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Fiduciaries of Humanity: How International Law Constitutes Authority, by Evan J. Criddle & Evan Fox-Decent

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Book Review



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Abstract

International legal scholars have increasingly noted that there is a fundamental tension within the international legal order. On one hand, international law represents a utopian idea that advances aspirations towards grand, yet equally hollow, goals of “peace,” “justice,” and “human rights.” We see these aspirations embodied in a number of international institutions—the United Nations Security Council strives to maintain “international peace and security” under the United Nations Charter and the United Nations Universal Declaration of Human Rights aspires to establish a “common standard” of human rights “for all peoples and all nations.” The international legal system hence calls on states to work together to advance these shared interests. However, to the extent that the international legal system is able to make inroads towards these ideals, it equally is frustrated by new tensions arising from the interplay of the system’s inherent and emerging qualities, such as states’ pursuit of their individual interests and the increasingly fragmentized nature of decision-making processes.

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Book Review

Fiduciaries of Humanity: How International Law Constitutes Authority,
by Evan J. Criddle & Evan Fox-Decent¹

WUDASSIE TAMRAT²

INTERNATIONAL LEGAL SCHOLARS HAVE INCREASINGLY noted that there is a fundamental tension within the international legal order. On one hand, international law represents a utopian idea that advances aspirations towards grand, yet equally hollow, goals of “peace,” “justice,” and “human rights.”³ We see these aspirations embodied in a number of international institutions—the United Nations Security Council strives to maintain “international peace and security” under the United Nations Charter⁴ and the United Nations Universal Declaration of Human Rights aspires to establish a “common standard” of human rights “for all peoples and all nations.”⁵ The international legal system hence calls on states to work together to advance these shared interests. However, to the extent that the international legal system is able to make inroads towards these ideals, it equally is frustrated by new tensions arising from the interplay of the system’s inherent and emerging qualities, such as states’ pursuit of their individual interests and the increasingly fragmentized nature of decision-making processes.

1. (New York: Oxford University Press, 2006) 352 pages.

2. JD Candidate (2018), Osgoode Hall Law School, Toronto, Canada.

3. Martti Koskenniemi, “What is International Law For?” in Malcolm D Evans, ed, *International Law*, 4th ed (New York: Oxford University Press, 2014) 29 at 45.

4. *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

5. GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

In many instances, the very goals and ambitions that the international legal order seeks to achieve are being manipulated to challenge and violate other aspects of the international legal order. A chilling example arises in the way states adopt the language of humanitarianism and human rights to label and denounce actions taken by their political adversaries with the goal of legitimizing their own use of force (which would otherwise contradict international legal principles). As such, what we see within the international legal system is an inherent tension between the codes and principles developed at an institutional level and the particular interests and individualized agendas of states. These tensions, which have become a classic fixture within the international legal system, cause many to question and doubt the ability of international law in its current form to truly achieve its goals and maintain even the guise of legitimacy. Many international law scholars have attempted to overcome these concerns by injecting overarching normative principles into the discourse of international legal scholarship. One such attempt is represented by historical considerations of the fiduciary theory and its application within the international system.

Although it is most commonly understood within the domestic context, the fiduciary theory⁶ has been discussed within the ambit of the law of nations dating back to the days of Swiss jurist Emmerich de Vattel.⁷ In connecting the basis for sovereign power to the “happiness of...the people,”⁸ Vattel grounds the legitimacy of the monarch and the right to rule in a duty to those same people. Ultimately it is from this starting point that Evan J Criddle and Evan Fox-Decent, in their book *Fiduciaries of Humanity: How International Law Constitutes Authority*, begin their analysis of the fiduciary theory and its application to today’s international legal order. Whereas traditional concepts of the fiduciary theory within the international system have focused on states’ relationships to their own peoples, Criddle and Fox-Decent extrapolate it to various contextual relationships within the international system—breathing new life into fiduciary theory. They argue that states owe fiduciary duties not simply to their own people, but also, in concert with international institutions, to humanity in general. In so doing, Criddle and

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6. In the domestic legal context, a fiduciary is broadly defined as “a person who occupies a position of such power and confidence with regard to the property of another that the law requires him to act solely in the interest [or best interests] of the person whom he represents. Examples of fiduciaries are agents, executors and administrators.” “Fiduciary” in *Encyclopaedia Britannica* (20 July 1998), online: <www.britannica.com/topic/fiduciary>.
 7. Criddle & Fox-Decent, *supra* note 1 at 1.
 8. Emmerich de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, 6th ed, translated by Joseph Chitty (Philadelphia: T & JW Johnson, 1844) at 12.

Fox-Decent not only push the boundaries of the fiduciary theory, they resurrect a refreshing normative perspective in what has become an overwhelmingly positivist international legal dialogue.

I. FORGING A NEW PATH FOR PUBLIC INTERNATIONAL LAW

It is clear that *Fiduciaries of Humanity*'s thesis is a lofty one; however, Criddle and Fox-Decent lay a carefully considered path towards achieving it.⁹ The depth and breadth of the book's conceptual and philosophical underpinnings cannot be understated. Evidently, the realm of public international law is a notoriously difficult beast to tackle, plagued with poorly defined and inconsistently applied principles of customary law and human rights, to use just a few examples. Attempting to explain these concepts to the average layperson is an entirely separate and even more complicated effort. Nevertheless, *Fiduciaries of Humanity* manages to overcome these inherent challenges and to explain the conceptual underpinnings, nuances, and contours of their argument. Yet, what resonates most about *Fiduciaries of Humanity* is not its readability. Rather, it is the overarching progressive tone of the book. For Criddle and Fox-Decent, the fiduciary theory and its interpretive and prescriptive theoretical contributions represent an opportunity to "guide international law's progressive development."¹⁰ This normative vision of hope for the international legal system, coupled with the book's accessibility to the average layperson, comes at a critical juncture in history. To demonstrate this point, a current international case that Criddle and Fox-Decent briefly discuss in *Fiduciaries of Humanity* will be further explored.

9. In *Fiduciaries of Humanity*, Criddle and Fox-Decent present a detailed philosophical account of the moral basis for state authority and responsibility and discuss how the fiduciary theory model can be used to reconcile these concepts under international law. To do so, the authors examine the fiduciary character of sovereignty, the creation of fiduciary states, human rights and *jus cogens*, the operation of fiduciary states in emergencies and situations of armed conflict, the application of the fiduciary theory to the detention of foreign nationals and refugee law, and finally the concept of international institutions as trustees of humanity. Criddle & Fox-Decent, *supra* note 1.

10. Criddle & Fox-Decent, *supra* note 1 at 5.

II. THE SIGNIFICANCE OF SYRIA¹¹

In the context of the Arab Spring, the independent state of Syria slid into civil war in the spring of 2011. As the regime of Bashar al-Assad fought against civil forces, news of government attacks on civilians provoked widespread international criticism. In August 2011, the United Nations Security Council issued a statement condemning these widespread human rights violations and the regime's use of force against its own people. In October 2011, a draft resolution by France, Germany, Portugal, and the United Kingdom was introduced in the Security Council.¹² Security Council members debated the resolution, which was aimed at preventing the use of force against civilians in Syria through the threat of ultimatum and sanctions. Ultimately, Russia exercised its veto power and blocked the resolution from gaining approval. The Security Council has since been unable to come to a consensus on a resolution regarding the crisis in Syria; subsequent attempts have continually been vetoed. In the absence of another state bringing forward a viable self-defence claim against Syria, the Security Council is the only international entity with the institutional legitimacy to rule on the use of military force against a sovereign state such as Syria. As of 2017, the Security Council remains stalled and war continues to rage on in Syria, leaving the rest of the international community to watch as Syrian lives are lost.

The crisis in Syria is further complicated by the rise of the Islamic State of Iraq and the Levant (ISIL), an unrecognized and militant jihadist state identified as a terrorist group by the United Nations and other international organizations. Historically speaking, ISIL finds its roots in the September 11, 2001 terrorist attacks and the subsequent American invasion of Iraq. Acting on the basis of President George W Bush's allegations that the Iraqi regime under Saddam Hussein continued to possess and manufacture weapons of mass destruction, the United States and its allies overthrew Saddam Hussein's regime, marking the end of Sunni Muslim minority rule in Iraq.¹³ Coupled with extensive US-led

11. For a helpful overview of the factual circumstances of the Syrian case, see generally Jeffrey L Dunoff, Steven R Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach*, 4th ed (New York: Wolters Kluwer, 2015) at 790-91.

12. UNSCOR, 66th year, 6627th Mtg, UN Doc S/2011/612 (2011) [provisional]. , ar , Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolutionh "tattn overview as the one in this

13. "Chapter 1: Early Post Invasion Iraq" *Al Jazeera* (26 October 2015), online: Enemy of Enemies: The Rise of ISIL <interactive.aljazeera.com/aje/2015/riseofisil/chapter-one.html> [Al Jazeera].

coalition efforts to dismantle the former ruling Ba'ath Party,¹⁴ the opportunity arose for the development of a militarized and highly skilled Sunni led insurgency in the region. The increasingly "improvised nature of Sunni attacks [backed] with...Baathist know-how pushed the insurgency to a new scale of terror" against Shia Muslims.¹⁵ This rise in Sunni extremist violence in Iraq has resulted in large-scale sectarian violence in the region, which, coupled with increasing political destabilization in neighbouring Syria, has allowed ISIL to expand quickly across the Middle East.¹⁶ This expansion is supported by ISIL's extensive propaganda, which highlights "its successes in battle and its brutal treatment of enemies and those it deem[s] to be violators of Islamic law."¹⁷ The graphic content of ISIL's propaganda documents gruesome acts of aggression and violence against journalists, aid workers, and civilians.¹⁸

III. FIDUCIARIES OF HUMANITY IN LIGHT OF THE SYRIAN REFUGEE CRISIS

These events have given rise to a significant increase in the number of Syrian nationals seeking refuge in other states to escape the turmoil of their home state. However, efforts to accept Syrian refugees by other states have led to an additional problem—host state nationals have become increasingly unwilling to accept growing numbers of Syrian refugees. On the one hand, these objections arise over legitimate concerns regarding the economic strain that accommodating Syrian

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14. "The Ba'ath Party espoused nonalignment and opposition to imperialism and colonialism, took inspiration from what it considered the positive values of Islam, and attempted to ignore or transcend class divisions. Its structure was highly centralised and authoritarian." "Ba'ath Party" in *Encyclopaedia Britannica* (16 March 2007), online: <www.britannica.com/topic/Bath-Party>.
 15. Al Jazeera, *supra* note 14.
 16. "Islamic State in Iraq and the Levant (ISIL)" in *Encyclopaedia Britannica* (14 April 2017), online: <www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant>.
 17. *Ibid.*
 18. *Ibid.*

refugees will put on national economies. On the other hand, underlying racial biases and Islamophobia also seem to play a role in shaping these objections.¹⁹

In light of this context, *Fiduciaries of Humanity* is particularly poignant. In their careful analysis of the institutional structures and gaps within the current state of international refugee law,²⁰ Criddle and Fox-Decent effectively sum up the competing principles that lead to refugee crises such as the current Syrian crisis. Their normative framework emphasizes “dual but complementary” fiduciary obligations upon sovereign states to act as trustees, both on behalf of their own people and, more broadly, on behalf of humanity writ large.²¹ In so doing, they extend the case for applying fiduciary principles and argue why and how the duty of non-refoulement²² ought to be recognized as a peremptory international legal principle.²³ Given that all states are bound by these peremptory (or *jus cogens*) principles to maintain the legitimacy of their participation within the international legal order, such an analysis is significant as it strengthens obligations upon host states.

Criddle and Fox-Decent’s reinvigoration of the fiduciary theory in international law functions to constrain what has become a state-centred monopoly over international legal discourse. It elevates the legitimacy and bargaining power of refugee claimants. As Criddle and Fox-Decent state, “the fiduciary character

19. For a look at emerging discussions on this issue, see Caroline Nagel, “Southern Hospitality and the Politicization of Refugees in South Carolina during the 2016 Election Season” (2016) 56:3 *Southeastern Geographer* 283; Heribert Adam, “Xenophobia, Asylum Seekers, and Immigration Policies in Germany” (2015) 21:4 *Nationalism & Ethnic Pol* 446; Stephen Zunes, “Europe’s Refugee Crisis, Terrorism, and Islamaphobia” (2017) 29 *Peace Rev* 1; Farid Hafez, “The Refugee Crisis and Islamaphobia” (2015) 17:4 *Insight Turkey* 19; Abed A Ayoub & Yolanda C Rondon, “Willful Blindness or Deliberate Indifference: The United States’ Abdication of Legal Responsibility to Refugees” (2017) 22:1 *Barry L Rev* 47.

20. Criddle & Fox-Decent, *supra* note 1. See especially the chapter on “Right to Refuge” at 243-82.

21. *Ibid* at 265-66.

22. A more limited understanding of the duty of non-refoulement has been incorporated into the institutional fabric of international legal system. For example, Article 33 of the Convention Relating to the Status of Refugees states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Although the Convention states that this principle is one that is fundamental to international refugee law, to the extent that neither reservations nor derogations may be made against it, this definition does not guarantee a general right to asylum, but rather establishes a right *against* the denial of asylum on the grounds stated. Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

23. Criddle & Fox-Decent, *supra* note 1 at 265-82.

of sovereignty supports construing the alienage requirement restrictively to allow individuals fleeing persecution to assert asylum claims at international borders.”²⁴ What this effectively means is that states that seek to close their doors to asylum seekers by invoking any number of state-focused or national arguments, *e.g.*, that “an influx [of refugees] that would jeopardize the cultural and economic integrity” of some receiving states,²⁵ are faced with a steeper burden within the international legal order for legitimizing their actions. By elevating this burden on states and preventing them “...from using their immigration authority in a manner that would treat foreign nationals with hostility or indifference,”²⁶ Criddle and Fox-Decent attempt to effect an international change of attitude that has real-life implications for refugees. Perhaps the most potent and timely implication of the fiduciary theory’s application in international refugee law is in its ability to limit state power vis-à-vis refugee travel. As Criddle and Fox-Decent state:

[R]efugees enjoy a peremptory right of non-refoulement to a place of danger, even under exigent circumstances. To deny them this entitlement would be inconsistent with their status as equal subjects and beneficiaries of international legal order, as refoulement deliberately places them at risk while treating their very physical existence as an illegality.²⁷

Viewed in this light, states’ efforts aimed at preventing Syrian refugees from entering their borders—most notably, recent executive orders by the Trump administration banning entry into the United States of citizens from Muslim-majority countries, including refugees from Syria²⁸—would constitute a breach of international legal obligations. In addition to the domestic statutory and constitutional obligations upon which the first executive order was reviewed, Criddle and Fox-Decent’s fiduciary theory provides added stakes for any revised orders and actions by the Trump administration moving forward.²⁹ Not only will

24. *Ibid* at 275.

25. *Ibid* at 276.

26. *Ibid*.

27. *Ibid* at 276-77.

28. For a useful timeline of developments on the Trump administration’s efforts, see Tom McCarthy, “A Timeline of Trump’s Travel Ban: What’s Happened, and What’s Next” *The Guardian* (10 February 2017), online: <www.theguardian.com/us-news/2017/feb/10/trump-travel-ban-timeline-washington-supreme-court>.

29. Although a US federal court overturned the first executive order, signed by President Trump on January 27, 2017, the Trump administration issued a revised order on March 6th, 2017. The White House Office of the Press Secretary, Press Release, “Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States” (6 March 2017), online: <www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

the administration be forced to answer to those domestic actors who have already challenged the legality of its immigration policies and actions,³⁰ but Criddle and Fox-Decent's interpretation of international refugee law through the lens of the fiduciary theory gives rise to legitimate international legal claims on the part of other nations and individual refugee claimants—*i.e.*, those who have yet to arrive on American soil—to challenge US foreign policy in both domestic and international courts. From a political perspective, raising the international legal stakes for states puts their political capital and diplomatic bargaining power in jeopardy, particularly with regards to their relations with other international institutions and actors. As such, Criddle and Fox-Decent's interpretation of fiduciary theory functions as a check against the seemingly far-reaching influence of state power—even for the world's most powerful states—by encouraging them to act within stricter parameters and ensuring that they are answerable to many more players.

IV. CONCLUSION

Ultimately, *Fiduciaries of Humanity* is best described as a doctrinal bridge—one that seeks to close the gap between theory and application within the international legal system. For those who look with frustration at international crises, such as the events unfolding in Syria, Criddle and Fox-Decent offer a conceptual lens that may effectively bring hope back into international discourse. Criddle and Fox-Decent's approach to the fiduciary theory not only strengthens the content of international law by elucidating the often unclear or seemingly silent expectations on states during international crises, but, more importantly, functionally raises the stakes for individual states and the international system as a whole. By rebalancing the locus of legitimacy and power in the international system, Criddle and Fox-Decent aim to elevate the status of history's least powerful and most disadvantaged actors within the international legal order. In so doing, *Fiduciaries of Humanity* outlines a legal road map to bridge the gap between the promise of international law and human rights with their experienced results.

30. Since issuing the revised order, several states within the United States have initiated legal proceedings against the federal government to challenge its validity. See generally Mica Rosenberg, "Several States Jointly Sue to Block Trump's Revised Immigration Ban" *The Globe and Mail* (13 March 2017), online: <www.theglobeandmail.com/news/world/us-politics/several-states-jointly-sue-to-block-trumps-revised-immigration-ban/article34290978/>.