

*UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY* BY ENRICO MILANO (LEIDEN, THE NETHERLANDS: MARTINUS NIJHOFF PUBLISHERS, 2006) 300 PAGES. PRICE US\$133.00 (HARDCOVER) ISBN 9004149392.

This is an excellent book. It is the most thorough and comprehensive examination of the doctrine of ‘effectiveness’ — the occupation and control of a territory for the purpose of establishing international legal recognition — that I have read to date. It is clear and logical in its exposition, organised, and exceptionally well researched and documented. The doctoral thesis that was the precursor to this book was the deserving recipient of both the 2004 Alberico Gentili Prize and the 2005 Georg Schwarzenberger Prize.

As the substantive issues of the doctrine of effectiveness are so expertly treated by Milano, I shall largely refrain from any critical assessment of the book’s handling of the ‘black-letter’ aspect of the principle. Instead, I would like to focus on a number of theoretical points and issues that this book raises. Although the ‘Preface and Acknowledgements’ section of a text should not ordinarily be invested with significant critical weight, there is one passage that is highly revealing of what is to come. The author declares of his experience writing his doctoral thesis at the London School of Economics, ‘I was lucky enough to find myself in a British academic environment that would be naturally suspicious of purely theoretical or doctrinal work.’<sup>1</sup> It shows.

## I UNLAWFUL TERRITORIAL SITUATIONS

As the author rightly declares, ‘the concept of unlawful territorial situation[s] is a relatively unexplored subject’.<sup>2</sup> As the topic of the book may not be familiar to the general reader, a few words of explication may be in order. Milano correctly defines a territorial situation as ‘a state of affairs where an international actor displays actual control *and* general authority over a certain territory’.<sup>3</sup> The distinction between ‘control’ and ‘authority’ is crucial. An illegal territorial situation arises precisely where control has been established but the state of control is itself devoid of authority. Both Palestine<sup>4</sup> and Kosovo<sup>5</sup> are outstanding examples of such situations. The ‘international actor’, or ‘international person’, may be a state, an intergovernmental organisation (‘IGO’), a national liberation movement or, most timely, ‘potentially even a terrorist group’.<sup>6</sup> ‘Territory’, in turn, is usefully defined as

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<sup>1</sup> Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (2006) xiii.

<sup>2</sup> *Ibid* 9.

<sup>3</sup> *Ibid* 6 (emphasis in original).

<sup>4</sup> *Ibid* 159–65.

<sup>5</sup> *Ibid* 234–65. The author’s discussion of the illegality of the NATO action against Serbia is one of the best that I have read and should give pause to even the most self-assured of human rights advocates.

<sup>6</sup> *Ibid* 6.

‘the spatial framework within which a general legal authority is exercised’<sup>7</sup> — this explicit linkage between the juridical and the spatial, introducing an under-utilised geographic set of concerns, is one of the most attractive features of the book. Finally, we come to the ‘bright-line distinction’, that which objectively demarcates the juridical difference between lawful and unlawful territorial situations: the presence of ‘illegal authority’.<sup>8</sup> Milano states:

When referring to ‘illegal authority’, I do not refer to an authority exercised in accordance with the law, or, more specifically, in accordance with international law, but an authority capable of displaying juridical effects, *regardless whether the legal basis [of the occupation] is valid or invalid*.<sup>9</sup>

Here we encounter, in microform as it were, the fundamental philosophical problem that dogs the entirety of Milano’s work: the inconsistent and uncertain slippage between normative and factual modes of analysis, producing unsustainable frissons within the text. One asks: how can truly lawful juridical effects exist within a territorial situation the ‘legal basis’ of which is itself invalid? To pose this question is to invoke a straightforward natural law appraisal that uses foundational norms and values to invalidate the material action of the state in a given situation. The problem with this approach is precisely that it is naturalist: states understand the existence of their own legal personality in terms of positivism and can, therefore, maintain the presupposition of ‘illegal authority’ by shifting the terms of reference to the positive constitution of the actor implementing the juridical effects. Of course, the difficulty here is that the certainty of the presence of an objective unlawful territorial situation is put at risk, for the entire issue becomes one of auto-interpretation by the state actor.

Here, Milano, perhaps unconsciously, flags his extreme dependence upon the work of the leading new stream international legal scholar Martti Koskenniemi. The essence of Koskenniemi’s brilliantly simple argument is that international legal discourse is nothing other than rhetoric, perpetually alternating between naturalist and positivist modes of discourse. Consequently, international law is never self-grounding; a wholly positivist or a wholly naturalist approach will yield incoherence. International law, therefore, evades this discursive bind by shifting rapidly and continuously between the two poles, but always — and this is most important — with a sense of deliberate unawareness of its own stratagems.<sup>10</sup>

Milano’s indebtedness to Koskenniemi is revealed in his attempt to resolve the paradox of ‘illegal authority’, as a sign of an unlawful territorial situation, by acknowledging the presence of an unstable synthesis of naturalism and

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid (fn 18) (emphasis added).

<sup>10</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

positivism:

This is possibly due to the perception that international law had reached a stage of development, where its function was no longer to accept social reality as it is [positivism], but rather to promote and occasionally impose common values and normative standards of international justice [naturalism].<sup>11</sup>

As Milano realises, the danger of relying upon an exclusively positivist approach is that it creates the intolerable situation wherein an international actor is able to secure for itself a legal right or benefit, such as international recognition, through an action that is commonly understood to be illicit, thereby violating the ancient Roman maxim of *ex iniuria ius non oritur*.<sup>12</sup> Milano explains:

The exercise of territorial jurisdiction, in other words of general legal authority over a certain territory, is normally accompanied by the presumption that the subject exercising such jurisdiction has a right to do so. This is due to the role that the concept of effectiveness has played in the way international law has developed its basic concepts. However, the presumption can be rebutted, and, in certain circumstances, the display of legal authority may not be complemented by a valid legal basis. In other words, the basis of those legal powers may be invalid under international law or in conflict with one or more international law norms. Thus, the definition of unlawfulness concerning territorial situations relates in principle to the right or the competence to rule over a certain territorial area, rather than the fact that such competence is exercised, or the way in which it is exercised.<sup>13</sup>

Milano's dilemma is the same as the philosophical conundrum that haunts so much of international legal theory: the 'is/ought' dichotomy. On what basis, and under what conditions, is it valid to infer a normative principle — here, a 'right' — from a given fact situation? In order to prevent the 'crime' of the unlawful occupation from generating a right for the impugnable international actor, Milano must make an appeal to wholly normative considerations of legality and state practice — Koskenniemi's discursive oscillation<sup>14</sup> in miniature: 'By looking at its doctrinal elaboration, the book shows that the ambiguities inherent in the concept of effectiveness itself, as a concept that *can be both situated within positive law and outside this latter*'.<sup>15</sup> Whether Milano succeeds in maintaining logical coherence in making this move will constitute the remainder of this review.

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<sup>11</sup> Milano, above n 1, 10–11.

<sup>12</sup> A right does not arise out of wrongful conduct.

<sup>13</sup> Milano, above n 1, 8.

<sup>14</sup> See Koskenniemi, above n 10.

<sup>15</sup> Milano, above n 1, 11 (emphasis added).

## II TAKING SOVEREIGNTY SERIOUSLY

In Milano's own words, his book

argues that the concept of effectiveness is deeply entrenched in the ideas of statehood and territorial sovereignty, and that the substantive principles of legality developed after World War II<sup>16</sup> arose as a limitation on effectiveness. Furthermore, the book shows how these principles of legality often work at an unsophisticated level due to the inherent strength of the concept of effectiveness [positivism], as they fail to dictate a full invalidity of unlawful territorial situations, and to decisively impact on the application of other legal norms and claims. Most importantly, the choice to focus on the phenomenon of *unlawful* territorial situations unveils a driving motive and foundational question behind the present study: the truly critical aspect of the concept of effectiveness is that of the violation of international law and the creation of new law as a result of that violation. To what extent, if any, does international law recognise the effects produced by its violations, and what is the exact relationship between the original violation and subsequent recognition of legal effects?<sup>17</sup>

One is tempted to a 'riff' on Clemenceau's famous quip: 'International law is too important to be left to states'. Of course, one can always dismiss considerations of this kind like so much useless hand-wringing; states have decided among themselves, positively expressed by majoritarian consent, that conquest is illegal and that, ergo, any territory so occupied has been illegally acquired. There is no need for 'theory', especially of a naturalist variety, because the positive reality of international law has successfully encapsulated the totality of transnational space and has objectively eroded the sovereignty of the state actors, binding them to law-complying behaviour. The problem here is twofold. Firstly, there is an unfortunate tendency amongst international lawyers to overestimate their own relevance: a legally exhausted transnational space is 'good' for legality, so it must be so. The recent comeback of a ruthless unilateralism during Gulf War II and the latest Israeli incursion into Lebanon should do away with any underestimation of the visceral necessity of forcibly binding the militarily aggressive sovereign once and for all. Secondly, and more to the point, not all, nor even most, unlawful territorial situations come under the rubric of the reasonably well-defined legal situation of 'conquest' — Israel in Palestine, NATO in Kosovo, and Australia in Iraq are all outstanding examples of open-ended occupations which are not categorically acts of conquest.

Milano's dilemma, therefore, remains: the 'creation of new law as a result of that [prior] violation' — signified by the material reality of the unlawful territorial situation — gives rise to the paradoxical result of 'illegal authority' or, expressed another way, of 'authority which is not'.<sup>18</sup> Such a beast is wholly unrecognisable within the terms of reference of pure positivism. Understood broadly: what, if anything, can international law appeal to in order to *objectively* invalidate a state's voluntary recognition of an unlawful territorial

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<sup>16</sup> An era rife with unlawful territorial situations.

<sup>17</sup> Milano, above n 1, 12 (emphasis in original).

<sup>18</sup> Ibid.

situation, where the said recognition constitutes the ‘right’ or the benefit that the unlawful occupier is seeking to obtain? Or, expressed even better: what can international law ultimately rely upon in order to be saved from its own positivist self?

Milano deftly articulates the cruel circularity that underlies orthodox ‘recognition doctrine’. The physical terms of state personality, expounded in the *Montevideo Convention on the Rights and Duties of States*,<sup>19</sup> cannot be used as the basis of a self-grounding and self-validating positivist model because of the unconditionally volitional nature of state recognition.

One may argue that this is part of the reality of the international legal system, or to use David Kennedy’s words, the ‘dark side’ of international law. The argument is that international law often cannot avoid the antinomy between effectiveness and validity and ‘the catastrophic alternative between either denying the normative character of international law, or creating a fiction, incapable of serving even the minimum needs of international intercourse’.<sup>20</sup>

One of the most attractive features of Milano’s book is its intelligent and meticulous employment of new stream international legal scholarship, predominantly the works of Koskenniemi,<sup>21</sup> Kennedy<sup>22</sup> and Carty.<sup>23</sup> For Milano, as with other members of the new stream, the overriding question is always a foundational one: wherein lies international legality? What, if anything, grounds the deciding principle that may operate objectively to limit the scope of the purely positivist doctrine of effectiveness so that an unlawful territorial situation does not give rise to a legally recognised right?

The problem here appears intractable, as recognition itself is the state act that confers legality upon any territorial situation, lawful or unlawful. It is highly refreshing to encounter another international legal scholar who actually takes the statist concept of sovereignty, and the dangers that it entails, seriously. And, in full accordance with new stream theory, Milano can only come to something approaching a coherent view of international law by stepping outside it altogether and introducing extra-legal factors for consideration — in other words, law as a continuation of politics by other means.

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<sup>19</sup> Opened for signature 26 December 1933, 165 LNTS 19, art 1 (entered into force 26 December 1934).

<sup>20</sup> Milano, above n 1, 16, quoting Krystyna Marek, *Identity and Continuity of States in Public International Law* (1968) 566 (citation omitted).

<sup>21</sup> Koskenniemi, above n 10.

<sup>22</sup> David Kennedy, *International Legal Structures* (1987).

<sup>23</sup> Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986).

## III LAW, POLITICS AND POWER

For Milano, the solution of the positivist paradox lies with careful consideration and application of the concept of legitimacy:<sup>24</sup>

The present study tries to reconcile the inherent ambivalence of effectiveness as a juristic concept on the borderline between norm [naturalism] and social reality [positivism], by considering the concept of legitimacy and how legitimacy may represent the key to reconciling an effectiveness that is in violation of international law and the creation of new law in illegal territorial occupations.<sup>25</sup>

Milano's self-imposed task is to provide the basis of a self-grounding positivist theory that is both factual and normative but that obviates the otherwise necessary shift to naturalism. Strikingly, he seeks to do this by substituting a new form of discursive shift — not within law but outside of it — appealing directly to interdisciplinary considerations:

We can preliminarily define legitimacy as the subjective perception that a certain rule<sup>[26]</sup> and conduct or situation corresponds to the normative values of a certain society and therefore ought to be obeyed, justified or recognised. The hypothesis of the present study is that while general recognition is the process through which unlawful territorial situations can gradually become lawful, the legitimacy of the underlying claim or the legitimacy conferred by an authoritative body is the discursive tool used by the occupying powers to attract recognition of the unlawful territorial situation. The ambivalence of the concept of legitimacy and the fact that, while building on the foundational principles of the international community, it goes beyond positive international legality, show how legitimacy can be a very 'efficient' complement to effective power by providing, compared to legality, for less objective and less transparent criteria of power recognition in international law.<sup>27</sup>

The argument is as simple as it is brilliant: since occupiers deploy claims of legitimacy as a means of obtaining legal recognition by the other legal actors, the critical examination of the claim of legitimacy itself can serve as the reliable basis for objectively distinguishing between lawful and unlawful territorial situations. Any territorial situation that cannot be conclusively demonstrated as 'legitimate' is unlawful and does not merit recognition; any international actor that would recognise such a situation can be shown to be in breach of its international legal obligations.

Eschewing the supine liberalism of Ronald Dworkin,<sup>28</sup> Milano is robustly new stream in his approach, exhibiting a clear appreciation of the pitfalls of attempting to explain 'law' in terms of legality. The true self-knowledge of the collective enterprise known as 'law' must be interdisciplinary in nature and

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<sup>24</sup> Milano, above n 1, 190–204.

<sup>25</sup> *Ibid* 17.

<sup>26</sup> Note that Milano does not use the term 'law'.

<sup>27</sup> Milano, above n 1, 17 (citation omitted).

<sup>28</sup> See especially Ronald Dworkin, *Taking Rights Seriously* (1977).

thus extra-legal in origin:

Legitimacy can work *beyond the positive norms* to allow a recognition of an originally unlawful situation by the legal system. The international community, in particular through its authoritative bodies such as the [Security Council], recalls the ‘unique’ or ‘exceptional’ nature of specific situations — in particular those where the legal norms cannot limit hegemony — and it uses broad and often vague principles such as the ‘maintenance of peace and security’, ‘the protection of human rights’, ‘the promotion of self-determination’, in order to ‘normalise’ the illegality.<sup>29</sup>

Milano provides as material proof of his argument a highly insightful and useful discussion of Security Council *Resolution 1546*<sup>30</sup> which explicitly addressed the legality of the occupation resulting from the armed intervention into Iraqi territory/space by the ‘Coalition of the Willing’. The preamble states:

*Welcoming* the beginning of a new phase in Iraq’s transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004 ...<sup>31</sup>

By this political–rhetorical manoeuvre, the cogency of international law is maintained. *Resolution 1546* legitimises only the resultant occupation and not the original illegal act of forcible intervention. Further, the said occupation is lawful solely because its purposes coincide with the prevailing and governing norms of the international legal system: democratisation and the self-determination of peoples.<sup>32</sup> Milano is thus perfectly justified in concluding that

a simple proposition may explain effectiveness’ enduring relevance to international law: international law needs to accept social realities [positivism], in order to become effective. This point is illustrated through the case of Iraq. Whereas it has been argued that ‘using’ the [Security Council] has been the way for the Coalition states to legitimise and, in the long run, legalise their violating effectiveness, paradoxically, going back to the [Security Council] has also meant making international law again relevant, in other words effective.<sup>33</sup>

For Milano, therefore, the establishment and verification of legitimacy within the legal argument relating to the existence of an unlawful territorial situation is inseparable from the broader issue of ‘authority’ — an inherently elusive

<sup>29</sup> Milano, above n 1, 17–18 (emphasis in original) (citations omitted).

<sup>30</sup> SC Res 1546, UN SCOR, 58<sup>th</sup> sess, 4987<sup>th</sup> mtg, UN Doc S/RES/1546 (8 June 2004).

<sup>31</sup> *Ibid* 1 (emphases in original).

<sup>32</sup> It is interesting to note that the actual moment of invasion was not legitimated in terms of protection of human rights. Despite the overwhelmingly liberal bias of contemporary international legal scholarship — primarily expressed through human rights law — states themselves remain absolutely unwilling to expressly recognise a customary ‘right’ of humanitarian intervention.

<sup>33</sup> Milano, above n 1, 273. A pun? In any event, the weakness of the author’s position should be clear, as will be discussed below. What makes ‘legitimacy’ legitimate? Is it the objective nature of the situation itself or the subjective determination by the participating actors? In the latter sense, the approval of the Security Council accomplishes nothing in terms of the self-validating purpose that legitimacy is to perform, which was the entire reason for its introduction in the first place.

term. Milano follows the definition offered by the neo-Weberian sociologist Peter M Blau:

We speak of authority ... if the willing unconditional compliance of a group of people rests upon their shared belief that it is legitimate for the superior ... to impose his will upon them and that it is illegitimate for them to refuse obedience.<sup>34</sup>

This definition, while of some practical use, is fraught with peril. Milano readily concedes that it is ‘undeniable that legitimacy discourse can be easily manipulated, and it is one of the most sophisticated forms of “soft power” exercised by the hegemon, in the sense that it can perfectly complement the “hard power” of effectiveness’.<sup>35</sup>

Although Milano does not utilise the seminal works of Immanuel Wallerstein<sup>36</sup> or Giovanni Arrighi,<sup>37</sup> it might be useful at this point to make a detour and examine the concept of hegemony in some detail. Any international hegemony, or ‘leadership’, properly exercised — in both the instrumental and the normative sense — will always operate in tandem with the foundational normative principles of international public order. The conferral of status as hegemon upon a particular international actor, whether Sparta or the United States,<sup>38</sup> will itself be determined by the general perception of that actor’s compliance with the then prevailing system of norms. Indeed, the actual creation and maintenance of the international public order is itself the main product of the exercise of the hegemonic ‘function’. As a result, the legitimacy generated by the hegemon

is at least built starting from a general normative framework provided by the fundamental norms of the international society, and by the institutions mandated to uphold and enforce these fundamental norms. Moreover, explaining the process of recognition of unlawful territorial situations through legitimacy helps us to maintain the integrity of the international rule of law, by denying the possibility that an illegal act produces *per se* legal effects considered in accordance with international law in contradiction to the principle *ex iniuria ius non oritur* or, that *a fortiori*, such effects may be lawfully endorsed by authoritative bodies like the [Security Council].<sup>39</sup>

My only serious objection to Milano’s argument is that it does not work.

#### IV WHAT IS SO ‘LEGITIMATE’ ABOUT LEGITIMACY?

The Achilles’ heel of Milano’s normative efforts — as opposed to his descriptive undertakings — is revealed in the concluding sub-section ‘Reconciling Effectiveness, Legality and Legitimacy’, recapitulating the title of

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<sup>34</sup> Peter M Blau, ‘Critical Remarks on Weber’s Theory of Authority’ (1963) 57 *The American Political Science Review* 305, 307.

<sup>35</sup> Milano, above n 1, 202.

<sup>36</sup> Immanuel Wallerstein, *Geopolitics and Geoculture: Essays on the Changing World-System* (1991).

<sup>37</sup> Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (1994).

<sup>38</sup> At this point, I would like to offer my apologies to the ghost of Thucydides.

<sup>39</sup> Milano, above n 1, 202.



the book:

The present work has argued that international law is a set of norms having an objective normative content, equally applicable to all members of the international society and capable of defining issues of territorial sovereignty in a contextual and specific manner. *On the other hand*, by focusing on the concept of effectiveness, it has also addressed the role of international law in legitimising material processes of status recognition in the international society. The book has unveiled this *tension between the egalitarian element and the hegemonic element in the nature of international law*, by looking at the issue of unlawful territorial situations.<sup>40</sup>

The first difficulty is: what is the purpose of the book? If it is merely to highlight the tension within international law between power and equality — the descriptive agenda — then the work is fairly unproblematic. If, however, the objective is an attempt to resolve the ‘problem’ of unlawful territorial situations — the normative agenda — then the book is less successful. As pointed out above, Milano repeatedly slides between descriptive and normative purposes. The second and more fundamental problem is the difficulty he experiences in trying to identify that self-grounding ‘something’ that legitimates ‘legitimacy’, that is, the unveiling of a norm that would effectively bind the international actors against their possible wish to defect from the international legal order. The phrase ‘on the other hand’ implies equivocation — Milano is unintentionally repeating Koskenniemi’s oscillation between naturalist and positivist discourse.<sup>41</sup> This, in turn, points to a degree of logical regression within his own argument: in his quest for a self-grounding legal principle, has Milano not staked everything on making an inter-disciplinary appeal to an extra-legal basis for normative evaluation? In other words, instead of relying upon natural law, Milano keeps international law ‘positive’ but then resorts to non-legal discourse to limit the actions of the state: in this case, the non-judicial theory of legitimacy.

The fundamental unreliability of hegemony as the basis for an internally self-regulating system of law-compliance soon becomes evident:

The point is not that we need to go back to effectiveness as one of the fundamental principles of international law, in order to make law more credible, but that effectiveness is still relevant to the understanding of some emergency situations, where powerful states are determined to go beyond positive law. The book seems in fact to point in the direction of a concept of effectiveness re-gaining ground with regard to vital issues such as territorial sovereignty and, in part, the use of force, to the detriment of legality discourse. This is possibly due to the novel situation of an international society characterised by the existence of a single Super Power, which more and more espouses a Schmittian concept of the law as emergency decision, rather than legal norm.<sup>42</sup>

Milano avoids the most obvious objection at precisely this point: if international law cannot perform on its own the very threshold function of constraining the sovereign when defining the emergency situation (or the

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<sup>40</sup> Ibid 271 (emphases added).

<sup>41</sup> See Koskenniemi, above n 10.

<sup>42</sup> Milano, above n 1, 271–2.

‘exception’) then it cannot be the very thing that it understands itself to be — a genuine system of ‘law’. Even more serious is Milano’s invocation of unipolarity: does effective compliance with international law necessarily depend upon such a thoroughly non-legal, realist construct as the ‘balance of power’? If so, then the capacity of international law to effectively bind the sovereign does not lie within either positivist/factual legality or naturalist/normative lawfulness. Rather, it lies within extra-legal realist calculations of negative harm, suffered as a result of either serious or sustained defections from international public order:

Adopting legitimacy as a device of transformation of illegal effectiveness into a legal one, is also a way for the international community to safeguard the integrity of its principles of substantive legality developed in the last 60 years, *at least in the short run*, despite making them in some cases peripheral to the actual regulation of disputes. In fact, it has been submitted that either we must be ready to accept that a violation of these principles produces *per se* legal effects in the international sphere, or, alternatively, we must find an explanation beyond positive legality in concepts such as effectiveness and legitimacy. The book advocates the latter solution, as the former is simply incompatible with the existence of a rule of law in the international society. ... Starting from this position, an analytical reconciliation between effectiveness and legality is possible, by looking at the concept of legitimacy, and the role it plays in current international law in driving processes of power recognition. Such reconciliation is purely analytical, and in no way it [sic] aims at presenting it as a normative, ideal model; *on the contrary, the model plays against the sustainability of the rule of law in the international society in the long run.*<sup>43</sup>

I would argue that, *contra* Milano, the model of ‘analytical reconciliation’ does not even operate within the scope of the crucially qualified ‘short run’. The fatal flaw lies within the infinite problem of articulating self-validating and self-grounding norms. The entire success of Milano’s project of guaranteeing such an ‘analytical reconciliation’ — which, despite the author’s somewhat ingenuous protests to the contrary, strikes me as inherently normative in nature — comes down to the successful resolution of three essentially empirical questions: Who? What? When?

As far as ‘who’ is concerned, the penny drops when Milano writes:

When a certain *factual background is exactly and uncontroversially matched* by a positive norm definition, legality discourse will provide all we need to analyse the divide [of] lawfulness/unlawfulness. However, when the legal assessment of a certain factual situation requires examination and application of *different and perhaps opposing broad principles*, then it will be exactly legitimacy discourse, which will justify one choice rather than another.<sup>44</sup>

If Carl Schmitt was right in reminding us that in law the truly important question is ‘Who decides?’, then Milano’s formulation faces an insurmountable hurdle.<sup>45</sup> The actual process of norm formation — the lynchpin of positive legality discourse — is, in the first instance, inseparable from the subjective

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<sup>43</sup> Ibid 272 (emphases added).

<sup>44</sup> Ibid 192 (emphases added).

<sup>45</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, 1985 ed) [trans of: *Politische Theologie*].

identities and respective contexts of the actors giving their assent to the norm. The role of both the 'specially affected state' and the 'persistent objector' are critical here, rendering wholly problematic Milano's failure to consider 'social reality' in the mechanics of norm formation. Once again, neither the naturalist/normative nor the positive/realist are self-sufficient within their own terms of reference; each must perpetually signal the existence of the other in order for coherence to eventuate. Milano's telling phrase 'different and perhaps opposing broad principles' constitutes a tacit admission of this very point.<sup>46</sup> The objective presence of norm conflict as part of 'social reality' suggests that any resultant 'objective' resolution of contending meta-normative principles is more likely going to be the result of an intensely subjective exercise of respective power imbalances of the contending parties. It is sobering in this context to recall that, to date, the collective state practice and *opinio juris* of the developing states have failed to crystallise a single international legal custom in the face of opposition by the developed world.

At this juncture, the spectre of 'civilisationalism' raises its Hydra head: only certain privileged states, on the basis of their 'objective' degree of cultural development, are lawfully — or even normatively — empowered to decide international law for the totality of international society. All of this suggests a hierarchy of 'values' that clearly approximates a hierarchy of identities, reflecting asymmetrical relationships of power. Herein, consensus or compliance proves inseparable from coercion, effectively precluding the emergence of a transparent arena of state action and opinion that could serve as a 'real world' basis for the emergence of a self-grounding system of legitimation.

The question of 'what' is equally fraught with peril. If the international rule of law cannot be coherently self-grounding, then the normative regime expressed through international legality becomes contingent upon the continuation of the specifically liberal norms of the current incarnation of international public order. This is being held hostage to fortune on a truly massive scale; Milano's undisguised reference to 'the novel situation of an international society characterised by the existence of a single Super Power, which more and more espouses a Schmittian concept of law as emergency decision, rather than legal norm' acknowledges as much.<sup>47</sup> The aggressive unilateralism of the US is less suggestive of a temporary divergence from normative legality than of the descent of the international public order into an intractable, if not terminal, crisis. The problem of 'what' also provides an explanation for the otherwise curious resurgence of social contract theory within contemporary international legal discourse. Milano is quite direct in his

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<sup>46</sup> Milano, above n 1, 192.

<sup>47</sup> Ibid 272.

treatment of this issue:

Behind the idea of the modern state is indeed the idea of a social contract between the members of the community that decide to renounce to [sic] settle disputes between themselves by force, and delegate the authority to settle their disputes to a centralised system of institutions. Obedience to the law is ensured both by the threat of sanctions and by the belief in a number of shared rules.<sup>48</sup>

A little reflection should make it clear why this is so. The theory of the social contract seeks to obviate the 'is/ought' dichotomy by representing the veracity of the original consensual act as *itself* the material realisation of the normative/moral order. In this way, the 'social reality' of consensus serves as the normative lynchpin of the particular expressions of the moral and legal beliefs of the individual parties. The problem with 'what', however, is exactly the same as with 'who': the original consenting/contracting mechanism is critically unexamined and remains both historically and politically unembodied. At no point do we possess the requisite degree of transparency to validate the legitimating result independently.

Finally, we encounter the intractable problem of 'when'. When is the precise moment in which the authoritative declaration of consent is achieved, signifying the realisation of the self-validating norm? There is the additional practical difficulty of empirically adducing the substantive characteristics of the resultant norm. Terrorism is a perfect example of this. Although there is strong evidence that asymmetrical warfare has crystallised as a negative customary principle, perhaps even *jus cogens*, there is no agreement as to what it actually constitutes. No state would appear to ever actually practice it and the applicability of the category is dependent upon the identity of the international actor engaged in the act of denotation — invoking the unbound problem of 'recognition' all over again.

The semi-submerged rock upon which Milano's ship ultimately founders is the same one that has forever menaced mariners in these treacherous waters: the insoluble problem of a sovereign that is both law-making and law-complying. As long as the state qualifies as a 'sovereign', its defection from the international rule of law can never be conclusively precluded in terms of legality or lawfulness alone. Milano informs us that he is not being normative on this most vital of considerations — he is wrong. In this regard, he really was well served in producing his doctoral dissertation within the English university system. For the English legal academic is right to be suspicious of 'purely theoretical or doctrinal work'.<sup>49</sup> It requires too much thought.

ERIC WILSON\*

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<sup>48</sup> Ibid 13.

<sup>49</sup> Ibid xiii.

\* BA (Hons), MA (Dalhousie); PhD (Cantab); LLB (British Columbia); LLM (Washington); SJD (Melbourne); Lecturer of International Law, Monash University.