 127-FZ of 4 June 2018. On Measures of Influence (Counteraction) on Unfriendly Actions of the United States of America and Other Foreign States, Legislation Bulletin of the Russian Federation, 2018, No. 24, Art. 3394].

view of international law, retorts are lawful coercive actions of a state committed in response to discriminatory acts of another state, that is, acts which specifically violate the rights and interests of citizens and organizations or the interests of the state itself. The purpose of retorts is to induce the state that committed a discriminatory act to abandon it, to restore the normal practice of international communication, and thus the act of retort is adopted for a certain period.

According to Russian law, these restrictive measures (a) are imposed by the government of the Russian Federation; (b) must be proportionate, adequate (“symmetrical”) restrictions imposed because of a discriminatory act; (c) are established in the form of retaliatory restrictions and, therefore, cannot be pre-emptive or preventive; (d) and are allowed only in response to special restrictions on the rights of citizens and legal entities, that is, restrictions discriminating against Russian citizens and legal entities.<sup>20</sup>

Appearing often in the media recently are assessments on the negative impact of the sanctions policy of the West, which required the adoption of retorsion measures from the Russian side, with the result that the states participating in the sanctions policy have suffered large financial losses.<sup>21</sup> Other estimates are found regarding the impact of sanctions on the Russian economy. Despite certain negative aspects, the Russian economy as a whole has withstood the “sanctions blow,” was able to adapt to the new conditions and has seen the actual rise of certain industries. This demonstrates, among other things, the effectiveness of the economic and legal measures taken by Russia to counter discriminatory sanctions policies.

<sup>20</sup> Звеков В.П. Международное частное право: Учебник [Victor P. Zvekov, *Private International Law: Textbook*] (2<sup>nd</sup> ed., Moscow: Yurist, 2004); Комментарий к Гражданскому кодексу Российской Федерации, части третьей [Commentary to the Civil Code of the Russian Federation, Part Three] (V.P. Mozolin (ed.), Moscow: NORMA; INFRA-M, 2002); Комментарий к Гражданскому кодексу Российской Федерации, части третьей (постатейный) [Commentary to the Civil Code of the Russian Federation, Part Three (Article-by-Article)] (N.I. Marysheva & K.B. Yaroshenko (eds.), 4<sup>th</sup> ed., Moscow: Law Firm “Contract,” 2014).

<sup>21</sup> The Special Rapporteur of the United Nations on the Negative Impact of the Unilateral Coercive Measures Idriss Jazairy declared that the losses of the EU, the USA and the other countries that have applied the sanctions against Russia are more than the losses of Russia due to the European sanctions. The economies of the countries that have applied the sanctions against Russia have lost about US\$100 billion and the economy of Russia has lost approximately 50% less. В ООН оценили потери России и «противников» от санкций в три ВВП Эфиопии // РБК. 28 апреля 2017 г. [The U.N. Has Estimated the Losses of Russia and the “Enemies” Due to the Sanctions as Equal to Three Times the GDP of Ethiopia, RBC, 28 April 2017] (Oct. 5, 2019), available at <https://www.rbc.ru/economics/28/04/2017/590332b69a7947ae385244b0>. Similar thoughts have been expressed by representatives of the European business community. The Vice-Head of the Italian-Russian Chamber for Trade and Industry Vincenzo Trani notes that over the period of the sanctions the EU has lost billions of euros and, on the contrary, Russia has made progress in developing its own domestic economy, which can be seen in, for example, the impressive growth of Russian industry and agriculture. More detailed information, in РФ нанесла удар по экономике Евросоюза // Howto-News.info. 8 апреля 2019 г. [The Russian Federation Has Powerfully Struck the EU Economies, Howto-News.info, 8 April 2019] (Oct. 5, 2019), available at <https://howto-news.info/v-italii-rasskazali-kak-rf-nanesla-udar-po-ekonomike-evrosoyuza/>.

#### 4. The International Legal Estimation of Sanctions

While noting the overall positive impact of anti-discrimination legislation, it should be recognized that domestic measures alone cannot be limited to creating reliable legal barriers to inappropriate sanctions policies. Sanctions, since they are an instrument of the foreign policy of states and international organizations, belong to the sphere of international relations. Accordingly, the need to create international legal conditions for the exclusion of illegal unilateral actions is no less important than the improvement of national legislation in the field of combating foreign economic discrimination.

International law is created by states to regulate mutual relations, which is its content and is accepted by all researchers as an indisputable truth.<sup>22</sup> The question of the functions of international law, which receive different interpretations in the scholarly literature, is much more complex.<sup>23</sup> Generally speaking, it can be assumed that the most important function of international law is to maintain inter-state relations in a certain stable balance, ensuring the coexistence and peaceful development of states. Accordingly, in the event of challenges or threats to the international legal order, international law must respond to negative developments in international relations, or at least be able to contribute to the development of means to neutralize them in the future.

From this point of view, if we consider the problem of unilateral coercive measures that do not meet the requirements of the U.N. Charter, then international legal science faces the task of studying the concept and typology of the mentioned forms of international coercion in the broader context of the established legitimate mechanism of coercion.

International law as a normative regulator of international relations offers options for overcoming differences between states. Domestic international legal doctrine emphasizes the continuing importance of the basic principles of international law as

the basic and interrelated rules of general international law governing in a generalized form the behavior of states and other subjects of international law in all spheres of international relations.<sup>24</sup>

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<sup>22</sup> Thus, G.I. Tunkin saw international law as regulating inter-state relations in a broad meaning, so to say, as all the inter-state relations between all the subjects of this system of law. Тункин Г.И. Право и сила в международной системе [Gregory I. Tunkin, *Law and Power in the International System*] 27 (Moscow: Mezhdunarodnye otnosheniya, 1983). S.V. Chernichenko underlines that international law is traditionally considered to be the system of norms regulating inter-state relations created by its participants. Черниченко С.В. Контуры международного права. Общие вопросы [Stanislav V. Chernichenko, *The Contours of International Law. Common Items*] 14 (Moscow: Nauchnaya kniga, 2014). The British lawyer J. O'Brien writes that public international law (to some extent known as "the law of nations") is such a system of law, which, first of all, is connected with the relations between states. John O'Brien, *International Law* 1 (London: Routledge-Cavendish, 2001).

<sup>23</sup> Капустин А.А. Международные организации в глобализирующемся мире [Anatoly Ya. Kapustin, *International Organizations in the Globalized World*] 34–36 (Moscow: RUDN University, 2010).

<sup>24</sup> Ушаков Н.А. Международное право [Nikolay A. Ushakov, *International Law*] 54 (Moscow: Yurist, 2000).

The concept of the leading role of the basic principles of international law in the development and strengthening of the legal basis of international relations is now shared by individual representatives of the Western tradition of international law.<sup>25</sup>

Thus, compliance with the basic principles of international law, especially the sovereign equality of states, the non-use of force and the threat of force, the peaceful settlement of international disputes, non-interference in internal affairs, cooperation, respect for human rights and fundamental freedoms, and the faithful fulfillment of obligations under international law, is a necessary condition for overcoming crisis phenomena in international relations. This includes an assessment of the nature and meaning of the concept of “sanctions,” which, in the words of T. Ruys, “are a common feature of international relations,” but do not have a single authoritative international legal definition.<sup>26</sup> The basic principles of international law make it possible to establish legal limits on the legitimate use of coercion in international relations.

Historically, international legal science has been forced to respond to the emergence and spread of the 19<sup>th</sup>-century legal positivism of the notion that the defining characteristic of law is the command (order) of the sovereign, supported by force. This point of view, which absolutized state coercion as an inherent feature of the law, was justified by John Austin in his work “The Province of Jurisprudence Determined.”<sup>27</sup> The lack of international law of that era, such an important feature of the domestic law of states in comparison with other social regulators, and as the possibility of forcing citizens and organizations to comply with its provisions, gave rise to Austin’s argument that it is wrong to name international law as being law.<sup>28</sup>

It can be assumed that F.F. Martens in his famous course on international law, published in the late 19<sup>th</sup> century – early 20<sup>th</sup> century, was forced to introduce into use the concept of “the right of international coercion.” He regarded the latter as a “sanction” of international law that enforced its norms.<sup>29</sup>

In the 20<sup>th</sup> century, again, we believe, under the conceptual influence of the theory and practice of the internal law of states, in international legal doctrine the concept of “sanctions” began to be associated with one of the forms of responsibility,

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<sup>25</sup> Thus, A. Cassese supposes that the general principles *jus cogens generalis* are at the top of the scope of international legislation and define the fundamental basic legal standards, which can be considered to be the constitutional principles of the international society. Antonio Cassese, *International Law* 88 (Oxford: Oxford University Press, 2003).

<sup>26</sup> Ruys 2017, at 19.

<sup>27</sup> This work was initially published in 1832. In this work, Austin considered the law precisely to have four characteristics constantly belonging to it: order, sanctions, the obligation of observing the order and the power of sovereignty. More detailed information, in Frédéric Mégret, *International Law as Law in The Cambridge Companion to International Law* 64, 73–74 (J. Crawford & M. Koskeniemi (eds.), Cambridge: Cambridge University Press, 2012).

<sup>28</sup> *Id.* at 72.

<sup>29</sup> Martens 2008, at 303.

that is, with the onset of adverse consequences for the commission of an offense. We can refer to the opinion of a member of the USSR Academy of Sciences and the Russian Academy of Sciences G.I. Tunkin that sanctions for offenses in international law are reduced to compensation for damage, which is accompanied by possible coercive measures in case of non-compliance by the state-violator of this obligation.<sup>30</sup> Yu.M. Kolosov expressed a broader view on the problem of sanctions. He believed that sanctions were coercive actions against delinquent entities that had the character of a kind of punishment. They may be applied only in the case of an international intentional tort. The application of sanctions in other cases cannot be considered lawful, since they are essentially a reaction to the intentional deliberate commission of unlawful acts or the intentional infliction of damage.<sup>31</sup>

Currently, we can distinguish domestic doctrinal approaches to the concept of sanctions in international law.

Judge T.N. Neshataeva of the Court of the Eurasian Economic Union defines only one of the possible groups of coercive measures – international legal sanctions of international intergovernmental organizations (IIOs). Sanctions in this case, understood to be all measures of protection of the international legal order, enshrined in the norms of international law, are of a coercive nature and are applied in the case of offenses to the tort state through the institutional mechanism of the IIO.<sup>32</sup> This positive approach is based on the established practice of international legal regulation of the activities of the IIO. However, as will be shown below, in a number of cases sanctions imposed by some regional IIOs may be considered controversial, at best.

A peculiar position is taken by G.I. Kurdyukov. He believes that sanctions are coercive actions carried out by universal and regional international organizations, as well as bilateral and unilateral measures of states, as opposed to forms of international legal responsibility (substantive and non-material). Sanctions, in his view, are coercive retaliatory measures applied when the wrongdoing state voluntarily and in good faith failed to comply with its legal obligations.<sup>33</sup>

S.V. Chernichenko introduced into scholarly circulation a broader concept – “international legal coercion,” understood as a system of measures which, depending on

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<sup>30</sup> Тункин Г.И. Теория международного права [Gregory I. Tunkin, *The Theory of International Law*] 378 (L.N. Shestakov (ed.), Moscow: Zertsalo, 2000).

<sup>31</sup> Колосов Ю.М. Ответственность в международном праве [Yu.M. Kolosov, *Responsibility in International Law*] 54 (2<sup>nd</sup> ed., Moscow: Statut, 2014).

<sup>32</sup> Нешатаева Т.Н. Международные организации и право. Новые тенденции в международном правовом регулировании [Tatiana N. Neshataeva, *International Organizations and Law. New Tendencies in International Legal Regulation*] 141 (Moscow: Delo, 1998).

<sup>33</sup> Курдюков Г.И. Международные экономические санкции (применение в системе Совета Безопасности Организации Объединенных Наций) // Марийский юридический вестник. 2001. № 1. С. 170–176 [Gennady I. Kurdyukov, *International Economic Sanctions (Application within the Framework of the United Nations Security Council)*, 1 Mari Law Bulletin 170 (2001)].



the grounds for their application, includes sanctions measures (individual and collective) of international legal coercion and measures of an unauthorized character. The first group of sanctions measures of international legal coercion (countermeasures, retorts, reprisals, self-defense measures, individual and collective self-defense, collective non-institutional non-military sanctions measures) is a reaction to a violation of international law, including a violation of obligations *erga omnes*, that is, they can be attributed to measures of international responsibility. The second group is a reaction to any circumstances, situations or actions that do not violate international law. In addition, Chernichenko proposes the concept of “sanctions international legal responsibility,” including tangible and intangible forms. Despite the fact that this approach has significantly complicated the understanding of the specifics of sanctions as measures of international law enforcement, it allows separating the form of the international legal response to international crime from other forms of feedback that restrict in any way the rights of other subjects of international law.<sup>34</sup> It also follows that sanctions are considered by Chernichenko to be something inherent in international law as a whole.

In foreign legal science, there is also the spread of approaches to understanding the content of the concept of “international legal sanction.” Thus, G. Abi-Saab defines sanctions as

coercive measures taken pursuant to a decision of a competent social body, that is, a body legally empowered to act on behalf of a society or community that is governed by a legal system.<sup>35</sup>

Without going into detail in the analysis approach, Abi-Saab notes that it is right to take sanctions with competence, which states confer on international organizations. F.M. Mariño Menéndez gives the definition of sanctions from the perspective of the implementation of international responsibility. He believed that when collective countermeasures were taken by the international community in an institutional and centralized form, they could rightly be called international sanctions, especially if the basis for their application was found in proven violations of general peremptory norms of common international law.<sup>36</sup>

Some research approaches the issue in a more pragmatic, limited enumeration of the possible ways of implementation of such activities. For example, the proposal has been put forward to distinguish three approaches to the definition of “sanctions.” The first approach focuses on the objectives pursued by the relevant measures in

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<sup>34</sup> Chernichenko 2014, at 495–579.

<sup>35</sup> This opinion of G. Abi-Saab appears in *International Law* 252 (M.D. Evans (ed.), Oxford; New York: Oxford University Press, 2003).

<sup>36</sup> Fernando M. Mariño Menéndez, *Derecho Internacional Público: Parte General [Public International Law: General Part]* 569 (Madrid: Editorial Trotta, 2005).

response to violations of international law. Thus, the wrongdoing state is called to international responsibility. The second approach, on the contrary, seeks to identify the subject of action and reduces the definition of sanctions to measures taken by international organizations in accordance with their constituent instruments. Finally, under the third approach sanctions are established by specifying the type of measures taken; they are interpreted as economic in nature and include restrictions on import and export operations against states or the freezing of accounts of specific individuals or entities or other organizations.<sup>37</sup>

We do not deny the admissibility of such a classification, since, with regard to the first type of sanctions imposed by way of international responsibility, it can be agreed that the current level of development of international law makes it possible to recognize the legality of countermeasures as a means of realizing international responsibility in the case of an international offense. However, this type of international enforcement action, as set down in the International Law Commission draft articles on the responsibility of states and international organizations, does not usually give rise to discussion, although the application of the provisions of these instruments may cause difficulties in practice, due to the too general nature of the definitions contained therein. The legality of the second type of coercive measures of international organizations – in view of the large number of these organizations – is not so obvious. Thus, the provisions of the U.N. Charter which enshrine the competence of the Security Council to apply non-military coercive measures within the framework of the universal system for the maintenance of international peace and security established after the Second World War are recognized by all states and the doctrine of international law as a legitimate means of restoring and maintaining international peace and security. At the same time, the use of sanctions in the activities of regional international organizations should be limited both by the provisions of their constituent acts (measures taken against member states that violate the charters of such organizations) and by the rules of the U.N. Charter on the participation of regional international organizations in the system of maintaining peace and security.

At the beginning of the 21<sup>st</sup> century, the U.N. International Law Commission, which for many decades worked on the problem of systematization of the norms of international responsibility, prepared and submitted to the U.N. General Assembly two documents on international responsibility.<sup>38</sup> It is noteworthy that

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<sup>37</sup> Ruys 2017, at 19.

<sup>38</sup> The documents relate to the draft articles on the "Responsibility of States for Internationally Wrongful Acts" of 2001 and "Responsibility of International Organizations" of 2011. The documents were composed as attachments to resolutions of the U.N. General Assembly, which took them into account and suggested that countries become familiar with their contents, not mentioning the prospects of their possible adoption in the future nor the likelihood of their passage. Up to now, these documents have remained drafts only, which, as they stand, are not obligatory; however, they may be considered to be important and influential documents that interpret the everyday practical activity of states and international organizations.

they use the term “countermeasures” instead of the term “sanctions.”<sup>39</sup> At the same time, countermeasures in these instruments serve as a means of implementing international legal responsibility with a view to inducing the state responsible for the internationally wrongful act to comply with its obligations to compensate for the harm caused.

The result of the development by the International Law Commission of the concept of countermeasures as a means of coercion of the state responsible for an internationally wrongful act was the recognition of the need for conservation in international law, the decentralized enforcement mechanism. The use of the concept of “countermeasures” in the context of the implementation of international responsibility does not exclude their doctrinal understanding as a form of measures of international legal coercion, including sanctions coercion.<sup>40</sup>

Summarizing the analysis of doctrinal approaches to the international legal concept of sanctions, we can conclude that considering the problem from the historical aspect, we can note the weakening of the influence of general theoretical views of positivism on the development of modern ideas about the nature of one of the varieties of international legal coercion of lawful coercive measures of a non-military nature. At the same time, we can also note the preservation of the pluralism of doctrinal views on the concept of “sanctions,” which can be explained by the fragmentary, episodic and casual international legal regulation of international coercion, the continuing decentralization of the system of international law and the generally low level of international legal regulation of certain branches of international law and spheres of international relations.

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<sup>39</sup> I.I. Lukashuk has determined that the substitution of the definitions took place at the final stage of composing the draft articles devoted to the responsibility of states, and that it happened due to the most substantial role of international judicial practice that was considered at the time. International judicial practice denied the definition of “sanction” in connection with the unilateral measures of states. More detailed information, in Лукашук И.И. Право международной ответственности [Igor I. Lukashuk, *The Law of International Responsibility*] 325 (Moscow: Wolters Kluwer, 2004).

<sup>40</sup> Thus, S.V. Chernichenko, naming the countermeasures as the “measures of reliability,” supposes that the problem of considering them to be the measures of sanctional coercion, both sanctional and non-sanctional, can be resolved on the basis of interpretation of the definition of “legal reliability” in principle. Chernichenko 2014, at 591. At the same time, I.I. Lukashuk considers reliability and sanctions as phenomena tightly connected with each other. Lukashuk 2004, at 308. In the influential English juridical vocabulary there is the explanation of the difference between the definitions “sanctions” and “countermeasures”: Countermeasures are any legal reaction of a state towards the act previously committed by another state which had violated the international obligations in their relationship, and sanctions are the multilateral reactions to the infringements of the obligations to the international society in general or on the occasion of giving assistance to the victim of that infringement. Unilateral countermeasures more and more often are named as sanctions. *The New Oxford Companion to Law* 1045 (P. Cane & J. Conaghan (eds.), Oxford: Oxford University Press, 2008). It goes without saying that it is a very interesting example. There is a quite different conceptual viewpoint concerning these definitions. One should take into account that both definitions are connected with the reaction to the infringements, and this is evidence that in international legal doctrine there is no unanimous understanding of countermeasures and sanctions yet.

## 5. Sanctions in the U.N. Collective Security Mechanism

Currently, at the universal (worldwide) level, there is a legitimate mechanism provided for by the U.N. Charter for the application of coercive measures by the U.N. Security Council. Despite the abundance of literature on this issue,<sup>41</sup> it is proper here to briefly describe its main features. Coercive measures are imposed by the U.N. Security Council against states that, by their actions, pose a threat to the peace or violate peace and security or commit an act of aggression. Having established the existence of a threat to the peace or its violation, the U.N. Security Council has the right to make recommendations or take a decision on taking measures to maintain or restore international peace and security (Art. 39 of the U.N. Charter), in particular, to require U.N. member states to carry out actions related to the use of armed force and other measures not providing for its use.<sup>42</sup> Non-use of force (non-military measures) coercive measures by the U.N. Security Council in diplomatic practice, in the media and in scholarly literature are often referred to as “sanctions.”<sup>43</sup>

The U.N. Charter is an international treaty in which virtually all of the world’s states participate; under the Charter, the obligations of U.N. member states prevail over their obligations under any other international treaty. The U.N. Security Council has the primary responsibility for the maintenance of international peace and security and acts on behalf of all U.N. member states. Moreover, the U.N. Charter obliges all members to implement the decisions of the Security Council taken in pursuance of this primary responsibility.

The content of the term “Security Council sanctions,” sometimes referred to in the scholarly literature as “collective,” “centralized” or “institutional,”<sup>44</sup> has evolved throughout the history of the United Nations. During the Cold War, there were only two cases of non-military sanctions applied by the Security Council. They were

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<sup>41</sup> See, e.g., Мухеев Ю.Я. Принудительные меры по Уставу ООН [Yu. Ya. Mikheev, *The Application of Coercive Measures According to the U.N. Charter*] (Moscow: Mezhdunarodnye otnosheniya, 1967); Актуальные проблемы деятельности международных организаций. Теория и практика [*The Actual Problems of the Functioning of International Organizations. Theory and Practice*] (G.I. Morozov (ed.), Moscow: Mezhdunarodnye otnosheniya, 1982); Федоров В.Н. Организация Объединенных Наций, другие международные организации и их роль в XXI веке [Vladimir N. Fyodorov, *The United Nations, Other International Organizations and their Role in the Twenty-First Century*] (Moscow: Logos, 2007), etc.

<sup>42</sup> Non-military measures may be connected with the entire or partial break in the economic relationship, in the railway, marine, air, mail, telegraph, radio and the other facilities of inter-state relationships, and also it might be implied in the form of the breaking of diplomatic relations.

<sup>43</sup> In the U.N. International Law Commission’s Commentary to the draft articles on the responsibility of states, it is underlined that very often the definition of “sanctions” is used in order to explain the acts undertaken by a group of states against one state or by an international organization. But this definition is not correct, because in Chapter VII of the U.N. Charter there is the definition of “measures.” More detailed information, in International Law Commission, Report, *supra* note 14.

<sup>44</sup> The application of the definition of “institutional,” concerning the sanctions of the U.N. Security Council, is not correct. This is so because the coercive institutional measures can be applied also by other international organizations, but the legality of those measures might be disputable.

directed against states<sup>45</sup> and were comprehensive, that is, they applied to the states themselves, their bodies and officials, as well as legal entities and individual sectors of the economy of the states concerned.

Since the end of the Cold War, there has been a change in the conceptual model of U.N. sanctions. Attempts to use the previous model of comprehensive sanctions in the early 1990s were criticized because their negative impact was felt not only by states and their bodies and officials, but also by all of the legal entities and organizations of the country against which the sanctions were imposed. Bans on the importation of food and medicines led to humanitarian disasters among populations.<sup>46</sup> In this regard, a new concept of so-called targeted sanctions was proposed.<sup>47</sup> According to some estimates, this model of targeted sanctions has been the main model since 1994.<sup>48</sup> The difference between targeted sanctions and comprehensive sanctions is that the former are directed against specific individuals and organizations of the state that is the object of the U.N. sanctions.<sup>49</sup> In particular, such sanctions provide for the freezing of financial assets, a ban on visas and travel outside the country for designated persons, and other similar measures.<sup>50</sup> Without going deeper into the analysis of the features of the modern U.N. sanctions mechanism, it can be argued that its action contributes to the strengthening of the international legal order,<sup>51</sup> including through the organizational centralization of the sanctions mechanism in the maintenance of international peace and security.

<sup>45</sup> One case was dedicated to a non-recognized country – Southern Rhodesia – and Great Britain was responsible for governing its territory.

<sup>46</sup> Authors have held different views on the nature of sanctions of the U.N. Security Council. Since 1960, the possibility of recognizing sanctions as *ultra vires* acts has been considered; since 1990, the discussion on sanctions has focused on their effectiveness, and since 1995 on the humanitarian consequences of sanctions. See Mary E. O'Connell, *Debating the Law of Sanctions*, 13(1) *European Journal of International Law* 63 (2002).

<sup>47</sup> K.O. Kononova names these sanctions as “purposeful” (goal-setting). More detailed information, in *Кононова К.О. Санкционные резолюции Совета Безопасности Организации Объединенных Наций и их имплементация в национальных правовых системах государств-членов* [Ksenia O. Kononova, *Sanctional Resolutions of the U.N. Security Council and Its Implementation in the National Legal Systems of the Member States*] 126 (Moscow: Wolters Kluwer, 2010).

<sup>48</sup> Sue E. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions* in *Research Handbook on UN Sanctions and International Law*, *supra* note 14, at 52.

<sup>49</sup> On the criteria used to include individuals in the sanctions lists of the U.N. Security Council, see *Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* 43–67 (A.Z. Marossi & M.R. Bassett (eds.), The Hague: T.M.C. Asser Press, 2015).

<sup>50</sup> For a detailed analysis of the obligations imposed by U.N. Security Council sanctions on states, see Jeremy Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge; New York: Cambridge University Press, 2009). A lot of work was devoted to the problems of implementation of U.N. Security Council sanctions. See, e.g., *National Implementation of United Nations Sanctions: A Comparative Study* (V. Gowlland-Debbas (ed.), The Hague: Martinus Nijhoff, 2004).

<sup>51</sup> However, from time to time one can hear the critics with regard to this or that application of the sanctions, which are not effective enough. More detailed information, in Fyodorov 2007, at 155.

## 6. The Parameters of the Legitimacy of the Regional International Organizations Sanctions

The mechanism of U.N. coercive measures is not limited to the provisions of Chapter VII of the U.N. Charter discussed above. Chapter VIII provides for the participation of regional international intergovernmental organizations in such matters relating to the maintenance of international peace and security as are applicable to regional action.

The U.N. Security Council uses, where appropriate, such regional international organizations to carry out enforcement actions under its leadership, and no enforcement action is taken by virtue of such regional international organizations without the authority of the U.N. Security Council.

Member states, when establishing an IIO, confer on them the power to take restrictive measures against those member states that do not comply with the provisions of the constituent instruments (statutes of the IIO). Most often, such measures are to limit the rights of member states to represent or participate in the decision-making (voting) of the IIO, which are introduced in response to a violation of their statutory duties as a member of an international organization.<sup>52</sup> These measures are legitimate because they can be seen as self-restraint voluntarily undertaken by member states of international organizations.

The U.N. Charter does not specify what types of coercive actions of regional international organizations (actions by armed forces or non-military measures) are referred to in Chapter VIII. However, it can be assumed that both types of measures provided for in Chapter VII of the U.N. Charter are meant, that is, coercive measures with the use of armed forces and non-military coercive measures. The provisions of Chapter VIII of the U.N. Charter currently retain their importance for assessing the legitimacy of unilateral coercive measures of a non-military nature, which are quite common in the practice of modern regional international organizations.<sup>53</sup>

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<sup>52</sup> T.N. Neshataeva carried out a detailed analysis of the application of non-military sanctions practice of international organizations and she differentiated the application of the coercive measures for infringement of the material and procedural normative clauses of international law. More detailed information, in Neshataeva 1998, at 148–149. Moreover, the U.N. International Law Commission authors of the Commentary to the draft articles on the responsibility of international organizations say that sanctions which an organization might be authorized to apply against its own members in accordance with its own rules of procedure are legal, and they are not equal to countermeasures. Additional information, in International Law Commission, Report, *supra* note 14, Ch. V, at 133. Despite the abovementioned, which corresponds to the formed and developed practice, there is still the lack of a unanimous, clear theoretical background and justification of the legal character of these restrictive measures of IIOs, and the doctrine of international law has not elaborated any such justifications.

<sup>53</sup> Especially, very often they are applied by the regional and sub-regional international intergovernmental organizations in Africa and in Europe. According to some data received, recently the EU has applied sanctions (restrictive measures) in 48 situations, whereas the African Union in 11 cases. More detailed information, in Ruys 2017, at 22.

The constituent instruments of many regional organizations (League of Arab States, African Union (AU), Organization of American States, etc.) contain provisions on the use of collective measures in the event of an armed attack against any of their members. However, these provisions are often supplemented by special international treaties concluded between the member states of such organizations. For example, Article 2 of the Charter of the Organization of the American States (Charter of the OAS) establishes the principle that the OAS shall ensure joint action by member states in the event of aggression. However, more detailed obligations in this area are established in the Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Pact), which is not formally an act of the OAS, but was concluded as an agreement between its member states. A similar function in the League of Arab States (LAS) is performed by the Treaty on Joint Defense and Economic Cooperation of the League of Arab States member countries established in 1950.

In the practice of regional organizations, the use of combined armed forces for coercive action has never been noted. However, some of them have begun to establish peacekeeping forces. Such actions by regional organizations (LAS, AU, etc.) do not contradict the provisions of the U.N. Charter and can make an important contribution to the settlement of regional conflicts and disputes.

We can state the formation of two approaches in the practice of enforcement measures by regional international organizations: legitimate, based on the provisions of the U.N. Charter and the norms of general international law, and the so-called “autonomous,” ignoring the indisputable grounds of the legitimacy of such measures. For example, if the African Union uses sanctions that are established by its charter exclusively against its member states, then there is no reason to doubt their legitimacy; this cannot be said of the autonomous unilateral restrictive measures taken by the EU against third-party states that are not its members.<sup>54</sup> Thus, the “sanctions packages” adopted by the EU against Russia since 2014 in connection with the events in Crimea and Donbas cannot be considered to be legitimate, since they do not comply with the provisions of Chapter VIII of the U.N. Charter. The response of the Russian Federation in this regard is not only natural, but also a legitimate response based on the norms of general international law. The creation of such a long-standing legal situation in Europe undermines the credibility of the EU as a regional international organization based on the rule of international law and has a negative impact on the implementation of pan-European cooperation projects.

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<sup>54</sup> The EU as an advanced member of political worldwide relationships has the consequent economic potential and capacity for completing such a policy. This is quite obvious to political scientists, but not to lawyers. If world leaders consider their goals and interests to be more precious than worldwide recognized international legal values, it means that now there is no basis for constructing a multipolar world, and this policy cannot be used for this aim, because it contradicts international law. It is a method for the creation of new illegal situations and acts.

Coercive measures taken by the EU in pursuance of decisions of the U.N. Security Council, subject to certain conditions, can be considered to be legitimate. Such conditions include an appeal by a Security Council resolution to all states and their regional organizations, as well as compliance with the requirement of proportionality in respect of the scope of the applicable EU restrictions to that established in the U.N. Security Council resolution.

In assessing the sanctions policy of regional international organizations we should take into account not just the policy that was formed in the last century, i.e. the mechanism of coercive measures of the U.N. Charter, which was further developed in the 21<sup>st</sup> century. An analysis of the conditions and requirements for the use of coercive measures should be carried out in the context of international law, which has also been progressively transformed over the past more than seventy-four years since the signing of the U.N. Charter. In particular, the content of general international law has been affected by two trends – the humanization of international law and the sovereignization of the state in international economic relations. Both are aimed at preserving and strengthening the two most important principles of civilization, that is to say, the human person and the most important means of his or her development – the economy, which can be regarded as the progressive development of international law.

These trends have manifested themselves in the normative activities of the U.N. The provisions of international legal acts on the undesirability of applying or encouraging the use of economic, political or any other coercive measures<sup>55</sup> against other states have been embodied and developed in the publication of two series of U.N. General Assembly resolutions. Some of them declared the use of unilateral economic measures to be in flagrant violation of the principles of international law set forth in the U.N. Charter, as well as the basic principles of the multilateral trading system.<sup>56</sup> Others have found that the application of unilateral restrictive measures creates obstacles to trade relations between states and thus impedes the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of people and nations to development.<sup>57</sup> Moreover, because of the apparent violation since 2007 by unilateral restrictive measures of individual states and international organizations of

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<sup>55</sup> First is the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 and the Charter of Economic Rights and Duties of States 1974.

<sup>56</sup> The first among the mentioned resolutions of the General Assembly is U.N. 44/215 “Economic Measures as a Means of Political and Economic Coercion Against Developing Countries” adopted on 22 December 1989. Since that time, the resolutions have been adopted annually. They are aimed at supporting the sovereignty of developing countries, which is why the resolutions are less important for the European region.

<sup>57</sup> The first Resolution of the U.N. General Assembly 38/197 “Economic Measures as a Means of Political and Economic Coercion Against Developing Countries” on that subject was adopted on 20 December 1983; since that time they have been adopted annually.



the requirements of international human rights instruments, in 2014 the U.N. Human Rights Council (HRC)<sup>58</sup> decided to appoint a Special Rapporteur on the negative impact of unilateral coercive measures on the implementation of human rights.<sup>59</sup>

Analysis of the content of these resolutions suggests that the U.N. is currently developing a “soft” regulatory framework aimed at the formation of international legal awareness of the inadmissibility and illegitimacy of unilateral use of restrictive measures in international relations. Its main provisions can be summarized as follows. Unilateral coercive measures do not comply with international law, international humanitarian law, the U.N. Charter and the norms and principles governing peaceful relations between states. The resulting extraterritorial effects threaten the sovereignty of states and create obstacles to trade relations among states, thereby impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of people and peoples to development. In other words, “soft regulators” are aimed at establishing legal limits to the legitimacy of coercion that infringes on the sovereignty of the state in other spheres of international relations than the maintenance of international peace and security.

The above list of imperatives of the international legal order, which does not allow the use of unilateral coercive measures without the risk of violation of many international fundamental legal acts on the protection of human rights and peoples’ rights, is formulated in the form of international recommendations. In no way does it seek to influence in any way the established mechanism for the distribution of powers among the principal organs of the United Nations. However, as the practice of the U.N. shows, the formation of the conviction of the international community of the need to strengthen the international legal significance of consolidated norms from various treaties and other legal acts can be channeled into the declarations of the U.N. General Assembly.

The term “declaration” in itself cannot indicate the legal binding nature of the document; most often it has a recommendatory character. Nevertheless, the provisions of certain legal acts, titled “declarations,” adopted by the U.N. General Assembly as recommendations, could eventually become a reflection of customary international law or become binding as a rule of customary law. Consequently, the mere fact of the adoption of the declaration may be evidence of the conviction of the international community of the importance of an issue.

In the European region, the requirement for the full implementation of the rights set forth in international human rights instruments may be addressed to the EU, which, in order to implement its common foreign policy, resorts to the use of such an instrument, at least legally controversial, without giving due importance in some

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<sup>58</sup> The first Resolution of the U.N. Human Rights Council 27/21 “Human Rights and Unilateral Coercive Measures” was adopted on 26 September 2014. The latest resolution, with the same title and designated 37/21, was approved by the Human Rights Council on 23 March 2018.

<sup>59</sup> HRC Resolution 27/21, *supra* note 58.

cases to the universal mechanisms of the U.N. and the basic principles of international law aimed at guaranteeing the sovereignty of the state in the domestic sphere.

At the same time, the Council of Europe sees the achievement of the rule of law and the protection of human rights as its main task. The Council of Europe has several legal instruments to ensure its objectives in the field of human rights, in particular the European Convention on Human Rights (ECHR), and acting on its basis, the European Court of Human Rights (ECtHR), as well as a number of expert bodies such as the European Commission for Democracy through Law (Venice Commission). To date, the ECtHR has considered a number of cases related to the introduction of U.N. or EU sanctions against individuals, which have become the subject of scholarly research.<sup>60</sup> The specificity of the jurisdictional mechanism of the ECtHR does not allow it to consider complaints of citizens of some member states against other states that impose sanctions regimes, especially since it does not have such competence in respect of EU legal acts.

In these circumstances, it is reasonable to draw attention to unused resources, which could include the Venice Commission.<sup>61</sup> This commission is an advisory body of the Council of Europe in the field of legal guarantees of democracy. Its objectives are to promote the basic values of the rule of law, human rights and democracy.<sup>62</sup> It can therefore be concluded that the issue of the rule of law and the protection of human rights in the European region, which have been subject to restrictive measures as a result of sanctions, may be the subject of a study by the Venice Commission. Taking into account its high authority, the relevant research will provide an impartial and objective, scientifically based position on this problem.

## Conclusion

In closing this study, the following conclusions can be drawn.

First, it is necessary to expand the range of interdisciplinary studies of economic and legal instruments to counter the illegal unilateral use of coercive measures that

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<sup>60</sup> See *Корякин В.М. Невоенные санкции против России: правовой аспект: Монография* [Victor M. Koryakin, *Non-Military Sanctions Against Russia: Legal Aspect: Monograph*] 179–180 (Moscow: Yurlytynform, 2015). However, the author hypothetically proposed the possibility for the citizens of Russia and for the Russian entities to apply to the ECtHR and to the Court of Justice of the European Union (CJEU) with their complaints and claims regarding the EU sanctions. More detailed information, in Penelope Nevill, *Interpretation and Review of UN Sanctions by European Courts: Comity and Conflict in Research Handbook on UN Sanctions and International Law*, *supra* note 14, at 418. The author analyzed the judicial practice of the European courts, both national and international (ECtHR, CJEU) concerning the hearings on resolving the litigations connected with U.N. Security Council sanctions.

<sup>61</sup> More detailed information about this institution of the Council of Europe, in *Хабриева Т.Я. Венецианская Комиссия как субъект интерпретации права: Монография* [Talia Ya. Khabrieva, *Venice Commission as a Subject of Interpretation of Law: Monograph*] (Moscow: Statut, 2018).

<sup>62</sup> See more detailed information, in *Id.* at 23.

have a negative impact on international economic relations and the international legal order as a whole.

Second, it is advisable to continue to develop computer models for assessing the consequences of state management decisions taken during inter-country economic wars, with a view to their further use in the system of distributed situation centers of Russia, designed, among other things, to become effective tools for quantifying the consequences of international legal sanctions.

Third, research interest should be focused largely on gaps and the little-studied problem of the legitimacy of non-military collective coercion practiced by regional international organizations. In order to find mechanisms to overcome undesirable illegal situations that threaten the sovereignty of states, and their complete exclusion from the practice of international relations, it is advisable to explore the possibility of doctrinal development of the legal model of coordination by the U.N. Security Council of various forms of individual and joint coercion.

Fourth, there is a need to continue studying the international legal "soft" mechanisms for limiting the adoption or implementation of unilateral coercive measures by states and regional international organizations that are not in accordance with international law and the U.N. Charter (U.N. General Assembly resolutions), and in the future to move to the development of not just a resolution but a declaration of the U.N. General Assembly, integrating the most important principles of sovereignty in the economic sphere and international human rights standards, including the right to development.

We emphasize the importance of studying the possibility of using the democratic and expert potential of other regional integration associations to conduct relevant studies of the international legal framework for the application of unilateral coercive measures (sanctions), which should serve to achieve the rule of law at the universal and regional level.

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