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THE INTERNAL MORALITY OF INTERNATIONAL LAW

*Evan Fox-Decent and Evan J. Criddle**

I. Introduction

We would like to express our sincere thanks to the *McGill Law Journal* for organizing the symposium that was the wellspring for this volume. We gratefully acknowledge as well our debt to the volume's contributors—Seth Davis, Chimène Keitner, Frédéric Mégret, Jens David Ohlin, Edmund Robinson, and Kimberley N. Trapp—and to colleagues who participated in the symposium by offering valuable commentary: Margaret de Guzman, Colin Grey, Richard Janda, and Patrick Macklem.

We will offer reflections on our colleagues' insightful commentary in Part IV. Before doing so, however, we will first use this opportunity to offer a brief restatement of two central ideas from *Fiduciaries of Humanity*,[1] and their relationship to one another: the prohibition on unilateralism and the fiduciary criterion of legitimacy. The prohibition on unilateralism is a legal principle that denies one party any authority or entitlement to dictate terms to another party of equal standing. The fiduciary criterion of legitimacy is a standard of adequacy for assessing the normative legitimacy and lawfulness of the actions of international public actors. The criterion demands that public actions have a representational character in that, for them to be legitimate and lawful, they must be intelligible as actions taken in the name of, or on behalf of, the persons subject to them. In Part II, we elaborate on some of the ways international law reflects the prohibition on unilateralism and the fiduciary criterion. We suggest that the two are complementary, and that their synthesis comprises an internal morality of international law.

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

In Part III, we elaborate on our conception of the internal morality of international law, drawing on the writings of Lon L. Fuller. We compare the fiduciary internal morality with the Fullerian theory developed by Jutta Brunée and Stephen Toope, and suggest that the fiduciary theory can underwrite a compelling account of the rule of international law. We then use the fiduciary construal of the rule of international law, in Part IV, to develop or comment on our colleagues' contributions to this volume.

II. Standing to Resist Unilateralism

In *Fiduciaries of Humanity*, we suggest that the prohibition on unilateralism operates as an organizing idea of international law at a number of levels and across a wide range of fields. At the interstate level, the principle explains the foundational doctrine of sovereign equality according to which states enjoy legal equality and independence from one another, since independent equals cannot dictate terms to one another. States are thus barred at international law from violating the territorial integrity of other states, and from otherwise interfering unilaterally in the internal affairs of other states. When disputes arise, states are expected to pursue good faith negotiations, with resort to impartial third-party arbitration or adjudication if necessary.[1]

At the intrastate level, the prohibition on unilateralism bars individuals from dictating terms to one another. If one individual were legally entitled to impose terms of interaction on another, the principle of legal equality would be compromised. The ascendant party to the interaction would possess a legal prerogative not enjoyed by the other. On a Kantian construal, the prohibition on unilateralism follows from Kant's innate right to equal freedom; the mere subjection of one individual to the will of another (even if the other is reasonable, acting in good faith, and so on) is a wrongful compromise of equal freedom. On a Hobbesian construal, unilateralism's violation of the principle of legal equality is enough to demonstrate its wrongfulness. At the intrastate level of individuals and groups interacting with one another as private parties, the prohibition on unilateralism bears on horizontal relations between those individuals and groups.

We argue in *Fiduciaries of Humanity* that the prohibition on unilateralism may be understood to have two aspects. One is captured by the Kantian principle that no person may be treated as a mere means, but only as an end, which is the principle of non-instrumentalization. The other

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1 See *ibid* at ch 8; Evan J Criddle & Evan Fox-Decent, "Mandatory Multilateralism" (2019) 113:2 Am J Intl L 272 [Criddle & Fox-Decent, "Mandatory Multilateralism"].

aspect is the republican principle of non-domination, according to which one person may not be subject to the arbitrary will of another. The Kantian principle condemns actual abuse. The republican principle condemns the possession of arbitrary power that would make abuse possible, whether or not the power is ever in fact used abusively. On our construal, international law recognizes and authorizes states to govern and represent their people to safeguard them against instrumentalization and domination, and thereby provide for their equal freedom and legal equality. States offer a vertical relation of authority to resolve a horizontal problem of injustice.

But states, of course, bring serious risks of new forms of instrumentalization and domination. International law, we argue, mitigates those risks by subjecting states to a variety of legal regimes protective of equal freedom and legal equality, such as international human rights law, international humanitarian law, and international law's regime for regulating emergencies. Within these regimes, some norms, such as the prohibitions on genocide and torture, are regarded as peremptory or *jus cogens*, and are of a kind from which no limitation or derogation is permitted. Two puzzles are immediately apparent. First, on what principled basis can we distinguish peremptory from non-peremptory norms? Second, how can we distinguish legitimate and lawful state action from wrongful counterfeits that constitute abuse or domination? The fiduciary criterion of legitimacy emerges from the fiduciary theory's answers to these questions.

In our view, peremptory norms prohibit policies of intractable abuse or domination that could never be understood to be adopted in the name of, or on behalf of, the persons subject to them. Genocide and torture, for example, are not intelligible as policies that could be adopted in the name of, or on behalf of, their victims. By contrast, policies that modestly limit freedom of expression for publicly avowable reasons (e.g., health warnings on cigarette packages) are intelligible as polices that could be adopted in the name of, or on behalf of, the persons subject to them. Put another way, publicly justifiable limitations on certain human rights (e.g., the right to freedom of expression) are consistent with fiduciary norms of stewardship and representation that govern public authorities. We have argued that these include principles of integrity (resisting corruption and capture), formal moral equality (like cases receive like treatment), and solicitude (due regard for legitimate interests). The process and substance of democratic public justification embodies the principles of integrity and formal moral equality, and demonstrates due regard for the legitimate interests of the people on whose behalf and in whose name authorities govern. In the case of peremptory norms, no such justification is possible because any infringement of these norms constitutes wrongful instrumentalization or domination, and so cannot be action taken in the name of, or

on behalf of, the persons made to suffer it. The fiduciary criterion of legitimacy thus emerges as a standard of adequacy that takes its cues from the norms that constitute and regulate representation, which are also norms that resist instrumentalization and domination. In this context, the fiduciary criterion lets us distinguish peremptory from non-peremptory norms.

In *Fiduciaries of Humanity*, however, we argue that the fiduciary criterion of legitimacy has a wider mission than picking out *jus cogens* norms from the diverse catalogue of international legal rights and obligations. And, we suggest that the criterion results ultimately from the fiduciary structure of international legal order. Roughly, our account is that there is a fiduciary power-conferring rule (the "fiduciary principle") within international legal order akin to the power-conferring rule *pacta sunt servanda* that transforms international agreements into binding treaties. The fiduciary principle authorizes states to possess and use public powers, but on condition that those powers be used in the name of, or on behalf of, every person subject to them. The nature of public power on our theory is therefore fundamentally representational, and its scope is comprehensive across persons amenable to the relevant authority's jurisdiction. The fiduciary criterion of legitimacy, therefore, is generated by the fiduciary principle's limited and conditional authorization of public powers as well as anti-unilateralist norms of role that constitute and govern representation.

The fiduciary criterion provides a normative standard for assessing the moral legitimacy of a given policy. In the case of extraterritorially detained terror suspects, for example, we argue that it would be morally reprehensible to deny them humane treatment and due process. Such a denial would instrumentalize the suspect and undermine the state's claim to have authority to detain, since the detaining state would hold the suspect in a manner that could not credibly be said to be done in the name or, or on behalf of, the detainee. For the detaining state to make such a claim, the state has to be conceived as a fiduciary of humanity, and as acting on behalf of humanity in a manner consistent with minimal legal protections.

We suggest that the structure and operation of international refugee law reveal vividly the idea of states as local fiduciaries of their people and also global fiduciaries of humanity. In this context, we also claim that the fiduciary criterion can play a conceptual as well as normative role. On our account, the fiduciary principle authorizes states to possess joint stewardship of the earth's surface, but requires as a condition of its authorization that states participate as fiduciaries of humanity in a collective regime of surrogate protection in the service of exiled outsiders. Otherwise, an exiled outsider could find herself with nowhere to go. Her very existence would constitute a trespass wherever she happened to be. We thus advocate treating the duty of non-refoulement as a customary and peremptory norm of international law from which states are not entitled to resile.

Were states to have such an entitlement, the legitimacy of international law's distribution of territory to sates would be undermined because that distribution could not be said to be made in the name or, or on behalf of, humanity; exiled outsiders would be excluded. From the perspective of international law, states that enforce exclusionary practices against necessitous asylum seekers do so unlawfully. The failure to satisfy the fiduciary criterion would also be a failure to meet an intrinsic requirement of international law.

In sum, the fiduciary criterion of legitimacy articulates a representational ideal that serves as a normative and conceptual standard of adequacy. While it is always concerned with fidelity to role-based norms arising from representation, the criterion also invites critical assessment of complex interactions of law and social facts, as seen in the case of international refugee law. And the criterion presupposes that if it is satisfied, then the relevant authority will have standing to govern and represent the people amenable to its jurisdiction. Whereas unilateralism is the problem for which public authority claims to be the remedy, the fiduciary criterion sets the standard public authority must meet both to succeed in its anti-unilateralist mission and to have standing to rule. Combining the prohibition on unilateralism with the fiduciary criterion, we argue now, discloses the internal morality of international law.

III. The Internal Morality of International Law

In *Fiduciaries of Humanity*, we explain in greater detail how the prohibition on unilateralism and the fiduciary criterion are immanent in the juridical structure of positive international law, including the regimes that govern international human rights, armed conflict, detention of foreign nationals, and forced migration. We argue that these principles are constitutive of state sovereignty under international law, such that violations of these principles undermine a state's claim to exercise legitimate authority. In the discussion that follows, we make the case that the prohibition on unilateralism and the fiduciary criterion of legitimacy are essential features of international law's internal morality.

Our suggestion that international law has an "internal morality" builds on Fuller's account of the rule of law. Fuller envisioned law as a form of social ordering that uses authoritative directives to "create the conditions essential for a rational human existence."[2] In developing his theory of the rule of law, Fuller emphasized the need for lawmakers to re-

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[2] Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 9.

spect human autonomy and rationality. Respecting human autonomy and rationality was not merely a normative ideal, Fuller contended, but also a practical necessity for those who aspired to establish a legal system. For law to thrive as a form of social ordering, public authorities must appeal to the rational capacities of persons by enabling those persons to understand what the law requires and how the law will be applied so they can conform their actions to its demands. Only when government treats the law's subjects as rational, self-determining agents will its commands be capable of attracting compliance and thereby nurturing a culture of legality.

Perhaps the most influential feature of Fuller's social theory of law is his insight that government directives must share certain formal properties to generate legal order. In particular: (1) the directives must express general, not ad hoc, commands; (2) they must be publicized; (3) they must not be applied retroactively; (4) they must be intelligible; (5) they must not be contradictory; (6) they must not "require conduct beyond the powers of the affected party"; (7) they must be relatively stable to enable compliance; and (8) there must be "congruence between the rules as announced and their actual administration."[3] A directive that failed to satisfy any of these eight desiderata would be "futile" from the standpoint of contributing to a genuine "legal system," because it would afford no rational basis for people to orient their behavior in response to it.[4] The eight desiderata are also morally consequential, Fuller asserted, because a person's moral duty to obey directives from public authorities would depend upon the directives taking a form that could rationally attract compliance. As Fuller explains,

> there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.[5]

Fuller observed that these features of a functional legal system establish "a kind of reciprocity between government and the citizen with respect to the observance of rules."[6] Should public authorities fail to govern with directives that satisfy the eight desiderata, their relationship with their people would lack the reciprocity necessary to generate legal authority. When this "bond of reciprocity is finally and completely ruptured by

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[3] *Ibid* at 39.

[4] See *ibid.*

[5] *Ibid.*

[6] *Ibid.*

government," Fuller explains, "nothing is left on which to ground the citizen's duty to observe rules."[7]

Although Fuller characterized his eight formal criteria as representing law's "internal morality," he never claimed that a failure to satisfy these criteria was the only way that an "attempt to create and maintain a system of legal rules may miscarry."[8] In *Fiduciaries of Humanity* we argue that certain substantive criteria are also constitutive of international authority. The concerns that motivated Fuller's theory—namely, respect for human autonomy and rationality—support our fiduciary theory of sovereignty. To merit recognition as law, directives from public authorities must offer rational grounds for compliance. Directives that violate the prohibition against unilateralism or the fiduciary criterion cannot furnish these kinds of reasons.[9] For example, there is no rational basis to conclude that people have moral obligations to comply with public directives that authorize their own enslavement, arbitrary detention, or torture. These kinds of directives are not plausibly interpretable as actions taken on behalf of the persons subject to them. Accordingly, slavery, arbitrary detention, torture and other violations of international *jus cogens* dismantle the reciprocity that is necessary, both practically and morally, to sustain legal order. Thus, the prohibition on unilateralism and the fiduciary criterion constitute substantive desiderata of international law's internal morality.

This insight offers valuable lessons for international legal theory. Among scholars of international law, Professors Jutta Brunnée and Stephen Toope have proven to be Fuller's most eloquent and devoted disciples,[10] but their exclusive focus on Fuller's eight desiderata commits them to a distorted vision of international legal order. In their "interactional account" of international law, Brunnée and Toope contend that international law's authority arises from "three interlocking elements" inspired by Fuller:

> First, legal norms are social norms and as such they are connected to social practice – they must be grounded in shared understandings. Second, what distinguishes law from other types of social ordering is not so much form or pedigree, as adherence to [Fuller's] specific cri-

7 *Ibid* at 39–40.

8 *Ibid* at 38–39.

9 We do not argue here or in *Fiduciaries of Humanity* that satisfying these principles is a sufficient condition to generate legal obligations.

10 The two scholars have developed this account most fully in their excellent monograph: see Jutta Brunnée & Stephen J Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) [Brunnée & Toope, *Legitimacy and Legality in International Law*].

> teria of legality. When norm creation meets these criteria and, third, is matched with norm application that also satisfies the legality requirements, international law will have legitimacy and generate a sense of commitment among those to whom it is addressed.[11]

Brunnée and Toope argue that Fuller's desiderata are sufficient to explain why some international norms qualify as legally authoritative, while others do not. Their account plausibly explains some features of international law, including the scope of states' legal obligations in the global regime to confront climate change.[12] Yet, when their focus shifts to international human rights, their theory proves wholly inadequate to explain the peremptory authority of *jus cogens* norms. To their own evident discomfort,[13] Brunnée and Toope feel compelled by their own theory to conclude that the prohibition against torture is not legally binding because state practice is not sufficiently congruent with the positive norm.[14] This despite the fact that the prohibition against torture continues to be universally accepted—even by the very states that have practised torture—as a peremptory norm of international law.[15]

Brunnée and Toope's interactional account of the prohibition against torture suffers from two flaws. The first is their mistaken assumption that adherence to Fuller's eight desiderata is sufficient to give people rational grounds "to have their behavior guided by the promulgated rules even if they disagree with them on substantive grounds."[16] As we have shown in *Fiduciaries of Humanity* and elaborate more fully here, when national laws or practices intractably violate either the prohibition on unilateralism (i.e., the principles of non-instrumentalization and non-domination) or the fiduciary criterion, merely satisfying Fuller's eight desiderata cannot supply rational grounds for compliance. Second, when evaluating whether a human rights norm is legally binding, the relevant inquiry is not (as Brunnée and Toope suppose) whether violations of the norm dissolve *states'* moral obligations to comply. Human rights norms do not exist for the benefit of states but for the benefit of human beings subject to their power. Accordingly, the proper inquiry is whether the pur-

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[11] Jutta Brunnee & Stephen J Toope, "The Responsibility to Protect and the Use of Force: Building Legality?" (2010) 2:3 Global Responsibility to Protect 191 at 193.

[12] Brunnée & Toope, *Legitimacy and Legality in International Law*, *supra* note 11 at 268.

[13] See *ibid* ("Quite frankly, we are not at all comfortable with the conclusion to which our analysis draws us in relation to the prohibition on torture, but we are firmly convinced that the analysis is nonetheless correct.").

[14] See *ibid* at 269.

[15] See *Restatement (Third) of Foreign Relations Law of the United States* § 702 cmt d–i, § 102 cmt k (1987).

[16] Brunnée & Toope, *Legitimacy and Legality in International Law*, *supra* note 11 at 30.

ported incongruence between the positive norm against torture and state practice gives *people who are subject to state power* a rational reason to submit to torture at the direction of their own state. To ask this question is, of course, to answer it. States cannot rationally suppose that their people have a moral obligation to submit to their authority when the outcome is torture. Accordingly, when states authorize torture or other violations of peremptory norms of international law, these directives are incapable of generating legal powers and duties. They are simply *void ab initio*, as reflected in the doctrine of *jus cogens*.[17]

IV. Cultivating the Rule of (International) Law

Having explained how the prohibition on unilateralism and the fiduciary criterion can complement a Fullerian internal morality of international law, we are now better equipped to understand what it would mean to cultivate the rule of international law. Cultivating the rule of law at the global level means establishing rightful relationships between states and other transnational authorities, on the one hand, and the people who are subject to them, on the other. As Fuller recognized, these relationships can be understood as governed by the rule of law only if public authorities treat people as rational, self-determining agents by establishing rules that satisfy certain formal criteria. Taken to its logical conclusion, Fuller's account of the rule of law also demands that public authorities respect the prohibition against unilateralism and the fiduciary criterion. In short, states and other transnational authorities cultivate the rule of international law when they treat people subject to their jurisdiction as equal beneficiaries of international legal order.[18] While we cannot work out a fully realized account of the rule of international law in this brief reply essay, we use the space that remains to reflect on this theme while engaging with our colleagues' contributions in this volume.

In *Fiduciaries of Humanity*, we make the case that international law already embraces the rule of law's substantive dimension to an extent that has yet to be fully recognized by the international legal community. International law now defines sovereignty in relational terms, with the fiduciary criterion playing a central role in the constitution and distribution

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17 See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 53 (entered into force 27 January 1980) ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

18 We offer some guidance on what this would mean for inter-state relations in Criddle & Fox-Decent, "Mandatory Multilateralism", *supra* note 2.

of state authority.[19] The fiduciary criterion also supplies a standard for assessing the exercise of sovereign power, as reflected in peremptory norms of international law that govern human rights, armed conflict, migration, the environment, and other fields of international concern.

Some readers of our work have confused our theory of the rule of international law with an aspiration to colonize public law with private law rules and remedies. There is indeed a long history of international lawyers injecting private law doctrines into international legal discourse via doctrinal transplantation and analogical reasoning.[20] This is not our approach, however. We do not advocate applying private law directly to international relations, nor do we argue that states are merely analogous to private law fiduciaries, such that private law rules and remedies would translate smoothly to public international law. Rather, we argue that the fiduciary theory of state sovereignty offers a conceptual and normative framework that captures the relational character of public authority under international law. Characterizing states as fiduciaries makes sense, we argue, because fiduciary relationships governed by private law and international law, respectively, share a common juridical structure: in both contexts, fiduciary relationships arise when one party holds entrusted power over another party's legal or practical interests. International law therefore recognizes the relationship between a state and its people as a bona fide fiduciary relationship, albeit one that is *sui generis* and governed by legal requirements (e.g., human rights, *jus cogens*) that are responsive to the distinctive threats of domination and instrumentalization that arise within this relationship.

Our methodology in *Fiduciaries of Humanity* is not simply to posit non-domination and non-instrumentalization as first principles and then to reason by deduction toward specific rules that accord with our ideal conception of the rule of law. Instead, we employ a blend of inference to the best explanation and Rawls's idea of a "reflective equilibrium"[21]—an interpretivist methodology which requires that we take seriously the distinction between *lex lata* and *lex ferenda*.[22] Using this methodology, we sift

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[19] See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 1 at ch 1–2. See also Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20:3 Eur J Intl L 513; Helen Stacy, "Relational Sovereignty" (2003) 55:5 Stan L Rev 2029.

[20] See H Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longmans, Green & Co, 1927).

[21] See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 20.

[22] Accordingly, Trapp & Robinson are mistaken to insinuate that we treat the fiduciary principle as a "source" of international legal obligations. See Kimberley N Trapp & Ed-

through centuries of international legal theory and practice to show how the fiduciary conception of state sovereignty has become firmly entrenched in international legal order. We do not argue that the fiduciary theory can explain every feature of international law. But we do claim that the theory best explains and justifies certain constitutional elements of international law, such as peremptory norms and the emerging rules of state recognition, which are incompatible with the classical conception of sovereignty as an "absolute" and "supreme" power that is "subject to no law."[23]

Fiduciaries of Humanity occasionally offers arguments for clarifying or revising established rules of international law. For example, we propose that when a state responds with force to attacks from nonstate actors abroad, international human rights law's (IHRL) restrictive standards for the use of force should apply. We base this proposal on the observation that when a state uses force against nonstate actors abroad, it arguably exercises public powers in the host state's place, operating as a temporary agent of necessity under international law.[24] If this is so, it follows that an intervening state would assume the host state's fiduciary obligation to respect the "right to life,' as enshrined in the International Covenant on Civil and Political Rights and other instruments.[25] Although we recognize that IHRL's applicability to asymmetric self-defense is not yet firmly established in positive law, we do identify some tentative shifts toward this approach in state practice, and we speculate that these developments might eventually crystallize into firm customary or treaty-based obligations.

Trapp and Robinson reject this application of our theory. They argue that "[c]haracterizing the intervening state, in the context of asymmetrical self-defense, as a surrogate sovereign is unrealistic" and "unlikely to be effective in practice."[26] In addition, they object that our theory does not adequately "acknowledge or engage with" the tension between a state's

mund Robinson, "Extra-Territorial 'Fiduciary' Obligations and 'Ensuring' Respect for International Humanitarian Law" (2018) 63:3&4 McGill LJ 675 at 684.

23 Jean Bodin, *Les six livres de la République*, ed by Christian Frémont, Marie-Dominique Couzinet & Henri Rochais (Paris: Fayard, 1986) at 179–228, 295–310.

24 See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 1 at 190.

25 See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 6(1) (entered into force 23 March 1976).

26 Trapp & Robinson, *supra* note 23 at 683

own "security interests" and the "human rights" concerns of foreign nationals.[27]

We nonetheless remain convinced that our proposal to apply human rights standards to asymmetric self-defense is not a utopian fantasy. As we show, the United States has already incorporated human rights-style standards into its rules of engagement for counterinsurgency and counterterrorism operations, and it has employed these rules in a variety of conflicts. IHRL's restrictive rules for the use of force are not always operationally convenient, but experience attests that they are feasible and can be employed effectively in conventional settings involving asymmetric self-defense. Nor have we overlooked the obvious tensions between a state's duties to its own people and its duties to foreign nationals abroad. Indeed, our chapter on the law of armed conflict focuses on working out a principled resolution to this problem.[28] We explain that this problem is hardly unique to the law of armed conflict; across a variety of international regimes—including those that govern national security detention and refugee protection—international law requires states to balance competing fiduciary obligations toward their own people, on the one hand, and to foreign nationals, on the other.[29]

Ultimately, Trapp and Robinson's argument boils down to the assertion that IHL norms, not IHRL norms, are "inherently" superior when it comes to "balanc[ing] the interests of the intervening state's domestic population ... against the rights to physical integrity of the local population to the armed conflict."[30] For the reasons we have articulated, we do not consider IHL's superiority to be so self-evident. In our view, the nonbelligerent relationship between an intervening state and a host state during asymmetric armed conflict points toward IHRL's more demanding standards for the use of force. Taking the international rule of law seriously (including the prohibition against unilateralism and the fiduciary criterion) would require that intervening states be prepared to publicly justify their use of force as the least harmful means available, as well as show that any collateral harm to innocent civilians is no greater than strictly necessary to neutralize the threat.

Keitner's essay for this symposium explains how this kind of public justification is standard practice in the international legal system.[31] Motivated in part by our recent debate with Ethan Leib and Stephen Galoob

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[27] See *ibid*.

[28] See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 1 at ch 5.

[29] See *ibid* at ch 6–7.

[30] Trapp & Robinson, *supra* note 23 at 683.

[31] See Chimène L Keitner, "Explaining International Acts" (2018) 63:3&4 McGill LJ 649.

over the role of justification in IHRL,[32] Keitner shows that a robust "culture of justification ... exists at the international level" and "includes an expectation that states will articulate the legal and policy bases for their actions, particularly when such actions depart from accepted norms of state behavior."[33] She traces this culture of justification through four episodes involving the use of force that have seized the world's attention within the past two decades: the NATO bombing campaign in Kosovo (1999); international military action in Iraq (2003); Russia's intervention in Crimea (2014); and American, British, and French missile strikes in response to Syria's use of chemical weapons (2017). In each of these episodes, states felt compelled by international law's culture of justification to explain and defend their actions to the broader international community.

Keitner's account of international law's culture of justification resonates with the internal morality of international law as we have described it in this essay. When states seek to persuade one another concerning the lawfulness of their cross-border military actions and other deviations from international law's default rules, they respect the internal morality of international law. As Keitner observes, the practice of public justification contributes to clarifying and crystallizing the content of customary international law, while also promoting compliance with established rules.[34] "From the perspective of fiduciary theory," Keitner explains, "the core insight is that an account of compliance that focuses exclusively on outcomes misses an important part of what makes international law *law*: namely, the ex ante and ex post processes of justification and explanation that shape actors' collective understandings of what constitutes internationally permissible conduct."[35] Thus, international law's culture of justification contributes to a Fullerian legal order by promoting publicity, clarity, consistency, stability, and congruence.

Ohlin's essay stacks one provocative claim upon another. The first is that the doctrine of *jus cogens* is only seriously defensible from a natural law perspective. The second is that it was only the murkiness of various

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32 Compare Ethan J Leib & Stephen R Galoob, "Fiduciary Political Theory: A Critique" (2016) 125:7 Yale LJ 1820 at 1877 (arguing that a "rigorous culture of justification [does not] appl[y] to the international realm) with Evan J Criddle & Evan Fox-Decent, "Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob" (2016) 126 Yale LJ Forum 192 at 195 (defending the view that IHRL requires justifications, not merely outcomes).

33 Keitner, *supra* note 32, at 651 (citing the work of Etienne Mureinik and David Dyzenhaus on the concept of a "culture of justification").

34 See *ibid* at 652–57.

35 *Ibid* at 673.

accounts of *jus cogens* that likely prevented the doctrine from being discredited or falling into disuse, given the dominance of legal positivism after the Second World War. He suggests we are not as forthright as we might be about what he perceives as the fiduciary theory's natural law (or natural law-ish) account of *jus cogens*.[36]

Throughout *Fiduciaries of Humanity* we prescind from entering jurisprudential debates about the ultimate nature of international law. Our chief aim is to offer an interpretive account of some of international law's central doctrines and principles. While we are sympathetic to Ohlin's position, our hope is that the book might be attractive to inclusive legal positivists as well as natural lawyers. In principle, inclusive positivists could interpret the fiduciary criterion as a standard of adequacy that goes exclusively to the normative merits (and not validity) of international norms. By contrast, anti-positivists can interpret the criterion as offering a limited, substantive standard that in some cases (e.g., *jus cogens*) calls into question the legal validity of inconsistent measures.[37]

In his essay, Davis takes issue with the fiduciary theory's purported "ratification of state sovereignty," arguing that the state system displaces and effaces alternative forms of political association, such as those traditionally used by Indigenous Peoples, which "claim the authority to make law that does not depend on the state's authority."[38] The fiduciary theory, however, does not presuppose the legitimacy of existing state configurations, nor does it assume that states are the only legitimate form of political association. Although *Fiduciaries of Humanity* offers an interpretive theory of the contemporary law of state recognition, we accept that non-state institutions may exercise forms of authority under international law. We also appreciate Davis's insight that current compliance with the fiduciary criterion, while a necessary condition for legitimate state authority, may not be sufficient to establish legitimacy when a state has acquired that authority through military aggression or colonial annexation in violation of the prohibition on unilateralism.

Davis also contends that *Fiduciaries of Humanity* "overstates the power of the fiduciary conception as such to resolve ... problems" and "pre-

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36 See Jens David Ohlin, "In Praise of Jus Cogens' Conceptual Incoherence" (2018) 63:3&4 McGill LJ 701.

37 One of us has since argued that the fiduciary criterion can play this kind of role in an anti-positivist jurisprudence that takes seriously the role-based norms of representation. See Evan Fox-Decent, "Jurisprudential Reflections on Cosmopolitan Law" in Jacco Bomhoff, David Dyzenhaus & Thomas Poole, eds, *The Double-Facing Constitution* (Cambridge: Cambridge University Press) [forthcoming in 2020].

38 Seth Davis, "The Private Law State" (2018) 63:3&4 McGill LJ 725 at 759.

scribe particular doctrines in international law."[39] He seems to believe that our theory cannot succeed unless private law concepts and doctrines offer clear, unequivocal, and uncontroversial guidance for debates in international law.[40] This criticism misses the mark because it mischaracterizes the shape of our argument. Nowhere in *Fiduciaries of Humanity* do we argue that the bare legal concept of a fiduciary relationship *as such* dictates the resolution of particular problems in public international law. Rather, we articulate a normatively rich interpretive theory of the fiduciary relationship based on principles of non-domination and non-instrumentalization as well as the fiduciary criterion, and we argue that this conception best captures core features of international law.[41]

We do not deny, of course, that other scholars have offered alternative interpretive theories of fiduciary obligations. We also recognize that national courts and legislatures have adopted varying formulations of private fiduciary law rules, and some of these formulations are in tension with our conception of the fiduciary relationship. But focusing on these doctrinal divisions, interesting as they may be, misses the point of our analysis.

Our argument in *Fiduciaries of Humanity* does not depend on the international community reaching a consensus about the normative basis for fiduciary obligations in private law. For our interpretive theory to succeed, we need only show that the normative concerns that underpin our theory of fiduciary duties in private law are shared by international law, and that these normative concerns offer intelligible criteria for explaining, clarifying, and critiquing positive international law. *Fiduciaries of Humanity* meets this burden by explaining how two guiding normative principles—non-domination and non-instrumentalization—underwrite the rules of state recognition, human rights, and peremptory norms in international law. These normative principles enable the fiduciary theory to address a variety of challenging questions, such as the difference between torture and cruel, inhuman, and degrading treatment; whether the prohi-

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39 *Ibid* at 743.

40 See *ibid* at 750.

41 At several points in his essay, Davis does acknowledge these contributions when he observes that our "core argument is as much a claim about the nature of fiduciary duties as it is a claim about the fiduciary nature of a state's duties." *Ibid* at 733; see also *ibid* at 751 (asserting that *Fiduciaries of Humanity* "rethinks problems of private fiduciary law together with problems arising in public law"). This is exactly right. Elsewhere, one of us has argued that the principles of non-domination and non-instrumentalization also best capture the central features of private fiduciary law. See Evan J Criddle, "Liberty in Loyalty: A Republican Theory of Fiduciary Law" (2017) 95:5 Texas L Rev 993.

bition against state corruption is a *jus cogens* norm; and whether states have positive legal duties to guarantee access to secondary education.

Davis is right to associate our fiduciary theory of international law with "a lawyer's mindset about politics."[42] At the very core of a lawyer's mindset is a commitment to the rule of law, and the fiduciary theory is a theory about how the rule of law operates in international affairs. It is with this commitment to the rule of law firmly in view that we characterize the fiduciary criterion as part of the "constitution of international law," while emphasizing that international law's constitutionalization is, to quote Martti Koskenniemi, less "an architectural project" than an emancipatory "programme of moral and political regeneration."[43]

Like Fuller's account of the rule of law, the fiduciary theory's "primary appeal" is to international lawyers' "sense of trusteeship" and "the pride of the craftsman."[44] Lawyers, by virtue of their professional training and role, are uniquely positioned to cultivate and safeguard the rule of law. Thus, if the rule of law is to thrive in international affairs, it will depend on international lawyers recognizing that they are not only advocates and advisors for their clients, but also guardians of the rule of law and fiduciaries of humanity.[45]

We share Davis's conviction that subjecting power to "the rule of law—and the rule of lawyers—is not the only way to transform" international society for the better.[46] To make real progress, the international community must also nurture a political culture and institutions that will complement the law in establishing a global society where all people enjoy secure and equal freedom. When all is said and done, international lawyers' efforts to promote an international culture of legality might be less critical to the cause of global justice than the work that diplomats, civil servants, activists, and humanitarians perform in cultivating a cosmopolitan politi-

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[42] Davis, *supra* note 38, at 756. We therefore embrace Davis's effort to connect our work with Martti Koskenniemi's vision of an international "culture of formalism." *Ibid* at 756. Indeed, in *Fiduciaries of Humanity* we claim common cause with Koskenniemi in viewing global constitutionalism as a "mindset" or "practice of professional judgment." See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 1 at 38 (quoting Martti Koskenniemi, "Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization" (2007) 8:1 Theoretical Inquiries in L 9 at 18).

[43] Koskenniemi, *supra* note 42 at 18.

[44] Fuller, *supra* note 3 at 5–6.

[45] For discussion of the relationship between lawyers' first-order fiduciary duties to their clients and their second-order fiduciary duties to legal systems, see Evan J Criddle & Evan Fox-Decent, "Guardians of Legal Order: The Dual Commissions of Public Fiduciaries" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge: Cambridge University Press, 2018).

[46] Davis, *supra* note 39 at 759.

cal and ethical culture, designing institutions, and introducing economic reforms that reflect compassion, inclusion, and generosity for the destitute and disenfranchised at home and abroad.[47]

Nonetheless, we think it would be a grave mistake to infer from this that international law cannot play an essential part in the establishment of a just global order. As Fuller recognized, law is the social mechanism by which political communities affirm that every person is entitled to respect as an autonomous, self-determining agent. Law accomplishes this, in part, through the formal features of legal norms that Fuller identifies. Yet, Fuller's eight desiderata do not exhaust the demands of legality. As we have shown in *Fiduciaries of Humanity*, the internal morality of international law also requires that public authorities respect people as rational, autonomous agents by observing the prohibition on unilateralism and the fiduciary criterion. These features of international law's internal morality find expression throughout positive international law. They provide the normative and conceptual structure through which peoples and individuals can progress toward a more just international order on terms of equal freedom.

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[47] See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).