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# PREFACE: THE WORLDS OF FIDUCIARY THEORY

*Frédéric Mégret**

## Introduction

If there can be crimes against humanity in international law, then international law really ought to have a more positive and productive theory what humanity means, and what duties to it might entail.[1] Can states be reimagined not as the self-sufficient—if rational—egotists that they have long been understood to be, or merely as the contingent guardians of the fate of *their* people, but as, more generally, fiduciaries of humanity? And, beyond the nice-sounding title, what would it mean to operationalize such a theory for the development of international law? Providing for such a theory is the ambition of Professors Criddle and Fox-Decent in a book that has become an influential restatement and refinement of a tradition of political theory, jurisprudence and international law that has sought to portray sovereignty as deriving from some prior international mandate. Contrast this with how, for some, the primacy of international law over sovereignty is merely conceived as an ontological condition of international law's existence: Criddle and Fox-Decent's work endow it with something more, that is a true moral grounding. Their account places international law before sovereignty. It does so by making sense of sovereignty as a bundle of duties as opposed to merely a putative jurisdiction or a simple set of prerogatives. In so doing, the book, *Fiduciaries of Humanity* succeeds the rare feat of being both a theory of international law and a theory of sovereignty.[2]

This theory is nothing if not ambitious, tantalizing and every bit worth this symposium dedicated to some of its facets. Where normative theorizing about international law has tended towards the "thin" end of

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1 See Philip Allott, "Reconstituting Humanity—New International Law" (1992) 3:2 Eur J Intl L 219.

2 See Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016).

justice,[3] *Fiduciaries of Humanity* is somewhat more ambitious, and certainly quite comprehensive. In fact, so broad is the book's span that several contributions to this symposium discuss only one element of the overall theory. Yet the book is also specific in some ways: Criddle and Fox-Decent's endeavour is a unique attempt to weave together private law insights with constitutional and, increasingly, international ones. What sort of theory is thereby produced? Is it a theory of the law or a theory of justice? What are some of the limits to what it can be applied to? How well does it fare in areas of the law that exist apparently far from where fiduciary concepts originally sprung? Seth Davis in his contribution underlines the originality of the work of Criddle and Fox-Decent. In a context where we have a great many contradictory intuitions about the ends of political life, both domestically and internationally, and dramatically few overarching narratives, Criddle and Fox-Decent strikes a meaningful chord.

And, indeed, it may be that, as the world becomes more "private" private law tools may, under certain conditions, provide some unique insights. As Davis cautions, however, these tools are only as good as what they are applied to and deployed for. The element of adequate "fit" of such legal concepts within the complex framework of public law questions cannot be assumed. The question which emerges, then, is what particular mindset does thinking about international law through the lens of one particular private law mechanism reveal? For example, is it a modest contribution or a hegemonic move? Or, to frame it differently, is it new or is it merely a reformulation of the canon? Who does such a perspective empower or disempower? As the papers in this symposium reveal, there remain questions as to the actual scope and ambition of the project and whether fiduciary theory can sustain the claims that are made on its behalf about international law. In this preface to the symposium issue, I seek to frame Criddle and Fox-Decent's contribution within broader trends in international law, emphasizing how its various articles, including Criddle and Fox-Decent's own epilogue piece, help us push the boundaries of what it might mean to think about international law in terms of fiduciary duties.

## I. The Basic Gambit

There is no doubt that Criddle and Fox-Decent's gamble is a bold one, in at least three respects. First, reduced to its simplest formulation, it is nothing less than the claim that the fiduciary theory better explains or at

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[3] See Steven R Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015).

least provides a better theoretical account of international law than those provided to date by international lawyers . This is not to say that international lawyers have not relied in the past on some sort of fiduciary theorizing—the theory would not be compelling if they had not at all—but that Criddle and Fox-Decent propose to do so more specifically, systematically and consistently than has been done by the profession and scholarship. Theirs is a project to foreground what had arguably been always lurking in the background. Whether this works is for readers to decide, but it will require them to accept the basic intuition that the state and sovereignty are more like fiduciary relationships than anything else, in a context where there is no shortage of contenders. This thought inevitably opens the book up to all kinds of questioning about whether the proposed theory is making a descriptive or aspirational claim. In effect, it seems it is making both—the normative case being made more plausible by its grounding in reality, and the descriptive one by the fact that jurisprudential theory can, in fact, give an account of how the normative system actually functions.

Second, their theory is quite comprehensive. It is both a theory of sovereignty and a theory of international law. It is important in this respect to emphasize that the claim is a triple claim: one more conventional, one less so and the other quite radical. The more conventional claim is that states act as fiduciaries for their own populations, something that is in and of itself obviously consonant with much liberal or republican theory. The relatively less conventional one is that they are fiduciaries of their people *as a result* of international law. The radical one is that states have fiduciary duties towards humanity at large. This is potentially explosive, in that it operates at the intersection of fraught debates between communitarian and cosmopolitan theorists on the ultimate beneficiaries of duties (fiduciary or otherwise, in fact). This is not fiduciary *lite*, but a sort of comprehensive, overarching theory of not only what it means to be a fiduciary but how having fiduciary duties constitutes one as a lawful and legitimate subject in international law.

Third, the brilliance of their theory is that it profoundly subverts the order within which we construe the power-duty dyad (obviously the authors are in good company in doing so, but they also do it in a very systematic and elegant way). Where many international lawyers and scholars in a realist mindset are prone to first take sovereignty as fact—that is to say that sovereignty exists and is sovereignty as a result of some independent, typically factual, variable—and then tackle the problem of how to constrain sovereigns, Criddle and Fox-Decent argue that it is the duty to behave in a certain way that preexists the fact and legitimacy of sovereignty. And where international lawyers typically try to mold a reality that is seen as external to the law, Criddle and Fox-Decent provocatively argue that the reality is and ought itself to be seen as constituted by the law in the first place. There is no raw "power" to be civilized by the law,

only a power that is one only because it is created by the law. Moreover, their theory is not, in line with the conception put forward by the Kelsenian positivists, merely a logical "pure" idea of the state— one where the state can only exist as part of a pyramid of norms, and where international law logically comes before the state, etc.—but rather part of a normative commitment to the ends of political association.

Here, I want to first point out some of the inherent plausibility of Criddle and Fox-Decent's theory and later, in the process of introducing the papers to this symposium, suggest ways in which their approach might find its limits. When considering the plausibility dimension, it is worth noting that fiduciary theories, belonging as they do to the very core of the development of the law writ large, have probably long undergirded international legal developments whose own intellectual debts to private law are often neglected. Criddle and Fox-Decent's work does not shine by its historical depth on this issue—that is a choice, to which I return later—but readers do find in much early and classical international legal work echoes of fiduciary concepts. For example, as Seth Davis reminds us, Hersch Lauterpacht, one of contemporary international law's foundational articulators, made much of international law's private law origins more generally. Going back in time, of course, we find a legal corpus in which the natural and the positive aspects, the public and the private, and the domestic and the international were all held up as much less irreducible.

Criddle and Fox-Decent's call to retire the old conception of sovereignty as exclusive jurisdiction is, in fact, as old as sovereignty itself. In international law at least, there has arguably never been a call to sovereignty that was not simultaneously a call to restrain it in some meaningful way. Fiduciary theories, then, are not a late discovery, they are a rediscovery, as Criddle and Fox-Decent clarify, of something that had always been there, only to be temporarily forgotten or neglected as a result of intellectual fads. The idea that states should serve their people has long been one of the central tenets of human rights. The search for criteria of legitimate statehood has always haunted international law. Of course, for a realist and positivist theory of international law, sovereignty can be reduced to whether states tick the bare boxes of Montevideo sovereignty: territory, population, government. In reality, however, sovereignty and, crucially, its recognition, go much beyond displaying the 'status symbols' of sovereignty. It has long been underscored, for better or for worst, by the ability to meet a certain "standard of civilization"—vague in essence, but all the more crucial and unambiguously normative.[4]

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[4] See Brett Bowden, "The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization" (2005) 7:1 J Hist Intl L 1.

The theory of Criddle and Fox-Decent is also plausible normatively in that it points to an entire register of ideas not only *about* international law but also *beyond* international law that continue to structure it deeply. Only a positivist absolutist could be so taken up in his own theory as to miss the continued influence of what are sometimes described as "naturalist" ideas about international law. Jens David Ohlin's contribution to this symposium makes that case quite clearly via the idea of *jus cogens*, as acting as a sort of Trojan horse for naturalist ideas. Of course, his quite provocative argument is that we should not pin down natural law too forcefully lest that be seen as an indication that *jus cogens* needs philosophical reinforcement. Be that as it may, he is at least in broad agreement with Criddle and Fox-Decent that the laws that we have, such as they are, are sustained by more than their positivist crutches and necessarily partake in some residual commitment to the good life.

It may be, of course, that we have reason to be wary, under liberal conditions, of this "implicit theory of the good life" that international law promotes soto voce without ever fully arguing for it. But that there is such a theory and that international lawyers constantly draw on a jurisprudential register to fill in the gaps of what would otherwise be a clunky and inanimate set of rules should be obvious to at least international lawyers steeped in its rhetorical practices. And if there is such a theory, then it needs to be excavated, dissected and perhaps energized, a task that international lawyers themselves—these days a self-professed pragmatic and realist profession, if ever there was one—have long gladly abandoned to philosophers and metaphysicists. The allure of Criddle and Fox-Decent's theory, then, is that it seeks to do this work through a discreet domestic law construct of impeccable pedigree rather than the wholesale fabrication of a philosophical system—or so it seems, at the outset. Indeed, they make a strong case that their institutional theory of international law based on fiduciary duty theory does a good job of escaping the abstraction and metaphysics of, for example, naturalist human rights discourse, perhaps because it is based on a hermeneutic rather than ontological tradition.

## II. Cracks in the Edifice?

Is this plausibility of Criddle and Fox-Decent's theory bought at too high a cost, maybe that of originality, distance, or critique? What could be some of the limitations of applying fiduciary theory to international law and, more generally, importing private law tools into theorizing about the public sphere? This section seeks to shed light on those questions and on how the theory might be received in international law.

First, what is the meta-theoretical stance involved in proposing fiduciary concepts as the key to understanding international law, and how well does it fare? In seeking to be both descriptively plausible and normatively

ambitious, Criddle and Fox-Decent set out to square a circle that has continuously proved, in the past, arduous to square. Inevitably, their theory will be at its most convincing where it is least useful—making the case that states have certain obligations which international lawyers will gladly concede they already have under positive international law—and least plausible where it could be most enlightening—pushing the normative envelope in directions where no obvious positive law obligation exists and the suggestion can at times therefore seems gratuitous or worse.

There are at least two dangers involved here: not taking the law seriously enough, or taking it too seriously. On the one hand, one may neglect the potential of existing positive law, its internal morality (even as expressed through, for example, the self-determined consent of independent sovereigns), and perhaps even subtly undermine it by making a very abstract case for its content where none is needed. When it comes to extra-territorial human rights obligations, for example, one should be careful, in trying to provide such obligations with a normative foundation, to not brush aside the intricacies of the vast register of existing case law and soft law on the matter.[5] Is there perhaps a danger of excessively emphasizing the need for the law to be supported by a normative theory? This is, implicitly at least, the critique of Trapp and Robinson who are more comfortable working from within positive international law trends.

Another danger is that of apology, of merely providing a theory of what is at the expense of a higher conception of the "ought." The risk is that the theory's interpretative stance will perhaps succeed in rendering only too well what international law is; that it will do so, moreover, at the risk of portraying under a rosy light a body of norms that we have reasons to be wary of, perhaps precisely because of its old-fashioned reliance (now helpfully disclosed by Criddle and Fox-Decent themselves of course) on notions such as fiduciary obligations. Many of the elements that we often consider to have been wrong about international law—including a certain propensity for sovereigns to over-enthusiastically offer themselves up as responsible for others (or even for those they claims as "theirs" but who have a strong claim to wanting to fall under another sovereign)—have had a marked fiduciary connotation. *Fiduciaries of Humanity* therefore operates in a very narrow space in seeking to simultaneously give an account of the law and to offer further prescriptions for it: if the interpretative value of fiduciary theory is great, then it is hard to imagine that it

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5 See Françoise Hampson, "The Scope of the Extra-Territorial Applicability of International Human Rights Law" in Geoff Gilbert, Françoise Hampson & Clara Sandoval, eds, *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (London: Routledge, 2011).

would have much to offer in terms of significant further prescription and vice versa.

Criddle and Fox-Decent's theory, in such a context, is certainly constraining of what sovereigns can do but it is also considerably empowering of the solicitous, if not always welcome, sovereign. The authors casually remark that fiduciary theories have "furnished a conceptual foundation of international legal relationships for centuries, from colonial encounters … to the laws of occupation."[6] Should we be alarmed? Do Criddle and Fox-Decent want us to surrender to humanitarian, paternalistic and slightly Victorian appeal of the enlightened monarch? Although the authors finesse this—swiftly arguing that colonialism was the problem, not its fiduciary structure—it seems hard to disentangle the benevolent thrust of wardship from its more sinister connotations. After all, colonialism was always nominally enlightened under its own terms, an attempt to provide the best of civilization to peoples in need, in the process of extracting blood and resources from them. Moreover, this is surely a bizarre foundation for sovereignty even where sovereignty is irrefutable, the idea here being that a series of mechanisms invented, one would think, precisely to deny certain peoples their sovereignty, would turn out to have been a moral blueprint for sovereignty all along. It is perhaps here that Criddle and Fox-Decent's ahistorical and universalizing stance may raise most eyebrows.

Indeed, one of the weak points of the fiduciary theory is its tendency to assume that *who* holds the fiduciary duty is not in itself particularly problematic. The implicit idea is that states are legitimate so long as they behave as fiduciaries, rather than a prodding of whether we should treat states as the relevant subjects in the first place. Under this light, a sovereign government, a benevolent colonial power, a liberal occupier or an international administrator, are all equally plausible candidates as subjects of fiduciary theory. By contrast, whether the emphasis should be on burdening the occupier with fiduciary duties, for example, or kicking the occupier out—or at least significantly limiting the scope of its interventions—is a debate that has raged for the last decade[7] and has quite far reaching implications. In that debate, many— liberal accounts have appeared tone-deaf to claims about self-determination.

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6 See Criddle & Fox-Decent, *supra* note 2 at 3.

7 See Aeyal M Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18:1 Eur J Intl L 1; Naz K Modirzadeh, "The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict" in Raul A "Pete" Pedrozo, ed, *The War in Iraq: A Legal Analysis*, International Law Studies series, vol 86 (Newport, RI: Naval War College, 2010); Martti Koskenniemi, "Occupied Zone—'A Zone of Reasonableness'?" (2008) 41:1&2 Israel L Rev 13.

The aspiration to be governed by sovereigns who take their duties seriously—manifested in the obsession with good governance —is worthwhile aspiration. All other things being equal, who would not want sovereigns to behave as fiduciaries? But, the question here can also be framed as follows: "Who asked you to have fiduciary duties towards me?" Some, no doubt, would rather be governed poorly by their sovereign than benevolently by another. The ambitions and claims of independentist Catalans or Québecers will not be appeased by claims that the Madrid or Ottawa governments operate as good fiduciaries. Gaza Palestinians might prefer to be governed by Hamas (not exactly, one surmises, Criddle and Fox-Decent's idea of a fiduciary duty imbued ruler) than by even the most benign and benevolent version of the Israeli occupier. This may be a fortiori the case when a foreign state or international organization purports to use force to remove a tyrant who has arguably fallen short of his fiduciary duties. From a distance it is easy for powerful states to find fault with the discharge of their fiduciary obligations by weak states—indeed, they have never needed very sophisticated theories to do this.

One of the ideas that is not clear in the fiduciary theory of international law, then, is how one becomes a holder of fiduciary obligations in the first place, and what or even who makes one into a fiduciary. There is a mysterious self-referential quality to the process by which sovereigns are "adumbrated" (to use a term often found in the book) into holders of fiduciary duties. Because Criddle and Fox-Decent's theory takes the form of "thinking about what is", moreover, it may disappoint those for whom there is no more pressing task for theory than to problematize rather than rationalize power. This is a concern that should be particularly important in a context where having endowed sovereigns with fiduciary duties may well impose certain burdens on them—but may also make it all the more difficult to challenge and resist those sovereigns that have passed the fiduciary litmus test.[8]

Second, the book only works to the extent one buys into the rather large range of assumptions that it is led to make. In the papers in this symposium, one occasionally detects a dose of skepticism. Seth Davis, for example, leading the critical charge, wonders about the numerous assumptions needed to stitch *Fiduciaries of Humanity* together. Criddle and Fox-Decent rely on heady brew of philosophical Kantian and Republican assumptions that at times seem strangely detached from fiduciary theory itself. This leaves the answer to a number of questions open: To whom are

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8 See Frédéric Mégret, "Grandeur et déclin de l'idée de résistance à l'occupation: Réflexions à propos de la légitimité des 'insurgés'" (2008) 41:1&2 R Belge Dr Intl 382; A Dirk Moses, "Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine" (2017) 8:2 Humanity 379.

duties owed? Why not welfare and development as opposed to just human rights and human security? The imperfect correspondence between the remedial and jurisdictional world of private law and the realities of government make any transposition problematic and potentially misleading, argues Davis, despite Criddle and Fox-Decent's talent for seemingly consensual formulas.

This occasional lack of fit makes the use of the analogy with private law to solve discreet problems or even just rhetorically a fraught exercise. Moreover, it hardly solves the endemic problems of indeterminacy that affect both private law and public international law. As such, *Fiduciaries of Humanity* is always at risk of either saying something misleading about public international law or modifying private law fiduciary theory to such an extent that it would be barely recognizable to private lawyers. The idea that what sustains the fiduciary theory is an understanding that the "international legal order ... is intended to benefit humanity,"[9] for example, will not convince those for whom such invocations have always been a thin cloak to disguise what its true finalities are, and make it that much more difficult to uncover the system's actual distributive biases.

On this point, Criddle and Fox-Decent might be faulted for taking what some international lawyers *say* about international law too seriously, at the risk of making their theory too normative and insufficiently descriptive—in short, of lacking in realism. To the extent that it is constitutive of states and their authority, international law has done so either on much thinner and agnostic Montevideo grounds (whether a state governs seems to the key criterion, not for whose benefit and with what intentions) or been much more concerned with other ways in which states might prove their international respectability, for example the extent to which they refrain from attacking other states or whether they provide a safe and welcome environment for investment. The focus has been much more on how states behave towards other states than towards their "own," let alone foreign others.

It may be that in certain Western capitals, the liberal talk of human rights, "human security" and *Responsibility to Protect* has at times become so intoxicating that one can confuse it with the normative constitution of reality. But in many other sites, including sites that may matter somewhat more to what international law is—diplomatic negotiations, head of state encounters, UN corridors—it hardly bears saying that "a state's claim to exercise sovereign authority is" not—not even rhetorically and in polite company—"derived from and wholly dependent upon, the

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[9] Criddle & Decent, *supra* note 2, at 2.

satisfaction of its relation duties to the people subject to its legal powers."[10]

Historically, by and large states have not implicitly or explicitly agreed to be bound by fiduciary obligations in order to be recognized by other states as being states. A contrario, for example, Taiwan might be a decent fiduciary towards its peoples and even towards humanity at large, but that has not helped it in the face of obstinate refusal by many states to recognize it. In another vein, s Trapp and Robinson point out, the idea that fiduciary obligations entail resort to the least harmful means in warfare, or that a state take into account duties owed to the international community at large in the *jus ad bellum* may appear quite *de lege ferenda.*

Nor has there been much inkling in international legal practice, for example, that states might lose their sovereign status or even governments lose their recognition merely by virtue of having failed completely to discharge their fiduciary duties: consider, for example, how even the most muscular proponents of liberal intervention in Syria have always shunned from arguing that the Damas government is, in fact, not the Syrian government or that Syria is, in fact, not a sovereign State. We may only derive the impression that fiduciary discourse really shapes international legal reality by tuning into select scholarly and UN debates and focusing on those rare cases where it in fact had an effect. But, as I have argued elsewhere, there is a considerable difference between that discourse being broadly determinative and its being useful instrumentally in this or that case to help achieve a goal already and independently agreed upon by the powers that be.[11]

The deeper point, and it is not a wholly decisive one, is that it is notoriously hard to have it both ways: to provide a theory that is both descriptively and normatively compelling. In that respect, *Fiduciary of Humanity* is a helpful reminder that international legal theorizing can no more escape the dilemmas of apology and utopia than international legal practice.[12] As such, the book may be at its best when it charts new normative courses rather than when it tries to merely interpret existing ones.

It is also interesting to consider what is the net effect of the proposed fiduciary theory of international law. As Criddle and Fox-Decent, I suspect, see it, the theory imposes or recognizes further obligations on states. It thus constrains and limits their action, in a context where one fears

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10 *Ibid,* at 3.

11 See Frédéric Mégret, "ICC, R2P and the Security Council's Evolving Interventionist Toolkit" (2010) 21 Finnish Yearbook Intl L 21.

12 See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

that states will not, for example, pay due regards to foreigners. Yet, what if the problem was the opposite? What if states were historically, actually and at least occasionally, only too keen to take on responsibilities vis-à-vis aliens (or indeed their own citizens) in ways that were deeply problematic? In that context, rather than obligatory and constraining, the fiduciary theory is also more generally permissive and empowering. It humanizes with one hand, what it fundamentally licenses with the other. By focusing on fiduciary *obligations*, it obscures fiduciary *power*.

In fact, the theory of Criddle and Fox-Decent is not entirely beyond suspicion that, like the long tradition of its forbearers, it is both a tool to uphold the sovereignty of some and to question that of others. In the era of "shithole countries," in a world riddled by power differentials, do we really need another theory of the legitimacy of states, prodding the weakest of them for their compatibility with an ideal set of demands predictably produced in the West? We must note that the claim of Criddle and Fox-Decent is not only that compliance with fiduciary duties is a good measure of state's legitimacy; it is also specifically and more incisively that the state's sovereignty ought to depend on their fulfilling their core fiduciary mission. Is this not part of a broader movement that invokes states' illegitimacy (their rogueness, their primitiveness, their insusceptibility to the ways of modernity) against the hard-won concreteness of their sovereignty?

Third and more prosaically, there are some challenges to translating the domestic theory of fiduciary obligations to the international realm. For example, fiduciary duties in private law are typically to one person at the expense of others. They involve a strong element of exclusive loyalty. Here, Criddle and Fox-Decent are maybe setting their holders of fiduciary duties for some pretty stark dilemmas. It is difficult to be exclusively loyal to such irreducible constituencies as one's people and the world's people. It may be that this concern can be assuaged by the notion that one merely owes "due regard" to the various secondary constituencies to which one has fiduciary obligations to, but that does not get us much closer to how much "due regard" one owes to each, and how one decides which one trumps the other or how to mediate them when, sooner or later, the two clash.

Another potential problem is that a fiduciary is not supposed to profit from his situation as a fiduciary and should, in fact, comply with legal obligations to maximize the situation of the beneficiary. This works in private law because the holder and the beneficiary of the fiduciary duties are starkly separated persons. But it is not clear whether the state can be "other regarding" in the same way as a fiduciary in private law because of the porosity between such notions as "a people" and "the state". A sovereign might argue that what aggrandizes it or maximizes its power will ultimately benefit its peoples. The state and its population are different en-

tities, but they are certainly more the same than two private persons domestically. Indeed, a long tradition of romantic politics sees the people and the state as one.

Or, consider that domestically a fiduciary is not supposed to exercise power or domination, over the beneficiary. A fiduciary in private law does not, it is true, "govern" the beneficiary, however, clearly a state governs its people. The domestic framework of the holder of fiduciary duties needing to "insulate a beneficiary from domination at the hands of her fiduciary"[13] seems to sit oddly with the nature of government. For a population to entrust its fate to a sovereign is not the same thing as an individual to consent to another entity exercising fiduciary duties. Although we certainly do not want a government act oppressively, we do accept that it will exercise *power* over the people. Is that really compatible with the idea of non-domination and non-instrumentalization?

Another disjunction between private law and international law is that in private law there are relatively few ways for the beneficiary of a fiduciary duty to provide input to the holder. Indeed, the point of fiduciary power is that it is exercised for the benefit of someone but in a way that is discretionary and vested by the law itself. Moreover, the exercise of that power is inscribed within a managerial and instrumental horizon where what is to the "benefit" of the beneficiary is fairly non-controversial. Where, in private law, this may be as simple as increasing the wealth of the beneficiary, politically the idea that "equal freedom" happens to be the good that fiduciaries should maximize is open to a degree of incredulity. What if the goals to be maximized were order, equality, social harmony, spirituality, happiness or any other range of goals that the very diverse societies that constitute international system have sought to achieve historically?

The relationship between governed and governing within a polity, in fact, appears by necessity much more dynamic. The State may be its peoples' protector, as per fiduciary intuition, but it is also peoples' servant. It is at least as much if not more accountable to its people than it is, for all intents and purposes, to the international community, whatever residual supervisory role the latter may have. Moreover, that accountability is crucially connected to the need to constantly actualize what might conceivably be for the benefit of the people at large. As Seth Davis points out in this symposium, we have reason to be wary of set formulas for the common good. What is "reasonable" for the purposes of ruling a polity is surely more complex than what is reasonable for the purposes of exercising a power of attorney. Assuming the standpoint of the solitary governor,

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13 Criddle &Fox-Decent, *supra* note 2, at 21.

Criddle and Fox-Decent's theory seems relatively uninterested in the potential of democracy—and politics—to give expression to the range of goals that societies might at any given time give themselves, diverse and contradictory, but nonetheless prima facie at least respectable as they may be.

There is, then, an often unacknowledged tension in Criddle and Fox-Decent's book between fiduciary obligations on the one hand, and collective self-determination and democracy on the other. Consider, for example, that the people, as represented democratically, may pressure their fiduciary holder to do things that one might judge unreasonable—even harmful—from the perspective of an idealized rendering of fiduciary obligations. How should one deal with such an "unreasonable" people? Paternalistically, as good fiduciary logic would dictate, or democratically, yielding to their irreducible definition of the collective good? It may be that in blindly following the chimera of the *volonté générale* by pulling the UK out of the EU without a deal, a Prime Minister forsakes his most elementary fiduciary duty (assuming he or she actually knows that the consequences will be disastrous for the British people under his or her care). But who will have the courage to second-guess that exercise in self-determination? And, how appealing is the elite condescension that Brexit voters simply "did not know better" and need to be rescued from themselves?

Indeed, one of the intriguing twists in the theory is its tendency to turn traditional theories of popular sovereignty on their head: the mandate to treat a people well flows not from a kind of collective aspiration by those people to be treated well and their historical struggles to that effect, but from the solicitude of international law. This not only risks giving international law too much credit (after all, international law may be a decent system of ordering relations between states), but it is dubious that any state has ever treated its people well *because* international law told it to do so. It is also a strangely a-historical, politically disenfranchising and slightly roundabout notion. More governance than government, more global than domestic, "Fiduciaries of Humanity" may be a good blueprint for a Sergio de Melho in East-Timor, a Bernard Kouchner in Kosovo and a Paddy Ashdown in Bosnia—or even a Chris Patten in Hong Kong, or a David Petraeus in Iraq not to mention a Lord Mountbatten in India or a General MacArthur in Japan—but it is a stretch to think that it could extend a bridge between the prerogatives of these viceroys and the messy business of presiding over human affairs in a pluralistic world.

## III. Thinking With "Fiduciaries"

Yet despite these ambiguities, as the articles in this symposium and the vigor of the debates it gave rise to attest, *Fiduciaries of Humanity* is also teeming with ideas and likely to engender even more as other schol-

ars seek to process its implications. I want to underline here some of the areas where it might be most useful, perhaps useful in ways that Criddle and Fox-Decent themselves minimize or neglect. The trick seems to be to appropriately calibrate their theory, and further develop it where it is at its most promising. I suggest a few ways in which this might be done in this section.

First, rather than a normative account of international law as it stands, Fox-Decent & Criddle's book might be better read as a subtle re-invigoration of what international law could stand for and a subtle critique of what it is, from a place that gains in credibility precisely because it is so close to international law. To be sure, on the one hand, international law says many of the things that the fiduciary theory would lead one to anticipate it might. On the other hand, the fiduciary theory also goes further, particularly when it comes to duties to non-nationals which is currently one of the areas that international law is struggling with the most. It does this not so much as an alternative, entirely philosophical discourse, but rather as a discourse that it is joined at the hip with positive international law and point to an-international-law-that-could-be aside from the international-law-that-is. This sort of non-ideal theorizing (which one might describe as neo-Fullerian) is currently very much in vogue in international law and, so long as it does not become inebriated with its possibilities, provides a crucial intermediary springboard from which to take international law's normative potential seriously.

On this matter, I am more convinced than Jens David Ohlin (in this symposium) that we need such normative whispering alongside positive international law. Indeed, we need to remember that the "positivization of *jus cogens*" itself always relied on our moral imagination much more than on a hard and fast positivistic methodology. I am skeptical that the fiduciary theory, at any rate, provides a final guide as to what should be contained in *jus cogens* that would, as it were, "kill the Golden Geese." It is still fairly un-determinative and under-inclusive. The fiduciary duty "finds" international human rights law and the prohibition on genocide to flow from it—but perhaps only because they are already, helpfully, there. I doubt, for example, that a Herculean legal mind in the 1920s who would have had and fully internalized the fiduciary theory could have discovered and elaborated the *Universal Declaration* and *the Genocide Convention* in advance of their time. Operationalizing the fiduciary theory in international law, as it turns out, is perhaps not harder but probably not easier than operationalizing what human rights already imply.

In fact, the problem is if anything the opposite, that is to say that fiduciary theory, helpful as it may be, does not really address our anxieties

about what good government or law should be. For example, domestically the holder of fiduciary duties is to "exercise reasonable care in in her administration of the beneficiary's legal and practical interests."[14] What is reasonable may be ascertainable within the narrow confines of an individualized fiduciary relationships (although even under private law the courts steer away from monitoring this too closely), but it is hardly evident what it amounts to at the political level.

One element that is often emphasized in fiduciary duties and that seems connected to reasonableness is the element of prudence. What could that mean for a state? Is there a case that we want states to be prudent? And what prudence would that be? A classical prudence, a Machiavellian prudence, a bourgeois prudence? And who is to say that being prudent is the reasonable thing to do? Does dealing with the doomsday threat of global climate change and species extinction require prudence, or does it require flipping tables on the conventional set of benefit maximizing tools that have characterized governance in modernity? In fact, one may wonder whether, under the present conditions of political life, to be "reasonable" is *that* reasonable.

Rather than upholding *jus cogens* for the sake of a very thin consensus about things that we cannot fully rationalize, I wonder if it might not be more—or at least just as—interesting to engage the plurality of life forms that the international system is capable of sustaining. This is the realm of policy, but it is also the realm of democracy and it requires the fiduciary holder, whilst no doubt held to some ultimate standard by the international community, to step down from his virtuous pedestal to fray with the demos. Because Criddle and Fox-Decent are understandably eager to avoid the pitfalls of theories based on consent (which are particularly notorious when it comes to international law), they emphasize trust as the central element of their theory. But somewhere between the authority of the state being consented to and deriving from some higher source, lie the rather vast possibilities of democratic dialogue. The point of communal and democratic life might precisely be to shape the parameters of fiduciary duties, not simply to inherit those from one's participation in the international system.

Second, the fiduciary theory at times risks morphing into a theory of *everything*. The dilemma seems to be as follows. Criddle and Fox-Decent are clearly on to something, but the fiduciary conceit on its own often falls short of providing the comprehensive theory that the book ambitions to furnish. The strict focus on the fiduciary intuition, therefore, continuously needs to be prolonged by appealing to various strands of liberal theory

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14 Criddle & Fox-Decent, *supra* note 2, at 21.

(with a big emphasis on Kant's philosophy) which, respectable as they may be, often bear only a contingent connection to fiduciary mechanisms. The more the book does this, the more it strays from what makes its appeal specific. In other words, if the theory is a comprehensive theory of the liberal common good including what sort of detailed obligations states owe to their people (e.g. respect human rights, the laws of war, don't commit genocide, be nice), it risks becoming diluted. If the theory is kept to its core minimum—that there is a form of legally structured governance that involves managing other peoples' interests on their behalf—then it will say things that are more specific even at the cost of being incomplete. The question, really, is whether we want fiduciary theory to be an (important) piece of the puzzle or the key to the puzzle.

My own impression is that the theory is never as good as when it is fiduciary-specific and resists the temptation to spread itself thin. I therefore want to suggest ways in which it might be thought of in concrete ways that do not require buying into extensive philosophical baggage. For example, aside from grave human rights or humanitarian violence (the improbable equivalent domestically of a fiduciary physically harming the person he has a fiduciary duty to—the wrongness of which one does not really need fiduciary theory to demonstrate) one way in which fiduciaries might be faulted is, quite trivially, when caught stealing from the cookie jar. Kleptocracy is perhaps the most obvious way in which state leaders confuse the powers that have been vested in them with an invitation to make the public purse their own, in flagrant violation of their obligation to manage the public purse for the common good. This is interesting because international law has not said much traditionally on kleptocracy, but fiduciary law does. This could be one area where fiduciary concepts could re-energize international legal thinking about what is specifically wrong about spoliation, common as it may be.[15]

In the end, it bears emphasizing, however, in my view at least, that the singular import of Criddle and Fox-Decent's work lies not in their elegant but somewhat conventional (as they themselves acknowledge) framing of sovereignty as involving a fiduciary duty towards the state's own population. This part of their theory is important, but it sounds plausible only because it does manage to rationalize much existing loose talk along those lines. When dealing with a state's own people, fiduciary theory is competing with an abundance of more specific theories of government and

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[15] For a scholarly attempt in this direction, see Ndiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (London: Routledge, 2016). See also Jennifer M Hartman, "Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks" (1997) 24 Syracuse J Intl L & Commerce 157.

democracy, or even international law. The really novel suggestion, by contrast, is that states have fiduciary obligations towards both their peoples *and* the international community at large (including, notably, a range of other peoples).

When it comes to non-nationals, particularly those outside a state's territory and perhaps even outside a state's jurisdiction as currently understood under international law, the fiduciary theory proposes a provocative way to think about the sort of duties that might be owed. Of course, as Seth Davis points out, duties to humanity flow not so much from the idea of fiduciary obligations than from Criddle and Fox-Decent's cosmopolitan outlook, even though both are sometimes packaged together. Indeed, fiduciary ideas might even reinforce the case for enlightened, but exclusively nation-bound government, in the way corporations for example sometimes invoke their fiduciary duties to their shareholders to better explain how their hands are bound and they cannot take into account extraneous interests.

At least when it comes to people beyond the territory of the state, however, there is no risk of competing with theories of government because such people are, precisely, not being governed by a foreign state. Indeed, it is here that sovereigns govern highly vulnerable populations without being directly accountable to them and in the absence of democratic feedback mechanisms: a recipe for disaster in the absence of a convincing case that some bare obligations are owed to such individuals by the state. Finally, in this case, it also makes even more sense to ground the fiduciary obligation in a delegation from international law, because if such a duty is to exist at all it is unlikely to rest (at least merely) in a mandate from the state's own people or the consent of the affected persons.

Given the above, what might it mean to be a fiduciary of humanity in this context? Consider the obligations of the Brazilian government as Amazon fires rage. How tempting it is for a Bolsonaro to claim that this is merely a sovereign matter, one that affects at best the Brazilian government's fiduciary obligations to its own citizens. But what if we saw the Brazilian state as in a sense holding on to its territory and sovereignty in part as a sort of custodian of the Amazon for humanity's sake? Such a vision does open new vistas to challenge a self-centered vision of sovereignty, in a context where much seems to hinge—for the future of our common planet, no less—on the actions of one state. Nor is this really such an improbable construction, in a context where international law has long held states liable for their trans-border pollution but also, increasingly, for the security threats to others they have allowed to fester on their territory. Your territory, your government and even your population are not (entirely) your own seems to be one of the weightier intellectual legacies of *Fiduciaries of Humanity*.

Yet this is not exactly an unproblematic construct either. For example, it does not deal with the vexed question of the distribution of fiduciary obligations and the fact that some states may end up, perhaps by sheer luck of geography and history, owing significant obligations to the international community. Why should Brazil foot the bill? Moreover, this theory casts the international community in the role of the rescuer where it may have lent more than a helping hand to the destruction wrought.[16] Maybe the "international community" itself should act as a fiduciary of humanity before it insists on particular states doing so.

Perhaps it is the idea that states are fiduciaries of humanity at large (and not just a small part of it in form of their population) that most interestingly creates potential intense dilemmas with their domestic fiduciary obligations. What if, for example, a people democratically and vociferously insisted that the sovereign maximize their benefit at the expense of any duties to aliens? Seth Davis points out that the people might want the state to close its borders—and it seems some have wanted this very much and have democratic successes to show for it—in ways that are in tension with the state's cosmopolitan duties to let in at least some aliens. Who is the sovereign to obey? His constituents for whose benefits his government is supposed to be exercised—very much by virtue of the fiduciary theory—or the diffuse international *donneurs d'ordres* that supposedly account for its very fiduciary constitution? One of the perhaps neglected costs of downplaying the democratic and popular element in sovereignty (aside from the fact that, as Seth Davis correctly points out, it as much part of the human rights package as any other right), is that popular forces may also help hold the state to its global fiduciary obligations, acting as both allies of the international community within the state (as when nationals "betray" their state to denounce some egregious violation to the international community) and of foreigners (as when citizens disobey the state to provide protection to aliens).

Having two or three sets of beneficiaries with potentially incommensurable interests complicates the fiduciary metaphor: confronted with a similar situation, a domestic private law fiduciary would probably have to draw the line and decline to take on multiple fiduciary roles that would put it in a situation of conflict of interests. There is a real risk that the fiduciary will satisfy no one: a fifth column for internationalist interests for some, a populist renegade for others. Moreover, as Trapp and Robinson acknowledge, multiple beneficiaries of unequal weights will quickly lead

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16 See Travis Waldron & Chris D'Angelo, "The Entire Global Economy Is Complicit in the Destruction of the Amazon", *HuffPost* (29 August 2019) <https://www.huffingtonpost.ca/entry/amazon-deforestation-consumerism_n_5d66f174e4b022fbceb5a02b>, archived at https://perma.cc/HF68-ZVAX.

states into highly complex evaluations of proportionality to decide conflicts between priorities—how much increases of international humanitarian law violations should lead a state to desist from supporting a foreign armed actor even when in doing so it is honoring its duty to protect its own? This highly discretionary arbitrage may well empower the decision-maker's ability to "play God" with the lives of others, in a context where we simply do not know how many violations of IHL occur, how many occur as a result of foreign support, and how many are too many given the domestic stakes.[17]

Notwithstanding, maybe we can agree that the state is a different kind of fiduciary, one that has no choice but to honor these divergent constituencies—one indeed that would be fundamentally amiss if it prioritized one radically above the other. An excessively nationalistic fiduciary would do wrong to others in unjustifiable ways. For example, refusing to take on any refugees even though one could do so at little cost represents an undue prioritizing of one's (imagined) national constituency. By the same token, an excessively cosmopolitan fiduciary, one that gladly sacrificed the well-being of its own people for the sake of some grand but amorphous international obligation would surely be betraying a certain trust as well. Greek or Argentine governments have occasionally been accused of precisely this, of bowing meekly to international creditors invoking the international rule of law to the detriment of the wellbeing of the populations under their care.

On this last point, Fox-Decent & Criddle do tease out some of the implications of this theory. For example, when engaging in humanitarian intervention, states act as a surrogate sovereign of the people they are trying to rescue. As I have argued elsewhere, this entails that they not avail themselves of all the latitude—including in terms of collateral harm to civilians—that IHL entitles them to, or otherwise expose themselves to charges of hypocrisy.[18] But, perhaps rather than overextending the sovereign's carnivorous realm to allow it to make life and death decisions about distant others, there are creative ways in which even domestic fiduciary obligations can play their part in restraining the sovereign's extra-territorial use of force—ways in which one might not simultaneously and unnecessarily adumbrate the intervening state by emphasizing the national groundings of its fiduciary obligati1ons. This is the intuition of Trapp and Robinson, and it seems a fruitful one.

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17 See Martti Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power" (2010) 1:1 Humanity 47.

18 See Frédéric Mégret, "Missions autorisées par le Conseil de sécurité à l'heure de la R2P: au-delà du jus in bello?" (2013) 52:2 Military L & L War Rev 205.

Consider, for example, that one way in which fiduciaries might fail at being good managers of their fiduciary responsibilities is by engaging in external adventures that neither the attacked people nor perhaps equally interestingly, their *own* people stand to benefit from. This could include, for example, engaging in unlawful wars and dragging, per necessity, their population and treasury into them.[19] Where international law's prohibition of illegal wars focuses on the violation of the sovereignty of the attacked state without telling us much about why that should matter normatively, Criddle and Fox-Decent's theory can be doubly enlightening. Wars of aggression violate a fiduciary obligation towards the foreign people who stand to suffer from them, even as they also violate fiduciary obligations towards the attacking states' own people, who will pay in blood and tax the folly of their leaders.

Indeed, the existence of fiduciary obligations might even point to the need for a deeper temperance and stoicism in the face of aggressive foreign governments: states should resist the temptation to exact significant costs on those governments that will inevitably reverberate on the their peoples, towards whom they are bound by fiduciary duties. If that moral lesson had been learnt during Iraq's decade of crippling sanctions, if the full extent of the international community's fiduciary obligations to the Iraqi people had been acknowledged, then the (undeniable) evil of Saddam Hussein would not been invoked to better, in effect, chastise the Iraqi people.

Perhaps what we need, then, is for sovereigns to increasingly act as mediators between the local and the global. The sovereign, in his dual quality as a fiduciary for the international community and for his people, should a spokesperson for his people to the international community, and for the international community to his people. Where some leaders are only too happy to invoke international constraints to better fail their people in discharging their fiduciary obligations ("our hands are bound!" by the IMF, by the EU, etc), others betray their people in failing to communicate to them that the neglect of their international duties—the folly of nationalistic solipsism—will leave them less sovereign.

A fiduciary model lends itself quite well to this more minimalistic sense of obligation towards distant others, although it is also more glaring that the individuals in question never vested fiduciary obligations in this other sovereign and might even be ambivalent about that other sovereign thinking it has fiduciary obligations towards them. I wonder, however, if

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[19] For an exploration of this sort, see Frédéric Mégret, "What Is the Specific Evil of Aggression?" in Claus Kress & Stefan Barriga, eds, *The Crime of Aggression: A Commentary* (Cambridge: Cambridge University Press, 2017).

we are not excessively loading international law by asking that it serve as the repository of states' fiduciary obligations towards aliens. What if, more evidently, the fiduciary obligation to non-citizens abroad emerged from particular constitutional laws, and a domestically and presumably democratically chosen adherence to certain values? Certain people may decide that they do not want their state to engage in certain actions abroad; that is, invoking domestic fiduciary obligations to undermine the fiduciary obligations they might owe to distant aliens ("not in my name"). In doing so they would be conveying to their fiduciary obligation holder precise guidelines about how to arbitrate the tension between domestic and cosmopolitan duties; in all likelihood, they would do so with more precision and perhaps more legitimacy than international law, going above and beyond international law's bland 'do no harm' position.

A recent case in Québec suing the Canadian Federal government for its delivery of military-grade vehicles to Saudi Arabia that could be used to repress democratic protests (which is likely to be legal under international law) suggests that a people, out of solicitude for distant others, might require their state to up the ante in terms of international law.[20] There are ways, then, in which fiduciary and democratic theory can be combined dynamically for transnational deployment. Trapp and Robinson's article shows that this is a fruitful avenue and it is, in fact, the one that Fox-Decent is currently most actively working on. The debate is in need of being particularized, and the duties of states in armed conflict is a good way to start.

Finally, the element of fit of Criddle and Fox-Decent's theory is perhaps nowhere more obvious than when dealing with international institutions. The book makes a strong case that they already act as indirect or direct fiduciaries, and that this has implications for our understanding of their obligations and authority. The fiduciary model, however, is quite a top-down one and neglects the possibility that states also have duties, in the name of protecting their populations, to guard against careless and sometimes hegemonic international organizations.[21]

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[20] See "Montreal Professor Renews Legal Effort to Block Canadian Combat Vehicle Exports to Saudi Arabia", *The Globe and Mail* (4 August 2017) <https://www.theglobeandmail.com/news/politics/montreal-professor-renews-legal-effort-to-block-canadian-combat-vehicle-exports-to-saudi-arabia/article35887899/>, archived at https://perma.cc/J5QL-CSDR.

[21] See Frédéric Mégret, "Beyond UN Accountability for Human Rights Violations: Host State Inertia and the Neglected Potential of Sovereign Protection" (2019) 16:1 International Organizations L Rev 68.

## Conclusion

*Fiduciaries of Humanity* was published at a time when international law has seemingly never been more on the defensive, beset by populist rejection but also impoverished by stale pragmatism. Fox-Decent & Criddle provide a valiant attempt to reenchant it beyond a vision of a mere technique of power and order. They are on relatively solid ground in doing so: international law has long been rife with attempts at broadly extolling its inner morality and not simply "since the end of the Cold War." The risk is that the disjunction between what is sometimes said (notably by international lawyers) about international law as part of a time-honored tradition of showing it in its best light on the one hand, and the sometimes dismal outcomes produced by the discipline on the other hand, will open pitfalls upon which Fox-Decent & Criddle's theory stands uneasily. Still, this need not doom the project if it is understood as a formidable plea for a minimum standard of government (at the very least, never fall beyond the minimum of your fiduciary duties) rather than an apology for enlightened technocratic guidance—all there is to governing is the exercise of fiduciary duties.

The papers in this symposium are testimony to the critical appetite to engage in these ideas, and they develop some of the themes that I have only superficially highlighted. All take the idea of fiduciary obligations seriously, but all engage it at different levels. Seth Davis raises the meta-question of whether private law analogies can ever be appropriate to make sense of the State and opts for a cautious answer, highlighting how fiduciary reasoning about the state says at least as much about fiduciary reasoning than it does about the state. In a more descriptive vein, Chimene Keitner picks up on the fact that fiduciary obligations impose duties of justification and that surely this resonates with a venerable tradition of thought in international law that foregrounds rhetorical and discursive practices, and not just enforcement and outcomes. States act as fiduciaries to the extent that they justify their behavior in fiduciary terms. This opens up an entire empirical realm to validate the ideas of Criddle and Fox-Decent in practice. Methodologically, Trapp and Robinson insist on the need to better anchor the theory by having positive law do the "prescriptive heavy lifting." Indeed, there is much in the *lex lata* that can be informed by fiduciary reasoning without having to make fiduciary theory itself (improbably) the source of obligations. This is no doubt a prudent strategy and one that shows that there is still work to do to bridge theoretical intuitions such as those of Fox-Decent & Criddle and the practically minded world of jurisconsults. Finally, Jens David Ohlin raises a word of caution about the dangers of providing a normative theory of international law that would pin down its concept of justice too neatly at the risk, perhaps, of undermining the force of its prohibitions and even the exposing the mystery of its authority.