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Limping Toward Elysium: Impediments Created by the Myth of Westphalia on Humanitarian Intervention in the International Legal System Note

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Note

LIMPING TOWARD ELYSIUM: IMPEDIMENTS CREATED BY THE MYTH OF WESTPHALIA ON HUMANITARIAN INTERVENTION IN THE INTERNATIONAL LEGAL SYSTEM

STEPHEN CARLEY

The present international system is broadly thought to consist of nation-states possessing certain essential characteristics: a fixed population and territory, formal equality in external relations and, in nearly all cases, unquestioned domestic authority to conduct its internal affairs in any way it deems fit. That last characteristic, often viewed by historians, legal actors and diplomats as a central and indispensable principle of the international system, is the one most commonly associated with status as a nation-state and, in the language of international law, is understood as the essence of sovereignty.

With respect to the internal authority of a sovereign nation-state, few concepts of law in the history of Western or any civilization are viewed in such absolute terms. While slow, progressive strides have been made in humanitarian and human rights law, the orthodox core of international law maintains that such trends are mere outgrowths of the positive and consensual law of sovereign states. Sovereignty is therefore viewed as a fixed star, around which all other forces in international law and political affairs must move.

When inquiries are made into the source of international law's slavish adherence to internal sovereignty, the inquisitor is invariably referred to the Treaties of Westphalia of 1648, the ostensible foundation for the orthodox view of international law. However, as is explored in the work that follows, emerging historical scholarship and a closer view at the treaties themselves contradict the orthodox perspective on a number of serious and substantive points.

Despite its dubious historical account, the orthodox view has permanently influenced the development of international theory and law, particularly as applied to the domestic jurisdiction clause of the Charter of the United Nations. The Charter's travaux préparatoires reveal that the post-World War II Great Powers utilized the false historical and normative assumptions of the orthodox Westphalian view to eviscerate meaningful provisions for humanitarian intervention, a consequence of the myth of Westphalia that can be felt even today.

NOTE CONTENTS

I. INTRODUCTION.....	1743
II. HISTORICAL REALITY VERSUS THE MYTH OF WESTPHALIAN ORTHODOXY.....	1749
A. MEDIEVAL EUROPEAN POLITICAL REALITY PRELIMINARY TO THE THIRTY YEARS WAR.....	1749
B. PRECIPITATING EVENTS AND PARTIES TO THE THIRTY YEARS WAR .	1751
C. TREATY TERMS AND INSTITUTIONAL CHANGES INCIDENT TO THE PEACE.....	1753
D. THE EUROPEAN SYSTEM BEFORE AND AFTER WESTPHALIA.....	1755
III. HOW THE WESTPHALIAN MYTH BECAME ORTHODOXY	1757
A. LIKELY SOURCES FOR THE ORTHODOX PARADIGM	1757
B. FALSE HISTORICAL ATTRIBUTION OF THE MYTH TO WESTPHALIA....	1763
IV. THE MYTH'S IMPACT ON THE UNITED NATIONS SYSTEM.....	1765
V. FAILINGS OF THE WESTPHALIAN MYTH: NON-INTERVENTION IN BURMA.....	1774
A. OVERVIEW OF THE CRISIS AND THE INTERNATIONAL RESPONSE.....	1774
B. WESTPHALIAN ORTHODOXY'S INFLUENCE ON INTERVENTION IN BURMA	1779
VI. CONCLUSION	1782



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INTERNATIONAL LEGAL SYSTEM

STEPHEN CARLEY*

I. INTRODUCTION

Progress in the field of human rights has been slow, though it has not had the virtue of being steady. On the other hand, the world is coming to the realization that all persons, regardless of origin, ought to be afforded a certain measure of rights to enable them to live safe, productive and meaningful lives. Much, but certainly not all, of current international legal and political discourse focuses on how much liberty and security the people of the world deserve, and, what is a more comfortable subject for lawyers, how to provide them with it.

There are many obstacles to this process: political, psychological, institutional, systemic. One such obstacle is the idea that nation-states still possess something like “absolute internal sovereignty”; that is, states are not only equal among themselves but also retain unfettered and total discretion to determine what occurs within their own borders,¹ and as such no outsiders may interfere in their internal affairs.² Though stripped of much of its persuasive force in recent decades, the continuing—and perplexing—notation of this principle of absolute internal sovereignty is one of the most prominent obstacles to realizing international human rights.

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¹ Though the concept of sovereignty often refers both to *internal* sovereignty—the exclusivity of control by a nation-state over its domestic affairs—and *external* sovereignty—the same degree of control over the state’s priorities in foreign affairs—this Note concerns itself only with the former meaning.

² Ronald A. Brand, *External Sovereignty and International Law*, 18 *FORDHAM INT’L L.J.* 1685, 1688 (1994–1995); John Alan Cohan, Essay, *Sovereignty in a Postsovereign World*, 18 *FLA. J. INT’L L.* 907, 908–09 (2006); Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 *AM. J. INT’L L.* 20, 28–29 (1948); Alun A. Preece, *The Rise and Fall of National Sovereignty*, 8 *INT’L TRADE & BUS. L. ANN.* 229, 229–30 (2003). There are, of course, many other obstacles to the uniform and universal realization and enforcement of human rights norms—many of which overlap. Some such obstacles include various forms of racism, nationalism, sexism, religious fanaticism, power disparities, lack of democratic traditions and institutions, lack of education, lack of sustainable development, poverty, economic exploitation, homophobia and a distrust of peoples of different backgrounds and the institutional regimes theoretically designed to protect them. I certainly do not flatter myself capable of presenting a complete list here, nor do I intend to explore any of the foregoing in great detail. Such is outside the bounds of this Note.

For instance, the 2007 democratic movement in Burma was left unsupported by the international community due in part to the intransigence of this odd and destructive idea.³

The actual sources for this particular normative view of sovereignty are less than perfectly clear.⁴ Yet, at least since the middle portion of the last century, the standard story is that absolute sovereignty has been the norm since the great European powers signed the Treaties of Westphalia, covenants which ended the Thirty Years War in 1648.⁵ According to the champions of this paradigm, those nations involved in the war and its resolution, the Peace of Westphalia (“the Peace”), heroically shuffled off the coil of feudal and papal oppression in favor of entirely autonomous territories—the blessed “States” with a capital “S”—ruled, at least in theory, by secular authorities answerable to no one.⁶ From there, the standard story goes, the absolute sovereign system spread to the other European peoples and, eventually, to the remainder of the world.⁷

This view of sovereignty has become the *de facto* standard interpretation of international legal and political history, particularly in legal scholarship⁸ and international relations theory, a discipline whose star

³ See *infra* Part V.

⁴ See *infra* Part III.

⁵ Stephane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 J. HIST. INT’L L. 148, 148 (2000) (“In public international law, there may not be a greater orthodoxy than that according to which the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe, constitutes a paradigm shift in the development of our state system. The twin congress then held is deemed the forum where distinct separate polities became sovereign, that is, enjoying absolute and exclusive control and power over a relatively well-defined territory.”) (footnote omitted); Cohan, *supra* note 2, at 914; Gross, *supra* note 2, at 28; Preece, *supra* note 2, at 229.

⁶ See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 312 (3d ed. 1960) (“By the end of the Thirty Years’ War, sovereignty as supreme power over a certain territory was a political fact, signifying the victory of the territorial princes over the universal authority of emperor and pope, on the one hand, and over the particularistic aspirations of the feudal barons, on the other.”); Beaulac, *supra* note 5, at 148–49; Gross, *supra* note 2, at 28–29; Preece, *supra* note 2, at 230.

⁷ See Richard N. Haass, Dir., Policy Planning Staff, U.S. State Dep’t, *Sovereignty: Existing Rights, Evolving Responsibilities*, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University (Jan. 14, 2003), <http://2001-2009.state.gov/s/p/rem/2003/16648.htm> (“[Following the Peace of Westphalia, s]overeignty helped to stabilize Europe and, over time, the principle spread. For China and Japan, recognition of their sovereign equality by other states became a symbol of having arrived. Later, the desire for sovereignty became the motivating force for the decolonization movement that transformed international relations after World War II.”); Preece, *supra* note 2, at 234 (“After 1648, the concept of national sovereignty spread beyond Europe, as relations developed with countries in other continents, and as European and other countries gained independence by war, rebellion or peaceful legal processes.”) (footnote omitted). Whether this expansion of absolute sovereignty to nations outside Europe occurred naturally as a result of the inherent “genius” of the idea or was simply thrust onto colonial peoples by virtue of European imperial dominance has, to my knowledge, never been fully explored and is, apparently, a matter of the particular proponent’s degree of historical delusion.

⁸ Beaulac, *supra* note 5, at 148–49; Preece, *supra* note 2, at 230; see also Cohan, *supra* note 2, at 914 (“Westphalian sovereignty is the type of sovereignty that is the most well-known in academic discourse.”); Gross, *supra* note 2, at 26–27 (“It can hardly be denied that the Peace of Westphalia marked an epoch in the evolution of international law. It undoubtedly promoted the laicization of international law by divorcing it from any particular religious background, and the extension of its

rose concurrently with the standard story of sovereignty.⁹ It has become so pervasive, in fact, that even critics of absolute sovereignty have implicitly admitted that it represents historical fact, even while they proceed vigorously to dispute the wisdom of its corollaries.¹⁰ Reflecting this long-standing consensus, some legal scholars have taken to calling the accepted idea of absolute sovereignty, beginning in 1648, the orthodox paradigm or “Westphalian orthodoxy.”¹¹

Insightful and courageous scholarship by authors such as Stephane Beaulac, however, has recently called the traditional paradigm into serious question. Review of the political and religious power structure in Europe leading up to and following the Thirty Years War indicates, according to Beaulac’s research and an accompanying close inspection of the treaties’ history, that Westphalian orthodoxy is a gross over-simplification in some respects and a total misrepresentation of the historical evidence in others.¹² The Thirty Years War, and the international treaties that ended it, emerged out of the patch-work quilt of overlapping authorities and alliances including feudal lords, pseudo-monarchical princes, the Holy Roman Emperor and the papacy, all engaged in a host of secular and religious power struggles in multiple political dimensions, stemming largely from the divisive pressures of the Reformation and Counter-Reformation.¹³ When the series of armed conflicts drew to a close, the allied parties signed two treaties setting terms of the Peace: one, the Treaty of Osnabrück concluded between the Holy Roman Emperor and German princes with the

scope so as to include, on a footing of equality, republican and monarchical states. Indeed these two by-products of the Peace of 1648 would seem significant enough for students of international law and relations to regard it as an event of outstanding and lasting value.”). For a discussion on the certainty of Gross’s view, see *infra* notes 114–118 and accompanying text.

⁹ See, e.g., IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 93, 113 (Hans Reiss ed., H. B. Nisbet trans., 2d enlarged ed. 1991) (“The idea of international right presupposes the separate existence of many independent adjoining states.”). In making that claim, Kant, viewed as an early advocate of something like modern liberal international relations theory, notably admits what has become a bedrock assumption for all of realism’s normative and descriptive claims. It is unfortunate that even liberal international relations theorists, who dispute many of the basic tenets of realism, implicitly admit that nation-states, through some kind of natural order, ought to exercise de jure absolute sovereignty or something akin to it.

¹⁰ See, e.g., John R. Worth, Note, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the “Un-signing” of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 247, 259 (2004) (explaining, in a commentary criticizing the United States for shirking its international responsibility by “un-signing” the Rome Statute for the International Criminal Court, that “in the decades following the Treaty of Westphalia, nation-states were individualistic and thrived on self-sufficiency”).

¹¹ Beaulac, *supra* note 5, at 148, 150.

¹² See *infra* Part II.

¹³ Beaulac, *supra* note 5, at 152–53, 155; Gross, *supra* note 2, at 28–29; Preece, *supra* note 2, at 229–30, 232; see also Cohan, *supra* note 2, at 914 (“The concept [of Westphalian sovereignty] gains its name from the Treaty of Westphalia (1648), which dealt with ending the Thirty Years War. The treaty represented the concession of some power by the emperor, with his claim of holy predominance, to numerous kings and lords who wished to vigilantly [sic] protect their own feudal powers.”) (footnote omitted).

Protestant Queen of Sweden, and two, the Treaty of Münster with the Catholic King of France.¹⁴ In addition to limiting the princes' ability to control the religious beliefs and practices of their subjects, the treaties also restrained the secular governments from discrimination against religious minorities in the secular sphere.¹⁵ In terms of territorial settlements, much of the power of the Holy Roman Empire ("the Empire") was retained; Sweden gained feudal trusteeship of some lands formerly held by the Empire, and though France's acquisitions were more complete, at least one acquired territory held onto its semi-autonomous status.¹⁶

Furthermore, as demonstrated in part by Beaulac's research, the powers the monarchies actually wielded following the consummation of the treaties betrays traditional Westphalian orthodoxy. The lands held by the German princes—supposedly gaining total authority as the beneficiaries of their newfound status as sovereigns—were granted the power to form alliances, though any international treaties or agreements could not be against the interests of the Empire or the treaties themselves, and the Empire itself retained authority to control legislation, warfare and taxation.¹⁷ Following the Peace, the Empire preserved its legislative and quasi-judicial body, the Diet, in which Sweden was to sit as representative of its newly acquired territories, and which was responsible for ensuring respect for the terms regarding religious liberty.¹⁸ The transcendental Holy Roman Empire's atrophy of power vis-à-vis the secular principalities had begun long before the seventeenth century and concluded only in 1806 with Napoleon's conquest of all of Germany.¹⁹ What is more, even in the case of divided continental regions such as the Italian peninsula and the German Confederation, something approaching complete internal sovereignty under a unified government was not achieved until nearly the end of the nineteenth century.²⁰

The emerging historical evidence, as well as many facts surrounding the treaties never in doubt, suggest that the treaties' primary purposes and effects concerned religious and minor territorial matters, and were not fundamentally structural. Though if that is the case, why was any historical account to the contrary not rejected when it was proposed? As I

¹⁴ Beaulac, *supra* note 5, at 162.

¹⁵ *Id.* at 164–65; Preece, *supra* note 2, at 230.

¹⁶ Beaulac, *supra* note 5, at 165–66.

¹⁷ *Id.* at 167–68.

¹⁸ *Id.* at 165, 170.

¹⁹ *Id.* at 172–73; *see also* Preece, *supra* note 2, at 231 (explaining that the Empire was finally "put out of its misery" with the Napoleonic conquest in 1806).

²⁰ *See* Heinhard Steiger, *Peace Treaties from Paris to Versailles*, in *PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY* 59, 61 (Randall Lesaffer ed., 2004) (explaining that for the small territories in the German Confederation and Italy, because "the widespread aspirations for unity to become a nation-state were not met, these aspirations continued to influence the political developments in Europe during the first fifty-five years after the Congress of Vienna, until 1870/71 when both achieved their objective of becoming unified states").

shall discuss, the particular timing of this revisionist account of Westphalia's place in history—including Leo Gross's famous article, *The Peace of Westphalia, 1648–1948*—made it particularly palatable to Western powers seeking to retain their dominance in the world political and legal order, as well as to Western political and legal theorists searching for a way to simplify and justify their views on the nature of that order *ex post*.²¹ Furthermore, Westphalian orthodoxy neatly—if somewhat inaccurately—fit with the values espoused by political philosophers such as Bodin, Hobbes, Grotius and Bentham and explained the basis for the powers claimed and exercised by the absolutist monarchies of the eighteenth and nineteenth centuries, as well as the colonial empires that dominated much of the population of the world well into the twentieth.²²

The state-centered world order—with its fictional historical and conceptual antecedent, Westphalian orthodoxy—and the authority wielded by the so-called Great Powers faced major challenges with the catastrophes of the twentieth-century world wars. In response, a new universal organization, the United Nations, emerged and was profoundly influenced by a new, human rights-based cosmopolitan ethic, though it certainly was not immune to the long-standing and powerful influences of the surviving European empires, the totalitarian Soviet bloc, and the largely democratic newcomer, the United States.²³ A large portion of the character of that new organization came to reflect, somewhat schizophrenically, the competing norms of human rights on the one hand, and maintaining pre-World War II internal sovereignty on the other.²⁴ As will be explored in greater detail, certain provisions of the UN Charter (“the Charter”) and the organization's power structure refer to its commitment to securing and promoting human rights, while others pledge their commitment to retaining the sanctity of matters “essentially within the domestic jurisdiction” of its member states.²⁵ The *travaux préparatoires* of the Charter tell the story of how a shared but mistaken understanding of internal sovereignty was utilized to limit the competence of the Security Council's enforcement powers and to convert a legally binding international bill of rights into a non-binding universal declaration.²⁶

Ever since the immediate post-war era, the extent of adherence to

²¹ See *infra* Part III.B.

²² See *infra* Part III.A.

²³ See Preece, *supra* note 2, at 238 (“It took a yet more destructive war to lead to the establishment of the United Nations in 1945. The massive violation of the rights of civilians that occurred in the Second, as opposed to the First, World War sparked a much greater concern with human rights: hence, the adoption of human rights covenants, beginning with the International Declaration of Human Rights in 1948, and the spawning of a plethora of international organisations aimed at enforcing these rights.”).

²⁴ See *infra* Part IV.

²⁵ U.N. Charter art. 2, para. 7.

²⁶ See *infra* Part IV.

Westphalian orthodoxy has an inverse effect upon the enforcement of international human rights, particularly with respect to intervention issues, which meet head-on the sovereignty-human rights conflict.²⁷ In cases where totalitarian regimes severely curtail the forces of democracy and individual liberty, this Note will also explore how Westphalian orthodoxy, among other factors, acts like a braking mechanism on the progressive expansion of human rights and thereby has a substantial effect upon the experience of individuals and oppressed societies around the world.²⁸ One such example from recent headlines is Burma, known also as Myanmar, a state in Southeast Asia whose ruling military junta brutally repressed the largest pro-democracy movement in the nation in twenty years.²⁹ As I shall explore in context, part of the international community's reluctance to intervene on behalf of the Burmese people in 2007 and since stems from the effects of a robust—and misplaced—general belief in the myth of Westphalia as a cherished norm in international law and political affairs.³⁰

As a matter of structure, Part II of this Note will consider in greater detail the historical evidence surrounding the Peace of Westphalia and the treaties it engendered as brought into new light by recent scholarship challenging the orthodox paradigm. With reason to believe that Westphalian orthodoxy is almost entirely an historical fiction, Part III will explore some likely sources for the fictional account and why it gained the attraction and following it has. Part IV will review the way in which the Westphalian myth helped codify great power rule in the international political and legal order, with particular emphasis upon the UN Charter, the functioning of the Security Council, and the limitations placed on the Universal Declaration of Human Rights. Part V then serves to add color to the present discussion by demonstrating the effects of this attitude toward global order and the prioritization of the myth of sovereignty over humanitarian and democratic concerns. Reflections upon the extent of hindrances created by continued adherence to Westphalian orthodoxy draw the Note to a close in Part VI.

²⁷ See Cohan, *supra* note 2, at 915 (“Westphalian sovereignty may be thought of as an absolute norm of nonintervention.”).

²⁸ See *infra* Part V.A.

²⁹ Thomas Fuller, *Burmese Junta Admits at Least 15 Died in Protests, Envoy Says*, N.Y. TIMES, Nov. 17, 2007, at A5, available at LEXIS, News Library, NYT File (describing the extent of the junta's response to the August-September protests); Seth Mydans, *Monks' Protest Is Challenging Burmese Junta*, N.Y. TIMES, Sept. 24, 2007, at A1, available at LEXIS, News Library, NYT File (describing actions by Burmese monks as the largest pro-democracy protests in two decades).

³⁰ See *infra* Part V.B.

II. HISTORICAL REALITY VERSUS THE MYTH OF WESTPHALIAN ORTHODOXY

A. *Medieval European Political Reality Preliminary to the Thirty Years War*

The standard story told by the proponents—and implicitly accepted by a great many opponents—of absolute state sovereignty is that the authors of the Treaties of Westphalia, in a flash of brilliance, rid Europe forever of the chaos of the petty parochial interests of feudal lords and the universal religious aspirations of the pope and Holy Roman Emperor, bent on domination of the entire *civitas Christiana*.³¹ Insofar as this standard story assumes that authority in Europe in the Middle Ages was divided amongst many different levels, both horizontal and vertical, of political and religious influence, it is correct, but its accuracy and veracity largely end there.³² As has been demonstrated by several authors and researchers, most recently and persuasively by Beaulac, it is clear that the evolution of European power structures from overlapping hierarchies to a system of perfectly equal and well-defined sovereign nation-states neither began nor ended with the Peace of Westphalia, nor did 1648 even signify the end of influence from transcendental institutions such as the Catholic Church or the Holy Roman Empire.³³

Well before the eruption of hostilities that comprised the Thirty Years War in 1618, European territories in the Middle Ages—particularly Germany—were ruled by a hodge-podge of secular and religious authorities lacking formal ties of unity or any of the marks of modern

³¹ See Haass, *supra* note 7 (“In Europe before sovereignty, political authority was shared by empires, kingdoms, duchies, and city-states. Complicating matters further, there was no clear boundary separating religious and secular authority. Popes and kings claimed—and fought over—the same peoples and territories. This patchwork of overlapping authorities proved flammable when the wars of religion ignited following the Reformation. . . . In response, European rulers came to embrace sovereignty as a means to maintain a basic level of order, both within individual countries and in relations between and among them. A pivotal event in this process was the Peace of Westphalia of 1648 Sovereignty helped to stabilize Europe and . . . has been a source of stability for more than two centuries.”); see also Preece, *supra* note 2, at 230, 232 (“The Westphalian doctrine involved the recognition that, in order to avoid perpetual conflict as a result of religious differences, states must be allowed to differ on fundamental aspects of their internal organisation. . . . [Before 1648,] interference in ‘internal’ affairs of territories was easily justified on the basis of some alleged feudal right, or, after 1517, in the name of maintaining the true universal Christian religion against allegedly heretical reformers.”).

³² See Beaulac, *supra* note 5, at 150–51 (“[The Peace of Westphalia in] 1648 does not close the final chapter of the multilayered system of authority in Europe. Rather, it constitutes but one instance where distinct separate political entities strived for more power through independence, which was only achieved long after the Peace.”).

³³ See Randall Lesaffer, *Peace Treaties from Lodi to Westphalia*, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY, *supra* note 20, at 9, 43; Beaulac, *supra* note 5, at 175–76. Cf. Preece, *supra* note 2, at 232 (maintaining that the Westphalian Settlement significantly reduced the authority of the Holy Roman Emperor).

nationalism.³⁴ The average European could expect to be the subject of any number of vassals, feudal lords, secular monarchs or religious nobles under the authority of the pope and, assuming loyal behavior, the object of a varied array of rights in land and duties toward his or her family and local master.³⁵ England was the most centralized and organized monarchy without ties to Rome, but even France and Spain, insofar as they could be called nations, actively resisted feudal ties to the pope and the German Empire.³⁶ In the transcendental sphere, both the emperors and popes attempted to harness the unifying forces of the Crusades to rule the whole of Christendom, though the Catholic Church's efforts were severely hindered by the Great Schism beginning in 1378 that divided the Catholic world and nearly doomed the papacy.³⁷

In the century and a half before Westphalia, the forces of the Reformation did the most to encourage the peoples and princes of Europe to turn away from the Church and to establish secular governments.³⁸ As the Empire lost its ties with the same peoples who had largely abandoned the Catholic Church, those nations—mostly England, France, Spain and many city-states in northern Italy—were the first to establish autonomous regions under mostly secular authorities.³⁹ Though the methods these nations employed in moving toward centralized government were as diverse as the cultures of their citizens, it is perfectly clear that this process began well before the outbreak of the Thirty Years War and its peaceful resolution in the middle of the seventeenth century.⁴⁰

Even among the growing principalities within the Empire itself, local and regional rulers were granted increasing autonomy to set both secular

³⁴ See Beaulac, *supra* note 5, at 152–53, 155 (explaining the various authorities seeking dominance in European affairs, particularly between the Catholic Church and Holy Roman Empire and between those two transcendental institutions and the “countless subordinate civil societies of Europe” comprised of feudal lords and monarchs); see also G. CLARK, EARLY MODERN EUROPE FROM ABOUT 1450 TO ABOUT 1720, at 28 (London, Oxford University Press 1960) (“Europe was not divided up into exclusive sovereignties, but was covered by overlapping and constantly shifting lordships.”); Preece, *supra* note 2, at 232 (“In pre-1648 Europe, with its lack of a clear definition of national sovereignty, but rather a patchwork of rambling and competing feudal empires, there was no clear distinction between internal and external affairs.”).

³⁵ See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 161 (4th ed. 2003) (describing the conflicting “political, legal, religious, and moral allegiances” faced by Europeans during this time period); Beaulac, *supra* note 5, at 152 (describing how heteronomous communities and principalities overlapped, providing individuals with “different rights and obligations” under the decentralized feudal structure).

³⁶ Beaulac, *supra* note 5, at 155, 157–59; see also Preece, *supra* note 2, at 233–34 (describing the various efforts of England, Spain, Sweden, Denmark, France and Switzerland to resist the coercive tactics and religious hegemony of the Catholic Church).

³⁷ Beaulac, *supra* note 5, at 155.

³⁸ *Id.* at 155, 159–60.

³⁹ *Id.* at 157–59.

⁴⁰ *Id.* at 159, 161–62; see also Preece, *supra* note 2, at 233 (“In the century or more prior to 1648, a limited number of European countries succeeded in establishing the essentials of national sovereignty by breaking away from allegiance to the Pope.”).

and religious policy for their subjects in the two centuries leading up to the Thirty Years War.⁴¹ Indeed, the Peace of Augsburg in 1555, negotiated on equal terms between the German monarchs and the emperor, was the most prominent move in the direction of local control, formalizing and codifying the practice of *cuius region eius religio*, i.e., the religion of the king is the religion of the kingdom.⁴² This practice—combined with the increasingly restrictive laws on religious worship imposed by Emperor Rudolf II—provoked considerable resentment between Catholics and the growing Protestant minorities.⁴³

More kindling was added to fuel the eventual conflagration as Protestant and Catholic factions, both within the Empire and in nearly every other European nation—England, Denmark, Sweden, the Netherlands, France, Spain—formed armed coalitions or began arming as a nation, loosely constructed, in response to minor violent outbursts.⁴⁴ Beginning at the close of the sixteenth century, and in a manner eerily reminiscent of the complex network of treaties that accelerated and amplified the First World War approximately three hundred years later, those coalitions formed alliances with each other in anticipation of the other side’s desire to establish religious and political hegemony.⁴⁵

B. *Precipitating Events and Parties to the Thirty Years War*

The limited shifts toward greater local control and, for Lutherans living in ecclesiastical territories, religious tolerance that had been intended by the parties to the Peace of Augsburg were unable to check adequately the increasing attitudes of disaffection and malevolence felt by the Catholic and Protestant populations. Within the territory of the Empire itself, and especially in Bohemia, the Treaty of Augsburg did little to ensure respect for the minority’s religious views.⁴⁶ There, in fact, a devout Catholic, Ferdinand II, was named as the successor to Emperor Matthias, and Ferdinand sent two Catholic councilors to Prague in May of 1618 to manage Bohemian affairs while the emperor took up his new office.⁴⁷

⁴¹ See Beaulac, *supra* note 5, at 159 (“With respect to secular matters, increasingly substantial political concessions were gradually granted in favour of the principalities. As regards religious matters, several powerful German Princes took the Protestant side in the emerging conflicts and they revolted against the Holy Roman Empire.”) (footnote omitted). Beaulac also describes how religious authority was given over to the monarchies in a negotiated settlement with the Empire. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 160.

⁴⁵ *Id.*

⁴⁶ See Arthur MacDonald, *Suggestions of the Peace Treaty of Westphalia for the Peace Conference in France*, 88 CENT. L.J. 302, 305 (1919) (“The religious peace of Augsburg (1555) furnished no settlement to questions stirred up by the Reformation.”).

⁴⁷ See *id.* at 305, 306 (noting the presence of “two detested representatives of the [German] Crown” in Prague in May of 1618 and recalling that Ferdinand II, as emperor early in the war, “said he would rather beg or be cut to pieces than submit to [Protestant] heresy”).

Protestants, fearing a loss of their power under the new emperor, stormed the imperial palace, seized the two councilors and threw them out a window nearly seventy feet off the ground.⁴⁸ Known as the Defenestration of Prague, the near-deaths of the new emperor's councilors at the hands of the Protestant minority sparked a general revolt in Bohemia, a conflict which spread between all German religious forces, waged in part by the armed coalitions of the Protestant Evangelical Union and the Catholic League.⁴⁹

The new and comparatively weak Emperor Ferdinand II, facing an increasingly aggressive Protestant minority, called on his ally Phillip IV, the Spanish king, for assistance. France, though it was primarily Catholic, actively opposed the Habsburg-Spanish alliance and joined forces with Sweden to intervene on behalf of the Protestants; within a decade of the original religious rebellion in Bohemia, the spreading conflict became dominated by the political forces of the allied nations against the Empire.⁵⁰ The battles themselves, primarily fought on German territory, devastated Europe and nearly all of the regions of the disordered Empire, eliminating large proportions of the population through famine and disease as well as destroying vast quantities of property.⁵¹

Several powers, including Denmark, Venice, England and the papacy, failed several times to intervene and mediate a resolution to the conflict. The conflict extended and its destruction intensified partially because of the inability of the belligerents to agree on diplomatic procedures necessary to a multilateral peace settlement.⁵² Some of the disputed procedures concerned the attempts to include the German princes as equal parties to the negotiation, suggesting that there was absolutely no agreement about whether or in what way the principalities should be subordinated to the emperor.⁵³ After approximately nine years of negotiations, concessions finally made by the Empire and the Vatican as the chief mediating authority, permitted joint negotiated settlements with

⁴⁸ Beaulac, *supra* note 5, at 160 n.72.

⁴⁹ *Id.* at 160; *see also* JANIS, *supra* note 35, at 161–62 (describing the defenestration as the onset of the bloody religious wars that were to follow).

⁵⁰ Beaulac, *supra* note 5, at 161.

⁵¹ MacDonald, *supra* note 46, at 305, 306.

⁵² Kenneth Colegrove, *Diplomatic Procedure Preliminary to the Congress of Westphalia*, 13 AM. J. INT'L L. 450, 450 (1919).

⁵³ *See id.* at 450–51 (“The theoretical or ceremonial equality of states as now recognized in international law was by no means established [prior to the Peace], and the contest for pre-eminence among the crowns of Europe embittered national feelings and embarrassed the work of diplomats. The Holy Roman Empire, whose jurists had so positively claimed for it a universal jurisdiction, was crumbling into smaller units; princes and estates within the Empire, technically subordinate but practically independent of the Emperor, added to the diplomatic confusion by their demands for direct participation in international affairs”); *see also* Beaulac, *supra* note 5, at 163 (noting that the insistence of Sweden and France to have the German monarchs as parties to both treaties was a strategy, ultimately successful, to weaken the negotiating position of the emperor).

France in the city of Münster and concurrently with the Queen of Sweden in the nearby city of Osnabrück. This proved a major political and diplomatic victory for the Swedes; they had previously been unable to achieve the respect and recognition accorded to those elite nations on the extreme end of the European power spectrum, most specifically France and the Empire itself.⁵⁴

C. *Treaty Terms and Institutional Changes Incident to the Peace*

The hostilities came to an end without a decisive victory by either side, and in the treaties that emerged, the major parties negotiated territorial, structural and religious terms designed to prevent—or at least to minimize—future armed inter-conflict. It is clear from the complexity of several of the treaties' provisions, particularly those with respect to territorial exchanges and institutional powers, that a number of methods for dividing power were on the table; particular provisions allocating authority could be, and were, traded by the parties in return for concessions elsewhere.

Though on balance Sweden and France won more territorial acquisitions from the Empire than vice versa, Sweden's claims to the new lands under the Treaty of Osnabrück were explicitly limited.⁵⁵ That is to say, Sweden's acquisitions were not complete conveyances but rather new areas held in trust as "imperial fiefs" and for which the Swedish crown was to sit as representative in the Diet.⁵⁶ For France, most of its territorial gains gave it full title, with the notable exception of Alsatia, which remained semi-autonomous due to its privileged position in the Empire.⁵⁷

Though the German monarchs were generally cooperative parties with the Empire while negotiating bilaterally with France and Sweden in the two respective treaties, their inclusion in the talks at the insistence of the latter meant both a weakening of the Empire and some limited modifications of their legal status. Most significantly, Article 65 of the Treaty of Münster and Article 8, paragraph 1 of the Treaty of Osnabrück granted the principalities the power to conclude alliances with foreign nations.⁵⁸ However, these external powers were not to be exercised against the interests of the Empire, lest they come into conflict with the explicit terms of the treaties themselves.⁵⁹ Furthermore, though the treaties conferred a limited power upon the princes now recognized as "inherent in sovereignty," the Empire retained the domestic powers of legislation,

⁵⁴ Colegrove, *supra* note 52, at 480–81.

⁵⁵ Beaulac, *supra* note 5, at 165.

⁵⁶ *Id.*

⁵⁷ *Id.* at 165–66.

⁵⁸ *Id.* at 167.

⁵⁹ *Id.* Beaulac also argues that, far from transferring a new and exclusive power of external relations to the secular princes, the treaties more or less codified a custom that had been followed by the monarchs since the beginning of the seventeenth century. *Id.* at 168.

warfare and taxation through its Diet.⁶⁰ Although these provisions in the treaties can fairly be seen as a further deterioration of the Empire's political and legal authority, they in no way dissolved the Empire into distinct national entities. On the contrary—as Beaulac's research establishes—the treaties reaffirmed some of the Empire's historic powers while recognizing the changing political landscape respecting local German rulers.

Part of that recognition, in addition to extending a limited power of external relations to the principalities, also involved an explicit acceptance of external intervention into the affairs of any party if it failed to abide by the terms of the treaties. Specifically, Article 123 of the Treaty of Münster stated “all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against any one, without distinction of Religion”⁶¹ This term effectively granted the right and, in fact, the legal duty of any party to the Peace—but, implicitly, France and Sweden in particular—to come to the aid of any group, including religious minorities within the Empire, deprived of a right guaranteed to them under the treaties.⁶² Far from establishing inviolable national frontiers and entirely sovereign governments answerable to no external authority, the treaties established “what may fairly be described as an international constitution, which gave to all its adherents the right of intervention to enforce its engagements.”⁶³

Both treaties not only failed to consecrate the idea of absolutely independent secular authorities, they also placed legal restrictions on the German princes with respect to exclusive enforcement of any particular Christian denomination within their territories. Specifically, Article 5 of the Treaty of Osnabrück held that Catholics and Protestants embracing “a [r]eligion different from that of the Lord of the[ir] [t]erritory, shall in consequence of the said Peace be patiently suffered and tolerated” with respect to private religious practice, liberty of conscience and education.⁶⁴ Furthermore, the treaty protected those minorities from discriminatory exclusion from access to merchant guilds, poor houses, hospitals and other

⁶⁰ *Id.* at 167–68.

⁶¹ Treaty of Westphalia: Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies art. 123, October 24, 1648, *available at* http://avalon.law.yale.edu/17th_century/westphal.asp (spelling modernized). In his article from 1948, Gross noted that the inclusion of this provision in the treaty was not without precedent in European peace settlements. Gross, *supra* note 2, at 24.

⁶² *See* Gross, *supra* note 2, at 24 (“These [Westphalian] treaties contain clauses by which Sweden and France not only make peace with the Emperor on certain terms, but pledge themselves to their allies, the subordinate German Princes, that they will ensure that the privileges and immunities conferred on the Princes and free cities of Germany in the treaty shall be upheld and maintained.” (quoting SIR JAMES HEADLAM-MORELEY, *STUDIES IN DIPLOMATIC HISTORY* 108 (1930))).

⁶³ Gross, *supra* note 2, at 24 (internal quotation marks omitted) (quoting DAVID JAYNE HILL, *2 A HISTORY OF DIPLOMACY IN THE INTERNATIONAL DEVELOPMENT OF EUROPE* 602 (1925)).

⁶⁴ Beaulac, *supra* note 5, at 164 (internal quotation marks omitted) (footnote omitted).

institutions available to the majority.⁶⁵ Therefore, as opposed to the attempts at historical reification that were to follow, the Treaties of Westphalia contained several ground-breaking legal provisions for religious pluralism, enforced against domestic authorities in international law by both a transcendental institution and external governments. A codification of absolute and exclusive power in the nation-state these treaties were not.

D. *The European System Before and After Westphalia*

The traditional story told by proponents of Westphalian orthodoxy is that the Peace ended, for all intents and purposes, the authority of all entities above and below the level of the nation-state and left behind a system of secular governments which ruled autonomous territories without any outside interference whatsoever. Unfortunately for the proponents, however, Beaulac's scholarship strongly suggests that this version of history simply does not accord with the legal or political realities of the time.

Were the prevailing view on Westphalia's effects correct, one would reasonably expect the Empire to have quickly withered away along with all other feudal and religious institutions in and among the new independent states of Europe. Instead, the Empire's Diet was charged with the enforcement of the provisions for religious tolerance⁶⁶ and affirmed in its traditional legislative powers.⁶⁷ Beyond the sterile language of the treaties themselves, the Empire retained considerable practical influence and strength, though admittedly it did not thrive as it had in centuries past. Many of the German monarchs remained steadfast in their support of the emperor, the Diet and the imperial army, and the imperial courts retained their jurisdiction and functions well into the eighteenth century.⁶⁸ The office of the emperor itself faced significant constraints on its power, but largely not until after 1711; that date saw the final enactment of the principle of *Landeshoheit* into imperial law, giving explicit effect to the

⁶⁵ *Id.* at 164–65.

⁶⁶ *See id.* at 168–69 (“[T]he Empire remained a key factor according to Westphalia. Indeed, it is through Imperial institutions—such as the Diet and the Courts—that religious safeguards were imposed in decision-making process.”). Obviously, as previously noted, this responsibility was also given over to all parties, particularly France and Sweden, as an explicit legal right of intervention into the internal affairs of any party for violations of the Peace. *See supra* notes 61–63 and accompanying text.

⁶⁷ Beaulac, *supra* note 5, at 167–68, 170. Beaulac suggests that the Diet's effectiveness as an exclusive transnational or national legislative body was significantly hindered from 1648 onward, as it generally required consensus from the Protestants and Catholics on matters of religion, a consensus seldom obtained. *Id.* at 171. It was not until the middle of the eighteenth century, however, that the Diet lost all or nearly all of its influence. *Id.* at 171–72.

⁶⁸ *Id.* at 170, 172.

expanding authority of the monarchs vis-à-vis the emperor.⁶⁹ Thus, the compromises of Westphalia did not mean the dissolution of the Empire into a single or set of independent German nation-states, but rather another reduction in the Empire's influence because of an inability to vindicate the subordination of the Protestants and their allies on the battlefield.

Napoleon's military campaign at the beginning of the nineteenth century is also extremely telling. Though the transfer of lands to secular authorities from ecclesiastical rulers had been underway for hundreds of years in the Empire, that process was by no means complete by 1803, when the Diet passed its last major enactment, the *Reichsdeputationshauptschluss*.⁷⁰ That law was the final act of territorial redistribution, due primarily to French occupation of German lands west of the Rhine. However, as there was no unity among the German principalities, Napoleon's invasion and military conquest was directed against the last emperor, Francis II, who was instructed to abdicate the throne for all territories outside Austria.⁷¹ Therefore, the ultimate termination of the transcendental Holy Roman Empire did not come as a result of Westphalia or even at the behest of the secular German polities, but rather from an external threat made by imperial France, Europe's new hegemonic power.

In addition, institutions of authority other than the nation-state continued to exert considerable influence in the centuries following the Peace. The Vatican, though not a politically unifying force as it had been during the Crusades, had developed and implemented doctrine since the beginning of the Reformation both to gather new adherents and to retain those Europeans considering conversion to the multiplicity of Protestant sects. But despite the internal division of the Reformation and Counter-Reformation, Rome nevertheless continued to act beyond its limited territory as a unifying spiritual and cultural bulwark against non-European powers, particularly the Ottoman Empire. Moreover, the papacy's willingness to mediate the end of the Thirty Years War betrays the proposition that the Peace removed it as a player in European affairs. Thus, any conclusion that the European nations, including pre-revolutionary France, did or even could act utterly without regard to the dictates and preferences of the Vatican would be highly questionable. After the Congress of Vienna ("the Congress"), many European regions such as Italy and the German Confederation also lacked clear boundaries under a unified government, both necessary preconditions for statehood.⁷²

⁶⁹ *Id.* at 172. The origins of the limitation of the office of the emperor imposed by the lower feudal monarchs date back to the Golden Bull, a constitutional provision establishing the rules for electing the emperor, passed nearly three hundred years before the Peace of Westphalia. *Id.*

⁷⁰ *Id.* at 172-73.

⁷¹ *Id.* at 173 n.148.

⁷² See Steiger, *supra* note 20, at 61.

Thus, it was not only the continued significance of the Holy Roman Empire long after the Peace, but also the persistence of these non-national institutions and circumstances which defy the simplistic account portrayed by Westphalian orthodoxy.

III. HOW THE WESTPHALIAN MYTH BECAME ORTHODOXY

A. *Likely Sources for the Orthodox Paradigm*

Given that neither the language of the treaties of Westphalia themselves nor the practical reality of European power in the years following 1648 suffice to justify the claims of Westphalian orthodoxy, the natural question can be put plainly: where did scholars and diplomats of recent memory go astray? Put another way, if the traditional story of Westphalia—that the chaos of feudal Europe was quickly transformed into a system of co-equal, independent and absolutist nation-states—has no basis in legal or historical fact, why is the traditional story so widely accepted and disseminated?

From a Western philosophical perspective, medieval notions of secular authority tempered by the dictates of heaven gave way to greater emphasis on positive law in the period just before, and for centuries after, Westphalia. The process began with Jean Bodin, who wrote in his 1576 treatise *Republique* that the person of the sovereign at the head of a government was the ultimate maker of law and subject to no restriction except the divine law of God.⁷³ The initial grant of sovereignty to an earthly prince flowed along hereditary lines established by the Catholic Church, and all persons under the command of the sovereign were bound to obey that positive law unless that law contradicted a higher command from God.⁷⁴ Bodin went beyond this limiting condition in his later writings by arguing that, in order for the earthly prince to be an effective ruler, the power he wielded had to be both “absolute and unchallengeable.”⁷⁵

Hugo Grotius, who had been Sweden’s ambassador during the negotiations for the Peace of Westphalia, also redirected post-Westphalian views of sovereignty among academics, philosophers and monarchs with his 1625 work *De Jure Belli ac Pacis*.⁷⁶ Drawing on that natural law tradition of sixteenth-century Spanish theologians, and writing partially in response to the brutal excesses of the Thirty Years War, Grotius

⁷³ Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 372 (2005).

⁷⁴ *Id.*

⁷⁵ *Id.* at 372–73 (citing JULIAN H. FRANKLIN, *JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY* 23 (1973)).

⁷⁶ That is, *The Law of War and Peace*.

emphasized that the law of nations both regulated the conduct of war itself and the voluntary, reciprocal interactions between sovereign states.⁷⁷ As one of the representatives at Westphalia, Grotius did not claim that rulers had unfettered discretion to violate natural law. Taking just the opposite view, Grotius stated:

Least of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary, *war ought not to be undertaken except for the enforcement of rights*; when once undertaken, it should be carried on only within the bounds of law and good faith.⁷⁸

Instead, Grotius' contribution to the philosophical swing toward positivism involved the diminished roles the Empire and the Vatican played in his theory of international law and peace. That is to say, Grotius argued that both natural and divine law demanded that rulers were bound not just to make but also to respect in good faith mutual promises of peace and cooperation as members of the society of nations.⁷⁹ As those obligations were applicable directly to the sovereign nations who made them, the previous tasks of the emperor and pope as instruments of moderation were concomitantly restricted.⁸⁰ Under his theory, then, Grotius made it incumbent on states to police themselves by following a "positive law of nations grounded on moral notions of covenant."⁸¹

While Grotius had moved international commitments from the realm of transcendental institutions to a more positive law of nations, the most influential personality on the topic of sovereignty addressed the scope and applicability of domestic positive law. Thomas Hobbes, who wrote *The Leviathan* shortly after the Peace of Westphalia and while in exile in France, focused a great deal of his attention to describing the most appropriate characteristics of sovereign governments.⁸² For him, the philosophical ideal demanded that any authority claiming the status as a sovereign had to command the exclusive allegiance of its subjects and could not be restricted by any force external to it.⁸³ Ignoring the details of

⁷⁷ JANIS, *supra* note 35, at 164–66.

⁷⁸ *Id.* at 169 (emphasis added) (quoting HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 18 (Kelsey trans., 1925)).

⁷⁹ JANIS, *supra* note 35, at 166–68.

⁸⁰ *Id.* at 169–70.

⁸¹ *Id.* at 170.

⁸² *See id.* at 162 ("Hobbes' lasting contribution was the envisioning, in his own words, of 'that great Leviathan, or rather (to speak more reverently) of that *Mortall God*, to which we owe under the *Immortall God*, our peace and defence.' Rather than believing in any number of loyalties, Hobbes believed that all men required 'a Common Power, to keep them in awe, and to direct their actions to the Common Benefit.'" (quoting THOMAS HOBBS, *LEVIATHAN* 89 (Everyman's Library ed. 1987))).

⁸³ *See* JANIS, *supra* note 35, at 163 (explaining that Hobbes had asserted that "the key actor on the world's stage was the sovereign state to which all loyalty was due internally and which was unrestrained externally").

the Westphalian Peace, and clearly breaking from medieval European feudal structures, Hobbes demanded that the sovereign state exercise plenary powers in a unitary form of government centered around a single person, the absolute monarch.⁸⁴ Because individuals came together in the state of nature to form a government for the sole purpose of collective security, a novel concept in Western political philosophy,⁸⁵ any limitation upon the power of the sovereign, external or internal, was for Hobbes an unacceptable violation of the rights of the individuals who formed it.⁸⁶

Hobbes' impact upon Western thinking regarding the proper location and extent of ultimate law-making power within a nation cannot be overemphasized. In a very real sense, Hobbes' writings were instrumental in the way Western societies organized themselves for hundreds of years following their publication, including up to today. Further, the particular values and definitions of sovereignty Hobbes utilized in his works were so influential and lasting because they came at a time when Europe was moving from a feudal to a state-centered political system.⁸⁷ Those values also persisted because his political theories regarding the state of nature and the social contract—central themes in Enlightenment-era philosophy—inspired so many later thinkers, including Locke, Rousseau, Montesquieu, Jefferson, and even Kant and Mill.

Following Hobbes, the dominant philosophical stance on domestic legal authority had decisively moved from multi-tiered, decentralized organization among the entire *civitas Christiana* to unitary, absolutist sovereign states. Yet this shift from the religious or natural law traditions to positivist theory in Europe did not end with Hobbes. Jeremy Bentham—the founder of utilitarianism who famously derided natural law as “nonsense upon stilts”—also left his mark on the movement toward legal positivism.⁸⁸ Bentham's contribution was to alter the understanding

⁸⁴ See Thomas Hobbes, *Leviathan*, in SOCIAL AND POLITICAL PHILOSOPHY 139, 151–52 (John Somerville & Ronald E. Santoni eds., 1963) (explaining that the state, as a “multitude so united in one person, is called a *commonwealth*,” or “that great Leviathan,” and that “he that carrieth this person, is called *sovereign*, and said to have sovereign power; and everyone besides, his *subject*”).

⁸⁵ That is, all medieval European notions of legitimate authority had been based on a delegation of divine power, through the Church, to a secular authority. See *supra* notes 73–74 and accompanying text. For Hobbes, however, the state of nature represented the human condition prior to any political organization of any kind, and as Hobbes envisioned such a condition to be a perpetual state of war, humans were justified in extracting themselves from that condition by vesting their rights in a sovereign for their mutual protection. The fact that Hobbes based the organizing motivation for government on the needs and rights of individuals, apart from any divine delegation, was a truly revolutionary shift in political theory and arguably marked the beginning of the Enlightenment. Kelly, *supra* note 73, at 375.

⁸⁶ Hobbes, *supra* note 84, at 151.

⁸⁷ JANIS, *supra* note 35, at 162.

⁸⁸ Jeremy Bentham, *Anarchical Fallacies* L-6, available at <http://jan.ucc.nau.edu/~dss4/bentham1.pdf>. It is also worthy of note that in this same work—indeed, as an indispensable portion of his argument—Bentham defines natural rights as those which pre-exist law but determines that rights

of the law of nations, which had during the Middle Ages recognized some protection for individuals incident to the laws of war and as members of a global Christian community.⁸⁹ Though his actions were perhaps inadvertent, Bentham proposed in 1789 replacing “the law of nations” with a new term, *international law*, which he defined in such a way as to eliminate any inclusion of individuals as subjects of the discipline.⁹⁰ In so doing, Bentham distorted the traditional understanding of the positive laws by which nations abided. Individuals, if they were to have any rights whatsoever, could only obtain them at the behest of their own state; as defined by Bentham, no person could ever claim protection in international law against the actions of the sovereign government of which he or she was a national.⁹¹

The philosophical shift in both domestic and international legal theory from natural law to might-makes-right positivism was dramatic.⁹² Though there were pockets of resistance to the change,⁹³ a tide of positivist legal theory washed into Western thought in the eighteenth and nineteenth centuries, relegating the protection of individuals and sub-national groups to a derided discipline of “private” international law.⁹⁴ Even the more favored and respectable branch, “public” international law, which concerned itself solely with the interactions of nation-states as Bentham had proposed, was scorned by the English legal positivist John Austin, who called it merely “positive morality” and not really a form of law at all.⁹⁵

The political power and organization of Western civilization tracked, and was influenced by, these positivist and absolutist notions of sovereign

cannot but be based upon law, and insofar as laws require a sovereign, i.e., must be positive laws, no individual can be said to have any right without having it granted by the sovereign. *Id.* at L-5–6.

⁸⁹ See Brand, *supra* note 2, at 1687–88 (“[In the Middle Ages, t]he ‘oneness’ of humanity was to be found through the pervasive unity of God (*jus divinum*) in the *Respublica Christiana*. . . . [M]edieval notions of sovereign power included limitations—based on abstract moral rights. Thus, there were bounds beyond which the sovereign could not pass in its relations with the individual, and individual rights which were not alienable to the sovereign.”) (footnotes omitted).

⁹⁰ See JANIS, *supra* note 35, at 242–43 (describing how Bentham, in intending to replace the law of nations with international law, “really went much further” primarily by assuming that “international law was exclusively about the rights and obligations of states *inter se* and never about the rights and obligations of individuals”); JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY* 101 (2004) (explaining that Bentham’s new term “[i]nternational law’ . . . was a law governing the mutual transactions between sovereigns—a law that was entirely *between* nations, rather than reaching into their internal affairs”) (internal quotation marks omitted).

⁹¹ See JANIS, *supra* note 35, at 244 (“Bentham excluded from the domain of his new subject all of those rules in the traditional law of nations that concerned private rights and obligations.”).

⁹² See *id.* at 246 (“Regardless of its failings, Bentham’s definition of international law as a law for states alone has had a potent effect. The states-only view of international law was generally adopted by nineteenth-century legal positivists who went further than Bentham in elaborating the ramifications of the definition.”).

⁹³ See *id.* at 248 (“Despite the positivists’ philosophical rejection of individuals as subjects of public international law, some parts of legal practice never entirely abandoned the more inclusive doctrine of the traditional law of nations.”).

⁹⁴ *Id.* at 246 (internal quotation marks omitted).

⁹⁵ *Id.* (internal quotation marks omitted).

states. With the influence of transcendental institutions in sharp decline, European monarchs consolidated power into regimes of unquestioned authority, and why not? Their actions had been sanctioned by the seemingly progressive theories of the Enlightenment philosophers. Even the popular democratic revolutions in the United States and France focused on shifting the locus of sovereign power from the person of the monarch to the people, summarized by the expression “popular sovereignty.” However, despite the democratic attempt to empower the citizens directly with civil and political rights, neither revolution sought to abandon the positivist view. If anything, the struggle for democratic self-government in those nations reinforced the idea of internal self-governance without admitting the possibility of outside interference in the operation of the new sovereign government.⁹⁶

As legal positivism became orthodoxy in the nineteenth and into the early twentieth century,⁹⁷ absolutist, Hobbesian-style sovereignty became more commonplace in legal and political fact.⁹⁸ Unlike medieval Europe, where groups oppressed by a local lord or monarch could conceivably bring their grievances to the attention of the pope or emperor, no such avenue of redress was available at all, particularly following the dissolution of the Empire in 1806. A significant catalyst in solidifying the notion of the absolute sovereignty of European nation-states was the attempt by imperial France under Napoleon Bonaparte to gain control of all of Europe.⁹⁹ Following the bloody and turbulent Napoleonic Wars, during which the *le petit caporal* attempted to establish France as the dominant power on the continent, old European dynasties consolidated power under the guise of attempts to banish such interference and warfare.

The Congress of Vienna in 1814–1815 was the foremost vehicle for that purpose, concluded primarily between England, Russia, France,

⁹⁶ The United States, as a new nation and a comparatively weak power on the world stage, made significant strides toward joining the new and independent nation-states of Europe through its recognition as a sovereign nation by Great Britain in 1789 and the implementation of the Monroe Doctrine in 1823. See Preece, *supra* note 2, at 234–35 (“The independence of the United States added it to the Eurocentric world of nation-states, especially once the other American states gained their independence. This process was greatly facilitated by the enunciation by President Monroe of the Monroe Doctrine, in 1823, as the fundamental principle of United States foreign policy.”). This was also effectively the method by which the nation-states system spread to the newly independent Latin American nations. *Id.* at 235.

⁹⁷ See JANIS, *supra* note 35, at 246 (“For most of the nineteenth and early twentieth centuries, the positivist definition of public international law as a law for states alone dominated the theory of international law.”).

⁹⁸ See Victoria Tin-bor Hui, *Toward a Confucian Multicultural Approach to a Liberal World Order: Insights from Historical East Asia*, 99 AM. SOC’Y INT’L L. PROC. 413, 413 (2005) (“In the so-called Age of Reason, sovereignty was understood as a principle that permitted state rulers to do anything in their own self-interest. It was fair game for the strong to encroach on the weak. In the eighteenth century, Prussia, Russia, and Austria carved up Poland.”).

⁹⁹ See *id.* (listing imperial France’s attempts to conquer Europe as an extension of French sovereign power); Preece, *supra* note 2, at 231.

Austria and Prussia. That covenant embodied—or at least assumed—the principles of autonomous and exclusive nation-states, a concept which had been on the rise since the Middle Ages.¹⁰⁰ As a marked departure from the medieval approach of mediating authorities such as the Holy Roman Empire or the Catholic Church, the Congress laid the groundwork for a supposedly stable system of balanced alliances exclusively between the so-called Great Powers.¹⁰¹ However, the attempts by the Great Powers to restore those pre-revolutionary dynasties by expanding their territories led to the inclusion of large ethnic minorities—German, Greek, Italian, Serbian and Polish, among others—within their borders. Without any outlet for their grievances, the minorities’ demands for representation turned into nationalistic revolutions, though most were successfully suppressed through the joint military efforts of the Great Powers.¹⁰² While the Congress certainly re-ordered the political map of Europe, the creation of the German Confederation and the retention of a divided Italy left the transition to a well-defined system of independent nation-states somewhat incomplete.¹⁰³ Italian and German (excluding Austria) unification under a centralized government would not occur until approximately 1871,¹⁰⁴ though there is no doubt that by this time the European Great Powers could act unilaterally within their own territories without fear of reprisals, coercion or condemnation by external powers, let alone legal constraints.

The concept of exclusive internal authority also suited the European powers because many had established—or were still establishing—vast colonial empires in Latin America, Africa and Asia.¹⁰⁵ Knowing that the native peoples in those lands often—but of course not always—lacked one or more of the major attributes of “civilized” European nation-states such as a distinct territory, centralized government or formal external relations, it was easy for a European state to regard native peoples as having no legal

¹⁰⁰ See Preece, *supra* note 2, at 231 (“At the Congress of Vienna, held from 1814–15, the European leadership found no reason to question national sovereignty when drawing up the European peace. Indeed, external sovereignty was developed further at the Congress . . .”).

¹⁰¹ See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 73–74, 137–38 (1987) (marking the rise of the Great Powers leading up to the Congress of Vienna and describing the evolving European states system at the time as one “fashioned along lines which ensured a rough equilibrium” and a “balance of power”).

¹⁰² See Hui, *supra* note 98, at 413 (“In the post-Napoleonic era, great powers in the Concert of Europe used armies to put down revolutionary movements across Europe.”).

¹⁰³ As to the exact legal and institutional details of the German Confederation, the multi-tiered federal entity created by the Congress of Vienna was considerably complex. Suffice it to say, because the fates of the thirty-nine small principalities in the Confederation were determined to a large extent by Prussia and the Austrian Empire, this political body was clearly an aberration when compared to the ideal of well-defined and independent nation-states envisioned by Westphalian orthodoxy. Though the Holy Roman Empire had fallen in 1806, even the Congress of Vienna failed to establish even a *de jure* Westphalian state system throughout Europe, nearly 150 years after the Peace which is said to have done so.

¹⁰⁴ Steiger, *supra* note 20, at 61.

¹⁰⁵ Hui, *supra* note 98, at 413.

rights which it, as a colonizing power, was bound to respect.¹⁰⁶ In addition to the economic incentives of colonization, the competitive pressures from other European powers created a kind of arms race for exploiting local peoples and resources.¹⁰⁷ Certainly not eager to encourage or create external institutions or legal processes that would scrutinize their repressive colonial practices from a humanist or religious perspective, the European states following the Congress largely turned away from continental problems in favor of expanding their economic and military capabilities. As those capabilities increased, and as colonial competition intensified, the European powers organized themselves into an alliance system, hoping to ward off future conflict through a balance-of-power approach. Despite the obvious flaws of this model for international peace and security,¹⁰⁸ it took not one but two world wars and a genocide of unprecedented scale to bring those defects to the sober attention of the European nations.

B. *False Historical Attribution of the Myth to Westphalia*

Even though Europe has today entirely abandoned the system of absolutely sovereign nation-states,¹⁰⁹ the European influence on the modern international system cannot be doubted.¹¹⁰ To the extent that the European system of absolutist nation-states at some point resembled the theory posited by Westphalian orthodoxy, the theory surely carries some explanatory value, even if it simply fails to date accurately when the change took place or how it occurred—two highly significant flaws. It is possible to imagine that the state system could exist as it does today and that something *like* Westphalian orthodoxy—call it “European absolutism,” for instance—could be utilized to describe accurately that portion of its evolution. Yet the legal and historical literature does not speak of something like European absolutism; Westphalian orthodoxy itself is the dominant model. So a question posed earlier still remains: when and how did modern scholars and policy makers, nearly all of whom seem to recite Westphalian orthodoxy as if it were unquestionably true,

¹⁰⁶ Kelly, *supra* note 73, at 385–86.

¹⁰⁷ *Id.* at 383.

¹⁰⁸ See Hui, *supra* note 98, at 414 (noting the excessive death and destruction in Europe in the centuries prior to the Cold War, rejecting the explanatory hypothesis that Europeans as a people are “uniquely belligerent,” and instead comparing the high frequency of devastating warfare in Europe to that of China between 656 and 221 BCE, when the Chinese system most resembled the early modern European state-system and, not coincidentally, Sun Tzu wrote his famous work, *The Art of War*).

¹⁰⁹ If anyone doubts this assessment, one need only take a close look at the history of the European Union as a robust supranational system for economic and diplomatic cooperation, as well as the functioning of the European Court of Human Rights, easily the most successful regional human rights regime in the world.

¹¹⁰ See, e.g., Kelly, *supra* note 73, at 391 (“As the creator of state sovereignty, Europe was also, in fact, the chief exporter of the notion of state sovereignty to the rest of the world.”).

come to believe that the Peace of Westphalia marked *that* kind of decisive shift in the legal and political relations of Western powers?

To a certain extent, Westphalia may have historical appeal because certain aspects of the treaties relate to the recognition of European nations and others pertain to the semi-constitutional relationship between the Empire and the German monarchs.¹¹¹ In addition, as has been noted previously, the Peace did mark one event in a progressive series from decentralized power to absolutist nation-states,¹¹² though the latter probably reached its zenith sometime in the late nineteenth or first half of the twentieth century. It is undoubtedly tempting for a proponent to state unequivocally the origin of a complex historical and legal process, particularly in light of the fact that such processes often overlap and to delineate stark paradigm shifts is to simplify otherwise immensely complex systems.¹¹³ Furthermore, when the proponent has taken it upon himself or herself not only to describe but to defend the present system, the temptation to enhance its legitimacy by ante-dating a definitive point of origin may be irresistible.

An oft-cited work of scholarship on the meaning of Westphalia appears to have provided the proponents of the myth with an intellectual starting point, even though the original author was far more equivocal in his assessment than its proponents turned out to be. In 1948, with the tercentenary of the Peace approaching, Leo Gross published an article examining the significance of Westphalia in the development of the modern state system.¹¹⁴ In that work, Gross noted a common thread running between the Peace and later international instruments such as the League of Nations and the Charter of the United Nations, namely those provisions calling for the protection of individual rights and the prohibition of discrimination against minorities.¹¹⁵ Gross also emphasized the novelty of the Peace treaties' terms for multilateral pacific settlement of disputes and that, though Westphalia helped in replacing the transcendental authorities and "divorcing [international law] from any particular religious background . . . [i]t would seem hazardous, however, to regard the Settlement of Westphalia and the work of Grotius as more than stages in the *gradual, though by no means uniform, process which antedates and continues beyond the year 1648.*"¹¹⁶ As to drawing conclusions, Gross also explicitly warned that his own arguments were "necessarily tentative and

¹¹¹ Beaulac, *supra* note 5, at 166–68.

¹¹² See *supra* notes 32–33 and accompanying text.

¹¹³ See Beaulac, *supra* note 5, at 175–76 (discussing the tendency for historians to "ante-date the beginning of pivotal phenomena such as state sovereignty" for that reason).

¹¹⁴ See Gross, *supra* note 2, at 21 ("In view of this continued influence of the Peace of Westphalia, it may not be amiss to discuss briefly its character, background and implications.").

¹¹⁵ *Id.* at 22–24.

¹¹⁶ *Id.* at 25–27 (emphasis added).

intended to indicate rather than to solve the problems connected with the rise of the modern state system and the particular role of the Peace of Westphalia in this vital process.”¹¹⁷

Later scholarship on the topic would not share Gross’s original cautious assessment.¹¹⁸ Instead, much attention was paid to several now-famous passages that suggested Gross had conclusively determined Westphalia to be the definitive origin of the modern system of absolutely sovereign and independent nation-states.¹¹⁹ In promoting this narrow and distorted account of history, Gross’s contemporaries and those who were to follow could justify their opposition to mid-twentieth-century attempts to establish legal mechanisms for the enforcement of human rights. That is to say, Gross, perhaps inadvertently, provided such opponents with an additional arrow in their quiver; not only was legal protection of international human rights a bad idea generally, it was antithetical to the fundamental principles of the modern sovereign state system that had existed for three hundred years.¹²⁰ Unfortunately, as should become clear shortly, the latter basis, descriptive but inaccurate, has come to replace genuine normative debate over the optimal balance between domestic power and human rights enforcement.

IV. THE MYTH’S IMPACT ON THE UNITED NATIONS SYSTEM

Regardless of the extent to which scholars of law and international relations later (mis)used Gross’s writing, the national sovereignty’s myth played a critical role in retarding the progress of human rights enforcement following the Second World War.¹²¹ In this Part, for purposes of foundation, I shall briefly describe the historical and political background that led up to the formation of the United Nations system. From that

¹¹⁷ *Id.* at 30.

¹¹⁸ See, e.g., Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 271–72 & n.15 (1978) (labeling Gross’s conception of the era of the Peace an “accurate[] characteriz[ation] as the beginning of a new world order”).

¹¹⁹ Two particular passages have been especially prominent: “The Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world.” Gross, *supra* note 2, at 28. “In the political field [Westphalia] marked man’s abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.” *Id.* at 28–29.

¹²⁰ It is important to understand that Gross’s supposed attribution did not mark the starting point of the myth’s influence, but rather it helped to solidify the link between the Peace of Westphalia in history to the pre-existing belief, held by some, that absolute sovereignty was a kind of basic norm in international affairs. The myth had force and effect in international law and political relations well before it became conceptually anchored to Westphalia. For example, while a defendant at the Nuremberg trials in 1945–1946, Hermann Goering defended the premeditated horror of the Holocaust against his critics by declaring: “But that was our right! We were a sovereign State and that was strictly our business.” PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* 202–04 (2d ed. 2003).

¹²¹ *Id.* at 160.

foundation, I shall review the effect of the Westphalian myth on two related events of the immediate post-war era: the drafting and adoption of Chapters I and VII of the UN Charter, and the conversion of an international bill of rights into the Universal Declaration. Those events, significantly altered by the rhetorical force implicit in the term sovereignty, illustrate the crippling and lasting influence the Westphalian myth has on legal progress for human rights.

During World War II, the Allied powers employed extensive rhetoric of individual rights and social progress in order to convince nations to form a coalition against the Axis, most centrally in the creation of the Atlantic Charter.¹²² In particular, the Atlantic Charter pledged the Allied nations to promoting self-government, economic and labor rights, human rights, and a redesigned global legal order.¹²³ As a result, many smaller nations and activists believed that human rights and the protection of minorities would take center stage in the new United Nations system.¹²⁴ In fact, the Soviet Union, the United States, and Great Britain seemed to reconfirm those ambitions with the adoption of the Declaration of the United Nations on the first day of January 1942, which stated that its signatories would adhere to the principles in the Atlantic Charter.¹²⁵ The leading diplomatic representative for the United States, Undersecretary of State Sumner Welles, was instrumental in directing U.S. policy in favor of human rights norms. When he was assigned to head the State Department's Special Subcommittee on International Organization, Welles recognized that the post-war planners would face a crucial question: "*How do we limit sovereignty?*"¹²⁶

The first real opportunity for significant post-war planning came at the Dumbarton Oaks conference in late summer and fall 1944. There, with victory in Europe seemingly in hand, the four leading Allied powers—Great Britain, the United States, the Soviet Union, and China—met to decide the new course for the post-war international system. By that time, Undersecretary Welles had resigned his post and had been replaced in his advisory role to F.D.R. by the far more conservative Secretary of State Cordell Hull. During the negotiations, China surprised the other three Allied powers by openly expressing their willingness to "cede as much of its sovereign power as may be required," and they expected that Britain,

¹²² See *id.* at 137–40, 154–55 (detailing the effects of the Atlantic Charter upon small nations, oppressed peoples, and democratic movements).

¹²³ See *id.* at 138–39 (describing these portions of the Atlantic Charter).

¹²⁴ *Id.* at 139.

¹²⁵ *Id.* at 140.

¹²⁶ *Id.* at 157–59 (internal quotation marks omitted) (quoting Franklin Roosevelt Library, Sumner Welles Papers, Box 189, P-IO, Document 3, untitled, 31 July 1942).

the United States, and the Soviets would follow suit.¹²⁷ Understandably fearing that placing too much emphasis on human rights would encourage scrutiny of their own domestic practices, the Soviet Union, the United States, and Great Britain all agreed that human rights language—let alone a legal regime for enforcement—would be excluded from the new universal organization.¹²⁸ The Chinese proposal for granting the United Nations the power to intervene into the internal affairs of member states was rejected by the other three Allied powers outright.¹²⁹ One alternative the United States delegation suggested would have included two Charter provisions, one obligating the member states to respect human rights in their domestic legal systems and another empowering the United Nations to investigate allegations that a member state had failed in these obligations, but the Soviet Union and Great Britain blocked that initiative as well.¹³⁰ By October, when the Dumbarton Oaks conference ended, no provision for United Nations enforcement of human rights of any kind could be found within the agreement. In fact, six months later, in April 1945, at the commencement of the United Nations Conference on International Organization in San Francisco, the four leading Allied powers—now referred to as the Four Sponsoring governments—proposed a series of amendments to their Dumbarton Oaks framework, including a new paragraph to be found in Chapter I, Article 2 of the UN Charter:

Nothing contained in this Charter shall authorize the Organization to intervene in matters which are essentially within the domestic jurisdiction of the State concerned or shall require the members to submit such matters to settlement under this Charter; but this principle shall not prejudice the application of Chapter VIII, Section B.¹³¹

In order to understand the significance of the Four Sponsoring governments' Chapter I, Article 2 proposal, a review of the UN Charter's provisions for enforcement under Chapter VII is essential. Meeting in separate conference delegations that paralleled the final structure of the Charter, the representatives to the San Francisco conference in Commission III decided to vest responsibility for peace and security actions in the Security Council, operating under the assumption that any

¹²⁷ *Id.* at 161 (internal quotation marks omitted) (quoting T.V. Soong, speech of 9 June 1942, in Document 26831-11, "Public Statements by Chinese Leaders on International Organization," from the British Foreign Office in NANZ, EA 2, 1945/6b, File 111/8/8(1)).

¹²⁸ LAUREN, *supra* note 120, at 162–63.

¹²⁹ *Id.*

¹³⁰ *Id.* at 163.

¹³¹ UNITED NATIONS INFO. ORG., *Amendments Proposed by the Governments of the United States, The United Kingdom, The Soviet Union and China*, in 3 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, at 622, 623 (1945) [hereinafter DOCUMENTS OF THE UNCIO].

such measures required the unanimous approval of the great power nations. In the first instance, Article 39 of the Charter was written to give the Security Council the exclusive authority to determine what actions constitute a breach or threat to peace,¹³² and for instances in which military forces are required, such forces were to be provided by the member states, held “immediately available” for the Security Council’s command.¹³³ Short of the deployment of forces, Chapter VI of the Charter permitted referrals of disputes to the Security Council and authorized the Council to investigate such disputes and to recommend procedures for pacific settlement.¹³⁴ However—and this point is crucial to understanding the meaning of the United Nations’ enforcement powers—there is no provision in the Charter which obligates or even authorizes the organization to intervene in the event of widespread or systemic human rights atrocities committed by a state against its citizens.¹³⁵

The delegates to Commission I at the San Francisco conference understood these Chapter VII enforcement powers because Commission III had already accepted the basic structure initially proposed at Dumbarton Oaks.¹³⁶ Commission I was assigned the task of considering amendments to the first two chapters of the Dumbarton Oaks agreement, or what would eventually become the UN Charter’s preamble, Chapter I: Purposes and Principles and Chapter II: Membership. The Four Sponsoring governments’ amendment to Chapter I, Article 2 was eventually to become Article 2(7) of Chapter I of the Charter, or what is known commonly as the “domestic jurisdiction clause.”

The *travaux préparatoires* of the Charter shed light on the origin of that clause, and some inferences may be drawn as to the rhetoric used and values to which the delegates appealed in their debates, though the documents themselves are largely limited to minutes taken from meetings and unfortunately do not include verbatim transcripts of the delegates’ exchanges. Commission I representatives had the Dumbarton Oaks framework at hand, which provided the basic structure for the new organization. Debate over the preamble and Chapter I, purposes and principles, was delegated to Committee 1 of Commission I, and a good

¹³² U.N. Charter art. 39.

¹³³ *Id.* art. 43, para. 1; *Id.* art. 45. Critical to the understanding of the function of the Security Council, of course, is that each of the five permanent members have a veto power, resulting in an utter inability for the Security Council to take any action with which one of the permanent members disagrees. *Id.* art. 27.

¹³⁴ *Id.* arts. 33–38.

¹³⁵ Presumably, the Security Council could enact coercive measures through its Chapter VII authority, though such actions are incumbent upon a finding, under article 39, of a threat to peace, breach of peace or act of aggression which jeopardizes *international* peace and security. See *infra* Part V.B.

¹³⁶ UNITED NATIONS INFO. ORG., *Supplement to Report of Rapporteur, Committee I/1, to Commission I (Doc. 944, I/1/34 (1), June 13) Chapter II, Article 8, in 6 DOCUMENTS OF THE UNCIO, supra* note 131, at 486, 487–88.

deal of its work in May and early June 1945 consisted of considering and approving small proposed amendments to those three sections.¹³⁷ However, even though the drafting subcommittee of Committee 1 had produced complete drafts of those sections by June 9, 1945, the Four Sponsoring governments' Chapter I, Article 2 proposal was left for exclusive consideration later in the committee's agenda.¹³⁸

In one of the *travaux*'s few documents opposing the amendments offered by the Four Sponsoring governments, Norway's representative, Dr. Arnold Raestad, objected that the domestic jurisdiction clause would impose "a very grave limitation" on the Security Council's ability to mediate peaceful settlements.¹³⁹ In its view, the member states in nearly any such dispute could assert that the necessary concessions were within their domestic jurisdiction and were thus beyond the United Nations' competence.¹⁴⁰ The Norwegian delegation noted that even the Council of the League of Nations was authorized to offer conciliation for domestic conflicts, and it suggested that the United Nations' efforts for peace could not be realized "without a certain willingness on the part of the member states to recede from rigid concepts of national sovereignty."¹⁴¹

On June 14, 1945, the Australian delegation put forth a memorandum in support of a minor change to the amendment by the Four Sponsoring governments, one which illustrates some of the rhetorical devices employed in favor of the domestic jurisdiction clause.¹⁴² The Australian memorandum was in almost full agreement with the Four Sponsoring governments' amendment, and it posed the question of whether the Charter should contain a prohibition on the United Nations' intervention into matters of domestic jurisdiction.¹⁴³ The answer to that question, the Australian delegation argued, should be affirmative: "No [international] organisation should be permitted to intervene in those domestic matters in which, *by definition*, international law permits each state *entire liberty of action*."¹⁴⁴ Further, in asserting its main point of contention—that the Security Council could be used as a tool by stronger nations for extorting

¹³⁷ See UNITED NATIONS INFO. ORG., *Report of the Rapporteur of Committee 1 to Commission I*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 387, 387–401.

¹³⁸ UNITED NATIONS INFO. ORG., *Appendix to Rapporteur's Report, Committee I/1 (Doc. 885, I/1/34, June 9, 1945): Approved Texts of Preamble, Chapter I, and Chapter II*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 402, 402–04.

¹³⁹ UNITED NATIONS INFO. ORG., *Statement by the Norwegian Delegation (Dr. Arnold Raestad) on Paragraph 8, Chapter II: June 12, 1945*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 430, 430.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 431–32.

¹⁴² UNITED NATIONS INFO. ORG., *Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter II (Principles): Memorandum by Dr. H. V. Evatt on Behalf of the Australian Delegation*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 436, 436.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 436–37 (emphasis added).

concessions from less powerful ones—the Australian memorandum implicitly revealed its authors’ hidden assumptions about sovereignty:

The freedom of action which international law has always recognised in matters of domestic jurisdiction [ought not to become subject] to the full jurisdiction of the Security Council. . . . *By definition*, a state is free, within the limited sphere of domestic jurisdiction, to adopt *whatever policy it thinks best*.¹⁴⁵

On the afternoon of June 14, 1945, Committee 1 met in the Veterans Building in San Francisco to discuss the proposed amendment offered by the Australian delegation.¹⁴⁶ The majority of the discussion concerned Australia’s proposal for the exception to the domestic jurisdiction clause; only a few statements from various delegations addressed any alternative to its substance. The delegate of China was the first to speak in opposition, noting that in his view any limitation on the United Nations’ enforcement powers could undermine the organization’s primary purpose of maintaining peace and security, and he asserted that those powers ought not to be “hampered” by the domestic jurisdiction clause.¹⁴⁷ The delegate from Great Britain spoke in support of the Australian delegation’s version of the clause, explicitly recognizing that “certain states were jealous of their rights of national jurisdiction” and arguing that the United Nations could not interfere in the internal affairs of states “until and unless” a dispute threatened to become a war.¹⁴⁸ A representative of France followed the British delegate, reminding the committee that his government had originally proposed an amendment to the enforcement powers chapter to allow UN intervention in cases where “the clear violation of essential liberties and of human rights constitute[d] in itself a threat capable of compromising peace.”¹⁴⁹ That amendment, the French delegate said, was in recognition of the historical experience of Nazism and the Holocaust, which had illustrated the desirability of international intervention for the purpose of protecting “certain unfortunate minorities.”¹⁵⁰ Shortly before the final roll call vote was taken, the Norwegian delegate, reiterating his government’s earlier concerns, expressed agreement with the delegates from China and France.¹⁵¹

Before the close of the June 14 afternoon meeting at 6 p.m., delegate

¹⁴⁵ *Id.* at 438 (emphasis added).

¹⁴⁶ UNITED NATIONS INFO. ORG., *Summary Report of Sixteenth Meeting of Committee I/1, Veterans Building, Room 303, June 13, 1945, 3:40 p.m.*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 494.

¹⁴⁷ *Id.* at 497.

¹⁴⁸ *Id.* at 498.

¹⁴⁹ *Id.* (internal quotation marks omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

John Foster Dulles requested permission to speak on behalf of the domestic jurisdiction clause.¹⁵² The committee reconvened at 8:30 the next evening, and the chair called on Dulles to deliver his presentation in support of the proposed amendment to Article 2 of Chapter I.¹⁵³ Dulles first noted that the Four Sponsoring governments had proposed the amendment to alter the Dumbarton Oaks agreement in view of the “change in the character” of the United Nations since the initiation of the San Francisco conference.¹⁵⁴ The expansion of the organization’s competence to economic and social matters, he said, “constituted a great advance, but it also engendered special problems.”¹⁵⁵ Specifically, Dulles said, while the Economic and Social Council—recently made a principal organ of the new organization—was given a mandate to raise standards of living and foster employment and other economic goals, the domestic jurisdiction clause was written to ensure that no member of the Security Council would be permitted to “go behind the governments in order to impose its desires.”¹⁵⁶ Dulles opposed a proposal empowering the new International Court of Justice to interpret when a matter was essentially within the domestic jurisdiction of a member state, and he concluded by saying that future generations would be grateful to the committee’s adoption of a simple, absolute rule prohibiting interference in states’ domestic affairs.¹⁵⁷ Three days later, a report by Committee 1 of Commission I recorded the approval of the Four Sponsoring governments’ amendment, explicitly acknowledging that “[s]tated positively the [new] paragraph means: (1) that each state has entire liberty of action in matters which are essentially within its domestic jurisdiction”¹⁵⁸

Dulles’s reference to the new organization’s “change in character” between Dumbarton Oaks and San Francisco was undoubtedly reflective of the influence exerted by many nations and activists during the latter conference, the first time anyone other than the elite corps of diplomats from the Allied powers had a chance to express their preferences for the new international system. Extensive lobbying by many individuals and groups, all of whom having formed an expectation that the United Nations’ structure would conform to the cosmopolitan ideals of the stated Allied objectives, had led to the inclusion of human rights clauses in the

¹⁵² *Id.* at 499. In fact, it was Dulles who had originally proposed the domestic jurisdiction amendment at Dumbarton Oaks. CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955*, at 48 (2003).

¹⁵³ UNITED NATIONS INFO. ORG., *Summary Report of Seventeenth Meeting of Committee I/1, Veterans Building, Room 303, June 14, 1945, 8:30 p.m.*, in 6 DOCUMENTS OF THE UNCIO, *supra* note 131, at 507.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 508.

¹⁵⁷ *Id.*

¹⁵⁸ UNITED NATIONS INFO. ORG., *supra* note 136, at 487.

Charter—most prominently in the preamble and the elevation of the Economic and Social Council—as well as to the creation of the trusteeship system and a commission to create an international bill of rights.¹⁵⁹ Thus, after months of negotiations, the UN Charter came to reflect both the new norm of human rights as well as the traditional protection of internal sovereignty,¹⁶⁰ most conspicuously in the final version of its domestic jurisdiction clause, Article 2(7),¹⁶¹ which was recognized even at the time as “potentially the most substantial limitation that is to be found anywhere in the whole Charter upon the activity of the United Nations.”¹⁶² In fact, legal scholar Phillip C. Jessup had anticipated the ideological conflict between sovereignty and human rights enforcement even before the San Francisco conference began: “We have taught the layman to worship the arch-fiction of the sovereign state,” he wrote, “and thereby have built a Maginot line against the invasion of new ideas in the international world.”¹⁶³

The myth of sovereignty continued to exert its corrosive influence when it came to fleshing out the decision to draft and adopt an international bill of rights. During the drafting attempts led by the Commission on Human Rights, a primary question was whether any enumeration of such rights would be succeeded by a multilateral convention creating binding legal obligations upon its signatories.¹⁶⁴ A major influence upon Eleanor Roosevelt—who chaired the commission—during the implementation debates came from the Truman administration, whose Democratic party had to rely on votes from representatives in the Jim Crow-era South, many of whom insisted that any cessation of national or state sovereignty in this way would be tantamount to introducing anti-lynching legislation and could “ultimately lead to the United Nations investigating the condition of ‘negroes in Alabama.’”¹⁶⁵ Roosevelt

¹⁵⁹ LAUREN, *supra* note 120, at 188–90, 209; *see also* MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 10–18 (2001) (explaining the expectations of small nations and colonized peoples with respect to the international system and detailing their lobbying efforts).

¹⁶⁰ GLENDON, *supra* note 159, at 18–19; Preece, *supra* note 2, at 230.

¹⁶¹ The final version of Article 2(7) reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

¹⁶² LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS* 23 (2d rev. ed. 1949).

¹⁶³ LAUREN, *supra* note 120, at 191–92 (internal quotation marks omitted) (quoting Phillip Jessup, as quoted in Commission to Study the Organization of Peace, *International Safeguard of Human Rights*, at 16).

¹⁶⁴ LAUREN, *supra* note 120, at 223; GLENDON, *supra* note 159, at 84–87.

¹⁶⁵ ANDERSON, *supra* note 152, at 2–3 (quoting Minutes of the Tenth Meeting of the General Assembly Delegation, October 28, 1946, US/A/M/(CHR)/10, Box 60, File “US/A/M/(CHR)/I-32,”

received specific instructions from Durward Sandifer in the U.S. State Department that discussions of legal enforcement of human rights provisions “should be kept on a tentative level and should not involve any commitments by [the U.S.] Government.”¹⁶⁶

Great Britain and the Soviets had also lobbied since Dumbarton Oaks for a non-binding declaration, or no declaration at all, for similar reasons relating to their respective practices of operating a global colonial empire and a murderous totalitarian regime.¹⁶⁷ During those deliberations, the Soviet representative warned against “cross[ing] the border which divides international from internal law—the border which divides the inter-relationships of governments from the field where the sovereign rights of nations must prevail.”¹⁶⁸ After much discussion, Roosevelt and representatives from Great Britain and the Soviet Union persuaded their fellow members from smaller nations that a binding convention would be inappropriate and that the commission would work on a declaration only, with a convention to follow later, adopted into law at the initiation of the member governments.¹⁶⁹ Ultimately, the document the commission drafted, the Universal Declaration of Human Rights, was entirely aspirational.

The failure of the United Nations system to include legal, military or other coercive capabilities to prevent such atrocities was an indirect result of the myth of Westphalia. The political force of the proponents of the Westphalian myth had a perceptible influence on the outcome of events at the founding of the United Nations system. Though it is not certain that any San Francisco delegate ever explicitly invoked the term Westphalia, debate over the domestic jurisdiction clause was premised upon the very “definition” of international law as imposing no obligation on a state with respect to its own citizens, a position clearly recalling Bentham’s reinterpretation of the term.¹⁷⁰ Moreover, just as the concept of “states’ rights” had been used by American southerners for over a century to justify continued racial oppression, the great power nations used sovereignty as a talisman to undercut the international bill of rights, converting it into a

Records of the U.S. Mission to the United Nations, Record Group 84; Minutes of the Eleventh Meeting of the United States General Assembly Delegation, October 28, 1946, US/A/M/(CHR)/II, *ibid.*; Minutes of the Fifteenth Meeting of the General Assembly Delegation, November 12, 1946, US/A/M/(CHR)/15, *ibid.*; Minutes of the Tenth Meeting of the United States Delegation to the Third Regular Session of the General Assembly, October 5, 1948, US(P) A/M/(CHR)/10, Box 60, File “US(P)/A/M/(CHR)/I-34,” *ibid.*. *But see* GLENDON, *supra* note 159, at 86 (taking a much more favorable stance with respect to Roosevelt’s position on the plight of African Americans).

¹⁶⁶ LAUREN, *supra* note 120, at 223 (internal quotation marks omitted) (quoting Memorandum from Durward Sandifer to Eleanor Roosevelt (Feb. 5, 1947)).

¹⁶⁷ GLENDON, *supra* note 159, at 84–85; LAUREN, *supra* note 120, at 163.

¹⁶⁸ LAUREN, *supra* note 120, at 223 (internal quotation marks omitted) (quoting JOHN HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS 2 (1984)).

¹⁶⁹ *See* GLENDON, *supra* note 159, at 84–87.

¹⁷⁰ *See supra* notes 90–92 and accompanying text.

declaration of no legal force or effect.

It was clear, even to observers at the time, that only the less-powerful nations—not so obsessed with protecting their new presumed status as absolute sovereign states—were willing to accept that the idea of sovereignty was merely one way of distributing legal authority and not the only way; the most powerful nations could not be persuaded to consider that possibility.¹⁷¹ From a strictly political perspective, this disparity of power was a primary reason the myth took on its persuasive force in the negotiations. Had the roles been reversed and the powerful nations had argued for significant limitations on domestic powers in order to prevent human rights abuses by less-powerful nations, any appeal the smaller nations made to ethereal notions of “absolute sovereignty” would have seemed like feeble cries of last resort by petty tyrants bent on retaining their impunity to mistreat and murder their own citizens. But because an international order that did not include Great Britain, the United States and the Soviet Union was not politically feasible or practical, sovereignty operated in the background as an assumed principle that had to be overcome—when it was overcome at all—only with considerable effort.¹⁷² As such, a delegate’s appeal to sovereignty gave his or her argument the air of force and historical legitimacy while concealing the real motivation, the retention of political power. As a result, the less-powerful nations and others inclined to promote human rights were forced to accept the Charter in its present form, retaining a structure, function and series of limitations for essentially domestic matters that shape the distribution of power—as well as the ability for the United Nations to respond to human rights and humanitarian crises—to the present day.

V. FAILINGS OF THE WESTPHALIAN MYTH: NON-INTERVENTION IN BURMA

A. *Overview of the Crisis and the International Response*

The enduring inaccuracy of the traditional Westphalian story has produced a multitude of consequences in the international legal and political system, some immediate and some more remote. As demonstrated in the two previous Parts, the grounding of the current state system’s legitimacy on questionable historical footing has produced a nearly unexamined orthodoxy in the academy, as well as an early codification of the internal sovereignty principle in the founding document

¹⁷¹ See, e.g., GLENDON, *supra* note 159, at 85–86 (recounting the opinion of Charles Malik, the representative to the Commission on Human Rights from Lebanon, that the debate over a declaration or a legally binding convention was “a challenge between [the] small and great powers”) (quoting Human Rights Commission, Second Session (E/CN.4/SR.28, pp. 11–12)).

¹⁷² See *supra* note 159 and accompanying text.

of the world's only universal political organization. As a result, instead of governments, activists and theorists asking themselves how best to promote and protect human rights as a first-order priority, the inquiry has become: How can one secure marginal human rights progress without disturbing the seemingly indispensable foundation of the entire edifice? This constraint retards efforts that would otherwise result in improved human rights treatment and prosperity for literally billions of individuals on the planet. Amazingly enough, this breaking effect even persists in the face of acute crisis, when peoples—hopelessly out-matched—are forced to confront oppression, illness or mass violence with little or no help from the industrialized portion of humanity. Recent events in a segregated and terrorized segment of Asia will serve to illustrate the obstructions the Westphalian mythology poses to human rights and humanitarian concerns. But first, a review of those recent events would be beneficial.

The largest nation-state in Southeast Asia by territory is Burma, officially known by its government as the Union of Myanmar.¹⁷³ The country holds rich mineral reserves as well as significant offshore oil and gas deposits.¹⁷⁴ It is a member of the Association of South East Asian Nations (“ASEAN”),¹⁷⁵ and though the military-controlled economy includes revenues from those natural resources, illegal narcotics and some foreign investment, because of corruption and poor management, Burma remains one of the poorest nations in Asia with respect to per capita income.¹⁷⁶ In addition to the majority Burman people, the country contains several ethnic minority populations, though in terms of spiritual culture, nearly the entire nation practices Buddhism.¹⁷⁷ All news media are strictly controlled by the government.¹⁷⁸

Burma is a former colony of Great Britain that gained its independence in 1948 and had a democratic government until 1962, when General Ne Win seized power in a coup.¹⁷⁹ That military regime controlled the nation until a currency devaluation triggered a widespread pro-democracy

¹⁷³ B.B.C. News, Country Profile: Burma, http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1300003.stm [hereinafter Country Profile] (last visited Apr. 12, 2009). There is considerable debate, at least in the United Kingdom, as to whether the country is properly called Burma or Myanmar. See, e.g., B.B.C. News, Should it be Burma or Myanmar?, http://news.bbc.co.uk/2/hi/uk_news/magazine/7013943.stm (last visited Apr. 12, 2009) (explaining that the ruling junta changed the official name in 1989 following an unsuccessful popular uprising and that the B.B.C. refers to it as Burma for the familiarity of its readers). Simply out of respect for the activists still attempting to liberate the people and reignite the former democracy, references to the nation follow the former naming convention.

¹⁷⁴ Country Profile, *supra* note 173.

¹⁷⁵ B.B.C. News, Q&A: Protests in Burma, <http://news.bbc.co.uk/2/hi/asia-pacific/7010202.stm> [hereinafter Protest Q&A] (last visited Apr. 12, 2009).

¹⁷⁶ Country Profile, *supra* note 173.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ B.B.C. News, Obituary: Ne Win, <http://news.bbc.co.uk/2/hi/asia-pacific/1581413.stm> (last visited May 15, 2009).

movement in 1987–88 that destroyed the savings of many Burmese citizens.¹⁸⁰ A national uprising, consisting of hundreds of thousands of anti-government protesters, occurred on August 8, 1988, but that movement was brutally suppressed by the military, killing at least 3,000 persons in the process.¹⁸¹ The first multi-party election in thirty years was held in 1990, and Nobel laureate Dr. Aung San Suu Kyi, leader of the National League for Democracy (“NLD”), won a huge parliamentary majority.¹⁸² However, General Saw Maung—who had seized power in a 1988 coup—never permitted the NLD or any other civilian parties to govern according to any free election. General Maung was succeeded in 1992 by Senior General Than Shwe, who currently is chairperson of the State Peace and Development Council (“SPDC”), the twelve-member band of senior generals that leads the military regime.¹⁸³ The 75-year-old General Shwe has consistently refused to transfer power or even to make marginal democratic reforms. Moreover, in 2004, he sacked a moderate member of his own junta, former Prime Minister Khin Nyunt, for allegedly supporting reconciliation talks with the NLD and Dr. Aung San Suu Kyi, who was originally put under house arrest in 1990 and remains so to this day.¹⁸⁴

Due to its spiritual influences, the Burmese monks are the Buddhist nation’s most respected faction and serve as leaders in communities.¹⁸⁵ The monasteries offer free education even to those citizens who do not ultimately become monks.¹⁸⁶ In addition to simple religious or ceremonial services, the monks dole out a kind of spiritual credit to those who provide various handouts, as the monks are not permitted to accept donations of or even handle money.¹⁸⁷ A monk’s most potent admonition comes when he refuses to accept a handout, a signal that the donor has been denied the opportunity to earn the coveted spiritual credit.¹⁸⁸ Such denials are not the only form of censure displayed by the Burmese monks; they have a long history of activism against unpopular or immoral actions by a governing authority, including conducting protests against the British colonial occupation in the 1930s.¹⁸⁹ The monks’ protest role relates to their former function as intermediaries between the people and the Burmese monarchy

¹⁸⁰ Protest Q&A, *supra* note 175.

¹⁸¹ *Id.*

¹⁸² Country Profile, *supra* note 173.

¹⁸³ *Id.*

¹⁸⁴ *Id.*; Kate McGeown, B.B.C. News, What Burma Wants from the World, <http://news.bbc.co.uk/2/hi/asia-pacific/7033911.stm> (last visited Apr. 12, 2009).

¹⁸⁵ Sarah Buckley, B.B.C. News, Who are Burma’s Monks?, <http://news.bbc.co.uk/2/hi/asia-pacific/7014173.stm> (last visited Apr. 12, 2009).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

through the late nineteenth century. Monks are said to command considerable moral authority, even among the military, and can encourage many other Burmese to join a protest march if they rise in support of it.¹⁹⁰

Already facing extreme conditions of poverty from the corruption in the government, the regime's decision on August 15, 2007 to increase the price of fuel hit the Burmese people hard.¹⁹¹ Essential commodities such as rice and cooking oil also rose, sparking a 400-person protest by pro-democracy activists on August 19.¹⁹² Though that initial march was quickly dispelled by the military, protests around the nation continued, particularly after a significant number of Burmese monks joined on September 5.¹⁹³ The following day, monks took several government officials hostage and publicly demanded that the regime apologize to the people by September 17.¹⁹⁴ When the deadline passed, tens of thousands of monks began daily protests in earnest and withdrew religious services from the military and their families.¹⁹⁵ On September 21, an organizing group called the Alliance of All Burmese Buddhist Monks came forth to coordinate the protests and issued public statements declaring the regime an "enemy of the people" and that protests would continue until they had "wiped the military dictatorship from the land."¹⁹⁶ The monks were joined in the largest protests—in the city of Rangoon and elsewhere—by top members of the NLD, small ethnic groups, and ordinary Burmese citizens, and one rally linked the protests to Burma's pro-democracy movement by marching past the house of Aung San Suu Kyi.¹⁹⁷

Apart from the arrests made during the 400-person march on August 19, the military leadership took no action during the first week of large-scale protests.¹⁹⁸ Then, on September 25, the military issued a warning that action would be taken if the protests did not cease, and the next day it imposed a total daylight curfew by introducing hundreds of troops and riot police into the streets.¹⁹⁹ Clashes between the military and the protestors erupted immediately, and by September 27, the junta acknowledged killing nine people, though other observers noted that the count was probably far

¹⁹⁰ See *id.* (relating the history of the monks' political role and explaining why their refusal to accept handouts from the military was such a powerful statement in the recent protests).

¹⁹¹ Protest Q&A, *supra* note 175.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (internal quotation marks omitted).

¹⁹⁷ *Id.*; Kate McGeown, B.B.C. News, Burma: Your Questions Answered, <http://news.bbc.co.uk/2/hi/asia-pacific/7041203.stm> (last visited Apr. 12, 2009).

¹⁹⁸ Protest Q&A, *supra* note 175; see also Mydans, *supra* note 29 (reporting a 10,000-strong protest by monks in Rangoon and noting that the junta had been allowing free reign to the monks for fear of a public backlash if they were to crack down).

¹⁹⁹ Protest Q&A, *supra* note 175.

higher.²⁰⁰ The junta made thousands of arrests in the days following, rounding up monks to be held in makeshift detention centers before being transported north to prison camps, where many monks remain.²⁰¹ News reporters stationed in and around Burma also reported rumors that the military was using a Rangoon crematorium to perform night-time incinerations of the bodies of protestors killed as a result of the crackdown.²⁰² A B.B.C. reporter who witnessed the events, attempting to estimate the loss of life, admitted, “[t]he truth is that we may never know exactly how many people died and were detained.”²⁰³

In a report to the United Nations Human Rights Council, special rapporteur Paulo Sergio Pinheiro was also informed of the acts of incineration in the Rangoon crematorium as part of a five-day visit to Burma in the wake of the protests, though he was prevented from visiting the incineration site.²⁰⁴ Pinheiro confirmed the deaths of thirty-one persons, listed seventy-four missing persons and reiterated stories of soldiers driving amidst crowds of protestors, firing live ammunition and, on two occasions, fatally shooting young boys in cold blood.²⁰⁵ The report also contained information about large-capacity detention centers lacking sanitation, guarded by dogs and holding children, monks and pregnant women who were alternatively confined and tortured.²⁰⁶ Pinheiro’s report was part of the Security Council’s demand for an investigation into the incidents, and it called for a “genuine dialogue” between the junta and the pro-democracy elements as well as the release of political prisoners.²⁰⁷ A statement by the Security Council expressed “regret[] [at] the slow rate of progress” toward those goals, and UN envoy Ibrahim Gambari was in the process of negotiating another visit sometime before mid-April 2008, though the Burmese leadership stated that any time earlier than that would not be convenient.²⁰⁸

In terms of national and regional responses, the United States and the European Union enacted limited sanctions, though taken individually neither power carries much weight with the Burmese military regime.²⁰⁹ Initially, the ASEAN strongly condemned the junta’s violent repression of

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² McGeown, *supra* note 197.

²⁰³ *Id.*

²⁰⁴ Warren Hoge, *U.N. Myanmar Report Cites New Arrests and Deaths*, N.Y. TIMES, Dec. 8, 2007, at A10, available at LEXIS, News Library, NYT File.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ B.B.C. News, UN Raps Burma’s ‘Slow Progress’, <http://news.bbc.co.uk/2/hi/asia-pacific/7195313.stm> (last visited Apr. 12, 2009).

²⁰⁸ *Id.* Gambari, a UN special envoy, returned from Burma near the beginning of October 2007 after having spoken with senior military officials and Aung San Suu Kyi. Protest Q&A, *supra* note 175.

²⁰⁹ Protest Q&A, *supra* note 175.

the protests,²¹⁰ but by early December 2007, the organization had backed off its original stance and ignored the requests by the United States and European Union for diplomatic isolation and an economic embargo.²¹¹ China, seen as Burma's closest strong-power ally in Asia, also publicly called on the regime to put a stop to the violence, but as B.B.C. News noted, China "has maintained its traditional reluctance to interfere in the domestic affairs of other countries."²¹² India and Russia—the other regional powers with influence over the regime—apparently have adopted China's posture.²¹³

B. *Westphalian Orthodoxy's Influence on Intervention in Burma*

The persistence of the myth of Westphalia helps to perpetuate the autocratic Burmese junta and their gross violations of human rights. This it does in several ways—systemically, institutionally and psychologically. The political history of the United Nations system demonstrates the way in which the Great Powers enshrined the exclusivity principle of sovereignty into the organization's charter, limiting its enforcement powers to actions that threaten only international peace and security.²¹⁴ With the gravitational distribution of global power centered almost solely at the level of the nation-state, and with the understanding that something like Westphalian state sovereignty still persists to protect states from legal sanctions over internal matters, states pursue domestic policies that undermine their moral and political authority on matters of humanitarian concern. Finally, the psychological force of national sovereignty—supposedly given descriptive credibility by questionable references to European history—tends to smother frank discussions of diplomacy by falsely presenting exclusive and absolute sovereignty as a desirable feature in international law.

At the broadest level, the United Nations system was unable to prevent the brutal repression of the recent democratic protests in Burma, or to exert any kind of real pressure to bring down the ruling junta, largely because it was not designed to do so. In the first instance, the UN Charter prohibits states from using force or the threat of force against other states unless in

²¹⁰ *Id.*

²¹¹ Seth Mydans, *As Spotlight on Myanmar Fades, Generals Breathe Easy*, N.Y. TIMES, Dec. 8, 2007, at A10, available at LEXIS, News Library, NYT File. In an analysis for the Times, Mydans noted the strong position the ASEAN took shortly after smuggled photographs and video of the protest crackdown were shown worldwide but that, by early December, the ASEAN had ignored opportunities to pressure the regime and to accept a visit from UN envoy Gambari. *Id.* "We don't want to come across as being too confrontational in a situation like this," ASEAN secretary-general, Ong Keng Yong, said. *Id.* (internal quotation marks omitted).

²¹² Protest Q&A, *supra* note 175.

²¹³ *Id.*

²¹⁴ See *supra* notes 128–34 and accompanying text.

self-defense or, in practice, authorized in advance by the United Nations.²¹⁵ Thus, enforcement actions on humanitarian matters that do not threaten another member state are relegated to the purview of the Security Council through its Chapter VII powers.²¹⁶ However, two broad provisos have historically limited the council's discretion in such matters: the need to show a threat to *international* peace and security,²¹⁷ and the necessity of securing the offending state's consent before engaging peacekeeping troops into its territory.²¹⁸ Both limitations can be seen as indirect effects of the myth of exclusive and absolute sovereignty; the first concerns the proper role of the United Nations as determined by its founders—particularly the Great Powers—and the second clearly speaks to the persistent concerns of what types of situations are matters of exclusive domestic jurisdiction.²¹⁹

There is no doubt that the protests in August and September of 2007 related most directly to the internal organization and operation of the Burmese people's government. As such, the protests and their suppression probably did not threaten Burma's neighbors directly, and thus no other state could reasonably claim self-defense as a justification for intervention. By the same token, even an active Security Council would have difficulty making the case that the situation in Burma directly threatened international peace and security, though it has occasionally relaxed this rule for responses to humanitarian crises, such as in Southern Rhodesia, South Africa, Somalia and Haiti.²²⁰ However, the Security Council was not active in this case. As with a host of international human rights challenges, the Security Council has delegated the matter to a charter organ, the Human Rights Council, which concerns itself with fact-finding and diplomacy and clearly has no capacity to force an end to the military's violent oppression, detention and murder of its citizens.²²¹ The fact that such delegations are made, even in times of acute humanitarian crisis, is

²¹⁵ U.N. Charter art. 2, para. 4; *id.* art. 51.

²¹⁶ *Id.* arts. 39, 42.

²¹⁷ BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION* 151–52 (2002).

²¹⁸ *Id.* at 180–82. The author enumerates a few examples where the Security Council has found exceptions to the consent requirement, a constraint on UN action informed by Article 2(7)'s prohibition on intervention into the domestic affairs of states and proscription of the ability to require members to submit matters to settlement, as well as Chapter VI's explicit recognition of the consent requirement. *Id.* at 180, 182–83. However, despite these few exceptions, the list of instances where the council could have but failed to intervene without the ruling authority's consent—including in Burma—is probably much longer.

²¹⁹ *See id.* at 180 (explaining that, since the first armed peacekeeping mission, “the consent of the states involved has been a linchpin of U.N. peacekeeping practice”).

²²⁰ *Id.* at 152–54.

²²¹ Such capacity has been recognized as indispensable to bring democracy back to Burma. *See* McGeown, *supra* note 197 (explaining that, while the author and others were encouraged that the participation of the Burmese monks could bring about regime change, her colleagues warned her that, “no matter how much the monks were encouraged both at home and abroad, they could never overthrow the 400,000-strong military—one of the strongest in the region”).

itself a sign of the systemic results of a wildly erroneous belief in the propriety of exclusive domestic jurisdiction over such matters. It is therefore no wonder that telephone and other calls from the Burmese people to the United Nations during the brutal military response fell on deaf ears.²²²

Relating to the distribution of authority—or lack thereof—at the international level, there is the fact that nation-states have responded, as the recipients of the vast majority of global political power, by pursuing domestic policies that weaken their ability to pressure other nations on human rights and humanitarian issues. By continuing to follow unwaveringly the norm of national sovereignty—implicitly through their actions or, on occasion, explicitly through public statements—nation-states can assume a kind of impunity with respect to domestic policies, partially because they know there is almost never any higher legal institution authorized to restrict such action.²²³ The Bush administration in the United States, though admittedly one of the most vocal in calling for some kind of political and economic sanctions against the Burmese military government, suffered the effects of such policies by seeing its moral and political capital depleted through various domestic activities.²²⁴ More importantly, however, the frequent use of national sovereignty as a defense for domestic policies converts the descriptive accuracy of the concept into a normative principle, one that is identified with institutional or national behavior. Thus, attempts to appeal to other norms—such as humanitarian or democratic interests—subsequent to the repeated invocations of sovereignty are derided as hypocritical by the actor making the appeals.²²⁵ This increased probability of being regarded as insincere in one's

²²² See McGeown, *supra* note 184 (“While they might not favour sanctions, the people of Burma definitely want the international community’s help in other ways. Many of those who telephoned the UN during the crackdown asked why no-one was sending a peacekeeping force. . . . ‘The international community did nothing to stop a three-day killing spree,’ one woman said. ‘That was when I realised we were on our own.’”).

²²³ Of course, not all nation-states act with such impunity, and others who might be inclined to do so can sometimes be persuaded by recourse to certain types of political, economic or moral coercion, the varying effectiveness of which I will not attempt to address here. Suffice it to say that the assurances of national sovereignty provide states with substantial *legal* cover, and they are particularly likely to embolden governments that are not responsive to such non-legal forms of condemnation.

²²⁴ See Mydans, *supra* note 211 (“In what seems to be a sign of the United States’ waning influence in the region, China, India and Myanmar’s Southeast Asian neighbors have brushed aside Washington’s calls for an economic embargo and the diplomatic isolation of the junta.”).

²²⁵ China, for instance, has issued counter-attacks in its state-run media to reports by the United States detailing Chinese human rights abuses. See, e.g., *US Human Rights Hypocrisy Attacked*, CHINA DAILY, May 22, 2004, available at LEXIS, News Library, CHIDLY File. Such counter-attacks have included condemnations against the United States’ treatment of Iraqi prisoners and have stated that U.S. actions “have prompted China to suspend its human rights dialogue with the United States.” *Id.* Interestingly, the same report from the China Daily also contains the following statement, supposedly made by Dong Yunhu, the Vice President of the China Society for Human Rights Studies: “The United States should stop interfering in other countries’ internal affairs by using human rights, and return to an equal dialogue on human rights.” *Id.* (internal quotation marks omitted).

international affairs leads nation-states such as China never to invoke humanitarian interests and to concern itself solely with protecting its image as a defender of nationalism and, concurrently, with reaping the benefits of doing so.²²⁶

Perhaps the most potent effects of the myth of Westphalia are psychological in nature, as it distorts every discussion about whether humanitarian intervention in Burma was or is appropriate. The consequences of the myth are therefore registered all the way up through national policy, institutional capacity and, ultimately, to the basic structure of the international system. Even in the case of a totally failed and illegitimate government such as Burma, the presumption in international law and diplomacy is that the state is recognized as still entitled to the privileges of even the most just democracies. Of course, under the United Nations system, a government can forfeit such privileges if it becomes a threat to international peace and security, but absent that extreme circumstance, the ruling domestic authority is protected by its inherent sovereign rights.²²⁷ Such was the case with Burma, where the international community gave a large outcry against the military crackdown but no legal sanction or tactical support of any kind followed as a result.²²⁸ Insofar as decision-makers are aware that the concept of sovereignty informs and pervades every aspect of international affairs, any desire to intervene on behalf of internal popular uprisings must climb the conceptual hill of justification, made needlessly steeper by reference to an inaccurate account of the historical origins—and hence legitimacy—of the international state system.

VI. CONCLUSION

The appalling plight of the people of Burma remains just one in a long line of perfectly remediable yet unaddressed conditions throughout the developing world, tolerated by humankind and rationalized by myopic notions of the traditional or proper place of international law. While certainly there is no single cause for the sustained patience the international community shows to the few remaining totalitarian governments on the planet, the extent to which the falsehood of Westphalia

²²⁶ See McGeown, *supra* note 197 (“India and China, as Burma’s main trading partners, have come under a lot of pressure from the international community to take firm action against Burma. But people I met on the ground did not seem to have much faith in either nation to have a positive influence on the ruling generals. One woman we spoke to said she thought China wasn’t interested in helping ordinary Burmese people—a view that was reinforced when she noticed that the soldiers who took part in the crackdown were brought into Rangoon in Chinese-made trucks.”).

²²⁷ See *supra* note 217 and accompanying text.

²²⁸ See Mydans, *supra* note 211 (reporting in early December: “The streets are quiet in Myanmar. The ‘destructive elements’ are in jail. The international outcry has faded. The junta’s grip on power seems firm.”).

plays into that patience is the degree of speed with which legal and historical scholarship must correct its error. This humble work, far from making any claim to bringing about actual change, seeks only to illustrate the link between an erroneous historical orthodoxy and the present suffering of real people.

In addition to intervention issues, the fact that strong or even absolute notions of sovereignty—which persist among theorists and policy makers—obstructs the progression of human rights generally is probably not in dispute. One of the most troubling consequences of the continued belief in the myth of Westphalia is how it has changed the rhetoric and decision-making process when discussing critical human rights issues in classrooms, political debates and foreign ministers' offices. To a certain degree, for those who believe the status quo has a certain normative legitimacy because “things are the way they are for a reason,” the descriptive inaccuracy of Westphalia poses enormous obstacles to challenging the status quo of the present state system. Many political and legal theorists, particularly in international relations, it seems, suffer from an inexcusable deficiency of imagination when it comes to evaluating the wisdom of the current system as a whole. When the specter of a threat to sovereignty is made as ground for opposition to a humanitarian cause, the image conjured in the mind of a Western scholar or policy maker may be that of challenging the very foundation upon which international law and society are based. One might expect the natural response to be, yes, the notion of *absolute* sovereignty is being challenged, and that is at least a plausible starting point for the debate. Instead, all too often the discussion is closed, as preserving sovereignty is seen as an end in itself. Unwavering faith in the accuracy of the Westphalian mythology, unsurprisingly, provides no assistance for resolving these limitations.