

The Power to Refuse

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The Power to Refuse

State sovereignty has been described variously as “the most glittering and controversial notion in the history, doctrine and practice of international law,”² a “word which has an emotive quality lacking meaningful specific content,”³ and as “the basic constitutional doctrine of the law of nations.”⁴ Perhaps the only point on which scholars agree is that, as Richard Falk once put it, “[t]here is little neutral ground when it comes to sovereignty.”⁵

Despite the disagreement, or perhaps because of it, concerns about state sovereignty lie at the center of not just academic but also public debate over international law. In the latest round of discussions over whether the United States should ratify the Law of the Sea Convention, for example, opponents accused the President of demonstrating a “flippant attitude toward America’s sovereignty” by seeking to ratify the treaty.⁶ Shortly after, members of the Senate announced their support for the proposed “Second Amendment Sovereignty Act of 2012,” which proclaimed “the sense of Congress that the sovereignty of the United States and the constitutionally protected freedoms of American gun owners must be upheld and not be undermined by the Arms Trade Treaty”⁷ On the same day, the United States was on the receiving end of sovereignty concerns. The Pakistani Ambassador to the United States demanded “our American friends to respect our sovereignty and territorial integrity. This means no drone attacks and no incursions into Pakistani territory,”⁸ concerns which U.S. Defense Secretary Leon Panetta answered with the retort, “This is about our sovereignty as well.”⁹

In this Article, we aim to clarify the relationship between international law and state sovereignty. We argue that the claim that international law and state sovereignty are at odds which animates much scholarly and popular debate is fundamentally mistaken. State sovereignty is best understood as the power of states to refuse the requests and offers of other states. The right to refuse gives states both the power and the incentive to

² Helmut Steinberger, *Sovereignty*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397 (R. Bernhardt ed., 1987).

³ Elihu Lauterpacht, *Sovereignty—Myth or Reality?*, 73 INT’L AFF. 137, 141 (1997).

⁴ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 89 (1998).

⁵ Richard Falk, *Sovereignty*, in THE OXFORD COMPANION TO POLITICS OF THE WORLD 851 (1993).

⁶ Rep. Gus Bilirakis, *For America, Law of the Sea Treaty is a Loss of Sovereignty*, THE HILL’S CONGRESS BLOG (May 24, 2012, 11:01 AM), <http://thehill.com/blogs/congress-blog/foreign-policy/229341-for-america-law-fo-the-sea-treaty-is-a-loss-of-sovereignty>.

⁷ Second Amendment Sovereignty Act of 2012, S.B. 2205, 112th Cong. (2012). See Bob Adelman, *Two More Senators Support Bill Opposing UN Arms Trade Treaty*, THE NEW AMERICAN (June 19, 2012, 2:53 PM), <http://www.thenewamerican.com/usnews/congress/item/11770-two-more-senators-support-bill-opposing-un-arms-trade-treaty>.

⁸ James Morrison, *Embassy Row: Pakistan Demands Respect*, THE WASH. TIMES, June 19, 2012, <http://www.washingtontimes.com/news/2012/jun/19/embassy-row-pakistan-demands-respect/>.

⁹ Andrew J. Bacevich, *Divorcing Pakistan*, L.A. TIMES, June 19, 2012, <http://articles.latimes.com/2012/jun/19/opinion/la-oe-bacevich-pakistan-20120619>.

make and enforce international law. Far from violating sovereignty, international law could hardly defend sovereignty more.

We begin in Part I by describing what we call the Sovereignty Challenge to international law. In this view, which is held by proponents and opponents of international law alike, when states accept binding international legal obligations, they may gain benefits but they must accept “sovereignty costs” in return. Such costs may include changes in outcomes on particular issues or loss of authority over decision-making in an issue-area covered by the agreement. Charitably understood, the Sovereignty Challenge is based on the view that international law, while voluntary, deprives states of their authority to govern themselves. As such, it threatens to subordinate state sovereignty just as the U.S. Constitution subordinates the sovereignty of the states of the Union.

In Part II we step back from international law to consider the nature of requests, offers, and refusals. In ordinary life, when a person makes a request, he understands that he may be refused. Not only may he be refused, he may not refuse that refusal. He may not use force to overcome the denial, either by threatening physical reprisals or simply taking that which has been requested. Requests that are denied may also be granted. When a request is granted, the person who has granted the request loses his privilege to refuse. This creates the conditions in which bargains may be struck—one may trade an offer for an offer or counter a request for one thing with another request for another. When a bargain is struck, entitlements change in ways that change the right to refuse.

This understanding sets the stage for our discussion in Part III of the nature of requests, offers, and refusals among states. We show that international law grants to states a nearly total right to refuse and is this right that gives states the power to bargain. The mistake of the Sovereignist, then, is the claim that any bargain that compromises a state’s right to refuse necessarily compromises its sovereignty. The total right of refusal, however, is no more than a state’s *initial* endowment. It is the ability to bargain with this endowment—and, yes, to trade some of this allotted power to refuse for control over others that gives states their sovereignty.

We argue that sovereignty is best understood not as the *total* right of refusal but as the *final* right of refusal. A state has the final right of refusal when it has the unreviewable power to protect its refusal. That right exists even when a state has entered into an agreement that legally binds it not to refuse. Indeed, the essential fact and paradox of international law is that its protection of sovereignty is so great *that it grants states the right to refuse to comply with international law*.

We address in Part IV the worry that understanding sovereignty as the final right to refuse obligations is a recipe for ineffectual international law. We argue that it is the

very power to refuse that *ensures* the effectiveness of international law. States cannot be compelled to act as others wish nor can they force others to act as they wish. States may use these reciprocal powers not only to generate favorable bargains but also to discipline those who fail to live up to them. In this way, the right to refuse provides the foundation for the creation and the enforcement of international law. Part V concludes.

I. THE SOVEREIGNTY CHALLENGE

International law scholarship generally assumes that international law and state sovereignty stand in opposition to one another. International law interferes with the exclusive governing authority of domestic governments by placing constraints on the policies they can make and actions they may take—constraints that are determined in part by foreign states and international organizations. We will call this view the Sovereignty Challenge. We begin by outlining the challenge and restating its central objection.

A. *The State of the Debate*

Jeremy Rabkin has been a standard-bearer for the “new sovereigntist” critique of international law for over a decade.¹⁰ “A sovereign state,” he argues, “is one that acknowledges no superior power over its own government.”¹¹ That requires, he argues, that a state be able to determine its policy without any interference or influence from abroad. Even consensual treaties are problematic: “When we let international agreements determine our own policies, we cannot choose different policies for ourselves from those that come to be embraced by ‘the international community.’ To that extent, policymaking by international agreement must restrict our own system of self-government at home.”¹² Hence, “[t]he potential for distorting U.S. policymaking is almost inherent in the nature of international commitments.”¹³ To preserve U.S. sovereignty, then, it is necessary to avoid international commitments.

In his extensive treatment of the subject in *Sovereignty: Organized Hypocrisy*, Stephen Krasner puts the point in more neutral terms, though he arrives at the same conclusion. Westphalian sovereignty, he explains, is based on “territoriality and the exclusion of external actors from domestic authority structures.”¹⁴ This form of sovereignty (one of four Krasner describes) is “violated when external actors influence or

¹⁰ The term “new sovereigntist” was coined in 2000 by Peter Sprio, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov./Dec. 2000.

¹¹ JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 2 (1998).

¹² *Id.* at viii.

¹³ *Id.* at 35.

¹⁴ STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999).

undermine domestic authority structures.”¹⁵ Consensual international law thus violates sovereignty: “invitations, which compromise autonomy through conventions and contracts, violate Westphalian sovereignty.”¹⁶ That is true even through “[a] convention makes rulers better off—otherwise they would not have accepted it” and “contracts make at least one ruler better off and none worse off” as long as “participants honor their commitments.”¹⁷

The belief that international law compromises state sovereignty is shared by advocates of international law as well. Andrew Moravcsik, for example, explains that when a state makes a rational decision to delegate to an independent body, it weighs the reduction in domestic political uncertainty that it gains against “the surrender of national discretion, which in the international context might be termed the *sovereignty cost* of delegation to an international authority.”¹⁸ A state will only join an international human rights treaty, he argues, when the benefits of a promise of external protection of human rights offered by the treaty exceed the loss of sovereignty that joining the treaty entails.

Indeed, it has become common for scholars to speak of the “sovereignty costs” of international law. In recent years, the term has come to permeate discussions of international law, from debate over the Rome Statute of the International Criminal Court,¹⁹ to arguments for reshaping customary law,²⁰ to examinations of the costs and benefits of human rights agreements.²¹ The term has been particularly ubiquitous in the scholarship on “international delegation”—the delegation of authority to international organizations by treaty.²²

Much of this work can be traced to a foundational article by Kenneth Abbott and Duncan Snidal, which argues that “[a]ccepting a binding legal obligation, especially when it entails delegating authority to a supranational body, is costly to states. The costs

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 26. He argues that such agreements do not violate another form of sovereignty—international legal sovereignty—roughly defined as the state’s international legal personality. *Id.*

¹⁷ *Id.*

¹⁸ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 227 (2000).

¹⁹ See, e.g., Allison Marston Danner & Beth Simmons, *Sovereignty Costs, Credible Commitments, and the International Criminal Court* (unpublished manuscript) (on file with author) (arguing that the Rome Statute creating the International Criminal Court “involves potentially significant sovereignty costs, namely ceding domestic control over the investigation and prosecution of highly political crimes”).

²⁰ Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 207 (2010) (arguing that “[t]he potential ‘sovereignty costs’ of establishing and joining [multilateral] treaties would thereby be lower” if states could withdraw from customary international law).

²¹ See, e.g., Emilie Marie Hafner-Burton, Jon Pevehouse, Edward Mansfield, *Human Rights Institutions, Sovereignty Costs, and Democratization* (APSA Meeting Paper) (2009).

²² See, e.g., David Epstein, Sharyn O’Halloran, *Sovereignty and Delegation in International Organizations*, 71 LAW & CONTEMP. PROBS. 77, 83 (2008) (“sovereignty costs can be defined as the distance between the policy that a country would implement if it were not a member of the international organization and of the policy that it enacts once it has joined”).

involved can range from simple differences in outcome on particular issues, to loss of authority over decisionmaking in an issue-area, to more fundamental encroachments on state sovereignty.”²³ Abbott and Snidal explain that it is these costs, which they refer to collectively as “sovereignty costs” that “makes states reluctant to accept hard legalization,” by which they mean binding legal agreements, “especially when it includes significant levels of delegation.”²⁴ States considering legalization face “a series of tradeoffs”—they are torn between the “benefits of hard legalization . . . and the sovereignty costs it entails.”²⁵

While all international law entails sovereignty costs, Abbott and Snidal explain, those costs are not the same for all agreements. Sovereignty costs are low, they say, “when states simply make international legal commitments that limit their behavior in particular circumstances.”²⁶ States accept these minimal costs to achieve better collective outcomes. Yet the agreements still do infringe on sovereignty: “even they may limit the ability of states to regulate their borders (for example, by requiring them to allow goods, capital, or people to pass freely) and to implement important domestic policies (as when free trade impinges on labor, safety, or environmental regulations), thus encroaching on other aspects of sovereignty.”²⁷

Sovereignty costs are higher, they argue, when states “accept external authority over significant decisions.”²⁸ Such agreements “may implicitly or explicitly insert international actors (who are neither elected nor otherwise subject to domestic scrutiny) into national decision procedures. These arrangements may limit the ability of states to govern whole classes of issues—such as social subsidies or industrial policy—or require states to change domestic laws or governance structures.”²⁹ Agreements may also carry “unanticipated sovereignty costs,” that is, international institutions may assert more independence or reinterpret obligations in ways that change states’ commitments under the agreement. Abbott and Snidal acknowledge that the impact of these arrangements on state sovereignty is “tempered” by the ability of states to withdraw from the agreements, but they caution that “processes of enmeshment may make it increasingly costly for them to do so.”³⁰

Sovereignty costs are at their highest, Abbott and Snidal maintain, “when international arrangements impinge on the relations between a state and its citizens or

²³ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 436 (2000).

²⁴ *Id.* at 437.

²⁵ *Id.* at 455.

²⁶ *Id.* at 437.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

territory, the traditional hallmarks of (Westphalian) sovereignty.”³¹ This occurs when an international human rights regime “circumscribes a state’s ability to regulate its citizens.”³²

The Sovereignty Challenge to international law is not confined to the dusty halls of academia, nor are its consequences. In the United States, concern over American sovereignty has long been front and center in debates over whether to ratify international agreements. The successful effort to defeat U.S. ratification of the Convention on the Elimination of Discrimination Against Women focused on this theme: “If the United States ratifies the United Nations treaty recently approved by the Senate Foreign Relations Committee, Americans will lose what remains of their right to govern themselves and define their culture. They will lose their freedom.”³³ The argument has been at the heart of successful efforts to prevent the U.S. from ratifying the Law of the Sea Treaty. The Clinton, Bush, and Obama Administrations have all argued the treaty would require no changes at all to U.S. practices or policy, but the agreement has nonetheless drawn attacks from commentators every time it has been presented to the Senate for ratification. Writing after the latest round of hearings, columnist George Will sounded an oft-repeated theme when he argued that ratifying the treaty would lead to the “derogation of American sovereignty.”³⁴

As we will show, the Sovereignty Challenge is ultimately incoherent. We turn now to exploring this critique—and where we think it goes wrong.

B. Taking the Sovereigntist Seriously

It is tempting to dismiss the Sovereigntist Challenge out of hand, for the idea that international law violates sovereignty seems, at least at first glance, absurd. Sovereignty, after all, is a construction of international law. States are sovereign *because international law says they are*. How then can international law be blamed for violating the very power it itself grants?

The Sovereigntist Challenge can be even harder to take seriously when we consider that one of the central rights associated with sovereignty is the power to accept obligations. To be sovereign is to possess, as lawyers would say, full legal “personality” and to possess that status is to enjoy the power to form binding relations with other

³¹ *Id.*

³² *Id.* To alleviate these sovereignty costs, Abbott and Snidal suggest reducing the precision of agreements, making agreements that are not legally binding, or reducing the degree of delegation to retain decisionmaking control in individual states. *Id.* at 442.

³³ Thomas L. Jipping & Wendy Wright, *CEDAW Treaty Would Undermine American Sovereignty* (Federalist Soc’y, Working Paper No. 2012).

³⁴ George Will, *International Sea Treaty Dissolves our Sovereignty*, POSTCRESCENT.COM (June 22, 2012, 6:33 PM), <http://www.postcrescent.com/article/20120625/APC06/306250026/George-Will-column-International-sea-treaty-dissolves-our-sovereignty>.

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sovereigns. International law is created through the *exercise* of sovereignty. It is difficult to see how a body of law can destroy a status that is the precondition for that law's very existence.

Matters might seem even worse for the Sovereigntist. International law is not only created through the exercise of sovereignty—it appears to *maximize* sovereignty. Consider the analogy to contracts. Private parties have the power to enter into contracts binding themselves. Domestic law grants them such power because it is to their advantage to have such a power. Through the exercise of this right, parties are able to bind others. To be sure, parties can bind others only if they bind themselves in the process. But the costs to promisors are often worth the benefits. Though promisors decrease their sovereignty by undertaking to act in ways that benefit others, they increase their sovereignty by inducing others to become promisors and undertake acts that benefit them in return. Provided that the deal is rational, each party will enjoy a net increase in power.

By the same token, we might say, states enjoy a net increase in their sovereignty by concluding agreements and accepting certain common rules. They lose certain freedoms, but gain more valuable ones in return. Why, then, does the Sovereigntist think that international law diminishes, rather than expands sovereignty?

We should, however, resist the temptation to dismiss the Sovereigntist Challenge. It is a powerful objection to the normative structure of international relations and the supporters who write it off do so at their peril. A simple example will suffice to show why. Consider a contract to sell oneself into slavery. Such contracts—if valid—would vitiate the sovereignty of the individual. Slavery, in everyone's view, is the antithesis of sovereignty. Enslavement undermines sovereignty even if there are cogent reasons to surrender one's freedom. Suppose you have a rare disease and require an extremely expensive medication to survive (say its cost is \$1,000 per day). Recognizing your plight, a sadistic billionaire offers to subsidize the treatment on the condition that you become his slave. Even though it might be rational to accept the offer—otherwise you are going to succumb to the disease—you would nevertheless lose your sovereignty by doing so.

Slavery contracts are clear cases of sovereignty-destroying agreements. But sovereignty can be undermined even in less extreme circumstances. Consider the political transformation engendered by the United States Constitution. Under the Articles of Confederation, Congress had very limited power over the individual states. Famously, it could not tax them. It could not raise an army. It could not regulate interstate or foreign commerce. There was no executive branch to enforce federal law. Nor was there a federal system of courts. Amendments had to be unanimous. It is no

wonder that the Articles declare: “Each state retains its sovereignty, freedom, and independence”

The United States Constitution treats the country’s constituent parts very differently. Congress has the supreme power to tax, to raise an army, and to regulate interstate and foreign commerce. It creates an executive branch headed by the President and a Supreme Court to adjudicate federal law. It prohibits states from entering into agreements with foreign governments, coining money, and abrogating contracts.

While it is a matter of considerable debate among constitutional scholars how much sovereignty states enjoy in the federal system, everyone accepts that the Constitution fundamentally deprives states of important aspects of sovereignty. (The word “sovereignty” and its cognates do not, in fact, appear in the document. The Preamble notably begins: “We the People, in order to form a more perfect Union”) The Articles of Confederation were discarded precisely because states had too much power and concerted action was impossible. Union was required, not a mere confederation of sovereigns.

The Sovereigntist Challenge claims that international law is similar to the United States Constitution (or in more radical versions, a slavery contract). International agreements may be created through an agreement among sovereigns, but they do not maximize sovereignty. They diminish it and may ultimately destroy it. Charitably understood, then, the Sovereigntist Challenge is not based on a simple confusion or legal mistake. International law has the capacity to diminish international sovereignty of states just as the United States Constitution subordinates the domestic sovereignty of the states that formed the Union.

In order to evaluate the Sovereigntist Challenge, it will be necessary to explore the nature of sovereignty in some detail. What do states exactly have when they have sovereignty? How do states exercise their sovereignty? Is it possible for a state to bind itself and still remain sovereign? If so, do states normally bind themselves in this way?

We will see, somewhat surprisingly, that to understand the nature of sovereignty and the corresponding power to accept binding agreements requires that we first explore the right to *refuse* binding obligations. A state’s power to refuse to interact with other states lies at the heart of state sovereignty and forms the foundation for states to create and enforce international law. International law does possess the capacity to undermine the sovereignty of states, but it very rarely does so. Properly understood, then, international law does not pose a challenge to international law to which a true Sovereigntist should object. Indeed, once we appreciate the centrality of the right of refusal, we will understand not only how international law functions, but how it protects and preserves sovereignty in the process.

II. REQUESTS, OFFERS, AND REFUSALS

A. *The Right to Request—and to Refuse*

My neighbor has the right to ask me for a cup of sugar. There would be nothing untoward about his knocking on my door and asking for it. And I have the right to grant his request. It's my sugar and can give it away if I want. I can also, of course, refuse his request. It's my sugar and can keep it if I want. It might be unfriendly to do so. It is just a cup of sugar. Nevertheless, it is *my* sugar and I have the right to say "No."

While my neighbor has the right to ask for sugar, he cannot demand it. It would be untoward for him to order me to give him sugar. If my neighbor demands the sugar, I can simply slam the door in his face. I don't even have to say "No."

Technically speaking, the right to refuse a request is different from the right to refuse an order. The right to refuse a request is an example of what Hohfeld called a "privilege."³⁵ One has a privilege not to perform some act when there is no duty to perform it. Thus, my right to refuse the request is a privilege because I have no duty to give my neighbor the sugar.

On the other hand, my right to refuse my neighbor's order is what Hohfeld called an "immunity." One is immune from the action of another when the other has no power to affect one's rights. I am immune from my neighbor's demands because he has no power to obligate me. His demands are illegitimate and give me no reason to comply.

To understand my relationship to my neighbor, then, we need to attend to both immunities and privileges. My immunity explains why my neighbor does not demand sugar from me. If my neighbor could properly do so, he might. But since he cannot, he does not even try. My neighbor is not like my boss, who can either request that I work on a project or order me to do so. Since my neighbor has no authority over me, he cannot deny me the right to refuse. Orders are not a legitimate option for him.

While my immunity explains why my neighbor cannot demand sugar from me, my privilege explains why he can request it. My neighbor is able to request the sugar only because I am not obligated to give it to him. If I owed it to him, he could not properly request it—he would have to *claim* it. Requests presuppose a choice and, hence, the possibility of refusal. Obligations, on the other hand, rule out refusal. My neighbor might say: "Can I please have my lawnmower back?" but this is simply a polite way of him claiming his lawnmower, as evidenced by the fact that the only proper answer is "Yes."

³⁵ See H.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1918).

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My neighbor's request, therefore, signals the appreciation of his own weakness. He asks for sugar because he understands that he may be refused. I am fully within my rights to refuse him and he is unable to change that fact.

Yet, there is another sense in which my neighbor lacks power over me. Not only may he be refused, *he may not refuse my refusal*. Suppose my neighbor decides not to take "No" for an answer. He barges through the doorway and into my kitchen. I am not powerless to respond. I can demand that he leave my house. And once I exercise this power, he has no right to refuse.

My right to refuse, we might say, is "protected" by my power to exclude my neighbor from my home. This protection renders his normative situation the negative image of mine: my privilege and immunity to refuse his request corresponds to his lack of privilege and immunity to refuse my demand. I can refuse his request but he cannot refuse my demand.

Without powers of exclusion, rights of refusal are considerably less potent. Suppose my neighbor wants to walk on the right side of the sidewalk and asks me to walk on the other side. I refuse. This does not guarantee that I will, in fact, walk on the right side because I cannot compel him to accede to my wishes. The sidewalk is a commons and neither of us has the power to exclude the other. As a result, our mutual rights of refusal will conflict and unless one of us relents, we will deadlock. By contrast, my power to exclude you from my house breaks the impasse. You want me to give you sugar that is in my house, but I don't. My refusal to let you in my house trumps your request or demand that I give you the sugar. I win.

My rights of refusal are not only protected by powers of exclusion—they are also backed by claims against threats of force. Not only may my neighbor not charge into my house and take the sugar, he cannot threaten me with harm if I don't produce it. To threaten me in such a way would violate a duty he owes to me. I may refuse him safe in the knowledge that physical retaliation is out of bounds.

B. The Power to Grant

Just as I can say "No" to my neighbor, I can say "Yes" as well. I can, in other words, *grant* his request for a cup of sugar. I can do so, first, because I have the privilege. Since it is my sugar (and, say, I promised it to no one else), I am not under a duty not to give him the sugar.

Not only do I have the privilege to grant the request, I have the power to do so. Again, it is my sugar and so I can agree to give it to him. But we need to be careful here. Strictly speaking, when I grant my neighbor's request, my sugar does not become his sugar. In both law and morals, ownership in movable property does not change until

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there has been a change in possession. I must give him the sugar before it becomes his sugar. Granting a request is not the same as acting on it.

While granting my neighbor's request does not result in a change of ownership, it does affect certain other rights. Most significantly, it eliminates my privilege to refuse him going forward. He can now *claim* the sugar from me. Of course, he cannot threaten to harm me if I refuse to satisfy his claim. And I still have the power to exclude him from my home if he tries to satisfy it himself. But he can do something that he could do before I said "Yes," namely, *legitimately demand the sugar*.

C. The Power to Bargain

Just as I have the choice whether to refuse or grant my neighbor's *requests*, I have the right to decline or accept his *offers*. Suppose my neighbor stops by with a pitcher of lemonade and offers me a drink. I am within my rights to refuse it. Not only do I have the privilege to do so (I am not under a duty to drink the lemonade), I am immune from any order that I drink it (my neighbor is not my feudal lord).

Similarly, I may accept my neighbor's kind offer. I have the privilege (I am not under a duty not to drink the lemonade) as well as the power (I am an adult and have the right to accept liquids from others).

Offers are distinguished by their intended beneficiaries. Offers seek to benefit their offerees. I offer sugar *to you*. Requests, on the other hand, are not made for the sake of their audience. Typically, they are made for their makers. You request the sugar *from me*. Requests, therefore, are "granted" but offers are "accepted." When granted, the audience *gives* something; when accepted, the offeree *gets* something.

The fact that requests and offers differ by beneficiary suggests that they may be combined to overcome refusals. Suppose I deny my neighbor's request for a cup of sugar. He might follow up with an offer: if I give him my sugar, he will give me some lemonade. My neighbor has, in effect, embedded the request within his offer, making my granting his request the condition for his making good on his offer.

Just as requests may be embedded in offers, offers may be embedded within requests. Suppose I feel uncomfortable about accepting my neighbor's offer of lemonade. My neighbor might sense my discomfort and respond by requesting sugar. He might say: "Would you feel better taking the lemonade if I took some sugar?" I may feel better about him benefiting me if I reciprocate by benefiting him.

Offers may also be combined with offers. My neighbor might offer me lemonade on the condition that I offer him sugar. I accept that offer when I accept the sub-offer of lemonade. By doing so, I become obligated to offer him sugar.

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Offers that are refused may be countered. I might not give my neighbor sugar for lemonade, but I might be willing to trade the sugar for beer. My neighbor might refuse my counter-offer and counter that counter-offer to trade the sugar for soda. We might bargain back and forth—refusing and countering—until we settle on a mutually agreeable trade. At a minimum, each of us must value what we are being offered more than we value what we are offering.

It goes without saying that each of us has the power to accept these offers. A five-year child cannot trade his family's sugar. By contrast, we have sufficient personality to strike this deal. Just as the power to accept offers is a precondition for *concluding* the bargaining, the right to refuse is a precondition for *starting* the bargaining. Because my neighbor has no claim or power over me, I can refuse his offer and counter with a more advantageous one. While my neighbor need not accept my counter, he must accept it *if he wants my sugar*. Since he cannot march into my house and simply take it or threaten to pour lemonade over my head if I do not give it to him, he has no other option but to consider my counter-offer. He must take my refusal seriously.

When we conclude our bargain and agree to the trade, we not only swap food, but entitlements as well. Because my cup of sugar becomes my neighbor's cup of sugar, my privilege and immunity to refuse his request for that cup becomes his privilege and immunity to refuse my request for that cup. And my power to exclude him from using the sugar becomes his power to exclude me from using the sugar. He is now entitled to bargain with others over that cup of sugar and possibly secure something of even greater value.

III. REQUESTS, OFFERS, AND REFUSALS AMONG STATES

Requests, offers, and refusals characterize the relations among states as well. Just as among individuals, the right to refuse is necessary to the right to accept. And just as among individuals, when individuals have the right to refuse, bargaining is the only solution. Indeed, the right to refuse is so fundamental to the international legal system—and so robustly protected by it—that international agreements offer states the only available means for improving their position. Understanding the role that requests, offers, and refusals play in the international legal system therefore provides the key to answering the Sovereigntist Challenge.

A. The Initial Allocation: A Total Right of Refusal

Let us recall the variety of refusal rights introduced in the previous section: (1) Privileges to refuse requests and offers; (2) Immunities to refuse orders; (3) Claims to prevent others from entering one's territory; and (4) Powers to exclude others from one's

territory. An entity which possesses all of these privileges, immunities, powers and claims enjoys what we will call the “total right of refusal.”

International law grants states a near total right of refusal. States are not obliged to heed the requests or offers of other states; nor are they subject to their authority. States, therefore, have the privilege to refuse the requests and offers of other states and the immunity to refuse their order. Furthermore, these privileges and immunities are protected by the powers to exclude others from their borders and claims against territorial non-interference. Each state begins with this stock of refusal rights. They constitute a sovereign state’s initial endowment.

While international law endows states with extensive rights of refusal, it does place two important restrictions on this initial allocation of entitlements. First, states may not use or threaten to use force against another state—i.e., they can never refuse another sovereign state’s power to exclude. Second, states may never violate *jus cogens* norms—i.e., states neither have the privilege nor the power to refuse claims of persons to certain basic human rights even within their own territory. We will call the powers of exclusion and human rights that no state may refuse “non-refusable” rights. Let us take each in turn.

The first restriction on the total right of refusal is established by Article 2(4) of the United Nations Charter. It provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . .” The provision thus prohibits the use or threat of physical force against any other state. We will see later how important this right is to the functioning of the international legal system as a whole. For now, it is simply important to recognize that the total right of refusal does not include the right to use force against other states.

The second restriction is established by human rights law, specifically *jus cogens* norms. There are some human rights restrictions that apply regardless of whether a state agrees to them or not—and no state may withdraw from their application. As a matter of international law, a *jus cogens* norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”³⁶ *Jus cogens* norms disable states from changing their initial endowments in certain limited respects. For instance, no state may torture its citizens regardless of what it says or does.

³⁶ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. The precise list of rights that have attained *jus cogens* status is the subject of some scholarly dispute. Most would agree, however, that they include bans on the use of aggressive military force, torture, genocide, crimes against humanity, extrajudicial killing, war crimes, and slavery, at a bare minimum.

It is important, however, not to exaggerate this second restriction. Though human rights norms restrict the initial endowment of sovereign states, these constraints are removable in most instances. That is because most human rights limits on state behavior are voluntary—for example, the Convention on the Rights of the Child includes rights that bind only parties to that treaty. Even then, many human rights are “derogable.” A right is derogable when it can be eliminated through state action. Such rights must be explicitly renounced by a state, but once the state renounces, it is not legally constrained by the derogated rights.³⁷

B. The Symmetry of Sovereignty: Bargaining in the Shadow of Refusal

Not only does each individual state begin with a total right of refusal (subject to the limits described above), but *every* sovereign state does so. This is what we will call the “symmetry of sovereignty.” In the international realm, *sovereigns face other sovereigns that possess their own rights of refusal.*

Because every sovereign possesses its own rights of refusal—and no state may overcome that refusal with force—a sovereign state may obtain what it wants from other sovereign states in only one way: bargaining. It is only by offering another sovereign something it wants that a sovereign state may obtain what *it* wants in return. The initial total right of refusal, coupled with the symmetry of sovereignty and the prohibition on the use of force against others, creates a system in which international agreements (whether formal or informal) are only way for states to improve their lot.

A state may trade any refusal rights that it actually possesses. It may not, however, trade what it does not have—the non-refusable rights outlined above. For instance, a state may not trade the right to commit torture in its territory, for that is a right the state does not itself possess. Short of that, it may engage in any trade that it deems advantageous.³⁸

³⁷ See, e.g., International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”); *id.* (“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”).

³⁸ If a state trades what we shall later call the *final* right of refusal, it will lose its sovereignty in the process. But it has the right to make the trade nonetheless. For example, Hawaii entered into a treaty with the United States by which it surrendered its sovereignty, which it was entitled to do. See U.S.-Hawaii, Treaty of Annexation of Hawaii (1897), ALOHAQUEST.COM, available at

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The Sovereigntist conception of sovereignty may be characterized as follows: *a state is sovereign only when it possesses the total right of refusal*. A state loses part of its sovereignty, in this view, when it gives up one of the rights in the above bundle. That is precisely what happens whenever a state enters into a treaty. A state that enters into a trade agreement, for example, loses the privilege to refuse requests to allow the goods from its partner states into its country (refusal right #1).

Not only does this conception confuse an initial allocation of rights with sovereignty itself, it mistakes the function of this initial allocation. States are allotted a certain set of refusal rights not so they can stubbornly resist all potential interactions with other states. Rather, states have near total rights of refusal so that they may effectively bargain with one another and engage in cooperation when it is mutually beneficial.

An example illustrates the point. Consider Uganda, a landlocked state in Central Africa. It is completely surrounded by other countries and thus has no access to the sea. Uganda's neighbors to the east and west are more fortunate, at least in this respect. Kenya lies eastward on the Indian Ocean and its Port of Mombasa is a main trading hub for the Central African region. Westward, the Democratic Republic of Congo (DRC) enjoys only a miniscule 25 miles frontage on the Atlantic Ocean, yet it contains one of the largest harbors in Africa. The Port of Matadi, located near the mouth of the Congo River, serves as the main import and export center for the country.

Uganda is not only landlocked, but it also has no right to maritime access. Under international law, states that lack resources do not have the right to demand these resources from states that have them. If Uganda wants access to an ocean, it cannot claim it from Kenya or the DRC—it must request it. Kenya and the DRC, of course, may turn down the request. Since Uganda has no claim on access, Kenya and the DRC have the privilege to refuse. Moreover, under the principle of sovereign equality, Uganda cannot command its neighbors to open its borders. Kenya and the DRC not only enjoy access to the sea but the immunity to refuse that access to others as well.

International law, therefore, grants both a privilege and immunity to states to refuse access to its territory. This places landlocked states in a difficult position. Not only may port states refuse others access to their ports, their refusal may not be refused. Kenya and the DRC have virtually unlimited power under international law to control their borders. If Ugandan trucks try to cross the border without permission, Kenya may use physical force to turn them away.

http://www.alohaquest.com/archive/treaty_annexation_1897.htm (providing that Hawaii “hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii”); *see also* S.J. Res. 55, 55th Cong., 30 Stat. 750, 750-51 (2d Sess. 1898) (accepting, ratifying, and confirming an order of accession of the Hawaiian islands).

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But sovereignty is symmetrical. Just as Kenya may refuse Uganda the use of its ports, Uganda may refuse Kenya the use of its roads and navigable rivers and lakes. Kenya might be able to import goods through Mombasa, but unless Uganda permits those goods to pass through its borders, these shipments may have nowhere to go. Thus, both sides have symmetrical refusal rights which they can assert against each other. Unless Uganda gives up some of its rights, it cannot hope that Kenya will do so as well, and vice versa.

As in the lemonade example, the refusal to grant a request may be overcome through bargaining. Uganda could offer Kenya and the DRC access to its territory on the condition that Kenya and the DRC reciprocate. Each could agree, in other words, to relinquish their privilege to refuse provided that the others do so as well. In this way, each state would acquire access to the so-called “Northern Corridor” of Africa.

In fact, the Central African nations did just that. Uganda, Kenya, and the DRC (when it was called “Zaire”), along with two other landlocked countries, Rwanda and Burundi, signed the Northern Corridor Transit Agreement (NCTA), whose main objective was to enhance and ensure seamless movement of trade and traffic across the region. The NCTA not only grants signatories reciprocal rights of access, it removes trade barriers and custom duties and coordinates transport infrastructure projects.

By signing the NCTA, each party relinquished its privilege to refuse requests and offers from each other party. But the parties did more than that. By granting rights of access, they gave up their claim to territorial non-interference. Uganda no longer has the right to complain about border crossings from Kenyan trucks as long as the crossings are consistent with the NCTA. Indeed, Kenya now has a claim against Uganda for non-interference. Kenya can demand that its trucks pass through Uganda without hindrance.

The Sovereignist would look at this agreement and point out that it imposes sovereignty costs on all of the state parties. Parties to the NCTA, as we have seen, forfeit certain rights of refusal that they had prior to the agreement. Under its terms, for example, Uganda renounces its privilege to refuse access to other Central African states. The Sovereignist sees this loss of rights as a diminution of sovereignty. Uganda no longer has the total right to refuse the requests and offers of others.

But suppose Uganda refuses to sign the NCTA. Such a decision would hardly produce a happy situation for this sovereign. Uganda, after all, is a landlocked country! Without securing reciprocal agreements from other sovereign states, it would have no access to the sea, and the trade and wealth that comes from it. In signing the NCTA, therefore, Uganda demonstrated that it did not want its total right of refusal – it did not want to be fully sovereign in the Sovereignist sense.

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The Sovereigntist conception, we might say, makes sense in a world where there is only one sovereign. If the Sovereign of the Earth accepted an obligation, it would indeed be giving up something for nothing. The world, however, is populated by multiple sovereigns who have extensive rights of refusal. In the realm of symmetrical sovereignty, control can be gained only if some control is relinquished. Rational sovereigns do not hoard their rights of refusal—they trade them when doing so is better than asserting them.

When Sovereigntists assess “sovereignty costs” to acceptance, therefore, they are engaged in one-sided calculation. They neglect to consider *the costs of refusal*. If Uganda refuses Kenya, Kenya will refuse Uganda. Uganda will forgo a degree of control that was within its grasp. By refusing, it passes up a claim to Kenyan action. It won’t be able to demand that Kenya act in a manner that furthers Uganda’s national interest.

Ignoring the symmetry of sovereignty leads to absurd implications. If we count the costs of acceptance but disregard those of refusal, it follows that only a state that has no international agreements—and therefore has not compromised its right to refuse—is perfectly sovereign. Though not quite perfect, North Korea is the arguably the most sovereign country in the world on this skewed method of accounting. North Korea has only very limited international commitments compared to comparably sized nations. It persistently and vociferously denies that it owes anything to other states and hence frequently asserts a total right of refusal. Of course, North Korea is suffering massively as a result. The regime is an outlaw and impoverished state with which few countries wish to deal. Indeed, for much of this year, one of the “least sovereign” states on the Sovereigntist conception—the United States of America—was sending food shipments to North Korea in order to stave off mass starvation (aid that was suspended when North Korea tested ballistic missiles in contravention of international law). By asserting its sovereign right to refuse the United States, North Korea forced the United States to assert its sovereign right to refuse North Korea food assistance. As a result, the citizens of the “most sovereign” nation in the world are starving to death.

Contrary to the Sovereigntist, then, the total right of refusal is not the maximal degree of control a state can attain. It is, in fact, the *minimal* amount. In a world of symmetrical rights of refusal, total refusers cannot convince others to grant them control. North Korea is a testament to the infirmities of the perpetual veto.

Sovereigns who trade entitlements, therefore, are not diminishing their sovereignty. They are using it in the manner that it is meant to be used. Rights of refusal are not ends in themselves, but rather means to accomplishing goals that would not be possible otherwise. Conversely, states such as North Korea are not so much preserving their sovereignty as *squandering* it. They foolishly sit on their initial endowments and fail to put them to their highest and best use.

C. The Final Right of Refusal: The Right to Do Wrong

We have argued that the Sovereignist is wrong to think of sovereignty as the total right of refusal. The total right of refusal is not the maximum but the minimum; it is the point at which the state begins its bargaining. But there is a sense in which the right of refusal is essential to sovereignty—not only a chip to be bargained away, but core to the meaning of what it is to be a sovereign state. That core is what we shall call the “final right of refusal.” A party has the final right of refusal when it possesses the unreviewable power to protect its refusal. When this right is exercised, all other parties must respect the decision to deny. Its refusal, in other words, may not be refused.

For example, I have the final right of refusal over your request for my sugar. Not only may I refuse your request, you must respect my refusal. You cannot barge into my house and just take the sugar. Nor can you threaten to harm me physically if I don't comply. By contrast, I do not have the final right of refusal over which side of the street I will walk. Both of us have the right to refusal each other's request to move over but neither of us has the power to compel the other to respect our refusal. If I refuse your request to walk on the left side, you are not required to move to the right.

This final right of refusal lies at the heart of state sovereignty. In the Westphalian system, it is manifested by the power that each state possesses to exclude others from its territory. If Uganda does not want Kenyan trucks using its roads, it has the final right to deny those trucks access to its roads. It has the unreviewable power to deny access and its refusal may not be refused. *That is true even if the state is legally bound to grant access.*

Let us return to the NCTA. The parties to the NCTA give up their *privileges* to refuse border-crossings. But they nevertheless retain their *power* to exclude others from their territory. They retain, in other words, their *final* right of refusal because no one may override a state's decision to close its borders. Though Kenya is not permitted under the NCTA to exclude Uganda from using its roads, Kenya has the legal power to do so.

It might seem incoherent to assert that parties to the NCTA (1) lack the claim against each other for territorial non-interference *and* (2) possess the power to exclude each other from their territory. How can someone have a duty to permit others to cross their borders but also the power to turn them away? In fact, this normative combination is familiar from many legal contexts. It is often the case that parties have powers they are under duties not to exercise.

Consider a real estate contract. When parties enter into an agreement to sell property, the seller is under a duty to transfer title to the buyer. Nevertheless, the seller

retains the power to transfer title to someone other than the buyer if he does so before this deal closes. The seller has the legal power, in other words, to violate his contractual duty.

Similarly, the parties to the NCTA have a duty to provide access to other signatory states. Yet they also have the power to exclude visitors from these states from their territory. Thus, sovereign states that enter international agreements and, as a result, incur duties under international law nevertheless retain the power under international law to refuse to fulfill these duties: they have the power to exclude those who may not properly be excluded. They have the right, we might say, to do wrong. Indeed, sovereigns never lose this right. *That* is what sovereignty is.

D. Guaranteeing the Final Right of Refusal

The final right of refusal is the linchpin on which the international legal system relies. International law thus not only grants states the final right of refusal, but the treaty that lies at the heart of the international legal system—the United Nations Charter—protects that right. As we have already noted, Article 2(4) of the Charter provides that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . .” The words are deceptively simple, but they are fundamental to the system we have described.

This guarantee against the use or threat of physical force against any sovereign state protects the right to refuse in two important ways. First, it protects a state’s right to refuse to enter into an agreement. No state may be forced to accept an offer. Article 2(4) thus outlaws gunboat diplomacy. Indeed, as we have shown, the power to accept has meaning only because of the power to refuse—a power guaranteed by Article 2(4). Every state now is literally a force to be reckoned with. Because every state has the final right to refuse—and that right may not be taken away by force—the only way to get a state to act is with its consent.

Article 2(4) thus grants even the very weakest state formidable power with regard to its own resources and territory. The state, which is allocated the total right to refuse, may then spend that initial allotment to its advantage. It may enter agreements that require it to act in certain ways (for example, allowing the goods of another country access into the country) in return for commitments by others that will offer benefits it could not otherwise obtain (because other states also possess the right to refuse).

Second, Article 2(4) protects the right of a state to refuse to comply with international law. Under Article 2(4), no state may be forced to comply with its international legal commitments by another state. This applies even in the case of much of human rights law. Sovereigns, in other words, have the legal right to do legal wrongs.

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This might at first appear puzzling. It means that international law effectively guarantees the right of a state to violate international law. And, indeed, the final right of refusal conferred by international law is so strong that Article 2(4) trumps the principle of *pacta sunt servanda*. Though states are under a duty to comply with their agreements, states possess the power to violate their agreements. A state cannot use or threaten to use force to enforce a treaty obligation. That is true even though the state is legally entitled to the benefit it seeks. A sovereign state has the final right to refuse another state's rights. As we will show below, a state whose rights are refused by a state may use *its* right of refusal to penalize that state. But it may not use *force*.

Sovereign states are prohibited from using physical force against one another. States may not use physical force to push others into bargains, and they may not use physical force to enforce bargains once struck. But this does not mean there is no recourse to physical force in the system. Article 2(4) does not stand alone. It is accompanied by a provision that sometimes permits the recourse to physical force—and it is this provision that provides the only legal limits to a sovereign state's final right of refusal.³⁹

Chapter VII of the Charter grants the Security Council the right to use physical force to maintain peace and security. Specifically, it provides that where the Security Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression,” it “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁴⁰ Chapter VII thus provides an exception—indeed the only exception—to the final right of refusal of states. Although individual states acting alone may not use force to overcome the final right of refusal of another state, *the Security Council may authorize states to do so*.

It is important to note how extraordinarily narrow this limit on the final right of refusal actually is. Chapter VII authority may only be used to address a “threat to the peace, breach of the peace, or act of aggression.” It must, moreover, be authorized by the Security Council—which requires “an affirmative vote of nine members including the concurring votes of the permanent members.”⁴¹ In practice, this means that the five permanent members have an unfettered final right of refusal, for they may veto any exercise of Chapter VII authority. For all other states, Chapter VII authority may be used

³⁹ In addition, Article 51 gives every state the power to defend itself. It provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51. This guarantee of the right of self-defense includes the right to consent to acting in collective self-defense.

⁴⁰ *Id.* art. 42.

⁴¹ *Id.* art. 27.

to overcome the final right of refusal—and hence sovereignty—only when the Security Council has determined there is a “threat to the peace.”⁴²

The final right of refusal is so robust, in other words, that a state cannot violate it even when another has illegally refused to respect what we earlier termed “non-refusable” rights. An individual state may not respond with force to a violation of Article 2(4) by one state against another⁴³ or to another state’s violations of *jus cogens* norms.⁴⁴ Even in these extraordinary circumstances, overcoming the right of refusal with an armed response requires Security Council authorization.

Notice, moreover, that this exception to the final right of refusal is frequently exercised in service of the final right of refusal. Absent the Security Council’s capacity to compel compliance with Article 2(4) using Chapter VII authority, the guarantee in Article 2(4) would be less secure. More powerful states would always possess the power to force less powerful states to do as they ordered. Article 2(4), backed by Chapter VII, prevents this state of affairs and in doing so protects the right of states to refuse and, with it, their sovereignty.

IV. THE FINAL POWER TO REFUSE IS THE POWER TO ENFORCE

We can see now that state sovereignty—understood here as the final right of refusal—is a piece of a complex puzzle that enables the international legal system to function. State sovereignty enables states to make and refuse offers. When a state accepts an offer, it loses the total right of refusal (it gives up some part of the bundle of rights associated with sovereignty, for instance the claim to prevent others from entering its territory), but it retains the final right of refusal. No other state may compel a state to

⁴² Whether this imposes any substantive limit on Chapter VII authority is a matter of some debate. Article 39 and the *travaux préparatoires* indicate that it is within the discretion of the Security Council to decide what constitutes a “threat to the peace.” As one scholar put it, “a threat to the peace seems to be whatever the Security Council says is a threat to the peace.” PETER MALANCZUK, *AKELHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 426 (1997). Michael Reisman made the same point as follows: The “United Nations system was essentially designed to enable the Permanent Five, if all agree, to use Charter obligations and the symbolic authority of the organization as they think appropriate to maintain or restore international peace, as they define it.” W. Michael Reisman, *Peacemaking*, 19 *YALE J. INT’L L.* 415, 418 (1993).

⁴³ An exception is collective self-defense. If State A has a right to defend itself from an armed attack and it enters an agreement with State B to exercise that right on its behalf against State C, State B may take those actions on behalf of State A against State C that State A could have taken on its own behalf under Article 51 of the United Nations Charter.

⁴⁴ There are some who argue that the emerging doctrine of Responsibility to Protect requires Security Council authorization. Currently, the majority view is that it does. Nonetheless, we need not take a position on this point here. If armed intervention under the doctrine of Responsibility to Protect were permissible even without Security Council authorization, this would simply mean that the right of refusal could be more easily overcome.

accept an offer, nor may any state compel another state to abide by an agreement—even when it is legally bound to do so. That is because states are protected by Article 2(4), backed by Chapter VII. No state may use or threaten to use force against another state, even in service of enforcing international law.

This story raises one final question that we shall now address: How could such a system possibly work? If each state has the final power to refuse—even when it is legally obligated to do otherwise—what force or value does international law have? After all, if states have the final power to refuse to comply with international law even when they are legally bound (hence under a duty) to comply, this would seem to be a recipe for utterly ineffectual law and therefore rampant lawbreaking. Put differently, if there is no actor with the power to force a state to comply with international law—no actor that can overcome the state’s final power to refuse—is international law even worth the paper on which it is written?

We begin our answer by noting that the question makes a common mistake: It assumes that international law must operate in the way the modern domestic law often does. If a state had a legislature that passed laws but had no police capable of enforcing those laws, it would likely fall into chaos. International law, which lacks anything resembling police, the reasoning goes, must face the same problem.

In other work, we have called this conception of law the Modern State Conception.⁴⁵ In brief, the Modern State Conception holds that a regime is only law when it (1) possesses internal enforcement mechanisms (2) that use the threat and exercise of physical force. The Modern State Conception takes modern domestic legal systems—which have internal bureaucratic enforcement mechanisms that may use physical force in the form of police—as the paradigm cases of law. In modern domestic law, individuals do not have a final right of refusal. If an individual breaks the law, that individual may be subject to the brute physical force of the police. Police enforce the rules, including private contracts, and they can put those who violate the law in jail.

The Modern State Conception leads to what we have previously called the Sovereigntist Fallacy: If international law is really law, then it must be like a modern state—with international police ready to use violence to force states to comply with its commands. To be real law, then, international law must live up to the greatest fears of the Sovereigntist. And if international law is not like the law of a modern state, then it does not threaten sovereignty, but it must be utterly ineffectual.

International law does indeed fail on the Modern State Conception. It lacks bureaucratic enforcement mechanisms that can employ physical force—put simply, there

⁴⁵ Oona A. Hathaway & Scott S. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 268-70 (2011).

are no international police. Not only are there no police, but individual states are expressly prohibited from using physical force to enforce the law on their own by virtue of Article 2(4). Unlike domestic law, then, international law does not take away the final right of refusal. Indeed, a state can always choose to exercise its final right of refusal and fail to honor a trade even where it is bound to do otherwise. States continue to possess the final right of refusal as long as they are acting within the minimal boundaries on their sovereign rights.

This brings us back to the question with which we began: How can such a system possibly work? The answer, as we showed in our earlier work, is that states may discipline other states that fail to comply with their international legal commitments through a process we have called “outcasting.”⁴⁶ Outcasting allows states to use refusal to counteract refusal. Any state that is bound by an international legal commitment has the right to exercise its final right of refusal and fail to comply (despite the legal obligation to which it has consented). But the symmetry of sovereignty offers states a tool to respond: States that are party to that agreement may exercise *their* final right of refusal in response.

Consider an example. There are more than 150 state parties to the General Agreement on Tariffs and Trade (GATT), among them the United States and the Philippines. In 2010, the United States complained that the Philippines’s taxation of imported distilled spirits discriminated against imported distilled spirits by taxing them at a substantially higher rate than domestic spirits in violation of the GATT.⁴⁷ The United States is prohibited by Article 2(4) from using or threatening to use physical force to enforce the agreement (even though, were it to do so, it would surely get what it wants, for its military far surpasses that of the Philippines). Instead, it is required to follow the dispute resolution process laid out by the World Trade Organization. If the Philippines is found to have violated the agreement, the United States then may be permitted to put in place countermeasures—to refuse the Philippines the benefits of the agreement equivalent to the benefits it has denied the United States. We label responses of this kind “outcasting,” which we define as denying the disobedient the benefits of social cooperation. Thus, although the international legal system prohibits the use of physical force to enforce the trade, it provides for *enforcement through outcasting*.

Our earlier discussion of sovereignty now allows us to re-describe outcasting as follows: States outcast when they use their final right of refusal to punish a state that has used its final right of refusal despite the existence of a duty not to exercise this right. Indeed, *outcasting works precisely because states have the final right of refusal*. The violating state cannot be compelled through physical force to comply—it always has the

⁴⁶ *Id.*

⁴⁷ Request for Consultations by the United States, *Philippines—Taxes on Distilled Spirits*, WT/DS403/1 (Jan. 18, 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/january/tradoc_145748.pdf.

final right of refusal. But the state with which it has made a deal (and to which it therefore owes a duty) *also* has the final right of refusal and can use it to punish the violating state.

The fundamental weakness of international law thus becomes its greatest strength. Certainly, states' final right of refusal does mean that no state may be forced to comply with international law. But it also means that no state can be forced to continue to cooperate with a state that has violated its duty. States that are wronged may use their right to refuse to enforce international law by refusing to provide the benefits of continuing cooperation.

V. CONCLUSION

We now can see why the Sovereigntist Challenge with which this paper began must fail. The Sovereigntist makes two fundamental mistakes. First, the Sovereigntist fails to acknowledge the symmetry of sovereignty: each state not only has the right to refuse other states, but they too have the right to refuse it. As a result, the Sovereigntist mistakes the initial allocation of total rights of refusal as the best allocation, rather than recognizing that it is the resource that states use to bargain with others to overcome their rights of refusal against it. Second, the Sovereigntist fails to recognize that sovereign states retain the final right of refusal—the unreviewable power to protect its refusal. When this right is exercised, all other parties must respect its decision—even if its decision fails to comply with a bargain it has struck. Indeed, as we noted at the outset, the essential fact and paradox of international law is that its protection of sovereignty is so great that it grants states the right to refuse to comply with international law.

Surprisingly, then, conceiving of sovereignty as the final right of refusal flips the sovereignty challenge on its head: rather than not taking sovereignty seriously enough, international law seems in danger of taking it *too* seriously. If international law protects the right to break international law, how can chaos not be the result? The answer brings us back once again to the right to refuse: The system works—and states follow international law—not because states cannot refuse to honor the bargains they have struck but because *all* states can refuse to honor the bargains they have struck. International law provides cooperative benefits to states that they cannot take by force. The right to refuse thus gives states both the power and the incentive to make and enforce international law.