ON TRUST: THE U.N. SECURITY COUNCIL AS FIDUCIARY

DEVIKA HOVELL*

ABSTRACT

Perceived failures by the U.N. Security Council have been characterized as "betrayals of trust," which threaten to impact the strength of the Council's authority. In certain legal cultures, fiduciary law has been recognized as an effective legal mechanism to underwrite trust in the exercise of authority. This Article considers the potential value in applying the fiduciary construct to the Security Council setting as a way to consolidate trust. In doing so, it is necessary to unpack two different conceptions of the fiduciary construct: the precept of law (derived from domestic private law) and the precept of authority (sometimes described as public fiduciary theory). Interpreting the former precept as applicable to private interests and the latter to the public interest, this Article recognizes both precepts as applicable to relationships in which there is a legal expectation that those exercising control over another's interests will not exploit (duty of loyalty) or squander (duty of care) those interests. The central question is whether the U.N. Security Council can be said to exist in such a relationship, either with private individuals or entities or with some iteration of the international community more broadly. By reference to recent controversies, including privatization of public assets in Kosovo, sexual exploitation and abuse by U.N. peacekeepers, Security Council vetoes in the face of atrocity and due process failures in sanctions decision-making, this Article examines the extent to which

* Associate Professor of Public International Law, London School of Economics. I would like to thank Evan Criddle and the organizers of the *William & Mary Law Review* symposium on "The Future of Fiduciary Law" and colleagues including Alejandro Chehtman, David Kershaw, Nahuel Maisley, Francisco Quintana, Nicole Roughan, Matthew Windsor and Dominik Zaum for their thoughtful advice and comments on earlier drafts. My grateful thanks to Michaela Chen for her editing assistance.

the fiduciary construct can play a useful role in reinforcing trust in the Security Council setting.

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INTRODUCTION

Power and trust can be an unholy alliance. Trust itself does nothing to control power and can, if misplaced, facilitate power's exploitation. Certain legal systems have created the construct of the fiduciary as a way to regulate particular relationships "in which one party ... [exercises] discretionary power over the significant practical interests of another."[1] To the extent the fiduciary construct has been described as a principle of trust, trust is used here as a metaphor for a legal expectation that those exercising control over another's interests will not exploit or squander those interests. Considered in this way, fiduciary law has more to do with distrust than trust, with law offering itself as a surety in situations in which mere trust has the potential to corrupt.

The U.N. Security Council is a context in which trust alone has proved no match for power. The drafters of the U.N. Charter vested the Council with vast discretionary power in the expectation it would take its place among the harbingers of international peace and security and contribute to the "salvation of mankind."[2] This trust has not always been rewarded. Certain recent missteps by the Council have been characterised as a "betrayal of trust," including (1) the exercise of veto power to prevent measures to address atrocity crimes in Rwanda, Srebrenica and Syria, among other conflicts;[3] (2) sexual exploitation and abuse by U.N. peacekeepers;[4]

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1. Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011) (emphasis omitted).

2. NAGENDRA SINGH, TERMINATION OF MEMBERSHIP OF INTERNATIONAL ORGANISATIONS at vii (1958); Jan Klabbers, *The Life and Times of the Law of International Organizations*, 70 NORDIC J. INT'L L. (SPECIAL ISSUE) 287, 288 (2001).

3. Rep. of the Indep. Inquiry into the Actions of the U.N. During the 1994 Genocide in Rwanda, transmitted by Letter dated 15 December 1999 from the U.N. Secretary-General, U.N. Doc. S/1999/1257, at 3, 45 (Dec. 16, 1999); *see* U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶¶ 5, 503, U.N. Doc. A/54/549 (Nov. 15, 1999).

4. Rep. of an Indep. Rev. on Sexual Exploitation & Abuse by Int'l Peacekeeping Forces in the Cent. Afr. Rep., transmitted by the U.N. Secretary-General Pursuant to Resolution 70/186 (2016) Taking Action on Sexual Exploitation and Abuse by Peacekeepers, U.N. Doc. A/71/99, at 2, 4, 61 (June 23, 2016), https://www.undocs.org/A/71/99 [https://perma.cc/3X4V-QMJG].

(3) responsibility for severe cholera outbreak in Haiti;[5] and (4) due process failures in imposing sanctions on individuals.[6] The loss of trust is pertinent. The Council relies upon collaboration and compliance by state and non-state actors to fulfill its mandate,[7] a mandate increasingly described in terms of governance. "Sociologists who have studied the phenomenon of 'social capital' have argued that trust is a condition of effective govern[ance],"[8] enabling cooperation and collaboration in the achievement of valuable goals.[9] As Kristina Daugirdas has described in her detailed work on the reputation of international organizations, "when an international organization's reputation ... suffers," stakeholders will be "less willing to support the organization financially and otherwise, less willing to follow its recommendations, or more reluctant to turn to the organization to address new problems."[10]

This Article considers the potential value in applying the fiduciary construct in the Security Council setting as a way to consolidate trust. The legal basis for this extension of the principle is not obvious. The origin of fiduciary law is in the private law of equity developed as part of the common law.[11] However, by mapping the development of the fiduciary concept in common law jurisdictions, the legal logic in its extension to the Security Council setting becomes more evident. Development of the fiduciary relationship can be tracked through a number of shifts, from an ad hoc to a generalizable concept of private law; from private law to the context of

5. *See* Deborah Sontag, *In Haiti, Global Failures on a Cholera Epidemic*, N.Y. TIMES (Mar. 31, 2012), https://www.nytimes.com/2012/04/01/world/americas/haitis-cholera-outraced-the-experts-and-tainted-the-un.html [https://perma.cc/U24Y-PNSB].

6. Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 85, 98 (Erika de Wet et al. eds., 2003).

7. *See* Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113, 120 (2010); Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 461 (2009).

8. Gerald J. Postema, Fidelity, Accountability, and Trust: Tensions at the Heart of the Rule of Law 9 (Feb. 19, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126397 [https://perma.cc/EDZ4-AEZX].

9. *See* Matthew Harding, *Manifesting Trust*, 29 OXFORD J. LEGAL STUD. 245, 262 (2009).

10. Kristina Daugirdas, *Reputation as a Disciplinarian of International Organizations*, 113 AM. J. INT'L L. 221, 232 (2019).

11. *See, e.g.*, Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 818 (1983).

public governance and from public governance to international governance. This Article necessarily builds on the work of scholars who have navigated these shifts. My aim is to engage critically with this literature and consider whether it is appropriate to carry the concept into the distinctive setting of the Security Council.

For certain scholars who view fiduciary law as a "meta concept" potentially applicable to relationships with a transnational or global scope, the proposition will not be controversial.[12] However, many other scholars consider the fiduciary construct to have already been stretched too far beyond its intended remit and "should not be the growing area that it is sometimes alleged to be."[13] It could be that the loose association of the term "fiduciary" with "trust" has bred a temptation to import the label into new contexts without adequate attention to the principle's roots or parameters. Indeed, it is arguable that the use of the term fiduciary should sometimes be seen as more legal metaphor than legal principle, with implications for the legitimacy of legal authority instead of legal liability.[14] The problem is a failure, on occasion, to distinguish between these two different usages of fiduciary, that is, fiduciary as legal principle and fiduciary as a principle of authority.

In this Article, the first step is to distinguish between these two manifestations of the fiduciary construct. The second step is then to determine whether either fiduciary construct applies or should apply in the U.N. Security Council setting. Of course, "[l]aw is a source-based enterprise."[15] In considering the application of fiduciary law to the U.N. Security Council, it is clearly not enough

12. *See* Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 1, 3 (2020); *see also* Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 933 (2011); *cf.* Frankel, *supra* note 11, at 798.

13. Sarah Worthington, *Fiduciaries: When Is Self-Denial Obligatory?*, 58 CAMBRIDGE L.J. 500, 508 (1999). Scholars have described the propagation of the fiduciary principle as an invasion, developing into a "habit of throwing fiduciary language at any moral outrage," Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 5 n.5 (2000), to the extent fiduciary law has become "a back-door route to law reform of private law obligations and public law protections." Worthington, *supra*, at 507; *see also* Laura Hoyano, *The Flight to the Fiduciary Haven*, *in* PRIVACY AND LOYALTY 169, 169 (Peter Birks ed., 1997) (discussing "the territory the fiduciary concept recently has invaded").

14. Paul Finn, *Public Trusts, Public Fiduciaries*, 38 FED. L. REV. (SPECIAL ISSUE) 335, 336, 339 (2010).

15. Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2435-36 (2017).

to point to the existence of such principles in the private law of the United States, or the United Kingdom, or Japan, or India, or even to a modest collection of jurisdictions[16] in which fiduciary or fiduciary-like principles have been found to exist.[17] The focus of this Article is on the position under international law, a context in which positivism "remains the lingua franca."[18] Our first port of call is accordingly to the pedigree sources of international law listed in Article 38 of the Statute of the International Court of Justice, namely treaties, customary international law and general principles of law.[19] An additional challenge, if such obligations are found to exist under international law, will be to establish that these principles apply to the U.N. Security Council. As will be shown, the heterogeneity of principles of fiduciary law across legal systems coupled with the broad discretion granted to the Council under the Charter renders the exercise of identifying positive principles of fiduciary law applicable to the Security Council complicated.[20]

Nevertheless, while a positivist analysis may be the beginning, it should not be the end of the inquiry. Considering the political

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16. *See generally Part III Fiduciary Law Across History and Legal Systems*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019) (providing an overview of fiduciary principles in various classical and contemporary jurisdictions).

17. The domestic law route should not be entirely discounted without comment. While the option of domestic enforcement of fiduciary duties against the Council is unlikely given the U.N.'s absolute immunity from domestic law processes, it is not impossible. *See* Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 16 U.N.T.S. 4. The future limitation of U.N. immunity in contemporary circumstances of international governance is something that has been raised in academic commentary and that continues to be tested (albeit unsuccessfully) in domestic courts. *See, e.g.*, Georges v. United Nations, 834 F.3d 88, 90 (2d Cir. 2016), *aff'g* 84 F. Supp. 3d 246, 247 (S.D.N.Y. 2015); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 CHI. J. INT'L L. 341, 363 (2016); Rosa Freedman, *UN Immunity or Impunity? A Human Rights Based Challenge*, 25 EUR. J. INT'L L. 239, 241 (2014). There is also the prospect of the U.N. waiving immunity or of the U.N. creating a body that operates outside the U.N. context and without the protection of its immunity; on this latter possibility, see Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate*, 16 EUR. J. INT'L L. 637, 652 (2005). In these circumstances, the issue of the application of fiduciary law will be a matter for the particular domestic legal system in which any claim is raised.

18. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999).

19. Statute of the International Court of Justice art. 38, ¶ 1, https://www.icj-cij.org/en/statute [https://perma.cc/RU2F-STZN].

20. *See infra* Part I; *infra* notes 212-16 and accompanying text.

setting within which it operates, the Security Council is concerned not merely with the legality but also with the legitimacy of its authority.[21] To ignore legitimacy in analysing the role of law in the U.N. context is, as the expression goes, to leave Hamlet out of the play. Adherence to fiduciary law may be justified by factors other than a legal requirement to adhere to it. In positivist terms, there are very few legal restrictions on the Council, yet this has come with negative consequences in terms of wider perceptions of the Council's legitimacy.[22] Recent controversies have led to a "crisis of legitimacy" in U.N. decision-making.[23] In the absence of objective standards by which the conduct of international officials can be assessed, or against which Council officials and agents can be held accountable when they are perceived to have fallen short, the Council is deprived of the vital function of law as a legitimating mechanism *facilitative* of its overall authority.[24]

The discussion of the fiduciary principle in both the domestic and international context will accordingly be dual pronged. Parts I and II seek to understand and outline the fiduciary construct for the benefit of international lawyers, both as a precept of law and as a precept of authority. In Part III, I consider the potential for the fiduciary construct to be recognized as an international precept, either in narrow terms as a legal principle or in broader terms as a principle of authority. In Part IV, I seek to apply the principles to a number of case studies as a means to determine whether fiduciary law and theory has any role to play in the Security Council setting.

I. THE FIDUCIARY CONSTRUCT AS A PRECEPT OF LAW

For international lawyers, as will be explained, one purpose of understanding domestic fiduciary law is to ascertain whether it can serve as the source of a general principle of international law. For much of its history, fiduciary law was not regarded as a field of law

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21. *See infra* notes 196-202 and accompanying text.

22. *See, e.g.*, *supra* notes 3-6 and accompanying text.

23. Christine Gray, *A Crisis of Legitimacy for the U.N. Collective Security System?*, 56 INT'L & COMPAR. L.Q. 157, 157, 169-70 (2007).

24. More broadly on this theme of the advantages of legal limitations on political authority, see generally STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995).

in its own right, but rather "the various types of fiduciaries [were] studied in the context of ... specific substantive areas of law."[25] Tamar Frankel's work was pivotal in identifying fiduciary law as a "discrete category ... properly separate from contract, tort, [trust,] and the other departments of private law."[26] However, the idea of fiduciary law as a generalizable category is not without problems.[27] The heterogeneity of fiduciary principles is revealed not only across various kinds of fiduciary relationships but also across jurisdictions.[28]

This indicates that the idea of identifying "general principles" of fiduciary law may be naïve. Nevertheless, there is clearly something distinctive about the fiduciary construct, and salient resemblances between established categories of fiduciary relationship are discernible.[29] In the Section that follows, I examine whether it is possible to identify the nature of the relationship, protected interests, and obligations that together contribute to a set of general fiduciary principles that could potentially be applied to the U.N. Security Council. In doing so, I begin with the narrow aim of

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25. Frankel, *supra* note 11, at 796.

26. Joshua Getzler, *"As If." Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 975 (2011).

27. "[T]he search for a single unifying test" has been described as "fruitless," Richard Joyce, *Fiduciary Law and Non-economic Interests*, 28 MONASH U. L. REV. 239, 244 (2002), and resting on "vain hope." MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 9 (2010). Paul Finn began his seminal work on *Fiduciary Obligations* with the proclamation that "it is meaningless to talk of fiduciary relationships as such," PAUL FINN, FIDUCIARY OBLIGATIONS 1 (Federation Press 2016) (1977), while Paul Miller describes fiduciary relationships as subject to "bewilderingly disparate characterizations." Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 367, 374 [hereinafter Miller, *Identification*]. There is said to be "considerable uncertainty over the basis, nature and scope of fiduciary duties as well as their justification." Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 63 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Miller, *Relationship*]; *see also* Anthony Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 LAW Q. REV. 238, 246 (1994); P.D. Finn, *The Fiduciary Principle*, *in* EQUITY, FIDUCIARIES AND TRUSTS 1, 26 (T.G. Youdan ed., 1989).

28. *See* L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 72-73 (1962); FINN, *supra* note 27, at 1-2; Matthew Conaglen, *Fiduciary Principles in Contemporary Common Law Systems*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 565, 581; Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 583, 585.

29. *See infra* Part I.A.

examining the development of fiduciary principles within common law systems.

A. The Fiduciary Relationship

At the heart of fiduciary law is a relationship between fiduciary and beneficiary.[30] This relationship has been described as the central organizing construct of fiduciary law.[31] Some scholars draw a distinction between those relationships classified as fiduciary by virtue of status, and those so classified as a matter of fact.[32] In terms of status, "[t]he exemplar of a fiduciary is often said to be a trustee."[33] Other recognized categories of fiduciary relationship (though not all are universally recognized)[34] include agent-principal, director-corporation, doctor-patient, lawyer-client, parent-child, and guardian-ward.[35] Beyond these established categories, it becomes necessary to consider whether a relationship exhibits the characteristics of a fiduciary relationship such that a "fact-based" relationship can be said to exist.[36] This raises the complex question as to whether it is possible to identify an agreed set of characteristics. On the one hand, both scholarly and judicial opinion exhibit a high degree of uncertainty about the characteristics defining a fiduciary relationship.[37] The fiduciary relationship has been described as "one of the most elusive concepts in Anglo-American law."[38] On the other

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30. *See* Miller, *Relationship*, *supra* note 27, at 67.

31. *See id.*

32. *Id.*; *cf.* Lionel D. Smith, *Contract, Consent, and Fiduciary Relationships*, in CONTRACT, STATUS, AND FIDUCIARY LAW 117, 117, 120 (Paul B. Miller & Andrew S. Gold eds., 2016).

33. James Edelman, *When Do Fiduciary Duties Arise?*, 126 LAW Q. REV. 302, 304 (2010); Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 41, 41.

34. For example, as Lionel Smith notes, "[s]ome detailed studies of fiduciary law do not mention the parent-child relationship." Lionel Smith, *Parenthood Is a Fiduciary Relationship*, 70 U. TORONTO L.J. 395, 396 (2020).

35. *See* Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 969 (2013); DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 2 (2018); Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 23, 26; Smith, *supra* note 34, at 395; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401, 2426 (1995).

36. *See* Miller, *Relationship*, *supra* note 27, at 67-68.

37. *See* Joyce, *supra* note 27, at 242-43.

38. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879.

hand, this does not seem to have dispelled faith in the notion that the fiduciary relationship is a distinctive form of legal relationship with common characteristics.[39]

While disagreement therefore surrounds certain factors,[40] there appears to be a minimal consensus around the idea that "a fiduciary relationship is one in which one party (the fiduciary) [has] discretionary power" to affect the legal or "practical interests of [the other] (the beneficiary)."[41] Of course, the problem is that all manner of relations could be called fiduciary by reference to these characteristics.[42] The critical element missing from this basic description is the idea that the discretionary powers are undertaken or held "*on behalf of* another" (the beneficiary).[43] It is important to distinguish "situations where a person ... has power *over* another person from fiduciary situations, where a person holds power *on [their] behalf*."[44]

This "other-regarding" or "representative" aspect has been held to hint at a strong public dimension. Yet the "other" to whom fiduciary law is addressed is not a general public one. A fiduciary holds their authority "relative to a specific individual or group," that is "relative to particular beneficiaries ... with clearly defined personal or common interests."[45]

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39. *See* Andrew S. Gold & Paul B. Miller, *Introduction* to PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 27, at 1, 1.

40. For example, disagreement persists as to whether the fiduciary relationship can only ever be a "voluntary undertaking." Edelman, *supra* note 33, at 302, 310-11.

41. Miller, *supra* note 1, at 262 (emphasis omitted). For similar definitions, see Frame v. Smith, [1987] S.C.R. 99, 136 (Can.) (Wilson, J., dissenting); *Hosp. Prods. Ltd. v U.S. Surgical Corp.* (1984) 156 CLR 41, 96-97 (Austl.); EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 30 (2011).

42. As Worthington notes, "the characteristics are equally apt to describe the relationship between home-owner and house-painter, diner and chef, [or] driver and other road-users." Worthington, *supra* note 13, at 505, 505 n.27; *see* Robert Flannigan, *Fiduciary Mechanics*, 14 CAN. LAB. & EMP. L.J. 25, 25-26 (2008); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 668 (2009).

43. Lionel D. Smith, *Can We Be Obliged to Be Selfless?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 27, at 141, 148. As Evan Fox-Decent explains, "[t]he most significant feature of fiduciary relations that their trust quality helps to explain is the authority of the fiduciary to act ... on behalf of the beneficiary." Evan Fox-Decent, *Trust and Authority*, *in* FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 175, 194-95 (Paul B. Miller & Matthew Harding eds., 2020).

44. Smith, *supra* note 43, at 148.

45. Miller, *Relationship*, *supra* note 27, at 72-73.

That is not to say that a public body can never be characterised as being in a fiduciary relationship.[46] For example, in both Canada and New Zealand, fiduciary duties have been found to apply to specific state-Indigenous dealings over property.[47] However, as Kirsty Gover has recognized,

> actionable fiduciary duties only arise in circumstances where the [state] has either assumed discretionary control over Aboriginal interests ... or has undertaken "to act in the beneficiaries' best interests in the nature of a private law duty," which entails an undertaking to protect Aboriginal interests "in priority to other legitimate concerns."[48]

These circumstances are rare.[49]

By way of summary, under private domestic law, it seems that the beating heart of the fiduciary relationship is a compound promise, which may be expressed or implied. The fiduciary relationship stems from a reciprocal bargain under which the beneficiary either directly or indirectly vests discretionary authority in the fiduciary in return for a compound promise that the authority will be exercised (1) on behalf of the beneficiary (2) in performance of the designated representative function.[50]

B. The Scope of Protected Interests

Performance of the compound promise is the reason for the existence of the fiduciary relationship. It follows that fiduciaries do not have an "unlimited or open-ended duty" to act in and promote the

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46. Finn, *supra* note 14, at 346.

47. *Id.* at 350.

48. Kirsty Gover, *The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism*, 38 SYDNEY L. REV. 339, 357 (2016) (footnote omitted) (quoting Man. Metis Fed'n Inc. v. Canada, [2013] S.C.R. 623, paras. 61-62 (Can.)); *see also* Guerin v. The Queen, [1984] S.C.R. 335, 349-50 (Can.); *Cubillo v Commonwealth* (2001) 112 FCR 455, 576 (Austl.); *Bennett v Minister of Cmty. Welfare* (1992) 176 CLR 408, 426-27 (Austl.).

49. As Paul Finn notes, "the cases are few indeed in which it has been held that a public body has had discretionary power conferred on it to be exercised on behalf of, for the benefit of identifiable [individuals]." Finn, *supra* note 14, at 347-48; *see, e.g.*, *Wik Peoples v Queensland* (1996) 187 CLR 1, 96 (Austl.); *Habib v Commonwealth [No. 2]* (2009) 175 FCR 350, 365 (Austl.).

50. *See supra* notes 40-44 and accompanying text.

overall interest of beneficiaries.[51] It is said to be "an essential characteristic of fiduciary power[s] that [they are] *specified*," in the sense that they attach to specific matters or interests.[52] The extent of the interests protected is delimited by the nature and scope of the undertaking in any particular case.[53]

Nevertheless, certain legal systems appear to place a limit on the types of interests protected by fiduciary law. Perhaps the most significant point of dissonance relates to the question of whether fiduciary powers can apply to noneconomic interests.[54] In some jurisdictions, protected interests have been narrowed to proprietary or financial interests and therefore exclude the application of fiduciary obligations to physical or emotional health or welfare.[55] A distinction is often drawn in this regard between Australian and Canadian fiduciary law.[56] As Richard Joyce has shown, Australian courts have so far refused "to use fiduciary law to protect non-economic interests," even while recognizing the fiduciary nature of relationships such as guardian-ward and doctor-patient in which noneconomic interests are central.[57] For example, in cases involving the "sexual abuse of children allegedly suffered at the hands of guardians, and claims arising out of [Australia's 'stolen Generation'] policy of forced removal of indigenous children from their families," Australian courts declined to recognize fiduciary duties to protect noneconomic interests.[58] By contrast, Canadian courts have accepted the role of fiduciary law in protecting noneconomic interests. In *Norberg v. Wynrib*, a case in which a doctor issued prescriptions for drugs to which a patient was addicted in exchange

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51. Smith, *supra* note 34, at 400.

52. Miller, *Relationship*, *supra* note 27, at 72.

53. David Kershaw, *Corporate Law's Fiduciary Personas*, 136 LAW Q. REV. 454, 454, 479 (2020).

54. *See* Joyce, *supra* note 27, at 267.

55. *See id.* at 240.

56. As Paul Finn notes, "fiduciary law in Canada has followed—and is following—quite different courses to that followed in Australia." Finn, *supra* note 14, at 339 n.31.

57. *See* Joyce, *supra* note 27, at 250.

58. *Id.* at 240 (first citing *Paramasivam v Flynn* (1998) 90 FCR 489 (Austl.); then citing *Williams v Minister Aboriginal Land Rts. Act 1983* (1999) 25 Fam LR 86 (Austl.); and then citing *Cubillo v Commonwealth* (2000) 174 ALR 97 (Austl.)); *see also Breen v Williams* (1996) 186 CLR 71 (Austl.) (upholding a Court of Appeals decision that fiduciary law imposed no obligation to provide medical records).

for sexual favours,[59] Justice McLachlin opined that fiduciary principles "are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests."[60]

It is clear that fiduciary protection of noneconomic interests cannot yet be said to have achieved general acceptance. However, the logic of this position is questionable. Chief fiduciary legal historian Joshua Getzler describes fiduciary law as rooted not just in history but in "human nature" with "its distinctive functions in upholding trust ... in professional and intimate relationships."[61] Whether the interests are economic or noneconomic does not seem to be the point. The more pertinent questions seem to be (1) whether the interests relate in any relevant way to the fiduciary powers undertaken; and (2) whether the fiduciary's conduct in relation to a given interest transgresses recognized fiduciary obligations.

C. Fiduciary Obligations

According to some scholars, fiduciary obligations are the distinctive organizing idea of fiduciary law; this view is captured in Paul Finn's account that a person "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."[62]

While "[t]he phrase 'fiduciary duties'" has also been denoted as "dangerous" on the basis that it "giv[es] rise to [the] mistaken assumption that all fiduciaries owe the same duties in all circumstances,"[63] it is possible to identify certain core fiduciary obligations.

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59. Joyce, *supra* note 27, at 251.

60. Norberg v. Wynrib, [1992] 2 S.C.R. 226, 239, 289 (Can.) (McLachlin, J., concurring); *see also* McInerney v. MacDonald, [1992] 2 S.C.R. 138, 150 (Can.) (holding unanimously that a doctor was under a fiduciary duty to comply with a patient's request for a copy of all information in her medical file); M.(K.) v. M.(H.), [1992] 2 S.C.R. 6, 24 (Can.) (holding that incest is a breach of fiduciary duty); J. (L.A.) v. J.(H.), [1993] 102 D.L.R. 4th 177, 183 (Can. Ont.) (relating to sexual exploitation within families).

61. Getzler, *supra* note 26, at 975-76.

62. Bristol & W. Bldg. Soc'y v. Mothew [1998] 1 AC (Ch) [18] (appeal taken from Eng.) (discussing Finn's work); *see also* Finn, *supra* note 27, at 2; Edelman, *supra* note 33, at 316 ("[T]he label 'fiduciary' is a conclusion which is reached only once it is determined that particular duties are owed.").

63. Henderson v. Merrett Syndicates Ltd. [1995] 2 AC (HL) 145, 206 (appeal taken from Eng.).

1. Duty of Loyalty

The animating essence of fiduciary law is said to be the duty of loyalty.[64] Yet Birks considers that the term loyalty "fails to hit the nail on the head."[65] Indeed, the duty seems to relate more precisely to the absence of *exploitation*.[66] As D. Gordon Smith explains it, "[t]he duty that is distinctive of fiduciaries arises out of a concern that the fiduciary will take advantage of the beneficiary."[67] As with so many other aspects of fiduciary law, the content of this duty is subject to differing interpretations. While there are broader and narrower versions of the duty, the irreducible core relates to two duties: the duty to avoid conflicting interests (no-conflicts rule) and the duty not to profit from the fiduciary office (no-profit rule).[68] These rules have been said to be a natural law of all civil societies, found in all developed legal systems.[69] According to the no-conflicts rule, the fiduciary has a duty not to put themselves in a position in which their duty to the beneficiary might conflict with either (a) their self-interest; or (b) duties they owe third parties.[70] Under the no-profit rule, the fiduciary may not take unauthorized profits or personal gains from the fiduciary position, however innocent in intent and even when the profit does not subtract from the beneficiary's assets.[71]

2. Duty of Care

A broader view of fiduciary duty requires affirmative action on the part of the fiduciary. While it is generally accepted that equity imposes proscriptive duties on the fiduciary not to obtain unauthorized

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64. *See* Birks, *supra* note 13, at 11.

65. *Id.* at 12.

66. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1408 (2002).

67. *Id.*

68. Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 16 (1975).

69. *See* York Bldgs. Co. v. Mackenzie [1795] 3 Eng. Rep. 432, 446 ("It proceeds from nature, and is silently received, recognised, and made effectual wherever any well regulated system of civil jurisprudence is known.... [That] [h]e that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself.").

70. Edelman, *supra* note 33, at 318.

71. *See York Bldgs. Co.*, 3 Eng. Rep. at 448.

benefit or be in a position of conflict, there is continuing debate as to whether fiduciary duties extend to prescriptive duties of care.[72] In some jurisdictions, it is recognised that a duty of care and skill is owed by fiduciaries.[73] This duty of care is different from that owed in tort under the law of negligence[74] and arguably requires a higher standard of care. By contrast to the negative duty that exists in tort law to avoid careless conduct that could cause reasonably foreseeable harm to others, the fiduciary duty of care is unrelated to harm and requires simply that fiduciaries act with care, skill and diligence in performing their tasks under a fiduciary mandate.[75] Moreover, the standard of care owed by a fiduciary will take into account the particular expertise and influence of the fiduciary, rather than assessing conduct (for example) based on a general standard of reasonableness.[76] If the essence of the duty of loyalty is to prevent exploitation, the essence of the duty of care is to prevent a fiduciary *squandering* their authority.

3. Subsidiary Duties

In addition to the core fiduciary obligations, there are a number of "other fiduciary duties" (sometimes referred to as "subsidiary" fiduciary duties) that may serve a role in implementing the primary duties of loyalty and care in particular fiduciary relationships.[77] These may include duties of disclosure, duties of confidentiality, and the duty to inform and render an account.[78] The latter duty is regarded as intrinsic to both the duty of loyalty and care, justified in psychological terms on the basis that "[p]eople behave differently

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72. Lionel Smith, *Prescriptive Fiduciary Duties*, 37 U. QUEENSL. L.J. 261, 261-62 (2018); *see also Breen v Williams* (1996) 186 CLR 71 (Austl.).

73. Smith, *supra* note 72, at 262.

74. *Id.* at 268.

75. Birks, *supra* note 13, at 17-18, 28-29.

76. *Cf.* Frankel, *supra* note 11, at 809-10 (describing the fiduciary relationship as a trade-off in which the beneficiary gives up control over the fiduciary's decision-making in exchange for effective use of the fiduciary's specialized expertise in making those decisions).

77. Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 419, 419.

78. *See* Birks, *supra* note 13, at 26 n.48, 27-29 (discussing the duty to account and describing the duties of disclosure and confidentiality as components of the fiduciary duty of disinterestedness).

when they believe that they must account for their judgments and choices."[79]

II. The Fiduciary Construct as a Precept of Authority

In recent years, the fiduciary construct has been applied to a wide range of public institutions and legal regimes, both at national and international levels. One can understand the temptation to analogize relationships of public governance to a fiduciary relationship. Similar to fiduciaries, the state stands in a position of power in relation to its population and is in a better position than many to exercise discretion that can affect the legal and practical interests of those within its jurisdiction.[80] Public powers are by their nature other-regarding, "entrusted [in public authorities] so that they can exercise them on behalf of the public or a section of the public."[81] Of course, even in a democracy, populations are "vulnerable to exploitation [and] opportunism on the part of their [elected representatives]."[82] Therefore, the key criteria of fiduciary relationships—other-regarding discretionary power (on the part of the governors) and vulnerability to this power (on the part of those governed)—are present in the relationship between the state and its population.[83]

Yet we should be cautious not to conflate fiduciary principles applicable as between a state and its people (which I will refer to as public fiduciary theory) with the legal principle as it exists in private law. Public fiduciary theory shares no common genetic material with the legal principle, certainly in terms of its origin.[84] This is not to say that the legal principle cannot apply as between the state and individuals or groups in certain circumstances in which the state acts in a private legal capacity and undertakes to

79. Tess Wilkinson-Ryan, *Fiduciary Law and Psychology*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 720. It is also said to have particular historical significance, detailed by Joshua Getzler. Getzler, *supra* note 26, at 977.

80. *See* Equitable Life Assurance Soc'y v. Hyman [2002] 1 AC (HL) 408, 416 (appeal taken from Eng.).

81. *Id.*

82. D. Theodore Rave, *Two Problems of Fiduciary Governance*, *in* FIDUCIARY GOVERNMENT 49, 50 (Evan J. Criddle et al. eds., 2018).

83. FOX-DECENT, *supra* note 41, at 29; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 472-73 (2010).

84. *See infra* Part II.A.

protect a concrete interest of an individual or group, as discussed above.[85] Yet in the context of public fiduciary theory, the term fiduciary is used not in the private legal sense but as a form of legal metaphor to underpin a model of authority for public institutions.[86]

A. Source

The authority approach to the fiduciary construct is based on the idea that integral to public office is public trust.[87] Though the theory may draw on private law in terms of the content of the fiduciary construct, it does not generally do so in terms of source.[88] This line of thought makes no detour through the English courts of common law and equity where the equitable private law fiduciary doctrine finds its genesis.[89] Instead, its origins are found in modern political thought. For this reason, the approach is often referred to as "fiduciary political theory" rather than fiduciary law.[90]

In *Sovereignty's Promise*, one of the foundational texts for this theory, Evan Fox-Decent sets out a brief history of the private law fiduciary concept but rightly makes no attempt to link this with the sources that form the foundations of his fiduciary theory.[91] Instead, Fox-Decent locates the theory's foundations in what might be described as a Kantian interpretation of Hobbes. Elsewhere, Fox-Decent draws on Hobbes to explain that the office of the sovereign arises from the people's trust.[92] He highlights "Hobbes's pervasive use of the language of trust," suggesting this reveals Hobbes's perspective that the language of trust is more persuasive than the

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85. *See supra* notes 46-49 and accompanying text.

86. *Cf., e.g.*, FOX-DECENT, *supra* note 41, at 105.

87. *See* Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1825-26 (2016).

88. An exception is Miller and Gold's principle of "fiduciary governance." Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 556 (2015).

89. *See* Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS 577, 590 (Andrew Burrows & Lord Rodger of Earlsferry eds., 2006).

90. *See, e.g.*, Leib & Galoob, *supra* note 87, at 1822. In *Sovereignty's Promise*, Evan Fox-Decent refers to his theory variously as "fiduciary theory of the state," "fiduciary theory of public authority" and "fiduciary theory of legal authority." FOX-DECENT, *supra* note 41, at 39, 48, 49.

91. *See* FOX-DECENT, *supra* note 41, at 30-34.

92. *See* THOMAS HOBBES, LEVIATHAN 288 (E.P. Dutton & Co. 1950) (1651).

language of consent as a means to establish the legitimacy of the ongoing relationship between the sovereign and their subjects.[93] According to Fox-Decent, "the legitimacy and stability of sovereignty is necessarily a joint endeavour of sovereign and subject premised on mutual trust."[94] Fox-Decent uses a "Kantian conception of right" as the foundation for his description of the moral idea of trust, in particular each individual's innate right to equal freedom and dignity.[95] The justification for constraints on governmental action is "agency-based: it conceives of individuals as sources of [innate] legal and moral claims [by] virtue of their agency and the legal relationships in which they find themselves."[96] It follows from these innate rights that individuals cannot stand in a relationship of domination to one another nor can they instrumentalize each other.[97] To the extent that the state exercises irresistible discretionary power over individuals, who are vulnerable by virtue of this power, this "is premised on a presumption of trust," whose "normative constitution" necessarily entails the "principles of non-instrumentalization and non-domination."[98] According to Fox-Decent, "[a]n important consequence of the presumption of trust is that it renders the fiduciary [state's] exercise of power justifiable to the beneficiary, for it is on the beneficiary's trust that the fiduciary's authority depends."[99]

Scholars promoting the application of fiduciary law to the state and other public institutions accept that this approach relates to the foundations of public authority.[100] Fox-Decent's theory professes to relate to the *legitimacy* of authority, not its legal pedigree: "the fiduciary account of legal obligation, if successful, will imply an

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93. Fox-Decent, *supra* note 43, at 183.

94. *Id.* at 184.

95. FOX-DECENT, *supra* note 41, at 43, 46.

96. *Id.* at 238.

97. *Id.* at 43.

98. *Id.* at 44, 105.

99. *Id.* at 105.

100. *See id.* at 89; Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 27, at 388, 388; Leib & Galoob, *supra* note 87, at 1826; D. Theodore Rave, *Fiduciary Principles and the State*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 323, 323-24; *see also* Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. TORONTO L.J. 655, 669 (2013) (reviewing EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE (2011)); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1256 (2011).

account of state legitimacy."[101] The problem is that, as this account develops, the fiduciary construct is reinterpreted as the source of authority. In its private law incarnation, fiduciary law takes the form of adjective law in the sense that it does not itself confer or establish decision-making authority, but enforces undertakings that are said (expressly or impliedly) to accompany its conferral.[102] Yet under Fox-Decent's theory, he explains that "[t]rust and the fiduciary principle's authorization of state power best justify legal authority" and portrays fiduciary obligations as obligations that not only constrain but "constitute the state's legal authority."[103]

The problem is magnified by the claim made by theorists such as Fox-Decent and Leib and Galoob that public fiduciary theory is able to serve as an alternative to (rather than a potential complement of) consent theories of authority.[104] Fox-Decent argues that fiduciary theory addresses the fundamental problem with consent theories that "few individuals have ever explicitly consented to anything like the vast authority states claim.... [While] some individuals and groups ... reject outright the state's claims to authority over them."[105] Fox-Decent instead argues that trust provides the foundation of state authority because "the state is required to act on the basis of our trust (and so within fiduciary limits) even if we happen to distrust the state intensely."[106] While this seems to render trust just as hypothetical or tacit as the concept of consent under consent theories, this description is most problematic because it inverts the connection between authority and trust as traditionally understood in fiduciary law.[107] Rather than seeing the role of fiduciary law as providing limits to authority so as to enable trust, trust and fiduciary law are instead described as enabling authority.[108] While it is easy to agree that consent provides an insufficient or even artificial foundation for public authority,[109] the problem shared by

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101. FOX-DECENT, *supra* note 41, at 115; *see id.* at 96, 113, 114, 125-29, 134, 239-40.

102. *See* Frankel, *supra* note 11, at 804; Miller, *Relationship*, *supra* note 27, at 70-71.

103. FOX-DECENT, *supra* note 41, at 89, 239.

104. *See id.* at 108-09; Stephen R. Galoob & Ethan J. Leib, *Fiduciary Political Theory and Legitimacy*, *in* FIDUCIARY GOVERNMENT, *supra* note 82, at 163, 171.

105. FOX-DECENT, *supra* note 41, at 117.

106. *Id.* at 109.

107. *See supra* note 1 and accompanying text.

108. Fox-Decent, *supra* note 43, at 194-95.

109. For the position in international law, see, for example, BAŞAK ÇALI, THE AUTHORITY

consent theory and Fox-Decent's articulation of public fiduciary theory is that it focuses on the (hypothetical or tacit) act of the beneficiary public rather than active undertakings by the fiduciary state.[110]

The problems with claiming this inflated role for the fiduciary construct, of establishing rather than limiting authority, become clear when we look at the content of the principle. Reference to modern political thought is significant to our understanding of the link between public trust and the legitimacy of public authority, a link that can also be substantiated empirically.[111] Yet when such a broad goal is channelled through the fiduciary construct, the focus of the construct can become refracted by the plurality of interests in the beneficiary public and we can lose sight of the significance of the relevant constitutional or legislative mandate granting authority.[112] In delineating governmental legal obligations, I argue that it is more important to focus on the "covenant" (that is the legal undertaking by public authorities) than the "social contract" (the mechanics of political agreement by the beneficiaries). The relevant source of fiduciary obligations is not that of the beneficiary—either in consenting or trusting—but in the act of the fiduciary's *undertaking* to exercise discretionary power on behalf of others.[113] This is in the nature of a promise, creating a legitimate expectation in the

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OF INTERNATIONAL LAW: OBEDIENCE, RESPECT, AND REBUTTAL 24-32 (2015).

110. *See* FOX-DECENT, *supra* note 41, at 109, 117.

111. *See, e.g.*, ORG. FOR ECON. COOP. & DEV., GOVERNMENT AT A GLANCE 2013, at 20-35 (2013), https://www.oecd-ilibrary.org/docserver/gov_glance-2013-en.pdf?expires=1611543285&id=id&accname=guest&checksum=4078D304638F20DA4B8B3725EE63FDA4 [https://perma.cc/BK9H-RFEX]. *See generally* Org. for Econ. Coop. & Dev., *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*, OECD PUB. GOVERNANCE REVS. (2017), https://www.oecd-ilibrary.org/docserver/9789264268920-en.pdf?expires=1611543689&id=id&accname=guest&checksum=88CF16E18BA8EE2C9F5DBEAFE74A6E4B [https://perma.cc/5ECW-URKK].

112. *See* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1162-63 (2014) ("[T]rust law defines the fiduciary duties of trustees by reference to a discrete class of beneficiaries, whose interests are discernible and observable.... There is no real analogue in public law.... At some level, there is likely to be broad agreement that public officials should treat all citizens fairly. But that just restates the difficult questions that arise from our constitutional commitments.").

113. *Cf.* Frankel, *supra* note 11, at 820 (observing that a fiduciary's consent to undertake the relationship is required in order to trigger a fiduciary relationship and its attendant obligations).

public that this promise will be fulfilled, an expectation that we might call the public trust.

B. Content

The terminology of fiduciary is deployed in the public governance context as a type of legal metaphor. In assessing the content and parameters of public fiduciary theory, it is relevant to consider whether the theory as developed has remained faithful to the essence rather than the contextual particularities of its private counterpart. Fiduciary principles serve to underwrite the beneficiary's trust by enforcing the undertakings that are at its heart.

I have described the fiduciary relationship above as stemming from a reciprocal bargain under which the beneficiary directly or indirectly vests discretionary authority in the fiduciary in return for a compound promise that the authority will be exercised (1) on behalf of the beneficiary (2) to fulfill the representative purpose for which it was vested.[114] If we carry this through by analogy to the public sphere, the promise is transformed into one that public decision-making authority will be exercised (1) on behalf of the public (2) for the purpose of advancing public interests. Under the fiduciary analogy, public trust thereby inheres in the public fiduciary's joint undertakings that the exercise of authority will be representative (that is, on behalf of the public) and adequately advance the public mandate vested in it. The question is whether the construct as developed in the existing literature serves to protect or advance these two undertakings. In the following Sections, I explore how this has been achieved and examine the extent to which it can be said the principle has stayed true to the fiduciary metaphor that underpins it.

1. The Fiduciary Relationship

Public fiduciary theory has been described as a "relational conception" of legal authority.[115] The argument is that "an overarching fiduciary relationship exists between the state and [those] subject

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114. *See supra* note 50 and accompanying text.
115. FOX-DECENT, *supra* note 41, at 40.

to its authority," and that this relationship "generates legal duties."[116] The complication in this sphere is that the fiduciary relationship must be translated from the "interpersonal" context of private law[117] to the polycentric context of public authority, with its multiplication of fiduciaries, beneficiaries, and purposes.

There has been extensive debate on the identification of the beneficiary in the public sphere.[118] Leib, Ponet, and Serota highlight the problem that "loose mapping of fiduciary-beneficiary relationships in the public sphere precludes a clear understanding of whose interests are pertinent to the public fiduciary's representation, and what the public fiduciary is to do when beneficiaries' interests diverge or collide."[119] Evan Fox-Decent argues that the relationship is between the state and "the persons subject to their authority"[120] regardless of the "civil or political status of the person subject to state authority."[121] Theodore Rave construes the relationship as one between "democratically elected representatives in our constitutional system" and "the people they represent."[122] Leib, Ponet, and Serota by contrast contemplate the idea of a "shifting constellation of beneficiaries,"[123] recognizing in the case of a U.S. state-level legislator that her potential beneficiaries could include "her district's residents" (regardless of how they voted), "citizens of the state," "the nation's citizenry," and "future generations."[124] Some scholars have argued that public fiduciary theory should draw answers from private law contexts when fiduciary liability to multiple beneficiaries with conflicting interests is contemplated, such as the corporate context in which fiduciaries must engage with the interests of different groups of shareholders.[125]

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116. *Id.* at 28-29.

117. Miller & Gold, *supra* note 88, at 516.

118. Leib et al., *supra* note 100, at 398.

119. *Id.* at 389.

120. Fox-Decent, *supra* note 43, at 194.

121. FOX-DECENT, *supra* note 41, at 40. Writing with Evan Criddle (translating the theory to the sphere of international institutions) the relevant beneficiary is described as "humanity." EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 288 (2016).

122. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 713 (2013).

123. Leib et al., *supra* note 100, at 401.

124. *Id.* at 398-400.

125. *Id.* at 401-02; Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493 (2012). As David Kershaw points out, the fiduciary relationship is also potentially plural

Yet this focus on the identity of beneficiaries arguably mischaracterizes the fiduciary problem. The focus of public fiduciary theory should not be on the scope of the beneficiaries but on the scope of the undertaking to exercise a public mandate.[126] This may be an important point at which to distinguish public fiduciary theory from private fiduciary law. Under the private law analysis of fiduciary liability, liability is effectuated through "correlatively structured rights and duties that make fiduciaries directly and personally accountable to beneficiaries."[127] Rather than translating this personal undertaking between fiduciary and beneficiary to the public context, we should instead focus on the different nature of the undertaking. Public fiduciary theory is based not on a personal undertaking to particular individuals or groups but rather on an undertaking to exercise a public mandate.[128] As I explore in the next Section, the focus of public fiduciary theory should not be on accountability to discrete beneficiaries but on accountability to the public purpose the fiduciary is authorized to serve.

2. Protected Interests

The shift of the fiduciary construct from interpersonal relationships to the context of public authority requires a shift from administration of concrete interests to something different. As Paul Finn has recognized, the functions of public powers "as a rule, are to further public purposes, not the interests [or purposes of a particular person or] persons as such."[129] The argument is that public fiduciary theory is concerned with faithfulness to the

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in the corporate context from the perspective that the bilateral relationship of fiduciary and beneficiary converts to the "trilateral relationship between [the] corporation as an entity and its constituent parts or organs [of] the board and the shareholder meeting." DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 347 (2018).

126. *See* Miller & Gold, *supra* note 88, at 517-18 (theorizing that a subset of fiduciary relationships are governed by "*[f]iduciary governance* mandates ... in which the fiduciary is engaged to determine or advance certain *abstract purposes*" and that in these relationships, "[t]he powers of the fiduciary, and the objects for which he acts, are specifiable entirely with reference to one or more abstract purposes without it being necessary to identify a beneficiary").

127. *Id.* at 553-54; *see* ERNEST J. WEINRIB, CORRECTIVE JUSTICE 10-11 (2012); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 116-20 (1995).

128. *See* Miller & Gold, *supra* note 88, at 525.

129. Finn, *supra* note 14, at 343.

purpose(s) for which fiduciary powers were vested rather than particular concrete interests.[130] In their work on the concept of fiduciary governance, Miller and Gold have distinguished between a "service mandate," in which fiduciary powers are exercised in the service of interests of a determinate group of persons, and a "governance mandate" in which "the fiduciary's discretion is to be oriented to the achievement of certain objectives" held relative to collectivities as opposed to being "identifi[able] with determinate persons and their practical interests."[131]

The question then becomes how to characterize or identify these objectives or purposes. Some scholars have defined them broadly as "promot[ing] the public welfare"[132] or the "substantial interest in living in a world that is neither a Hobbesian state of nature nor one left to the caprice of an arbitrary ruler."[133] The problem with this approach is that it thins out considerably the scope of fiduciary obligations, leaving public fiduciaries with broad discretion accountable only to abstract and effectively unenforceable standards.[134] Other scholars have interpreted public purposes more in line with the private law context as including the multifaceted preferences and interests of members of the beneficiary public.[135] For example, in Leib, Serota, and Ponet's detailed work on judges as fiduciaries, they contend that "a fiduciary needs some knowledge of beneficiaries' preferences and interests to do a good job as a fiduciary when entrusted to make decisions on their behalf."[136] On this basis, they argue that judges must make "an authentic effort to

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130. *Id.* As Fox-Decent explains, "the most fundamental and general fiduciary duty is not loyalty to an individual or a discrete class of beneficiaries, but fidelity to the other-regarding purposes for which fiduciary power is held." FOX-DECENT, *supra* note 41, at 37.

131. Miller & Gold, *supra* note 88, at 523-24.

132. Criddle, *supra* note 83, at 466; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 136-38 (2006).

133. FOX-DECENT, *supra* note 41, at 112.

134. For example, Evan Criddle acknowledges that the concept of public welfare is "radically indeterminate at the margins" and "a fundamentally contested concept," such that "[a]fter satisfying the basic principles of fiduciary administration, regulators may find that they still enjoy substantial discretion to determine what policy alternative will best advance Congress's general purposes and promote the broader public welfare." Criddle, *supra* note 83, at 490-491.

135. *See* Ethan Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 712 (2013).

136. *Id.* at 741.

uncover preferences rather than a mere hypothetical projection of what beneficiaries might want."[137] The problem with this construction is that it conflates the public mandate with the subjective interests of the beneficiary public, or individuals and groups within it. The role of the judge is not to seek and serve the interests of certain sectors of the public, even the interests of a majority of the public, but to perform the allocated judicial function.[138] In a high-profile criminal law case, there may be a public clamour to convict when technical legal rules prevent admission of relevant evidence necessary to secure a guilty verdict. The judicial role in this scenario requires the judge to apply applicable rules of evidence rather than providing the public with the conviction they so desire. In other words, the role of the judge is to uphold the judicial function rather than public preferences regarding the outcome of particular cases.[139]

In conclusion, the protected interest in public fiduciary theory should neither be overly generalized so as to be unascertainable nor narrowly construed so as merely to serve the public's interests or preferences in a particular context. Rather, the fiduciary construct serves to protect and ensure performance of and adherence to the public mandate. The legitimate expectation of the public is that the public authority will fulfill their mandate, rather than serve their particular interests or preferences.[140]

3. Fiduciary Obligations

Recourse to the fiduciary metaphor in public fiduciary theory presumes the theory to be one that focuses on protection and justification of the public trust.[141] I characterize the goal of the fiduciary construct, as conventionally understood, as underwriting trust by ensuring the fiduciary neither *exploits* their authority by prioritizing self-interest or that of third parties (duty of loyalty), nor *squanders* their authority by failing to adequately fulfill their mandate (duty of care).[142] The question is whether the obligations

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137. *Id.*
138. *See* Miller & Gold, *supra* note 88, at 569.
139. *See id.* at 569-70.
140. *Cf. id.* at 553.
141. *See* FOX-DECENT, *supra* note 41, at 89.
142. *See supra* Part I.C.

or duties imposed by the fiduciary construct can be translated to the context of public authority in a way that is intelligible and fit for the purpose.

We explore this question by examining the work of prominent public fiduciary theorists. Here, we see that the obligations recognized do not always map onto fiduciary obligations as conventionally conceived. For example, the ambitious goal of Evan Fox-Decent's theory as constituting public authority has knock-on effects for the scope of fiduciary obligations.[143] Fox-Decent claims that "[t]he content of the [fiduciary] obligation is to govern in accordance with the rule of law."[144] Fox-Decent adopts "Fuller's eight canons of the internal morality of law [as giving] content of the rule of law," linking this to the agency-based justification on which his theory rests.[145] What is notable is that the connection to public trust forms no express part of this chain of reasoning.[146] Indeed, Fuller's internal morality of law, with its commitment to generality, publicity, clarity, prospectivity, constancy, feasibility, consistency and congruence, does not connect neatly (if indeed at all) to the fiduciary construct's commitment to the nonexploitation and due performance of public mandates.[147] That is not to say Fuller's internal morality does not serve valuable ends, it is just that it serves other values than those served by the fiduciary construct. In Fuller's own words, the aspirational aim of the internal morality is to identify the conditions of legal order that will enable persons "to find the good life in a life shared with others."[148] A more faithful implementation of the fiduciary metaphor would see public fiduciary theory focus on the double-edged fiduciary aim of ensuring that public authority is not exploited or squandered to the extent that it cannot be said to fulfill its representative or purposive aims.

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143. *See* FOX-DECENT, *supra* note 41, at 237.

144. *Id.*; *see id.* at 134.

145. *Id.* at 238; *see id.* ("[A] commitment to the internal morality entails respect for human agency; respect for human agency entails respect for human dignity; and respect for human dignity entails respect for human rights.")

146. *See id.* at 237-38.

147. *See* LON L. FULLER, THE MORALITY OF LAW 33-39 (rev. ed. 1969).

148. *Id.* at 13. Fuller described the inner morality as "a morality of aspiration and not of duty." *Id.* at 43.

III. THE FIDUCIARY CONSTRUCT AS INTERNATIONAL PRECEPT

In *The Legitimacy of the Collective Authority of the Security Council*, David Caron notes that "perceptions of [the Security Council's] illegitimacy may ... arise from both the failure to use authority effectively and the abuse of authority."[149] The fiduciary construct offers a potential legal basis by which to censure both forms of transgression. In this Part, I consider whether fiduciary principles have a role to play in the Security Council setting and, if so, how the relevant legal cross-pollination might play out. From a legal doctrinal perspective, one might construe the inquiry as a positivist one, examining whether fiduciary principles form part of existing international law. However, if we take a more normative perspective, we might determine that our role as lawyers in this setting should be more visionary. As Roberto Mangabeira Unger would have it, legal analysis should be focused less in searching for "recurrent doctrinal categories and distinctions" and more on the role of domestic law and legal principles as "animating idea[s]" from which contextualised rules can be forged in the interplay between legal imagination and power.[150]

In pursuing both positivist and normative lines of inquiry, drawing on and guided respectively by the literature on fiduciary law and fiduciary theory discussed above, two different versions of the fiduciary construct emerge as potentially applicable in the Security Council setting. The first is more particularized, examining whether the Security Council can ever be said to act as fiduciary in relation to certain individual or group interests.[151] The second is more generalized, examining the role of the Council vis-à-vis the international community more broadly.[152] I identify and distinguish

149. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 561 (1993). Ian Hurd also discusses how problems of "independence and hypocrisy" can make the Council "less useful to those trying to invoke its power-by-association, and may contribute to its marginalization." IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 195 (2007).

150. Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1, 1-2 (1996).

151. *See infra* Part III.A.

152. *See infra* Part III.B.

below between these as the *contractual* and *constitutional* versions of the fiduciary construct, which derive from different sources and enable us to differentiate between obligations owed to particular individuals or groups and those owed more generally to the international community.

A. The Contractual Concept

The construction of fiduciary obligations as contractual is considered in some legal systems as a subject of dispute.[153] This Article does not seek to take a position in this debate. Rather, in considering the translation of the fiduciary construct to the international sphere, the term “contractual” is helpful to distinguish the nature of the undertaking at the heart of the relevant fiduciary relationship. In differentiating between contractual and constitutional constructs, the intent is to distinguish an interpersonal undertaking made by a public institution to an individual or group of individuals from the general undertaking made by a public institution to the public at large.

In assessing the application of the contractual model in any particular case, the key question is whether it is possible to identify the source of an undertaking made or assumed by the fiduciary to the beneficiary that discretionary power will be exercised (1) on the beneficiary’s behalf, and (2) to advance or preserve particular protected interests. The source of this undertaking may be in a Security Council resolution, an agreement entered into by subsidiary organs or agents of the Council, regulations passed by such organs, or even a treaty. If this undertaking exists, the question becomes whether fiduciary obligations can be said to arise under international law. In the absence of any separate treaty foundation

153. For representative publications of the minority position that fiduciary obligations are contractual, see Edelman, *supra* note 33, at 302-04; Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993). This position is more accepted in civil systems and their progenitors. For example, under Roman law certain legal principles such as *fiducia* and *mandatum* arose directly under the law of contract and stemmed from a contractual obligation to hold property or money on the understanding that (1) it will be reconveyed or (2) used in good faith to carry out a particular undertaking. David Johnston, *Fiduciary Principles in Roman Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 505, 507-09 (2019).

for the obligations,[154] the question is whether such obligations exist under one of the pedigree sources of international law.[155]

The category of general principles seems more fitting than customary international law as the source through which to import the fiduciary construct. Fittingly (given the equitable source of fiduciary law), general principles as a source category is sometimes described as closely associated to, and even as originating from, equity and, its direct relation, natural law.[156] Like equitable principles, the role of general principles is to assist the proper functioning of the international system of justice.[157] Brierly noted that general principles can be drawn from principles of private law when applicable to international relations:

> Private law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon which international law has drawn.... for the good reason that a principle which is found to be generally accepted by established legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.[158]

According to the methodology for the establishment of general principles, the fiduciary construct will be recognized as such if its basic notions can be shown to be common to the principal legal systems of the world and transposable to the international legal system.[159] There is not scope in this Article to undertake the

154. There is no express recognition of fiduciary obligations owed to individuals or groups of individuals in treaty law. More attention will be given below as to whether the U.N. Charter can be interpreted to recognize the existence of obligations owed to the international community more broadly. *See infra* Part III.B.1.

155. *See* Statute of the International Court of Justice art. 38, ¶ 1.

156. *See* Louis B. Sohn, Equity in International Law, Remarks at the Proceedings of the Eighty-Second Annual Meeting of the American Society of International Law (Apr. 22, 1988), *in* PROC. 82D ANN. MEETING AM. SOC'Y INT'L L. at 277, 290; Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L & COMPAR. L.Q. 801, 814 (1976).

157. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 386-88 (1987).

158. ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS 63-64 (7th ed. 2012). *See generally* H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

159. Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Rep. on General Principles of Law*, ¶ 19, U.N. Doc. A/CN.4/741 (Apr. 9, 2020). As Judge McNair famously expressed in the South-West Africa advisory opinion:

detailed comparative analysis required to confirm this position. However, available literature affirms that basic principles of fiduciary law exist in a variety of legal systems including European civil law systems, India, Islamic law, Japan, and Roman law.[160] According to this legal principle, when an international decision maker such as the Security Council assumes discretionary control over the concrete interests of an individual or individuals, fiduciary obligations may arise in circumstances of an express or implied undertaking that the decision maker will act (1) on behalf of the beneficiary (2) for the purpose of protecting the latter's interests.[161]

The existence of such an undertaking, its nature, and its scope will need to be established on a case by case basis through an examination of relevant documents. Undertakings to particular individuals or groups to exercise discretionary authority over their concrete interests on their behalf may be express or implicit in U.N. Security Council resolutions, in agreements entered into with the Council or its officials (for example, Status of Forces Agreements), or in policy statements issued by the Council. In these circumstances, the Council and its officials may be bound by a duty of loyalty, such that public officials are prohibited from exploiting their authority and acting either in self-interest or to serve the interests of third parties.[162] They would also be bound by a duty of care and are not entitled to squander their authority through failing to exercise due diligence to protect the beneficiary's interest.[163]

> The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel," ready-made and fully equipped with a set of rules.... [T]he true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.

International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (separate opinion by McNair, J.).

160. *See* Gelter & Helleringer, *supra* note 28, at 583; Vikramaditya S. Khanna, *Fiduciary Principles in Indian Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 623, 623; Mohammad Fadel, *Fiduciary Principles in Classical Islamic Law Systems*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 525, 525; J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 16, at 643, 643; Johnston, *supra* note 153, at 505.

161. *See supra* Part I.A.

162. *See supra* Part I.C.1.

163. *See supra* Part I.C.2.

Violation of either undertaking would constitute a betrayal of trust and must be remedied.[164] Notably, no consensus currently exists that the construct extends beyond the protection of economic interests.[165]

B. The Constitutional Concept

While there will be some narrow circumstances in which the Security Council may undertake to protect the interests of particular individuals and groups, these particularized interests are not the typical focus of the Council's mandate. When international organizations, practitioners, and scholars reference the value of "trust" in international organizations and their officials, they are referring not to the trust of particular individuals or groups, but to something more akin to the "public trust."[166] This raises the question of the role of trust in legitimizing or strengthening the authority of international organizations such as the Security Council and the potential role of law in underwriting trust in this context. Here, public fiduciary theory might open up an interesting line of inquiry, illuminating a possible reference point for the legitimation of Security Council authority that has been given inadequate attention in the discourse surrounding the formulation of legal parameters for the Council's conduct: that of public trust. I refer to this conception as the constitutional construct in recognition that it relates to the attribution and distribution of authority in the international context.[167]

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164. For further discussion of fiduciary remedies, see generally J.R. Maurice Gautreau, *Demystifying the Fiduciary Mystique*, 68 CAN. BAR REV. 1 (1989); Getzler, *supra* note 26.

165. *See supra* notes 54-60 and accompanying text.

166. *See, e.g.*, Dag Hammarskjöld, The International Civil Servant in Law and in Fact, Lecture at Oxford University (May 30, 1961), *in* 100 YEARS INT'L CIV. SERV., at 4, 6-11, https://www.daghammarskjold.se/publication/the-international-civil-servant-in-law-and-in-fact/ [https://perma.cc/2UXY-4GVR]; Anne Peters, *The Security Council, Functions and Powers, Article 24*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 761, ¶ 48 (Bruno Simma et al. eds., 3d ed. 2012). *See generally* Eyal Benvenisti, *Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?*, 29 EUR. J. INT'L L. 9 (2018); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

167. It is important to distinguish this approach from the U.S. constitutionalist account of the fiduciary law, which derives fiduciary duties from the text, historical context and structure of the U.S. Constitution as a "fiduciary instrument." *See, e.g.*, GARY LAWSON & GUY

I conclude from my analysis of the literature on public fiduciary theory above that the public trust is based in a compound promise made expressly or implicitly by public institutions wielding discretionary power.[168] The trust or fiduciary element is based in recognition that the public institution in question will exercise discretionary power (1) on behalf of the public and (2) to advance the purpose(s) for which it is allocated.[169] The role of fiduciary obligations is accordingly to ensure the exercise of discretionary power is both representative and purposeful.

Application of this fiduciary construct to the Security Council will be appropriate only if the underlying compound undertaking can be attributed to the Council. This gives rise to some thorny questions: Is Security Council authority intended to be representative? Is it possible to identify with any certainty what purpose or purposes the Council is obliged to serve under its mandate? Are Council members permitted to act in self-interest or in the interest of third parties? Is it appropriate to recognize that the Council has a duty to act in certain circumstances? The first two questions relate to the existence of a fiduciary relationship and the interests or purposes it might serve. The latter two questions relate to the content of any fiduciary obligations. Ultimately, all questions have to be answered by reference to the constitutional instrument of the Security Council, namely the U.N. Charter, interpreted by reference to an analysis of its history, text, context, and developing practice in the application of its provisions.[170]

SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 47 (2017); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019); Leib et al., *supra* note 135, at 702-03; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1083, 1087-88, 1128, 1168 (2004). For a critique of this account, see Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1482-83 (2020).

168. *See supra* Part II.

169. *See supra* Part II.B.

170. According to established principles of treaty interpretation, it is widely accepted that the U.N. Charter can be interpreted by reference to its text, considered in its context and in "light of its object and purpose." *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340. In addition to context, it is acceptable to take into account any subsequent agreement or practice in the application of the treaty and any relevant rules of international law. *See id.* The Vienna Convention on the Law of Treaties was recognized as applicable to the U.N. Charter in, inter alia, Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment 2007

1. The Fiduciary Relationship

The fiduciary construct finds its central habitat in the exercise of discretionary power that can be characterized as other-regarding.[171] The idea is that this power is exercised on behalf of an individual or collective. The first complicating issue is whether the Security Council is intended to be a representative body that exercises discretionary power on behalf of some formation or iteration of the global public. Though the Security Council clearly exercises broad discretionary power,[172] the notion that its power is exercised on a representative basis or in a representative fashion cannot simply be assumed. Indeed, the drafters of the Charter "explicitly rejected the notion that the Security Council should be representative, democratic, or equitable."[173]

This originalist interpretation by the drafters of the Charter is not determinative of the position. However, the drafting history, text, and subsequent practice reflect possible alternative interpretations of the foundations of Council authority (beyond its representative authority) that we must factor into any consideration of the extent to which the Council's power can be said to be fiduciary. According to one interpretation, the Security Council framework serves not to displace power politics, but to institutionalize it.[174] The decision at the end of the Second World War to grant certain states (hitherto the "Great Powers") both permanent membership in the Council and a veto over decision-making sought to establish a balance of power as the underpinning of the collective security framework.[175] As the *New York Times* reported it at the time of the San Francisco Conference at which the U.N. Charter was drafted,

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I.C.J. 47, ¶ 160 (Feb. 26); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 94 (July 9).

171. *See supra* notes 33-43 and accompanying text.

172. *See* Devika Hovell, Glasnost *in the Security Council: The Value of Transparency*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 194, 202 (Larissa Van den Herik ed., 2017).

173. Edward C. Luck, *The U.N. Security Council: Reform or Enlarge?*, *in* IRRELEVANT OR INDISPENSABLE? THE UNITED NATIONS IN THE TWENTY-FIRST CENTURY 143, 144 (Paul Heinbecker & Patricia Goff eds., 2005).

174. HURD, *supra* note 149, at 133.

175. *See* Hovell, *supra* note 172, at 206-07.

"[m]ost countries ... 'reluctantly accepted the idea of a virtual world dictatorship by the great powers.'"[176]

Martin Wight accordingly speaks of "the sardonic smile of Hobbes [visible] between the lines of the Charter."[177] Though Hobbes' writings have been invoked by Evan Fox-Decent in public fiduciary theory in support of the idea that sovereignty arises from public trust,[178] the Hobbesian dilemma is more frequently characterized as an exchange of absolute freedom for absolute sovereignty arising from the need for security.[179] Indeed, "[t]he choice facing the drafters of the U.N. Charter in 1945" in their quest for international peace and security "has been described as a true Hobbesian dilemma, presenting a choice between two unsavory options of maximizing freedom and equality of states (risking potential anarchy), or concentrating power in the hands of a single authority (risking tyranny)."[180] The solution was to merge recognition of sovereign equality with a privileged status for the Permanent Five (P5) in what Gerry Simpson has described as a "legalised hegemony,"[181] harnessing the P5 to a multilateral framework in which they could protect their fundamental interests.[182] Koskenniemi describes the Hobbesian dilemma as a continuing one:

> [t]he unlimited nature of the language of Article 39 [of the U.N. Charter], coupled with the ... virtual impossibility of judicially challenging any determination under Article 39 do suggest an image of the Council as a post-Cold War Leviathan; not only as police but as judge, or perhaps a priest, of a new world order.[183]

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176. DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 37 (2009) (quoting Russell Porter, *Small Countries Gain a Wider Role: Numerical Status Is Evident as Working Committees Begin Parley Tasks,* N.Y. TIMES, May 7, 1945, at 10).

177. Martin Wight, *An Anatomy of International Thought*, 13 REV. INT'L STUD. 221, 223 (1987).

178. *See, e.g.*, Fox-Decent, *supra* note 43, at 183.

179. Robert O. Keohane, *Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society*, *in* WHOSE WORLD ORDER? UNEVEN GLOBALIZATION AND THE END OF THE COLD WAR 165, 168 (Hans-Henrik Holm & Georg Sorensen eds., 1995).

180. Hovell, *supra* note 172, at 206 (citing Keohane, *supra* note 179, at 165-87).

181. *Id.* (citing GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 68 (2004)).

182. IAN CLARK, HEGEMONY IN INTERNATIONAL SOCIETY 150, 155 (2011).

183. MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 84 (2011) (footnotes omitted).

Some argue that the Hobbesian element, if anything, has become more concentrated, with the P5 hegemony reduced to the power of one and the role of the Council reduced to "an after-sales service provider to US-led military interventions."[184]

Yet the idea that the Council serves merely to launder the P5's (or the United States') vision of world order without reference to the broader membership is overstated. Even considering the framework adopted in 1945, the plans for a Great Power dominion fell short.[185] At the San Francisco Conference, the idea of a privileged status for the Great Powers was the subject of criticism by medium and smaller powers.[186] "Indeed, in the course of ... negotiations, responsibility for the maintenance of peace and security shifted ... from the executive to the plenary organ" and back again when the decision was finally made to vest primary responsibility in the Security Council.[187] The Charter text reflects the final decision as a trade-off between representation and effectiveness, rather than between representation and Great Power interests.[188] Article 24 confers "primary responsibility for the maintenance of international peace and security" on the Security Council "[i]n order to ensure prompt and effective action by the United Nations."[189] The chosen voting formula, including the veto, was explained by a member of the Secretariat at the San Francisco Conference as stemming from the practical necessity of guaranteeing military weight behind Council decision-making, "devised to bring the bulk of the military forces automatically behind the Council's decisions and at the same time

184. RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY 209 (2006). On U.S. dominance in the Council framework, see also David M. Malone, *Introduction* to THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 1, 8 (David M. Malone ed., 2004); ADAM ROBERTS & DOMINIK ZAUM, SELECTIVE SECURITY: WAR AND THE UNITED NATIONS SECURITY COUNCIL SINCE 1945, at 20 (2008); Peter Wallensteen & Patrik Johansson, *Security Council Decisions in Perspective*, *in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY, *supra*, at 17, 20; BRIAN FREDERKING, THE UNITED STATES AND THE SECURITY COUNCIL: COLLECTIVE SECURITY SINCE THE COLD WAR 20 (2007); Ian Johnstone, *The Security Council as Legislature*, *in* THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY 80, 102 (Bruce Cronin & Ian Hurd eds., 2008).

185. Hovell, *supra* note 172, at 207.

186. *Id.*

187. *Id.* (citing 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 166, at 763-64).

188. *Id.*

189. U.N. Charter art. 24, ¶ 1.

to give scope for the operation of checks and balances on the part of the elected representatives of all the United Nations."[190]

Further, it seems that representation was always intended to be a limit on the license granted to secure efficiency and military resources. Significantly, Article 24 reflects the agreement by the founding member states that the Council, "in carrying out its duties ... acts on their behalf."[191] Anne Peters, in her commentary to Article 24, notes that "the concept of 'responsibility'" vested in the Council by the U.N. Charter "implies a 'position of trust,'" and of authority held on behalf of the "trust givers."[192] If anything, the scales have increasingly tilted in favor of more representative decision-making. The General Assembly has recognized the concept of hegemonism "global and regional, in all its different forms" as "a serious threat to international peace and security."[193] In 1992, Secretary-General Boutros Boutros-Ghali remarked that the "power of principles" was progressively "transcending changing perceptions of expediency."[194] In his 1992 *Agenda for Peace*, Boutros-Ghali cautioned that if there was a perception that the Charter's principles were being applied selectively, "trust will wane and with it the moral authority which is the [Charter's] greatest and most unique quality."[195]

Yet the need for a balance between representation and effectiveness remains. In practice, effective action through the Security Council continues to depend on the decision of the most powerful states (including members of the P5) to contribute military resources and "pay the bill for almost all the executive activity," applying invariably their own national criteria.[196] However, the Council's effectiveness depends equally on perceptions of the legitimacy of its mandate, which must broadly represent the will of the

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190. Dwight E. Lee, *The Genesis of the Veto*, 1 INT'L ORG. 33, 34 (1947).

191. U.N. Charter art. 24, ¶ 1.

192. Peters, *supra* note 166, ¶¶ 11, 41.

193. G.A. Res. 34/103, Inadmissibility of the Policy of Hegemonism in International Relations, at 19 (Dec. 14, 1979).

194. U.N. SCOR, 46th Sess., 3046th mtg. at 11, U.N. Doc. S/PV.3046 (Jan. 31, 1992).

195. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, ¶ 82, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

196. Jeremy Greenstock, *The Security Council in the Post-Cold War World, in* THE UNITED NATIONS SECURITY COUNCIL AND WAR 248, 250 (Vaughan Lowe et al. eds., 2008); *see also* Laura Neack, *UN Peace-Keeping: In the Interest of Community or Self?*, 32 J. PEACE RSCH. 181, 181 (1995).

broader international community and promote shared goals and values.[197] The relationship between the P5 and broader U.N. membership approximates one of "complex interdependence," drawing on Keohane and Nye's model for international order.[198] Keohane and Nye note the importance of legitimacy in situations in which the coercive element is diminished, entailing the need for leading states to "forgo short-run gains in bargaining" if they wish "to secure the long-run gains associated with stable [bargaining] regimes" and noting that this may "not confer special material benefits, although it may carry high status as well as the ability to shape the agenda for interstate discussions."[199] In similar terms, Ian Clark describes the effectiveness of Council action as predicated on "a complex, and volatile, balance of legitimation," requiring the Council to achieve in its decision-making an equilibrium between the interests of the P5 and the interests of the global public.[200] If the P5 wish to benefit from the authority and status that the Council confers, as well as from the "risk- and burden-sharing" it offers, it is in their interests to seek to preserve the Council's authority and ensure that correlation between Council action and P5 interests is not too overt.[201] If Council decision-making loses its "international sheen" and starts to "look more like big-power bullying," the Council and its permanent members both stand to be relatively disempowered as a result.[202]

By way of resolution, the Council can be said to operate at a level of second-order representation. By this, I mean that, while the Council's decisions do not themselves need to be representative, they must clearly be taken in fulfillment of public (or representative) purposes. For reasons related to its effectiveness, the Council is given broad discretion as to the measures it decides to take in

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197. *See* CLARK, *supra* note 182, at 155; Caron, *supra* note 149, at 560; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 221 (1998).

198. ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 20-21 (4th ed. 2012); ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL 202-03 (2011); Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions 1992-2003*, 59 INT'L ORG. 495, 523 (2005).

199. KEOHANE & NYE, *supra* note 198, at 265.

200. CLARK, *supra* note 182, at 155.

201. Nico Krisch, *The Security Council and the Great Powers*, *in* UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 196, at 133, 144.

202. *Open the Club*, ECONOMIST, Aug. 29, 1992, at 10.

fulfilling its mandate.[203] However, the mandate is a public one, in the sense that the purpose or purposes for which action is taken must reflect public purposes.[204] As I have framed the fiduciary relationship in the public sphere, institutional actors assume authority based on an undertaking that they will exercise that authority in pursuit of public purposes, giving rise to a legitimate expectation in the public that this undertaking will be fulfilled.[205] It follows that the question of purpose is not one that can be determined subjectively by one or more members of the Council but must accord with the relevant public's legitimate expectation.

The question then becomes who may authoritatively frame and formulate an understanding of the Council's mandate or the purposes in pursuit of which it may legitimately act. This is a critical and difficult question, and there are opposing views as to whether the directive in Article 24—that the Council acts on behalf of "Members"—renders it accountable to individual member states, to the General Assembly, to "We the peoples," or to some other iteration of the global public more broadly.[206] My position is that the better view is that the source of the public will is to be found, not in the views of any individual member state or in any amorphous conception of the international community but in the General Assembly. The will of the United Nations considered as a whole is separate in an important sense from the will of individual states, such that the Council is rightly construed as exercising a form of "public authority" rather than one delegated by individual states.[207] The United Nations is autonomous from its member states, possessing separate personality, rights, and duties on the international

203. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

204. *See* CLARK, *supra* note 182, at 155; Caron, *supra* note 149, at 560; FRANCK, *supra* note 197, at 221.

205. *See supra* Part II.A.

206. U.N. Charter art. 24, ¶ 1; *see* Peters, *supra* note 166, ¶¶ 41-47; KOSKENNIEMI, *supra* note 183, at 109; TZANAKOPOULOS, *supra* note 198, at 13; DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY 26-31 (1999); Erik Suy, *The Role of the United Nations General Assembly*, *in* THE CHANGING CONSTITUTION OF THE UNITED NATIONS 55, 59 (Hazel Fox ed., 1997); HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 275 (2000).

207. Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115, 116-17 (2017); Peters, *supra* note 166, ¶ 43.

plane.[208] The General Assembly's exclusive control over the U.N. budget[209] and the Council's reporting requirement to the General Assembly under Article 24(3) lend support to the idea that the Assembly is the rightful recipient of the Council's accounts.[210] The principal or beneficiary of the Council is therefore appropriately construed as the Organization itself, held accountable through "the Plenary organ in which [all Member States] are represented," namely the General Assembly.[211]

2. Protected Interests

The fiduciary construct is uniquely suited to this context of second-order representation. As discussed above, in circumstances in which a public authority is required to act in the collective interest, fiduciary responsibility is not judged by reference to the interests of its beneficiaries but rather by reference to fulfillment of public purposes. In the Security Council context, the question accordingly becomes whether it is possible to identify a set of purposes by which the Council's conduct can be measured in fiduciary terms.

The broad purpose of the Security Council is framed in Article 24 of the U.N. Charter as "primary responsibility for the maintenance of international peace and security" of the U.N. Charter.[212] The Council's specific functions are set out in Chapters VI, VII, VIII and XII, with its mandatory functions contained in Article 39, requiring the Security Council: (1) to "determine the existence of any threat

208. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

209. *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 162 (July 20).

210. Peters, *supra* note 166. While Article 24(3) merely states that reports are submitted "for [the] consideration" of the General Assembly, state responses to such reports in the General Assembly have led to increasing demands for the reports to be more analytical and to "highlight the specific challenges faced by the Security Council, especially when it has failed to act or has been divided." U.N. Charter art. 24 ¶ 3; LORAINE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 589 (4th ed. 2014). The reporting requirement was referred to by the ICTY as one of the "constitutional limitations" on the Security Council. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

211. Peters, *supra* note 166, ¶¶ 43, 45.

212. U.N. Charter art. 24, ¶ 1.

to the peace, breach of the peace, or act of aggression," and (2) to "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[213] An understanding of the Security Council's legal mandate is therefore tied closely to understanding the circumstances in which the Council's responsibility is triggered ("threat to the peace, breach of the peace or act of aggression") together with an understanding of the scope of measures that can be said to fulfill its responsibility to maintain or restore international peace and security.[214]

It is clear the Council is granted broad discretion in both respects.[215] Indeed, the broad parameters of the Charter text, and lack of certainty regarding its limits, has led Bart Szewczyk to conclude that "the primary problem of the Council ... is not insufficient resources or inadequate representativeness, but a lack of agreement as to its purpose."[216] On the other hand, Nathaniel Berman highlights the importance of pluralism in responding to conflicts, cautioning that "[i]nternational law's strength ... does not depend on the provision of 'clear mandates.'"[217] Berman notes that, on the contrary, international law's resilience "depends on complex, heterogeneously composed mandates—and on the presence of an agile and legitimate [interpreter] of those mandates, able to use the conflicts between the elements of the international regime as a resource for responding to changing or previously misunderstood features of the situation."[218] Taking a similar perspective, Koskenniemi posits that the place of law in collective security is in "opening conceptions and practices of 'security' to public debate, and by

213. *Id.* art. 39. For greater detail on the interpretation of these provisions, see generally Nico Krisch, *Introduction to Chapter VII: The General Framework*, *in* 2 THE CHARTER OF THE UNITED NATIONS, *supra* note 166, at 1237.

214. Krisch, *supra* note 213, ¶ 12.

215. Yet it is also now more commonly accepted that this discretion does not amount to "absolute fiat" and that "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus*." *Tadić*, no. IT-94-1-l, ¶ 28.

216. Bart M.J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L.J. 449, 451 (2012).

217. Nathaniel Berman, *Intervention in a 'Divided World': Axes of Legitimacy*, 17 EUR. J. INT'L L. 743, 753 (2006).

218. *Id.* at 753-54.

enhancing the accountability of governmental and international institutions for what goes on under the label of 'security policy.'"[219]

Consistent with the notion of second-order representation, an understanding of the purposes for which the Security Council's authority is exercised "can only be gleaned through a degree of reflexivity to the public on whose behalf [it] performs its functions."[220] Therefore, "[t]he 'shared values' and 'common interests' of the international community" will necessarily be the "subject [of] continual rethinking and reinvention."[221] They "can only be gleaned through ongoing, principled, factually informed deliberation about these 'terms' of accountability."[222] The representative and purposive elements must therefore work hand in hand to determine the scope of any fiduciary relationship in the Security Council context. The appropriate site for determination of the Security Council's proper purpose, and the appropriate forum within which to determine its compliance with its fiduciary obligations, is by reference to the will of the broader membership of the United Nations as reflected in the General Assembly.[223]

3. Fiduciary Obligations

The real test as to the value of the fiduciary construct in the Security Council context is whether it is possible to convert the construct into identifiable obligations. As discussed in relation to the domestic sphere, at the heart of fiduciary law and theory is (or should be) the idea that those exercising discretionary authority on behalf of others do not exploit or squander that authority.[224] The twin duties this gives rise to are duty of loyalty to purpose (or duty of nonexploitation) and duty of care (or duty of due performance).[225]

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219. KOSKENNIEMI, *supra* note 183, at 111.
220. Hovell, *supra* note 172, at 203.
221. *Id.*
222. *Id.* at 205.
223. Peters, *supra* note 166, ¶¶ 43, 45.
224. *See supra* Part I.C.
225. *See generally supra* Part II.B.3.

i. Duty of Nonexploitation

As Birks states in the domestic context, the term "loyalty" is unhelpful as it "conveys no idea of the way in which or the purposes for which a trustee is to be relied upon."[226] This is all the more so when the duty is applied to the context of public governance, in which it is anathema to describe those in positions of public authority as loyal to a particular beneficiary or a set of beneficiaries.[227] To the extent the Council and its officials must be loyal, it is to the purposes for which authority is vested.[228] At a minimum, according to the fiduciary analogy, this requires that the Council and its agents must not use the authority vested in them for direct personal gain or unauthorized profit, that is, directly and personally to profit from or to obtain direct personal profit for a third party.[229] I have argued above that the essence of this fiduciary duty is non-exploitation, and it may be more helpful to recognize any related duty in the Security Council context by that name.

The duty of nonexploitation does not require separate international legal foundation and can be seen as following from recognized principles of international law, including principles of good faith and abuse of right. The principle of good faith is well recognized as a general principle of international law.[230] It can moreover be regarded as a constitutional principle of the Charter, included in Article 2 of the Charter which sets out the principles in accordance with which the Organization and its Members are required to act.[231]

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226. Birks, *supra* note 13, at 11-12.

227. *See, e.g.*, *supra* notes 138-39 and accompanying text.

228. *Cf. supra* Part II.B.3.

229. *See supra* Part I.C.1.

230. *See* CHENG, *supra* note 157, at 105-160; J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991); Anthony D'Amato, *Good Faith*, *in* 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 107, 107-09 (Rudolf Bernhardt ed., 1984); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 106-26 (1999); Robert Kolb, *La Bonne Foi en Droit International Public*, 31 R.B.D.I. 661, 661, 674-732 (1998); Michael Virally, Review Essay, *Good Faith in Public International Law,* 77 AM. J. INT'L L. 130, 133 (1983); M. Lachs, *Some Thoughts on the Role of Good Faith in International Relations*, *in* DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 47-55 (Robert J. Akkerman et al. eds., 1977); Georg Schwarzenberger, *The Fundamental Principles of International Law*, *in* 87 RECUEIL DES COURS 290-326 (1955); A. Verdross, *La Bonne Foi Comme Fondement du Droit International Public*, *in* 5 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 17-21 (1952).

231. U.N. Charter art. 2, ¶ 2.

Article 2(2) of the U.N. Charter provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."[232] In interpreting this principle, the International Court of Justice (ICJ) has deployed the criteria of relationship to purpose as a yardstick for deciding what good faith requires in any particular case.[233]

While the principle of good faith can admittedly seem abstract, it serves as a juridical foundation based upon which more precise legal obligations can be concretized. In the context of international organizations, it has been described as having "the function of assuring the primacy of common aims over manifestations of excessive individualism by States which are incompatible with them."[234] One principle that has developed out of the overriding obligation of good faith is that of the prohibition of abuse of right, which has been recognized as a general principle of international law.[235] As Hersch Lauterpacht describes it,

> [t]he essence of the doctrine is that ... the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; [which will occur when] the general interest of the community is injuriously affected as the result of the sacrifice of an important social ... interest to a less important, though hitherto legally recognized, individual right.[236]

According to this principle, states are required "not to exercise a right beyond the limits of what was reasonable."[237] Bin Cheng elaborated that a

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232. *Id.*

233. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 91-93 (May 28) (dissenting opinion by Basdevant, Winiarski, McNair, and Read, JJ.); *see also id.* at 103 (dissenting opinion by Zoričić, J.); *id.* at 115 (dissenting opinion by Krylov, J.).

234. Robert Kolb, *Chapter 1 Purposes and Principles, Article 2(2)*, *in* 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 166, at 174, § 21.

235. Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

236. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286 (1933).

237. *Summary Records of the Twenty-Second Session,* [1970] 1 Y.B. Int'l L. Comm'n 222, U.N. Doc. A/CN.4/SER.A/1970.

> reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law.[238]

Principles such as good faith and abuse of right serve as legal markers for conduct that oversteps what can otherwise be an "imperceptible line between impropriety and illegality, [or] between discretion and arbitrariness."[239] The duty of nonexploitation, constraining Security Council members, agents and officials from deploying their authority in their personal rather than public interest, is in the same mold. Wolfgang Friedmann and Vaughan Lowe have both discussed the way in which principles of equity can be deployed to encourage the development of more precise principles that can serve to materially alter "the whole character of international law and its relation to the most pressing problems of fairness and justice."[240] Lauterpacht cautioned against a "too rigidly positivistic interpretation of [international law's] sources" or "a sweeping condemnation of beneficent principles forming part of the common stock of legal science on the ground" merely because they "have not secured explicit acceptance by States."[241] Against this backdrop, a fiduciary duty of nonexploitation can be seen as a fairly uncontroversial offshoot of established principles.

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238. CHENG, *supra* note 157, at 131.

239. Voting Procedure on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 120 (June 7) (separate opinion by Lauterpacht, J.).

240. Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 207, 218 (Michael Byers ed., 2000); *see also* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 289-90 (1963); LAUTERPACHT, *supra* note 236, at 313-14; Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 MCGILL L.J. 389, 429-30 (2002).

241. LAUTERPACHT, *supra* note 236, at 298-99.

ii. Duty of Due Performance

While the duty of nonexploitation addresses abuse of authority, the fiduciary duty of care would take the more controversial step of assessing failure by the Council to exercise its authority effectively. The fiduciary duty of care might be described as a duty of due performance, which entails within it both (1) a duty to perform the institutional mandate and (2) a duty to exercise care, skill and diligence in doing so.[242]

Recognition of a duty of due performance entails within it the controversial idea that, in certain circumstances, the Security Council may incur liability for failure to act. As discussed in relation to the domestic context, there is no general agreement between legal systems (or even within some systems) as to whether prescriptive obligations such as a duty of care or duty of due performance should be an aspect of the fiduciary construct.[243] In considering the application of such an obligation in the international sphere, there is good reason for caution. José Alvarez described the idea of the U.N.'s legal responsibility for failing to act (including in response to the Rwandan genocide) as "absurdly premature and not likely to be affirmed by state practice."[244]

However, for scholars including David Caron, recognition that the Council owes a duty of due performance is not controversial: "The failure of an institution to govern out of inability to use its authority, particularly an institution that represents or aspires to represent a system of order, has long been a basis for alleging that the order is illegitimate because it fails to perform its basic mission."[245] It is clear that such a duty was at least contemplated by the drafters of the U.N. Charter, including by the permanent members.[246] The

242. *Cf. supra* Part I.C.2.

243. *See supra* Part I.C.2.

244. José E. Alvarez, *The Schizophrenias of R2P*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 275, 282 (Philip Alston & Euan Macdonald eds., 2008).

245. Caron, *supra* note 149, at 560-61.

246. The drafters of the U.N. Charter explained that, following investigation of a situation or dispute, "the Council *must* determine whether [its] continuance ... would be likely to endanger international peace and security. If it so determines, the Council would be under obligation to take further steps." U.N. Conference on International Organization, *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, ¶ 5, UNCIO Doc. 852, 111/1/37(1), 11 U.N.C.I.O. Docs. 710-14 annex IV (June 8,

text of Article 24, in particular the use of the terminology of "responsibility," has been interpreted as implicating more than authority but rather a duty to "fulfil that task and discharge that function properly."[247] This view is further corroborated by reference to the Council's "*duties* under this responsibility" in Article 24(1).[248]

Beyond the drafting history and text of the Charter, the fiduciary duty of due performance finds reflection in other principles of international law. Scholars supporting the existence of a positive duty upon the Council to act tend to locate this duty in existing interstate duties under international law—for example, in duties to respect, to prevent, not to obstruct protective measures and to assist.[249] Yet such duties are not numerous and tend to apply only in limited circumstances. One of the only treaties to recognize a positive obligation on third-party states to prevent conduct that would constitute a grave threat to international peace and security is the Genocide Convention.[250] Under Article I of the convention, state parties "undertake to prevent and punish" genocide,[251] an undertaking that the ICJ has interpreted as more than merely hortatory. According to the ICJ's interpretation, the extent of a state's duty depends on its "capacity to influence" the main actors in the events, and a violation will be found only when the state "manifestly failed to take all measures" that were "within its power" to take.[252] The International Law Commission (ILC) recognized a

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1945) (emphasis added). They acknowledged this to be a course of action "from which the Security Council could withdraw only at the risk of failing to discharge its responsibilities." *Id.*

247. Peters, *supra* note 166, ¶ 13.

248. *See* U.N. Charter art. 24, ¶ 1 (emphasis added).

249. *See generally* Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 267-80 (2014); Anne Peters, *The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and Its Members*, *in* FROM BILATERALISM TO COMMUNITY INTEREST 297, 309 (Ulrich Fastenrath et al. eds., 2011); Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT'L STUD. 445 (2008).

250. *See* Int'l Law Comm'n, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, arts. 3-4, U.N. Doc. A/74/10, at 47, 54 (2019).

251. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. In addition, "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter ... as they consider appropriate for the prevention and suppression of acts of genocide." *Id.* art. 8.

252. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶ 430 (Feb. 26).

broader duty upon states to "cooperate to bring to an end through lawful means any serious breach" by a state of an obligation arising under a peremptory norm in Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts.[253] However, the ILC acknowledges in its commentary that this Article reflects a "progressive development of international law" rather than a statement of existing law.[254] The problem with relying on such obligations as the foundation for the Council's duty to perform its mandate is that the result would be somewhat piecemeal (arguably applicable only in the case of genocide) and would be open to the "plausible" objection that such obligations do not in any event apply to international organizations.[255]

In responding to some of these problems, Jan Klabbers has proposed recognition of a concept of "role responsibility," finding a positive duty to act connected to an international organization's mandate.[256] Yet Klabbers acknowledges that "the generic notion of responsibility employed ... will need some adaptation before it can be turned into a workable administrative law device."[257] Another relevant principle of note is the principle of due diligence, which is receiving increasing attention in international law scholarship.[258] Heike Krieger and Anne Peters detail how the principle of due diligence has expanded beyond the traditional no harm principle (which seeks to prevent negligent or reckless conduct that would cause reasonably foreseeable harm to others) to a duty to act diligently to prevent harm and even potentially to take all appropriate means to achieve goal-oriented obligations, while acknowledging

253. Int'l L. Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 41, U.N. Doc. A/56/10, at 113 (2001) [hereinafter ARSIWA]. Note that the Draft Articles on the Responsibility of International Organizations contains a similar clause, though this applies to the duty to prevent international organizations from violating peremptory norms. *See* Int'l L. Comm'n, Draft Articles on the Responsibility of International Organizations, art. 42, U.N. Doc A/66/10, at 10 (2011).

254. ARSIWA, *supra* note 253, at 114.

255. *See* Jan Klabbers, *Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act*, 28 EUR. J. INT'L L. 1133, 1136 (2017).

256. *See id.* at 1154.

257. *Id.* at 1160.

258. *See generally* Ellen Campbell, Elizabeth Dominic, Snezhana Stadnik & Yuanzhou Wu, Note, *Due Diligence Obligations of International Organizations Under International Law*, 50 N.Y.U. J. INT'L L. & POL. 541 (2018); Neil McDonald, *The Role of Due Diligence in International Law*, 68 INT'L & COMPAR. L.Q. 1041 (2019).

that due diligence may mean different things in different contexts.[259] However, Krieger and Peters detail a number of problems with recognition of due diligence as a general legal principle that might apply equally to any fiduciary duty of due performance. In both cases, the term due purports to disguise within a legal formula a dynamic value judgment, influenced by shifting "social, political and ethical considerations."[260] The problem with such an indeterminate formula is that it becomes very difficult "to gauge in advance and ascertain after the fact whether a due diligence standard has been breached or not."[261] The difference in the domestic sphere of operation is that the relevant fiduciary duty of care has been fleshed out through the development of professional and industrial standards applicable in particular contexts. As Krieger and Peters note, "[s]uch standards are often crucial for determining which conduct is actually 'due' in a given issue area, and they heavily influence the interpretation of the relevant hard law."[262] In the international context, and even more the Security Council context, few such standards exist.

However, all is not lost in terms of the recognition of such a duty in the Security Council context. The qualification is that, in this space of broad discretion and legal indeterminacy, the duty of due performance is arguably more appropriately achieved through the application of procedural rather than substantive standards. Ultimately, the question of due performance is something to be judged against the legitimate expectation of the relevant community. The question as to whether the expectation has been met can be resolved only by reference to that community. Specifically in terms of the Council's mandate, the relevant community expectations must be fleshed out by the General Assembly.[263]

The fiduciary construct in this way imposes an obligation on the Council to be responsive to the General Assembly's expectations, as reflected in its treaties, resolutions, reports, and debate, and

259. *See* Heike Krieger & Anne Peters, *Due Diligence and Structural Change in the International Legal Order*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER 351, 352 (Heike Krieger et al. eds., 2020).

260. *Id.* at 380-81.

261. *Id.* at 387.

262. *Id.* at 388.

263. *See supra* Part III.B.1.

arguably for the General Assembly to be proactive in generating minimum standards and holding the Council to account when it falls short of these expectations. Of particular significance in this regard is the recognition of a responsibility to protect in the 2005 World Summit Outcome document adopted by the General Assembly. The document provides that, when national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, "[t]he international community, through the United Nations, ... has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means ... to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and is "prepared to take collective action, in a timely and decisive manner, through the Security Council ... should peaceful means be inadequate."[264] Here, the Assembly indicates a responsibility on the U.N., including the Security Council, to act in specified situations of mass atrocity.[265]

The overall argument is that the Council's duty of due performance is not a matter of objective assessment in any particular case by any third-party arbitrator. Instead, the fiduciary construct opens up a framework for dialectical engagement between the Security Council and the General Assembly. The best method for assessing compliance with fiduciary duties in the Security Council context is through devising a set of procedural obligations to generate and guide informed deliberation within the General Assembly against the applicable standards.

iii. Subsidiary Duties: A Set of Procedural Obligations

Alleged violations of the duty of nonexploitation and duty of due performance will rarely if ever be the subject of judicial determination in the Security Council context. The significance of the recognition of this constitutional construct is predominantly political rather than legal. The operative dimension of the construct will be on the legitimacy rather than legality of the Council, with

264. G.A. Res. 60/1, ¶¶ 138-39, 2005 World Summit Outcome (Sept. 16, 2005).
265. *See id.*

repercussions being felt in terms of the reduction of its authority rather than the expansion of its liability.[266]

In this context, the subsidiary duties assume particular importance in providing a means to evidence and assess the scope of the Council's compliance with the relevant duties and to thereby impact the legitimacy of and trust in the Council. These duties include: (1) duty to notify (including by disclosing or declaring any self or third-party interests), (2) duty to inform, (3) duty to consult, (4) duty to give reasons, and (5) duty to account.[267] Without detracting from their significance, there is not enough scope in this paper to provide greater detail on these subsidiary duties, though others have done so in recognition of their broader contribution to the legitimacy of the Council's decision-making processes.[268]

IV. CASE STUDIES

Beyond a broad elaboration of the construct, it remains to be seen whether the fiduciary construct can be helpfully applied to regulate action by the Security Council, its agents and officials in particular circumstances. In this Part, I consider four situations that have been construed as a "betrayal of trust"[269] by the Council and its subsidiary organs in order to ascertain whether the fiduciary construct—either in its contractual or constitutional form—might apply to provide appropriate limits to the action of the Council, its agents, or officials. Sections A and B consider application of the contractual principle in relation to both the U.N. Interim Administration in Kosovo's privatization of public assets and to sexual exploitation by U.N. peacekeepers. Sections C and D consider the application of the constitutional principle to the use of the veto in

266. *Cf., e.g.*, notes 200-02 and accompanying text.

267. *Cf.* Sitkoff, *supra* note 77, at 44, 53-55 (describing these subsidiary fiduciary duties in the context of trust law); *see also* Daniel Moeckli & Raffael N. Fasel, *A Duty to Give Reasons in the Security Council: Making Voting Transparent*, 14 INT'L ORGS. L. REV. 13, 15 (2017).

268. *See generally* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Anna Spain, *The U.N. Security Council's Duty to Decide,* 4 HARV. NAT'L SEC. J. 320 (2013); Moeckli & Fasel, *supra* note 267, at 15; Nahuel Maisley, *The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making*, 28 EUR. J. INT'L L. 89 (2017).

269. *See supra* notes 3-6 and accompanying text.

situations of atrocity and to due process failures in sanctions decision-making. This exercise serves to highlight a number of problems in applying the fiduciary construct in the Council context, helping to determine appropriate limits and qualifications to its application.

A. Privatization of Public Assets in Kosovo: The Private/Public Problem

The exemplar fiduciary relationship is that of the trustee who undertakes to deal with the proprietary or economic interests of the beneficiary.[270] Only rarely can the Security Council, its agents, and officials be said to undertake such a role. Yet, one area in which the potential does arise is international territorial administration.

The issue of the U.N.'s fiduciary obligations specifically arose in relation to the privatization of public assets by the U.N. Interim Administration in Kosovo (UNMIK). In June 1999, following NATO's military campaign against the Federal Republic of Yugoslavia, the Security Council vested UNMIK with "[a]ll legislative and executive authority with respect to Kosovo,"[271] including "the reconstruction of key infrastructure and other economic reconstruction."[272] After elections were held and a provisional government took office in 2001, the power to administer public, state, and socially owned property was reserved to UNMIK.[273]

The question of property rights in Kosovo was characterized by great uncertainty.[274] Under the former Yugoslav system, the concept of "[s]ocial ownership meant that no particular individual or institution had property rights," which were instead owned by "society as a whole."[275] "The entity that exercised ownership rights

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270. Edelman, *supra* note 33, at 304; Sitkoff, *supra* note 33, at 41.

271. Special Representative of the Secretary-General, On the Authority of the Interim Administration in Kosovo, §1, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999).

272. S.C. Res. 1244, ¶ 11(g) (June 10, 1999).

273. Special Representative of the Secretary-General, Constitutional Framework for Provisional Self-Government in Kosovo, ¶ 8.1(q), U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001).

274. I am indebted to Dominik Zaum, who alerted me to this case study. *See* DOMINIK ZAUM, THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING 154-55 (2007).

275. *Id.* at 154.

on behalf of society was the state, and in particular the respective municipalities, who had the original right to allocate land and assets under social ownership for use."[276] Dominik Zaum explains:

> Throughout the 1990s, enterprises in Kosovo were privatized under Yugoslav and Serbian legislation and sold to international investors, bought out by workers, or merged with Serbian companies.... [T]hese mergers were often involuntary, and the Kosovar companies effectively became wholly owned subsidiaries of Serbian companies[, with assets] frequently siphoned-off to Serbia.... UNMIK's decision in December 1999 to change the applicable law in Kosovo to the law applied prior to 23 March 1989 had ... [the] effect[ ] [of] declar[ing] ... later privatization laws invalid. As a consequence, ... the concept of social ownership [was reintroduced,] ... rais[ing] the question whether any property transactions conducted under the old laws were retroactively invalidated.[277]

Under Security Council Resolution 1244, UNMIK was mandated to restructure Kosovo's public economy; however, U.N. legal advisers interpreted the resolution "as prohibiting UNMIK from making any lasting change[ ] to the ownership status of socially-owned enterprises (SOEs) which [might] prejudice the rights of former owners or claimants."[278] This led to a dispute between UNMIK's Office of Legal Affairs (OLA), the U.N. legal adviser in New York (UNLA), and UNMIK's European Union component (EU component) over the fiduciary duty owed in this case.[279] In particular, the dispute focused on the question as to "who[ ] UNMIK, as a trustee, ha[d] responsibilities [toward]: the owners of SOEs, or the population of Kosovo?"[280] The OLA and UNLA "insisted that the administration mandate of UNMIK meant that it was the trustee for [the] SOE owners, and [therefore] had a responsibility not to sell assets to which they had a right."[281] However, the EU component

276. *Id.*
277. *Id.* at 155 (footnotes omitted).
278. Knoll, *supra* note 17, at 651.
279. *Id.* at 653-54.
280. ZAUM, *supra* note 274, at 159 (footnote omitted); *see also* Knoll, *supra* note 17, at 651-55.
281. ZAUM, *supra* note 274, at 159.

"conceived [UNMIK's] trustee obligations as primarily directed toward" Kosovar society and "the territory's economic recovery," arguing that privatization was necessary to fulfill UNMIK's role as trustee.[282] UNMIK's "capacity to transfer property rights and allocate land and assets [was] resolved with the creation of [an independent authority,] the Kosovo Trust Agency[,] ... vested with the right to initiate privatization" of socially owned enterprises, and a special chamber in the Kosovo Supreme Court, vested with the power to resolve ownership disputes arising from privatization.[283]

The case highlights "the inherently contradictory sets of interests" that international institutions administering territory are mandated to serve.[284] Zaum characterizes the problem as a conflict between the U.N.'s legal and political fiduciary obligations.[285] He describes a tension between the legal and political conceptions of trusteeship, in which the U.N. was required to choose between the danger of legal liability if it failed to protect the legal beneficiaries or the danger of losing political legitimacy if it failed to protect its political beneficiaries (the Kosovar population).[286] However, as I have argued above, it is important not to conflate the legal and political fiduciary constructs. As Nicole Roughan has noted, writing in the context of state-indigenous fiduciary relations, there is nothing unusual about public authorities assuming private obligations or burdens in the course of exercising their public mandate.[287] Yet, it is important to differentiate the situation in which the U.N. acts as fiduciary for the Kosovar population from the situation in which, acting as fiduciary of public interests, the U.N. must consider the interests of private parties. In the former case, according to Roughan's construction, the

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282. Knoll, *supra* note 17, at 653.

283. *Id.* at 652; *see* Special Representative of the Secretary-General, On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, ¶ 4.1(c), U.N. Doc. UNMIK/REG/2002/13 (June 13, 2002). The issue was the subject of legal proceedings in New York, but those proceedings were dismissed at the behest of the plaintiff given the strength of forum non conveniens grounds due to the availability of a specialized court in Kosovo with exclusive jurisdiction over privatization disputes. Wood Indus., LLC v. United Nations, No. 1:03-cv-07935-GEL (S.D.N.Y. dismissed Sept. 29, 2006).

284. Knoll, *supra* note 17, at 651.

285. ZAUM, *supra* note 274, at 159.

286. *Id.* at 159-60.

287. Nicole Roughan, *Public/Private Distortions and State-Indigenous Fiduciary Relationships*, 2019 N.Z. L. REV. 9, 34.

U.N. is not a public office dealing with a private interest but more in the nature of a private office dealing with a public interest.[288] In the latter case, the U.N. does not act "on behalf of" the private parties concerned in the fiduciary sense but must consider these private interests in the manner of a public authority. This case study illustrates the difficulty, but also the importance, of identifying the relevant parties to a fiduciary relationship, and the nature of that relationship (legal or political) in the context of international governance.

B. Sexual Exploitation and Abuse by U.N. Peacekeepers: The Problem of Paternalism

The image of the U.N. peacekeeper has fallen from grace over the last decade with over one thousand allegations of sexual exploitation and abuse by peacekeepers recorded since 2007.[289] In public discourse, sexual exploitation and U.N. Peacekeeping are increasingly placed in an uncomfortable association.[290] Restoration of trust is at the heart of the U.N. response, both in terms of the trust of the beneficiary population and the trust of the international community.[291] The definition of "sexual exploitation" adopted by the U.N. incorporates betrayal of trust as an element of the violation, referring to "any actual or attempted abuse of a position of vulnerability, differential power, *or trust*, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another."[292] A 2017 General Assembly resolution on U.N. action on sexual exploitation and abuse stressed

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288. *See id.* at 35.

289. *U.N. Conduct in U.N. Field Missions, Sexual Exploitation and Abuse Over Time*, U.N., https://conduct.unmissions.org/sea-overview [https://perma.cc/8RUN-ALDC].

290. For some time now on the U.N. Peacekeeping homepage, the image hyperlink for general information about "peacekeeping operations" has been placed next to an image hyperlink for information on "prevention of sexual exploitation and abuse." U.N. PEACEKEEPING, https://peacekeeping.un.org/en [https://perma.cc/T7EN-MFXE].

291. Devika Hovell, *UNaccountable: A Reply to Rosa Freedman*, 29 EUR. J. INT'L L. 987, 988 (2018).

292. U.N. Secretary-General, Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Secretary-General's Bulletin, § 1, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) (emphasis added).

further that accountability for such conduct is "critical ... for maintaining the trust of the international community."[293]

Though the U.N. is concerned above all with allegations of rape and sexual abuse, the U.N. response clearly goes beyond the repression of criminal conduct. The U.N. has publicly adopted a "zero tolerance" policy and all individuals deployed to U.N. field-based activities must now carry a "No Excuse" card setting out the rules relating to sexual exploitation and abuse.[294] The "No Excuse" card provides that "[i]t is strictly prohibited to have sex with anyone, in exchange for money, employment, preferential treatment, goods or services, whether or not prostitution is legal in my country or the host country."[295]

How does the abuse and response sit in relation to the fiduciary construct? Here, the contractual version of the principle arguably comes into play, opening up the possibility for members of a beneficiary population to challenge the liability of the U.N. and its peacekeepers for breach of fiduciary duty of nonexploitation. When peacekeepers can be said to have used their authority for personal benefit, including sexual gratification, this could be construed as a violation of their fiduciary duty of nonexploitation. Institutional accountability would follow if the U.N. was found to have failed to prevent such conduct, protect potential victims, investigate allegations, or take remedial action against wrongdoers.[296] Of course, this is subject to the qualification that noneconomic interests are in

293. G.A. Res. 71/278, ¶ 3 (Mar. 20, 2017).

294. Press Release, United Nations, The 'No Excuse' Card Is Online and Ready to Be Distributed (June 2, 2017), www.un.int/news/no-excuse-card-online-and-ready-be-distributed [https://perma.cc/569Y-4ZEY].

295. *No Excuse Card*, U.N. PEACEKEEPING, https://peacekeeping.un.org/sites/default/files/2-no_excuse_card-4pages-en.pdf [https://perma.cc/ZV78-7RAD]. See also the Secretary-General's Bulletin, which notes that "[s]exual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged." U.N. Secretary-General, *supra* note 292, § 3.2(d).

296. Nigel D. White, *Due Diligence, the U.N. and Peacekeeping*, *in* DUE DILIGENCE IN THE INTERNATIONAL LEGAL ORDER, *supra* note 259, at 217, 218-20. White notes that the U.N. Human Rights Committee determined that a state is required "to respect and ensure ... rights to all persons ... within the power or effective control ... [of] a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation," though made no comment in relation to U.N. liability. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

some jurisdictions not recognized as protected interests under fiduciary law. However, "a legal basis for institutional [fiduciary] accountability" has been found "in cases relating to the sexual abuse of Aboriginal children in Indian residential schools and sexual misconduct by clergy against parishioners,"[297] and for individual accountability in the case of a doctor providing a prescription in return for sexual favours.[298]

Yet the response to the issue of sexual exploitation also gives insight into its paternalistic aspect. The fiduciary relationship is, as Nicole Roughan has put it, "structured by and give[s] rise to inequality between the parties."[299] We can either invoke the fiduciary construct as part of "a sacred story of guardians bound to the terms of a public trust" or recognize in it "a profane tale in which some citizens dominate others."[300] An unthinking insertion of the language and law of fiduciary and a trust conception of governance into the U.N. decision-making context raises the question as to whether we have learned the lessons of international trusteeship, associated as it has been historically with relationships of colonial domination and imperialism.[301] To construe the Security Council and its officials and agents as fiduciary is to intersect with a far broader historical narrative about "the relationship between political elites and those subject to the public power they wield."[302]

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297. Hovell, *supra* note 291, at 993 (footnotes omitted); *see also* Blackwater v. Plint, [2005] 3 S.C.R. 3, para. 61 (Can.) (providing an example of a residential school case); Cloud v. Canada, [2005] 73 O.R. 401, para. 12 (Can. Ont. C.A.) (same); Bonaparte v. Canada, [2003] 64 O.R. 3d 1, para. 21 (Can. Ont. C.A.) (same); Martinelli v. Bridgeport Roman Cath. Diocesan Corp., 196 F.3d 409, 426-30 (2d Cir. 1999) (considering liability in the church context); Doe v. Evans, 814 So. 2d 370, 375 (Fla. 2002) (same).

298. *See* Norberg v. Wynrib, [1992] 2 S.C.R. 226, 239 (Can.).

299. Roughan, *supra* note 287, at 28.

300. Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1789 (2017).

301. See generally on this point, Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 THEORETICAL INQUIRIES L. 447 (2015); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY (2008); BONNY IBHAWOH, IMPERIALISM AND HUMAN RIGHTS (2007); ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE 276-303 (2001); SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW 148-56 (1996); KENNETH ROBINSON, THE DILEMMAS OF TRUSTEESHIP: ASPECTS OF BRITISH COLONIAL POLICY BETWEEN THE WARS (1965).

302. Davis, *supra* note 300, at 1789.

This history of domination carries important lessons about the paternalistic and even infantilizing aspects of the fiduciary concept, where it has the effect of divesting the beneficiary population of their agency.[303] Gina Heathcote cautions against the use of legal structures that "reinforce negative stereotypes of the non-western victim subject, to whom restricted agency and seemingly perpetual vulnerability are attributed."[304] Where the fiduciary construct is applied, its implicit effect may be to question the beneficiary population's capacity for self-government.[305] Any interpretation of the fiduciary construct in the U.N. setting must navigate its potential to prevent exploitation, but also to prevent self-determination. It is critical that legal and political processes privilege participation in decision-making processes by beneficiaries and beneficiary populations.

C. Exercise of the Veto and Failures to Protect: The Problem of Pluralism

The veto power was the element that made agreement to the establishment of the U.N. Security Council possible, but also contains within it the seeds of the Council's demise if enough actors in the international community determine the Council does not adequately represent their will.[306] The role of trust is in this way critical to the Council's effectiveness and endurance. However, the veto right granted to the P5 also complicates any characterization of the Council as fiduciary to the extent the construct is designed to respond to a context of representative decision-making. In practice,

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303. The duty of loyalty has been said to build an element of paternalism into every fiduciary relation, requiring a fiduciary to act in a certain way even if a beneficiary might prefer a different course of action. Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post*: The Non-contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 27, at 209, 217.

304. Gina Heathcote, *Participation, Gender and Security*, *in* RETHINKING PEACEKEEPING, GENDER EQUALITY AND COLLECTIVE SECURITY 48, 50 (Gina Heathcote & Dianne Otto eds., 2014).

305. Vanessa Pupavac, *War on the Couch: The Emotionology of the New International Security Paradigm*, 7 EUR. J. SOC. THEORY 149, 163 (2004).

306. Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 196, at 61, 75, 79-81.

it is clear that the Council's permanent members "use the veto to defend their national interests, to uphold a tenet of their foreign policy or, in some cases, to promote a single issue of particular importance to a state."[307] It is not unheard of for the votes of non-permanent members to be "bought" with permanent members promising rewards or threats of punishment so as to influence votes.[308] Such practice might make us question whether we should just accept Caron's pessimistic characterization of the veto, concluding that "the potential to betray the promise is built directly and tragically into the organization."[309]

However, such practice is not determinative of the normative position. It is clear that the vote buying and other self-interested conduct is unjustifiable by reference either to law or legitimate political expectations. Judges of the I.C.J. have recognized that, in casting their votes in the U.N. context, states are "legally entitled to [base their vote] ... on any political considerations which seem to it to be relevant,"[310] though their freedom is limited. Rather, states are bound to exercise their powers in "good faith, to give effect to the Purposes and Principles of the [Organization] and to act in such a manner as not to involve any breach of the Charter."[311] From a legitimacy perspective, concerns about the unrepresentative nature of the Security Council and its decision-making run deep and could

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307. *UN Security Council Working Methods: The Veto*, SEC. COUNCIL REP. (Oct. 19, 2015), https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php [https://perma.cc/7FUJ-JRYS].

308. Professor Weston discusses reports of U.S. promises of financial help to Colombia, Côte D'Ivoire, Ethiopia, and Zaire and threats to cut off seventy million dollars in annual aid to Yemen so as to influence the vote on Resolution 678 authorizing the use of force against Iraq. *See* Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 523-25 (1991). For further scholarship on vote buying, see Bruce Bueno de Mesquita & Alastair Smith, *Aid: Blame It All on "Easy Money*,*"* 57 J. CONFLICT RESOL. 524, 528, 534-35 (2012); Natalie J. Lockwood, *International Vote Buying*, 54 HARV. INT'L L.J. 97, 98, 103 (2013); Axel Dreher & James Raymond Vreeland, *Buying Votes and International Organizations* 2-3, 7 (Georg August Univ. of Göttingen Ctr. for Eur. Governance & Econ. Dev. Rsch., Working Paper No. 123), https://www.econstor.edu/bitstream/10419/70233/1/661536777.pdf [https://perma.cc/FC7M-AQTM].

309. Caron, *supra* note 149, at 560.

310. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 92 (May 28) (dissenting opinion by Basdevant, Winiarski, McNair, and Read, JJ.).

311. *Id.*; *see also id.* at 103 (dissenting opinion by Zoričić, J.); *id.* at 115 (dissenting opinion by Krylov, J.).

prove existential. The characterization of certain members of the P5 as "Great Powers" is an anachronism, and even that critique is nothing new.[312] Movements pushing for reform of the veto are gaining momentum, particularly when a member of the P5 uses its veto to block action in cases of genocide and large-scale human rights abuse.[313] The Accountability Coherence and Transparency Group's Code of Conduct, calling upon permanent members not to veto any credible draft resolution intended to prevent or halt mass atrocities, has 119 state signatories.[314] Against this backdrop, certain permanent members publicly acknowledge that they cannot afford to exploit or rest on their privileged status but must earn this status by "making, and paying for, concrete and effective contribution[s]" to the maintenance of international peace and security.[315]

In these circumstances, trust can be regarded as a critical source of the Council's continuing legitimate authority, connected to the need to offer at least second-order representation and to ensure any discretion is exercised within the bounds of fulfilling representative purposes. The fiduciary construct offers potential legal parameters for the Council and its members to operate within, including in the exercise of the veto.[316] Applying the fiduciary construct, the exercise

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312. *See Strengthening the United Nations*, THE ELDERS (Feb. 7, 2015), https://theelders.org/sites/default/files/2015-04-22_elders-statement-strengthening-the-un.pdf [https://perma.cc/7YFP-QBGS].

313. *See* Permanent Rep. of Liech. to the U.N., Letter dated Dec. 14, 2015 from the Permanent Rep. of Liechtenstein to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2015); *Strengthening the United Nations*, *supra* note 312; Permanent Reps. of Fr. & Mex., Political Declaration on the Suspension of Veto Powers in Cases of Mass Atrocities (Aug. 7, 2015), https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/ [https://perma.cc/7HGW-A5SE]; Permanent Reps. of Switz., Costa Rica, Jordan, Liech. & Sing. to the U.N., Letter dated Nov. 3, 2005 from the Permanent Reps. of Switzerland, Costa Rica, Jordan, Liechtenstein & Singapore to the United Nations to all Permanent Representatives and Permanent Observers of all Missions to the United Nations (Nov. 10, 2005), https://www.globalpolicy.org/images/pdfs/Swiss_S5_Resolution_November_10_2005.pdf [https://perma.cc/A66W-E245].

314. This includes 117 U.N. member states and two non-member state observers (Palestine and Holy See). *List of Signatories to the ACT Code of Conduct*, GLOB. CTR. FOR THE RESP. TO PROTECT (June 20, 2019), https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/ [https://perma.cc/2SQ4-9858].

315. Greenstock, *supra* note 196, at 260; Laurent Fabius, *A Call for Self-Restraint at the U.N.*, N.Y. TIMES (Oct. 4, 2013), https://www.nytimes. com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html [https://perma.cc/5V7R-T56Z].

316. As Trahan notes, one potential complication is that the *threat* of the veto (or even

of the veto would constitute a violation of fiduciary duties when (1) it was exercised out of self-interest or in the interest of third parties and not for the purpose of maintaining international peace and security (violation of the duty of nonexploitation);[317] (2) its exercise was based on a lack of credible information (violation of the duty of care and skill);[318] or (3) it obstructed measures necessary to maintain international peace and security in a way that impeded performance of the Council's role (violation of the duty of due performance).[319]

How then would the fiduciary construct apply (or have applied) if China vetoed a proposed arms embargo against Sudan in the midst of a genocide because China did not want to jeopardize Sudanese arms imports from China;[320] if the United States used its veto to prevent a resolution denouncing Israel;[321] or if the United States, France, or the U.K. vetoed a resolution recognizing the killings in Rwanda as genocide because they lacked the will to commit the military resources necessary to protect the population?[322] Are permanent members entitled to use the veto to protect economic interests, to protect third-party interests based on diplomatic alliances, or out of a mere lack of political will? Each of these examples could be interpreted as a violation of applicable fiduciary duties of nonexploitation and due performance respectively.[323] Yet, in understanding the impact of this determination, it

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broad understanding of a permanent member's political alignment) can serve to "block the Security Council [sometimes] just as effectively as actual veto use." Jennifer Trahan, *Questioning Unlimited Veto Use in the Face of Atrocity Crimes*, 52 CASE W. RSRV. J. INT'L L. 73, 77 (2020).

317. *See supra* Part III.B.3.i.

318. *See supra* notes 72-73 and accompanying text.

319. *See supra* Part III.B.3.ii.

320. Press Release, Security Council, Head of Sudan Sanctions Committee Briefs Security Council as Delegates Debate Criteria for Lifting 13-Year-Old Measures, Ongoing Sexual Violence, U.N. Press Release SC/13668 (Jan. 17, 2019).

321. Rick Gladstone, *U.S. Vetoes U.N. Resolution on Gaza, Fails to Win Second Vote on Its Own Measure*, N.Y. TIMES (June 1, 2018), https://nytimes.com/2018/06/01/world/middleeast/gaza-israel-palestinians-.html [https://perma.cc/PE37-9GDH].

322. Ariela Blätter & Paul D. Williams, *The Responsibility Not to Veto*, 3 GLOB. RESP. TO PROTECT 301, 311 (2011); Colin Keating, *Rwanda: An Insider's Account*, *in* THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY, *supra* note 184, at 500, 509; Linda Melvern & Paul Williams, *Britannia Waived the Rules: The Major Government and the 1994 Rwandan Genocide*, 103 AFR. AFFS. 1, 2, 5, 10-11 (2004).

323. *See supra* Part III.B.3.

is necessary to engage with both the *political* and *pluralist* nature of authority in this setting. The veto is a political decision that can be exercised on the basis of political considerations.[324] Yet this does not mean permanent members should be permitted to cast the veto into a political void.[325] The role of fiduciary parameters is to place trust more expressly in the ledger.[326] Political authority exercised by permanent members in the Security Council setting should not be regarded as controlling and determinative but dialectical.

This is where the procedural or subsidiary elements of the fiduciary construct must be allowed to do their work. The role of the fiduciary construct is to provide means and methods to measure and assess decision-making by the Council, including the use of the veto by its permanent members.[327] When a permanent member or members use their veto in a way contrary to their fiduciary obligations, they must account for their conduct and be exposed to the political fallout, both for themselves as permanent members and for the Council more broadly. There is a duty to account for their veto through the giving of reasons and answerability to the General Assembly. Along these lines, Liechtenstein has launched an initiative proposing that "the President of the General Assembly ... [should] convene a formal meeting of the General Assembly to discuss a veto cast by [a] permanent member ... within two weeks from its casting."[328] Both the Security Council and the veto-casting member would be invited to submit a report and/or address the Assembly on this point.[329] Such initiatives should be encouraged to strengthen the legitimacy of the collective security framework. While the permanent members must be held to account, there is also a responsibility on other states to acknowledge their role in the collective enterprise of maintaining international peace and security.

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324. Conditions of Admission of State to Membership in United Nations, Advisory Opinion, 1948 I.C.J. 57, 92 (May 28) (dissenting opinion by Basdevant, Winiarski, McNair, and Read, JJ.).

325. *Cf.* Blätter & Williams, *supra* note 322, at 303-04.

326. *See supra* Introduction.

327. *See supra* notes 306-19 and accompanying text.

328. Christian Wenaweser & Sina Alavi, *Innovating to Restrain the Use of the Veto in the United Nations Security Council*, 52 CASE W. RSRV. J. INT'L L. 65, 69-70 (2020).

329. *Id.* at 70-71.

D. Due Process in Targeted Sanctions Decision-Making: The Problem of Displacement

From the late 1990s, the Security Council implemented a noticeable shift in its sanctions policy, replacing its approach of blanket sanctions against states with targeted sanctions regimes against individuals.[330] Due process was markedly absent from the Security Council's sanctions decision-making procedures until 2009, when the Council (under pressure following the European Court of Justice decision in *Kadi*)[331] established the Office of the Ombudsperson to hear delisting requests, albeit in only one of over a dozen sanctions regimes.[332] Critics of the office note that the Ombudsperson is not a court and structurally lacks independence, given the Security Council can by consensus choose to override the Ombudsperson's decision in any case.[333]

Does the Council's catalogued failures to accord due process to individuals on sanctions lists constitute a breach of fiduciary duty? Criddle and Fox-Decent have argued that this is "plainly offside the prescriptions of the fiduciary model."[334] The Ombudsperson review mechanism is said to violate the principle of nondomination on the basis that it lacks independence.[335] However, when one examines the arguments more closely, it becomes clear that the relevant violations are in fact described by reference to human rights law.[336] This is not unintentional. Indeed, Criddle describes human rights

330. Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 8 (2016).

331. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-1207, I-1293-94. For more detail, see Devika Hovell, Kadi*: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power Between the U.N. Security Council and Courts*, 79 MOD. L. REV. 147, 148 (2016).

332. S.C. Res. 1904 (Dec. 17, 2009). *See generally* Office of the Ombudsperson, Historical Guide of the Ombudsperson Process Through Security Council Resolutions and Reports of the Office of the Ombudsperson to the Security Council (June 2019), https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/historical_guide_ombudsperson_process_june_2019.pdf [https://perma.cc/4JKH-ZNFL].

333. See, for example, Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Second Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 14, 20-21, U.N. doc A/67/396, (Sept. 26, 2012). For a different view, see Hovell, *supra* note 330, at 8.

334. CRIDDLE & FOX-DECENT, *supra* note 121, at 316.

335. *Id.*

336. *See id.*

as "the international community's best effort to define collectively the legal implications of states' fiduciary obligations toward their people."[337] The argument is that human rights flesh out the contents of the principles of non-instrumentalization and nondomination such that a "state that fails to satisfy its fiduciary duty to respect human rights subverts its claim to govern and represent its people as a sovereign actor."[338]

This is a challenging aspect to Fox-Decent and Criddle's theory, and there is an appealing logic to the idea that a public authority that violates human rights will betray the public trust. I respect this objective of casting human rights as an imperative element of the public trust, humane as it is. However, while there is a degree of overlap, the fiduciary construct arguably addresses a different mischief than the variety of wrongs addressed by human rights.[339] There is a danger of watering down human rights protections when they are construed as justifiable on the basis of the public trust. It is clear from public discourse surrounding human rights protections of minorities, including upholding the right to free speech by those with publicly unpalatable views, respecting due process rights of suspected terrorists, and enabling the rights of refugees, that respect for human rights can sometimes frustrate the public and diminish their trust in public institutions (or indeed prevent the government from carrying out certain decisions made for public purposes).[340] Here, recourse to fiduciary theory seems a vague and circuitous route to achieve a result far better achieved by human rights law, applied without the need to introduce the fiduciary construct.

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337. Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 27, at 404, 416.

338. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 310 (2009).

339. For a volume addressing the normative foundations of human rights, see Rowan Cruft, S. Matthew Liao & Massimo Renzo, *An Overview*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 2-3 (Rowan Cruft et al. eds., 2015).

340. *Cf., e.g.*, Mike Berry, Inaki Garcia-Blanco & Kerry Moore, *Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries*, UNHCR 1, 4-5, 11 (Dec. 2015), https://www.unhcr.org/56bb369c9.pdf [https://perma.cc/4LPZ-8NHW].

CONCLUSION

As Eyal Benvenisti describes, "[t]he law on global governance that emerged after World War II was grounded in irrefutable trust in international organizations and an assumption that their subjection to legal discipline and judicial review would be unnecessary and, in fact, detrimental to their success."[341] This trust has proved to be misplaced. In the case of the Security Council, a culture of secrecy, selectivity, political dogmatism, and lack of accountability has permeated the legal vacuum within which it has been permitted to operate.[342] Yet there is also a growing awareness that the loss of public trust occasioned by this culture threatens to impact negatively on the relative strength of the Council's authority.[343]

The fiduciary construct has been recognized as an effective legal mechanism to underwrite trust in the exercise of authority. Indeed, the construct has come to assume a metaphorical status for the role of trust in relationships more broadly, as reflected in its propagation by certain inventive scholars as an animating idea for public fiduciary theory.[344] The question discussed in this Article is whether it is appropriate to extend the metaphor further to the Security Council context. Martha Minow cautions about the danger in metaphorical thinking obscuring our understanding of particular concepts "both because it keeps us from focusing on aspects of a thing that are inconsistent with the metaphor we choose, ... and because we fail to remember that we deliberately substituted the part for the whole, pretending that the substitution is somehow natural and real."[345] William Faulkner's succinct chapter in *As I Lay Dying*, "My mother is a fish," is not understood as a segue into marine biology but as an analogy drawn by one of the characters between his mother's floating coffin and a fish he once caught, an analogy that assists him in turn to understand the nature of

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341. Benvenisti, *supra* note 166, at 9, 12.
342. KOSKENNIEMI, *supra* note 183, at 106-09, 111.
343. *See id.* at 107-09.
344. *See, e.g.*, Finn, *supra* note 14, at 350.
345. Martha Minow, *The Supreme Court, 1986—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 44 n.165 (1987) (internal citations omitted).

death.[346] Just as we do in literature, we must be astute enough as lawyers to distill from the metaphor what is similar while excluding or disregarding what remains different.[347] While we may accept that the terminology of social contract tells us about the importance of the element of consent in the legality of government enactments, we do not insist on proof of consideration or seek to apply the *Carbolic Smoke Ball Co.* case[348] to extend the social contract's reach.

To the extent this Article proposes the application of fiduciary law and theory to the Security Council setting, I have considered it important to make explicit both the reach and the boundaries of the fiduciary construct in its capacity to underwrite trust. We should be cautious not to apply the fiduciary metaphor imprecisely, either too narrowly so as to constrain Council authority through the application of obligations that are an inappropriate fit in this sphere, or too broadly elaborating a set of constraints that do not respect the essential limits of the fiduciary construct. I have argued for the importance of disaggregating two manifestations of the fiduciary construct: fiduciary as a precept of law (which I describe in the international setting as the contractual concept) and fiduciary as a precept of authority (which I describe as the constitutional concept).[349] These two concepts have different sources, different content, and different consequences. Yet I have argued that at the heart of both are the duties of nonexploitation and due performance.[350] While acknowledging certain qualifications, both in terms of its application and impact in relation to the Security Council, my conclusion is that both duties can play a useful role in reclaiming the element of trust in the Security Council setting, a realm in which the Council is appropriately seen as acting on behalf of the General Assembly to fulfill its Charter mandate.

346. Reuben J. Ellis, *Faulkner's Totemism: Vardaman's "Fish Assertation" and the Language Issue in* As I Lay Dying, 24 J. AM. STUDS. 408, 408-09 (1990).

347. *See* Minow, *supra* note 345, at 44 n.165.

348. Carllil v. Carbolic Smoke Ball Co [1893] 1 QB 256 (appeal taken from Eng.).

349. *See supra* Part III.A-B.

350. *See supra* Part III.B.3.