Frédéric Dopagne, *Les contre-mesures des organisations internationales*, Louvain-la-Neuve: Anthemis – Bibliothèque de l'Institut des hautes études internationales de Paris (collection dirigée par Jean Combacau et Joe Verhoeven), 2010, ISBN: 9782874552526, 488 pp., € 95,20.
doi:10.1017/S092215651200074X

By their very nature, countermeasures and international organizations appear to have an uneasy relationship. While countermeasures are considered remnants of a 'primitive' decentralized international legal order,[1] international organizations are seen as harbingers of an increasing centralization and even constitutionalization of international law. With this difficult relationship in mind (p. 21), Frédéric Dopagne's book *Les contre-mesures des organisations internationales* sets out to combine these two individually complex topics. More precisely, Dopagne examines whether international organizations are authorized by virtue of international law to take countermeasures (p. 13), defined as intrinsically unlawful acts that are justified as a response to an alleged internationally wrongful act. In light of the ILC's recent adoption of the Articles on the Responsibility of International Organizations (ARIO) on second reading,[2] his book is not only timely but also a welcome addition to the literature on countermeasures. In seeking to offer 'a more complete understanding of the regimes of state countermeasures' (p. 21), it may even bespeak an increasing acceptance of the concept of 'countermeasures' whose codification in the 2001 Articles on State Responsibility for Internationally Wrongful Acts (ASR) had met with substantial opposition.[3] More importantly, Dopagne's book demonstrates that (and how) the rules and principles on countermeasures taken by states can also be applied to international organizations. Indeed, his book is the first comprehensive study of the topic of countermeasures by international organizations.[4] Needless to say that it is difficult to do justice to Dopagne's sizeable work, but a few critical notes are nonetheless warranted.

Part I of Dopagne's book begins with an examination of the capacity of international organizations to take countermeasures, which inevitably leads the author to enter the debate on international legal personality. Unlike many other contributions to this debate, Dopagne's approach is marked by a structured discussion of the relevant terms – especially personality, capacity, and competence – which he attempts to set in relation to each other. In this context, Dopagne takes a clear stance by arguing that certain legal capacities are inherent in legal personality, which is

1 In this regard see the study of D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (1994).

2 ILC Report, Sixty-Third Session, UN Doc. A/66/10 (2011), 50–170, as taken note of by the UN General Assembly in UN Doc. A/66/100 (2012). Published in 2010, Dopagne's book is based on the first reading of the ARIO, which was completed in 2009 (ILC Report, Sixty-First Session, UN Doc. A/64/10 (2009), 13–178).

3 The inclusion of countermeasures in the law of responsibility has been a bone of contention in drafting the ASR. On the different positions of states see the First Report of the Special Rapporteur James Crawford, UN Doc. A/CN./490 (1998), paras. 30–31.

4 As the title suggests, A. Tzanakopoulos's recent book *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011) focuses on a different, albeit closely related, scenario: countermeasures by members in reaction to wrongful sanctions.

attributed by international law (pp. 30 ff.). While the knowledgeable reader may assume that Dopagne endorses the objective position on the legal personality of international organizations, his argument takes a somewhat unexpected subjective turn towards the will or intention of member states. According to Dopagne, legal personality only conveys three core capacities: the capacity to conclude treaties, the capacity to establish diplomatic relations, and the capacity to participate in responsibility mechanisms, including the resort to countermeasures (pp. 50 ff.). As the author explains, these three capacities are indispensable for participation in the social relations of the international legal order (p. 35). With the problematic exception of individuals (p. 36), he hence argues that these core capacities are common to all subjects of international law, including international organizations (p. 35), which would otherwise be 'sujets "'amputés"' (p. 31). In contrast, any other capacities – Dopagne names the capacity to ask for an ICJ advisory opinion, the capacity to administer a territory, and the capacity to wage war (p. 41) – are attributed by member states.

The urge to accommodate both the subjective and objective stances on the legal personality of international organizations is understandable but problematic. Although Dopagne's approach could be called innovative, it is difficult to reconcile with the classical arguments against subjective approaches to the legal personality of international organizations.[5] For instance, most constituent instruments do (still) not make explicit statements regarding the legal personality or capacities of international organizations. Moreover, third parties may be left in a legal limbo as long as they do not know which capacities an international organization possesses by virtue of the intention of its members. While these arguments can be and have been countered in legal scholarship, Dopagne does not engage with this fundamental debate in international institutional law. Instead he continues to explain that states, unlike international organizations, have the 'ensemble of legal capacities' by virtue of their sovereignty (p. 41). In this regard, he makes clear that sovereignty only accounts for those core capacities that are not inherent in legal personality. Yet, he offers remarkably little discussion of the 'essentially contested concept' of sovereignty,[6] so that the reader is left wondering how sovereignty relates to the legal personality of the state.

Dopagne eventually reverts to discussing the subjective and objective origins of the powers of international organizations when delineating capacity from competence. According to the author, capacity is an abstract legal power that cannot be qualified in terms of 'full' or 'limited' capacity (p. 43), whereas competence determines the scope of powers of a subject and thus merits the attributes 'general' (states) and 'specific' (international organizations). This position stands in notable contrast to most of international- and also domestic-law scholarship,[7] and it may raise some

5 For an overview of the debate see J. Klabbers, *Introduction to International Institutional Law* (2009), 46–52.

6 Sovereignty has been suitably described and discussed as an 'essentially contested concept' by D. Sarooshi in his study on *International Organizations and Their Exercise of Sovereign Powers* (2005), at 3–17.

7 See, for instance, H. Mosler, 'Subjects of International Law', in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 7 (1984), at 442–59. See also H. Kelsen, *Pure Theory of Law: Translated from the Second (Revised and Enlarged) German Edition by Max Night* (2009), at 148–9, observing the close kinship

questions as to Dopagne's argument on the capacity to take countermeasures. For although the capacity to take countermeasures is attributed by the international legal system, member states could potentially internally diminish this capacity by limiting the competence of an international organization to an absolute minimum. As a matter of fact, Dopagne confirms that competence – while not being a condition for the capacity to take countermeasures – may affect the legality of countermeasures by an international organization, which have to be taken within the limits foreseen by its member states (p. 49).[8]

As his subsequent investigation of the capacity to take countermeasures in the practice of international organizations reveals, the questions raised by Dopagne's argument result from a lack of distinction between the inter-subjective relations in the internal legal order of an international organization and its external relations with other subjects of international law. Like the ILC, Dopagne had to grapple with the scarcity of practice of countermeasures taken by or against international organizations. In fact, the ILC considered not including a part on countermeasures corresponding to Chapter II of Part III of the ASR into the ARIO.[9] And like the ILC,[10] Dopagne reacts with a twofold strategy: he first emphasises that the lack of references to countermeasures in the practice of international organizations does not mean that they are explicitly excluded, and second he uses an enlarged definition of countermeasures that includes the relations between an international organization and its members (pp. 79 ff.). Consequently, Dopagne's definition of countermeasures seems to encompass measures taken by an international organization against a member in reaction to a violation of an international obligation owed to the organization, in particular when those reactions are not explicitly prescribed in the constituent instruments. The result is disconcerting: the author discusses measures taken by an international organization against its members in the form of suspension of participatory rights or exclusion from the organization or certain organs at the same level as traditional countermeasures such as the suspension or termination of treaty obligations, taken in particular by the EU against third parties.[11] Dopagne notes the qualitative difference (p. 107) and formulates his conclusions carefully, but the few instances of practice identified by the author still come at the high price of conceptual inconsistency.

---

between the concepts of 'capacity' and 'competence' that both refer to legal power, used in the private- and public-law contexts, respectively.

8 Dopagne thereby relies on the Seventh Report on Responsibility of International Organizations by the Special Rapporteur, Giorgio Gaja, UN Doc. A/CN.4/610 (2009), FN 191.

9 See the Fourth Report on Responsibility of International Organizations by the Special Rapporteur, Giorgio Gaja, UN Doc. A/CN.4/564 (2006), para. 25. Although the special sapporteur ultimately suggested a set of draft Articles on countermeasures in his Sixth Report (see UN Doc. A/CN.4/597 (2008), paras. 40–66), the ILC remained divided on the issue in its deliberations (see Provisional Summary Record of the 2964th Meeting, UN Doc. A/CN.4/SR.2964 (2008), in particular at 20).

10 See Article 21 of the ARIO on first reading, which the ILC attenuated on second reading in Article 22 of the ARIO, requiring that countermeasures against members are explicitly provided for in the rules of the organization.

11 See, for instance, the Case No. C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] ECR I-3655, discussed by Dopagne on p. 130.

https://doi.org/10.1017/S092215651200074X Published online by Cambridge University Press

It is true that the constituent instruments of international organizations do not always prescribe all measures taken by an international organization against their members acting in that capacity.[12] However, a characterization of such institutional measures as countermeasures would have required a thorough examination of existing approaches to institutional sanctions. Since Dopagne indicates treating institutional sanctions only at the margin of his study (p. 18), his characterization of measures not envisaged in the constituent instruments as countermeasures appears to be more presumed than argued. It is noteworthy that the author rightly observes that an international organization is not a party to its own constituent instruments (p. 82). Yet, he takes this observation to contend that only the contracting parties to the constituent instruments, alias member states, can exclude another member from the organization by means of the exception of non-performance under the law of treaties. Consequently, the decision of an international organization such as the Universal Postal Union (UPU) to exclude South Africa for acts of apartheid could only be justified as a countermeasure by the organization (pp. 82–3).

While the distinction between countermeasures and the exception of non-performance is far from clear in this context and throughout his study,[13] it is more regrettable that Dopagne hardly evaluates his findings in view of the relevant literature on international organizations. Such literature comprises international institutional law but also recent trends in international legal scholarship such as international constitutionalism and the projects on global administrative law or the exercise of public authority by international institutions.[14] Otherwise he may have recognized that the relations between an international organization and its members follow a constitutional dynamic, which allows for implied powers in addition to the explicitly attributed powers of an international organization in relation to its members. The neglect of this constitutional dimension certainly explains why the author has difficulties in construing a legal relationship between an international organization and its members that would justify using the language of countermeasures. Dopagne suggests that members have a subjective right to participate in the work of an international organization (p. 89), but does not specify under which legal regime the international organization owes the corresponding obligation to its members. As observed above, Dopagne explicitly excludes the law of treaties in the relations between an international organization and its members. Surely, it cannot be argued that states have a general right to participate in a particular international organization or to not be excluded from it that they can claim against the

12 This is not to say that an international organization cannot occasionally interact with its members in their capacity as states under international law, for instance when concluding an international agreement. On this crucial distinction see H. G. Schermers and N. M. Blokker, *International Institutional Law* (2011), at 1082 (para. 1688).

13 On this difficult distinction see J. Crawford and S. Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility', (2001) 21 *Australian Yearbook of International Law* 55–74.

14 For critical discussion of constitutionalism in relation to international organizations see J. Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31–58. On the two above-mentioned projects see, respectively, B. Kingsbury, N. Krisch, and R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law & Contemporary Problems* 15–61; and A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

organization under customary international law. Only if such a right to participate existed vis-à-vis the organization under international law could such institutional measures be characterized as countermeasures by the international organization.

In Part II of his book on the title of an international organization to take countermeasures, Dopagne seems to partly prescind from his peculiar definition of countermeasures. As is well known, the law of responsibility, as codified by the ILC, entitles states to take countermeasures based on a violation of an individual interest or a violation of a common interest. In line with his argument, Dopagne persuasively explains that international organizations may be injured individually in the same way as states (pp. 153 ff.). However, this is not to say that an international organization can take countermeasures in response to a violation of an individual legal interest of one of its members (pp. 171 ff.). Dopagne submits that not even regional economic integration organizations such as the EU can act on behalf of their members (pp. 179 ff.), acknowledging the difficulties of this view in cases of extensive conferrals of powers to an international organization (p. 186). Like states, international organizations other than the injured state or organization can only take measures in reaction to a violation of a common interest owed *erga omnes (partes)*. Interestingly, Dopagne distinguishes here between internal and external relations *erga omnes partes*. As the author observes, an international organization can only maintain external relations *erga omnes partes* as, for example, the EU does in the framework of the UN Convention on the Law of the Sea; it does not partake in the internal relations *erga omnes partes* between the contracting parties to its constituent instruments. Accordingly, he submits that wrongful acts such as the withholding of membership dues – as a possible basis for countermeasures – are not directly addressed against the international organization because the obligation in question is owed internally *erga omnes partes* only to the contracting parties to the constituent instruments (pp. 214 ff.). Dopagne thus convincingly concludes that measures taken in response to such breaches of the rules of the organization are not countermeasures by the organization but by the contracting parties to the constituent instruments of that organization.

Nonetheless, Dopagne falls back into old patterns when discussing countermeasures taken in reaction to violations of obligations owed *erga omnes*, in particular peremptory norms of international law. Considering his continuing oscillation between the internal and external sphere of an international organization, it is not surprising that Dopagne does not oppose the ILC's controversial view that the competences or functions of an international organization may limit it in taking countermeasures. Although he criticizes Article 57 of the ARIO (Article 56 on first reading) for its *renvoi* to the functions of the organization as a limitation, as stipulated in Article 49(3) of the ARIO (Article 48(3) on first reading), he does so for methodological reasons (pp. 269 ff.). As the author explains, the functions and competences of an international organization do not affect its title to take countermeasures under general international law. But Dopagne concedes that the competences of an international organization may limit it in taking countermeasures in accordance with the specific rules of the organization (pp. 271–2). This concession may be consistent with his argument in Part I of his book; however, it is subject to the above-noted

objections and weakens his main argument that international organizations can resort to countermeasures in the same way as states.

Part III of Dopagne's book treats the relationship between countermeasures and other consequences of wrongful conduct as well as the conditions for the resort to countermeasures by an international organization. It is here that Dopagne at least partly engages in the discussion that one would have expected from him in Part I of his book. More precisely, he examines how countermeasures relate to treaty measures and institutional sanctions against the background of the debate on self-contained regimes. The question whether self-contained regimes exist or not is deeply entrenched in international legal scholarship. Like other authors, Dopagne concludes that countermeasures are usually subsidiary to institutional sanctions and treaty measures but cannot be completely excluded. Relying inter alia on Simma and Pulkowski's pertinent study,[15] Dopagne identifies the 'total effectiveness' of existing procedures in an international organization as the decisive criterion for such a 'fall-back' (p. 337). Unlike Dopagne, however, the existing literature on self-contained regimes has mostly concentrated on countermeasures between states in their international relations. The reader of Dopagne's book would have expected additional explanations as to why the criterion of 'total effectiveness' is to be applied to the institutional relations between an international organization and its members, especially with regard to measures such as the suspension of participatory rights that have a questionable basis in general international law. It is clear that for autonomous subjects of international law, institutional sanctions are also treaty measures whose failure may indeed lead to the application of countermeasures under general international law. In contrast, an international organization may only take institutional sanctions against its members because it is not a party to its own constituent instruments so that an analogous application of the logic of subsidiary countermeasures is not necessarily compelling. Unsurprisingly, the ECJ has thus objected to measures of self-help in the relations between EU members but not felt the need to explicitly pronounce itself against countermeasures by the EU against it members (p. 320).

As noted by way of introduction to this review, the most significant contribution of Dopagne's book lies in his main argument that the rules and principles of the law of state responsibility are, with the necessary modifications, applicable to international organizations. Dopagne extensively compares the conditions for the taking of countermeasures with regard to both states and international organizations, in particular those pertaining to dispute settlement, respect for certain substantive obligations, and proportionality. He thereby buttresses the approach of the ILC to transpose the rules of the ASR to the ARIO, and also adds to the scant commentaries on the latter. Nonetheless, although the author unerringly identifies aspects of the law of countermeasures specifically relevant to international organizations, some of his key points would also have deserved further elaboration. In particular, Dopagne tends to obfuscate the distinction between the international organization as an

15 B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 EJIL 486, at 509 ff.

international legal person and the international organization as an internal legal order in relation to its members. This obfuscation will inevitably dilute the impact of his study. The reader should therefore take Dopagne's slightly grim outlook in the final lines of his book with the necessary caution, for the author predicts a prosperous future for the decentralized international society that – in his view – continues to persist in the form of countermeasures at the heart of what is habitually considered a lever towards the international legal order's institutionalization: international organizations (p. 431). The taking of countermeasures by international organizations as legal persons certainly confirms the continuation of the decentralized international legal order; however, if the measures taken by international organizations against their members within their own centralized legal orders are excluded from the definition of countermeasures, only few instances are left in which international organizations resort to such means of private justice.

*Christiane Ahlborn**

Kimberley N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects*, Oxford, Oxford University Press, 2011, 295pp., ISBN 9780199592999 (h/b).
doi:10.1017/S0922156512000751

It has perhaps become something of a cliché to regard the attacks of 11 September 2001 and subsequent events as a seismic moment in not only the fight against terrorism but also the way in which we perceive it. Perhaps once thought of as the collective term for individual acts of violence committed by groups of aggrieved individuals against a single state for a particular ideological cause, terrorism has since come to be perceived as something of a global phenomenon affecting all states in one form or another. This change in perception has led to the United Nations becoming more involved in tackling the issue at a systemic level, with the Security Council making greater demands of states and requiring increased co-operation in regard to a wide range of terrorist-related issues and the General Assembly addressing terrorism in a more general sense as opposed to specific manifestations of it. Furthermore, in the military context this globalization of the terror threat has led to the notion of a global 'war on terror' becoming prominent in some quarters.

In the contemporary environment states are also under an obligation to refrain from participating in, to prevent, and to punish terrorism like never before. The regulation of states' responsibility for failing to abide by these obligations – which are of both a positive and a negative nature – are fraught with difficulties, not least of all due to the covert nature of the terrorist activity concerned and because the capabilities and intentions of states are so varied. It is this general facet of the phenomenon that Kimberley Trapp in *State Responsibility for International Terrorism*

* Ph.D. Candidate, Amsterdam Center for International Law, University of Amsterdam [c.s.ahlborn@uva.nl].