Colonizing and Decolonizing International Laws:

Peace Treaties as Defense Mechanisms of Imperial Systems 1648-1952

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Key Words: History of International Law, Peace Treaty, War, Colonization, Decolonization, Nation-State, Empire.

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I. Introduction

A. Research Problems

The world is confronting new peace treaties at this moment. However, there have been few attempts to define or question the term *peace treaty*[1] even though the term is generally used to refer to an agreement that ceases a war. The meaning can only be inferred from statements in peace studies in international law academia. One scholar explained that "all international law is law of peace is valued for providing an alternative to the use of force in the ordering of human affairs, and peace is being the antithesis of force, violence, and armed conflict."[2] Another elucidated that the purpose of international law has been to let the reciprocal connection between peace and justice work.[3] This article raises concerns that the framework of 'peacekeeping'[4] or 'peacemaking' in international law embellishes the history of the modern Western international law and obscures its reality. Accordingly, these plain explanations about peace in international law remain questions about whether peace treaties we have encountered—and will encounter—are truly peaceful, what peace actually means, and whom it ultimately serves.

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[1] Almost no academic books and articles about international law and even legal dictionaries, except non-academic internet sources, define 'peace treaty' or 'peace agreement', even though the terms were generally and academically used in international law studies. Lacking discussion on the term remains in what context the term has been coined and used.

[2] Mary Ellen O'Connell, *Peace and War*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 272 (Bardo Fassbender et al. eds. 2012).

[3] HEINHARD STEIGER, *Peace treaties from Paris to Versailles*, *in* PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE, 99 (Randall Lesaffer ed., 2004). I agree with the opinion that international law should pursue peace and justice, but still, there are questions remaining about whether past international law has been toward peace, and what peace is.

[4] An American prestigious dictionary defines the term as "the preservation of a status quo in which there is no war or fighting." *Peacekeeping*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also*, Randall Lesaffer, *Peace Treaties and the Formation of International Law*, *in* THE OXFORD HANDBOOK OF HISTORY OF INTERNATIONAL LAW 71 (Bardo Fassbender et al. eds., 2012) [hereinafter Lesaffer, *Peace Treaties*]; Randall Lesaffner, *Introduction*, *in* PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 1 (Randall Lesaffer ed., 2004) [hereinafter Lesaffer, *Introduction*].

While some scholars argue that international law has evolved toward justice and equality, this article highlights its enduring imperial structures. Even as legal norms shifted, they often did so in ways that preserved existing power hierarchies. If the history of international law was a struggle toward peace, how can colonization be explained? This is the second question that this article tries to answer. Colonization and decolonization provide a good prism of sight to view peace as reality, not as ideology, in the history of international law. The reason why international law has changed its characteristics from a colonial tool to a decolonial tool is a main part of this change of prism. Anghie elaborated that colonial confrontation was central to the formation of international law and, particularly, to its founding concept, sovereignty, and international law has always been animated by the 'civilizing mission': the project of governing non-European peoples.[5] His explanation provides academia with a clear understanding of colonial aspects of international law.[6] While he elaborated imperialism and colonialism in the making of international law, he also pointed out about precedent TWAIL scholars[7] that if, however, the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law, then grave questions must arise as to whether and how it is possible for the postcolonial world to construct a

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[5] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 3–4 (2005).

[6] This year, 2025, there will be an international conference to celebrate 20th anniversary of the book, *Imperialism, Sovereignty, and The Making of International Law*. *See 12 noon on 19 December 2024 Deadline (Call for Papers) – 7-8 August 2025 Conference: Imperialism, Sovereignty and the making of International Law; 20 years on, with Antony Anghie*, LAUREATE RSCH. PROGRAM: GLOB. CORP. & INT'L L., https://www.lpgcil.org/past-events/save-the-date-imperialism-sovereignty-and-the-making-of-international-law-20-years-on (last visited Apr. 1, 2025).

[7] TWAIL means Third World approaches to international law. *See generally*, Matthew Craven, *Theorizing the Turn to History in International Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 21, 32 (Anne Orford et al. eds., 2016); Andrea Bianchi, *Third World Approaches*, *in* INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING (Andrea Bianchi ed., 2016); James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATION AND FRONTIERS 153, 163 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022) (categorizing Antony Anghie in TWAIL).

new international law that is liberated from these colonial origins.[8] This article argues that international law, particularly through peace treaties, has historically functioned as a defense mechanism for imperial powers rather than a true instrument of peace. By examining key historical treaties, this study demonstrates how legal frameworks served to maintain imperial control, both during colonization and in the selective process of decolonization.

Finally, this article will examine the intersection of these two primary questions: what is the definition of peace in international law, and how has international law worked as a tool for colonization and decolonization. For example, one scholar raised a doubt that decolonization agreements as peace agreements per se raise definitional issues on 'peace'.[9] This article asks the similar question, providing additional context by reviewing historical events surrounding peace treaties and settlements, alongside theoretical and definitional genealogy concerning the purpose of the modern Western international law.[10]

B. Research Scope and Methodology

To answer these two main questions, this article examines major peace treaties in the history of the modern Western international law and adopts the method of periodization which is a general but powerful methodology generally used in historical studies. Similarly, periodization is recognized as a strong method in international law studies, given that international law is

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[8] ANGHIE, *supra* note 5, at 7–8.

[9] CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 98 (2008).

[10] This article defines a specific legal tradition that was used by Western empires since early modern as "the modern Western" international law. The modern Western international law is only one among multiple legal traditions that have shaped global norms. Grammar article 'the' clarifies that this article is discussing a particular subset of international law rather than the concept in general.

considered a "historical system of law." [11] This interdisciplinary method, examining both international law and history, is required to capture the changing characteristics of international law.[12] Lawyers and historians have paid attention to 'turn to history in international law' for a long time, especially after the end of Cold War, as it help scholars both to understand current international law dispute in a shifting global situation and to study past. [13]

To achieve the purpose of this discovery, this article employs the traditional periodization that divides the history of international law into four stages: the Peace of Westphalian, the Congress of Vienna, post-World War I system and post-World War II system.[14] While the scope of this research primarily focuses on these periods, these by no means encompass the entirety of international law. Notably, contemporary academia often incorporates ancient law and non-Western systems into the realm of international law.[15] To make it clear, this article distinguishes

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[11] William E. Butler, *Periodization and International Law*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 392 (Alexander Orakhelashvili ed., 2011) ("International Law is an 'historical system of law.'"). For deeper understanding of periodization in the research of international law, *see generally*, *id.* at 379–393; Oliver Diggelmann, *The Periodization of the History of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender et al. eds. 2012).

[12] ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 1, 3, 70 (2021). Additionally, though I am not a big supporter of formalism in international law, look up explanation by professor of Melbourne Law School, Anne Orford, that the adoption of professional historical methods in international law can remove partisan bias and lead it to empiricist science and neoformalism. *Id.* at 8.

[13] *Id.* at 2, 3, 70–73.

[14] *See generally*, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (Macmillan 1954) (1947); Lesaffer, *Peace Treaties*, *supra* note 4.

[15] For example, Nussbaum started his book about the law of nations with ancient Greece. *See generally*, NUSSBAUM, *supra* note 14. Oxford handbook series included non-Western international laws into the genealogy of international law. Lesaffer, *Peace Treaties*, *supra* note 4. Furthermore, there is an argument that international tribunals of now should reflect regional system in their decision by a very recent work. So Yeon Kim, *Making International Law Truly 'International'?: Reflecting on Colonial Approaches to the China-Vietnam Dispute in the South China Sea and the Tribute System*, 24 J. Hist. Int'l L. / REVUE D'HISTOIRE DU DROIT INTERNATIONAL 227 (2021).

between the general term ‘international law’ and the specific term or legal tradition 'the modern Western international law.’

C. Research Hypothesis: Suggesting a New Prism.

This article explains these four transitions by describing peace treaties as defense mechanisms of the imperial systems and emphasizes realistic aspects of peace treaties. It should be noted that a common characteristic amongst these four eras is that they were all settled with peace treaties. This hypothetical idea of defense mechanism is rooted in doubt in the term, *peace treaty*. The phrase "defense mechanism" here is differentiated from "peacemaking," which has long been used to explain peace treaties. Instead of viewing treaties as deliberate efforts to secure peace, this article argues that they were often reactive measures designed to protect imperial interests. The aim of this article is not to abolish the term, *peace treaty*. On the contrary, the final goal is to rethink international law and peace.

To be more specific about the new prism of defense mechanism, this article focuses more on empires’ impromptu reactions – defense mechanisms – than nation-states’ peacemaking wills. Defense mechanism, here is differentiated from peacemaking, which the four systems of treaties that have long been, until now, explained with the latter framework, or peacemaking.[16] This article sketches the history of globalization of international law with this new narrative that empires, mostly European ones, reinforced and later dissolved colonization, not because they were

[16] *See, e.g.*, BELL, *supra* note 9. Williamson Murray also describes the era exactly between the Congress of Vienna (1815) and the Treaty of Versailles (1919) as peace. WILLIAMSON MURRAY, THE MAKING OF PEACE: RULERS, STATES, AND THE AFTERMATH OF WAR 12 (2008).

motivated by the pursuit of peace itself, but because they tried to solve their own problems, mostly through wars, with the impromptu defense mechanism.

This framework of defense mechanism is differentiated from the traditional view of peacemaking, not only because it provides more realistic explanations, but also because it overcomes the idea of historical progress that deeply soaks into Western modernity. The frame of peacemaking or peacekeeping implicitly assumes that the modern Western international law has developed toward peace, and it leaves the impression that not only is history on linear progress, but also that the actors of Western international law were the main drivers of this progress. However, this new framework would provide a more comprehensive view of complicated aspects of the history. For example, the empires discussed in this article were proactive in colonization but passive in defending against war-induced suffering.

Lastly, the whole narrative of this article relies on a different presumption from a myth of previous academia. The myth or presumption is that the system of nation-states – each state having equal sovereignty at least in Christian Europe – arose during the four phases of the modern history of international law.[17] Unlike this view, however, this article tries to describe a brief history of the modern international law under imperial systems.

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[17] *See, e.g.,* WALTER GEORGE FRANK PHILLIMORE, THREE CENTURIES OF TREATIES OF PEACE AND THEIR TEACHING 9 (Garland Publishing Inc. 1973) (1918); J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, *in* INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS 67–69 (Robert J. Beck & Thomas Ambrosio eds., 2002); Randall Lesaffer, *Peace Treaties from Lodi to Westphalia*, *in* PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 3, 13–15 (Randall Lesaffer ed., 2004).

II. Colonizing and Decolonizing Peace Treaties.

A. The Peace of Westphalia (1648): International Law of Christianity

European empires established the Peace of Westphalia, which consists of two treaties, after thirty years of suffering.[18] The fundamental purpose of these treaties was to prevent their present challenge, or to protect their own religious boundaries, and the birth of equal sovereignties was a safeguard for the protection of the religious boundary. All the pragmatic clauses were about prohibition of force,[19] private or public right of religion,[20] protection of assets,[21] and discharge of army[22]. These clauses mean that Christianity was protected under the mask of sovereignty rather than nation-states being established to replace the Christian empires. The equal sovereignty, in fact, was nothing more than the protection of Protestants from Catholic power, and of Catholics from Protestant nations.[23]

Precedent literature emphasized that these treaties had established an international law system based on an equal relationship among sovereign nation-states, and this development was

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[18] The reason why the word suffering and other similar words are used here in this article is to emphasize the aspect of European empires' passive aspect as well, unlike precedent literature focusing on active aspects when explaining the motivations of colonialism. This is also related to the author's point of view on history. Historical lessons can only be learned by pain (歷史 痛以知之). The following book defined the Thirty Years War as European Tragedy by its title and discovered that the first feeling of European on the war at that time was fear. PETER H. WILSON, THE THIRTY YEARS WAR: EUROPE'S TRAGEDY 840 (The Belknap Press of Harvard University Press 2011) (2009). The next classic book describes the suffering as well. *See generally* FRIEDRICH SCHILLER, GESCHICHTE DES DREYßIGJÄHRIGEN KRIEGS [THE HISTORY OF THE THIRTY YEARS WAR] (A. J. W. Morrison trans., Project Gutenburg 1996) (1790) (ebook).

[19] *See, e.g.*, Treaty of Peace between *France* and the *Empire*, signed at Munster art. V, Oct. 24, 1648, 1 CONSOL. T.S. 319.

[20] *See, e.g.*, Treaty of Peace between *Sweden* and the *Empire*, signed at Osnabruck art. V (31), Oct. 24, 1648, 1 CONSOL. T.S. 198.

[21] *See, e.g.*, *id.* at art. V (36).

[22] *See, e.g.*, Treaty of Peace between *France* and the *Empire*, signed at Munster art. CXVIII, Oct. 24, 1648, 1 CONSOL. T.S. 319.

[23] *See id.* at art. I.

evaluated as a form of political progress.[24] For example, the Peace of Westphalia was appreciated as a new framework of peace beyond the mere intention of peace.[25] However, the explanation of the creation of nation-states or the myth of the Peace of Westphalia should be reconsidered. During the modern era after the Peace of Westphalia, not only did the Holy Roman Empire still hold suzerainty on feudatories, which now became principally states,[26] but it is also argued that the imperial system was maintained.[27] In summary, the imperial system in international relations was not replaced by the nation-state system. Instead, it continued to operate under the influence of Christianity.

Hugo Grotius, who is generally regarded as the founder of international law and held diplomatic positions during the Thirty Years' War,[28] was also the first one who established the notion that war and peace are mutually exclusive states.[29] However, peace is not that simple. If one waged war and invaded other regions to cease a war in her region, can we regard the state of the cessation as peace? The contradiction of the modern international law's view of peace started here.

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[24] *See, e.g.*, WILSON, *supra* note 18, at 753; Lesaffer, *supra* note 17. Andreas Osiander argued that 'the Westphalian myth' directly and indirectly stemmed from Leo Groos's book 'The Peace of Westphalia, 1648-1948' (1948). Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 264–65 (2001).

[25] WILSON, *supra* note 18.

[26] Yoo BaDa (유바다), 19 Segi Huban Joseonui Gukjebeopjeok Jiwie Gwanhan Yeongu [A Study on the International Legal Status of Joseon Dynasty in the late 19th century] (19 세기 후반 조선의 국제법적 지위에 관한 연구) 2, 8, 20 (2017) (Ph.D. dissertation, Korea University) (S. Kor.).

[27] *See generally* JENS BARTELSON, BECOMING INTERNATIONAl (2023) (chapter 2 especially elaborates this point).

[28] NUSSBAUM, *supra* note 14, at 105, 113; David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 4 (1986).

[29] JAMES G. MUPHY, *Just War Thought and the Notion of Peace*, *in* THE NATURE OF PEACE AND THE MORALITY OF ARMED CONFLICT, 106-107 (Florian Demont-Biaggi ed., 2017).

Additionally, Hugo Grotius argued in his monumental book *Mare Liberum* (The Free Sea) that the right of navigation in the sea is open to every state under natural law, and that the domination of the Indian Ocean by Portugal was improper, instead positing that all states should have equal rights on the oceans throughout the globe.[30] This argument provided logical ground for imperialism and colonialism.[31] Accordingly, the peace and balance among the empires could be maintained in Europe at the expense of having to compete in other oceans and continents. Likewise, the Westphalian system excluded 'others' or non-Christian peoples from the boundary of law.

B. The Congress of Vienna (1815): Legal Formalization of Nationalism and Colonialism.

Unlike the Peace of Westphalia that closed the Thirty Years' War, which had been caused by religious disputes, the Congress of Vienna ended the Napoleon War, which heightened nationalism in Europe. Nationalism was a threat to subvert established order.[32] The Congress of Vienna was a result of dealing with nationalism, but ironically, nationalism has been formalized with this system. By means of formal treaty, the empires executed nationalistic incorporation inside Europe and expanded their colonial realms outside Europe

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[30] *See generally* HUGO GROTIUS, THE FREE SEA, (Richard Hakluyt trans., David Armitage ed., Liberty Fund 2004) (1609).

[31] Stefan Eklöf Amirell, *Tools of Imperialism or Sources of International Law? Treaties and Diplomatic Relations in Early Modern and Colonial Southeast Asia*, HIST. COMPASS, Nov. 27, 2023, at 1, 5; s*ee generally,* EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS (2002). He himself contributed for the Dutch East India Company (VOC) as a legal advisor and political lobbyist. John Cairns, *Arguing over Empire: Hugo Grotius, European Expansionism and Slavery*, THE EDINBURGH L. HIST. BLOG (June. 7, 2024), https://www.blogs.law.ed.ac.uk/elhblog/2023/12/06/arguing-over-empire-hugo-grotius-european-expansionism-and-slavery-call-for-papers/; NUSSBAUM, *supra* note 14, at 103.

[32] SHEPARD B. CLOUGH ET AL., A HISTORY OF THE WESTERN WORLD, MODERN TIMES 805 § 3 (2d ed 1968) (1965).

In the realm of international law, the theoretical standard that defined Europe has changed from Christianity to civilization.[33] It promoted integration inward but exclusion outward. First, in 1815, the Congress of Vienna unified small states into larger states in Europe. Empires' lawyers maintained "sovereignty as a gift of civilization".[34] With this setting of legal logic, the empires could obtain power and safety by consolidating small states. For example, in Federative Constitution of Germany, which is agreed upon and signed at the Congress of Vienna, for the purpose of "the safety and independence of Germany, and to the equilibrium of Europe, from their solid and lasting union," the Sovereign Princes and free towns of Germany "agreed to form a perpetual Confederation."[35] Article XI in the treaty solidified the common defense system of the confederation as a whole Germany.[36] Likewise, other treaties from the Congress of Vienna incorporated small nations into Russia, the Netherlands, and other empires.

This nationalist incorporation meant expansion of empires and reinforcement of the imperial system. The modernists' approach to nationalism has long supported that nations were 'invented' before and after the French Revolution, and scholars of international law and political

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[33] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 135 (2001); Oh Si-jin (오시진), Geundae Gukjebeopsang Munmyeongnone Daehan Gochal [A Critical Analysis of the Discourse of Civilization in the Classical International Legal System] (근대 국제법상 문명론에 대한 고찰) 25 (2014) (Ph.D. dissertation, Korea University) (S. Kor.).

[34] *See, e.g.,* KOSKENNIEMI, *supra* note 33, at chapter 2.

[35] Act relative to the Federal Constitution of Germany between *Austria*, *Prussia*, *Bavaria*, *Saxony*, *Hanover*, *Wurttemberg*, *Baden*, *Electoral Hesse*, *Grand Duchy of Hesse*, *Denmark*, *Netherlands*, *Grand Ducal and Ducal Houses of Saxony*, *Brunswick and Nassau*, *Mecklenburg-Schwerin* and *Mecklenburg-Strelitz*, *Holstein-Oldenburg*, *Anhalt* and *Schwartzburg*, *Hohenzollern*, *Liechtenstein*, *Reuss*, *Schaumburg-Lippe*, *Lippe* and *Waldeck*, and the Free Cities of *Lubeck*, *Francfort*, *Bremen*, and *Hamburg*, signed at Vienna, Preamble, June 8, 1815, 64 CONSOL. T.S. 444.

[36] "The States of the Confederation engage to defend from all hostile attacks, the whole of Germany, as well as each individual state of the Union; and they mutually guarantee to each other all their possessions comprised in this Union. When war is declared by the Confederation, no member can open a separate negotiation with the enemy, nor make peace, nor conclude an armistice, without the consent of the other members." *Id.* at art. XI.

history have explained that the law of nations based on equal sovereign states' relationship became more settled in this era.[37] In fact, neither nations were an invention of this era,[38] nor was the law of nations based on horizontal state relationships relating to their legal aspects. Even modernists with a critical stance that European-invented sovereignty is not universal throughout times and regions[39] did not reach the conclusion that European-invented sovereignty at the time, per se, was not substantially different from the so-called non-modern system. In fact, it was recently argued that the Western international law system in the late 19th century was not substantially different from the Tributary system in the context of the vertical setting between sovereign states and semi-sovereign states.[40] Considering international law as a unique feature of modern times itself is a product of modernist perception.[41]

Second, the idea of civilization also had an effect on the colonization outside Europe. Even though the Congress of Vienna acted as an obstacle to the slave trade and any uncivilized international conducts,[42] the new system accelerated colonization in more 'civilized' ways. The Congress of Vienna suppressed the still flourishing international slave trade under the name of

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[37] *See, e.g.*, Barkin & Cronin, *supra* note 17.

[38] AZAR GAT, NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM 2, 16 (2013).

[39] The following source shows the critical modernists' view. DANIEL LOICK, A CRITIQUE OF SOVEREIGNTY 1 (Amanda DeMarco trans., 2018).

[40] Yoo BaDa*, supra* note 26, at 2, 20.

[41] Yoo BaDa*, supra* note 26, at 8. And the pre-condition of inter-'nation'-al law is nation. The generally accepted myth that nation is the invention of modernity is a product of modernity. GAT, *supra* note 38, at 16 ("[N]ations and nationalism being a modern invention, the superficial product of political manipulation, this idea itself is a modernist (or sometimes postmodernist) invention.").

[42] NUSSBAUM, *supra* note 14, at 186–187; KOSKENNIEMI, *supra* note 33, at 111; Oh, *supra* note 33, at 53–4.

civilization.[43] It was because the concept of civilization emerged in international law academia in the 19th century, and the 'civilized' members banned 'barbarian' conduct such as slave trade by themselves.[44]

However, the idea of 'civilized' was also used to justify colonization, invasion, and exploitation. Scholars refer to the last quarter of the 19th century and the first quarter of the 20th century as "the Age of (European) Imperialism."[45] Not only did "the Scramble for Africa" happen in this era,[46] but the Opium Wars in 1840 and 1856, and other substantial invasions of Asia also occurred.

While those expansions of the European empires have been explained with economic and political motivations, they could also be understood in the context of international law. One of the significant traits established by the Congress of Vienna in internationthe U.S.s that states (and empires) tended to make 'written' agreements and treaties, especially from the second half of the 19th century.[47] Formality of treaties became a useful tool for empires to colonize, particularly in their subjugation of Asian nations.[48] For example, Great Britain forced Qing China to sign the

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[43] NUSSBAUM, *supra* note 14, at 186–187.

[44] Oh, *supra* note 33, at 37, 53–54.

[45] DAVID S. MASON, A CONCISE HISTORY OF MODERN EUROPE: LIBERTY, EQUALITY, SOLIDARITY 93 (2d ed. 2011); JOHN MERRIMAN, A HISTORY OF MODERN EUROPE VOLUME 2: FROM THE FRENCH REVOLUTION TO THE PRESENT 836 (4th ed., 2019) (1996).

[46] MASON, *supra* note 45; MERRIMAN, *supra* note 45, at 830.

[47] NUSSBAUM, *supra* note 14, at 196–202.

[48] About examples of colony governing by British empire consul in this era, *see generally*, EMILY WHEWELL, LAW ACROSS IMPERIAL BORDERS BRITISH CONSULS AND COLONIAL CONNECTIONS ON CHINA'S WESTERN FRONTIERS, 1880–1943 (2019).

Nanjing Treaty in 1842 as a 'peace' treaty of the first Opium War.[49] Additionally, the U.S., a new empire, brought Black Ship and attacked Japan to force their signing of the U.S.-Japan Treaty in 1885,[50] and similar unequal treaties were signed with force upon most parts of Asia.[51]

The Asian nations confronted civilization, the new style of treaty, and social evolutionism together, especially with Henry Wheaton's book, *Elements of International Law*.[52] This Western book, which was generally recognized in the East Asian regions, supposed that every sovereign state is of equal status. However, it noted there are exceptions, such as dependent states and semi-sovereign states.[53] For the civilized states, it was morally proper to protect the "uncivilized."[54] Thus, obedience to "peace treaties" promised the end of empires' physical invasions, and obedience was forced under the excuse of promoting civilization. Yet the invasion did not end.

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[49] The treaty is regarded as the beginning of 'modern' in East Asia in terms of international relations. Koo Dae-yeol (구대열), *Chongseol 'Geundae (modern)' Hanguk Oegyosaui Gukjejeongchijeok Baegyeong* [*Introduction: International Background of 'Modern' Korea's Diplomacy History*] (*총설 '근대 (modern)' 한국 외교사의 국제정치적 배경*), 184 HANGUGUI DAEOEGWANGYEWA OEGYOSA GEUNDAEPYEON [HISTORY OF INTERNATIONAL RELATIONS AND DIPLOMACY OF KOREA: MODERN] (한국의 대외관계와 외교사 근대편) 25–27 (Dongbugayeoksajaedan Hangugoegyosapyeonchanwiwonhoe ed., 2018) (S. Kor.). Yet this prospective also seems to be Western-oriented. *See also* Alexander Orakhelashvili, *The 19th-Century Life of International law*, *in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 451 (Alexander Orakhelashvili ed., 2011).

[50] It is formally known as the *Treaty of Amity and Commerce between United States and Japan*. ANDREW GORDON, A MODERN HISTORY OF JAPAN FORM TOKUGAWA TIMES TO THE PRESENT 49–50, 78 (2003). Black ship, *kurofune* in Japanese, referred to Western ships made of steel in general uses but also referred to the US flag ship used in The Perry Expedition. After the physical attack to Japan, the US could open the gate of Japan.

[51] Korean cases show good examples of the Western invasion to Asia in the name of treaty. *See*, CHOE DEOKSU (최덕수), JOYAGEURO BON HANGUK GEUNDAESA [HISTORY OF MODERN KOREA WITH LENS OF TREATIES] (조약으로 본 한국 근대사) 63–108, 169–262, (2010) (S. Kor.).

[52] Oh, *supra* note 33, at 24–5. Additionally, according the modernists' view, "Henry Wheaton (1785–1848) initially produced a treatise on the law of nations." Butler, *supra* note 11, at 382.

[53] Yoo*, supra* note 26, at 7; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 210–212 (William Beach Lawrence ed., Little Brown and Company 6th ed. 1855) (1836).

[54] *See, e.g.*, KOSKENNIEMI, *supra* note 33, at 107–108.

While every treaty has unequal aspects, the treaties between European empires and Asian nations in this era had notably imperialistic characteristics because these treaties presumed the permanent inferiority of one party, they were coercive, and the doctrine of reciprocity was ignored.[55] Further, the non-empire party did not have the right or the authority to revise treaties.[56] Likewise, the trends of nationalism and civilization became legally formalized during this period. The empires made use of formal treaties to incorporate small, adjacent states in Europe, and to colonize, place under protectorate, or exploit non-European nations.

C. The Treaty of Versailles (1919) and Post-World War I: The Invention of Self-Determination and the Failure of Legal Institutionalization.

Under the system established by the Congress of Vienna, European empires enjoyed their imperialistic peak in the first two decades of the 20th century.[57] However, the disputes among them regarding colony matter intensified.[58] Yet, even with these disputes, it was not until more European countries embraced nationalism that World War I was triggered.[59] The Treaty of Versailles made at the Paris Peace Conference ended the war in 1919.

National self-determination emerged as one of the main concepts before and during the making of the Versailles system. The doctrine of self-determination was promoted by the two

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[55] Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. OF INT'L L. 335, 339, 342, 345, 350 (2005); Oh, *supra* note 33, at 50 note 185.

[56] *See, e.g.,* GORDON, *supra* note 50, at 50.

[57] MASON, *supra* note 45, at 100.

[58] From 1880, for twenty years, European nations rapidly subordinate most of African nations to European states (Scramble for Africa). Disputes to take over Africa become more and more competitive among European empires. *Id.* at 93.

[59] There are different perspectives about what is direct event that caused the war: the Sarajevo assassination, Austria's invasion, and violation of Belgium's neutrality by Germany, and so on. But, whatever, there seems no denying the role of nationalism.

winning powers: the U.S. and the Soviet Union. The Fourteen Points by President Wilson is regarded as a symbol of the doctrine.[60] The Soviets emphasized the doctrine, but in different ways.[61] Overall, the doctrine was expected to be used as a decolonial tool and instilled in subjugated people the dream of independence.[62]

However, self-determination was instilled into decolonization selectively. President Wilson almost exclusively focused on the nationalities of Europe.[63] In other words, peace was protected in certain regions due to the protection of European empires. The main defense method to prevent war was to suppress Germany. First, some European nations that had lost their sovereignties to Germany during the war were granted sovereignty and established nation-states.[64] The idea of self-determination seems universal, but in reality, the doctrine was limited to certain regions, mostly in Europe.[65] For instance, after World War I, Central and Eastern European nations could have

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[60] *See e.g.,* MASON, *supra* note 45, at 111.

[61] About the role of Soviet Union in self-determination, *see generally*, Victor Kattan, *Self-Determination in the Third World: the Role of the Soviet Union (1917-1960)*, 8 JUS GENTIUM: J. INT'L LEGAL HIST. 87 (2023).

[62] JEONG TAEHEON (정태헌), INYEOMGWA HYEONSIL: PEONGHWAWA MINJUJUUIREUL HYANGHAN HANGUKGEUNDAESA DASI ILGI [IDEOLOGY AND REALITY: RE-READING KOREAN MODERN HISTORY TOWARD PEACE AND DEMOCRACY] (이념과 현실: 평화와 민주주의를 향한 한국근대사 다시 읽기), 133–149, 248–250 (2024) (S. Kor.).

[63] Kattan, *supra* note 61, at 100.

[64] For example, Austria-Hungary Empire has been ruined by German Empire, and Austria and Hungary each established a republic nation-state.

[65] The treaty explicitly states that "Any fully self-governing State, Dominion, or Colony not named in the Annex may become a Member of the League," but in reality, most of colonies could not be even liberated. Treaty of Peace between the *British Empire*, *France*, *Italy*, *Japan* and the *United States* (the Principle Allied and Associated Powers), and *Belgium*, *Bolivia*, *Brazil*, *China*, *Cuba*, *Czechoslovakia*, *Ecuador*, *Greece*, *Guatemala*, *Haiti*, the *Hedjaz*, *Honduras*, *Liberia*, *Nicaragua*, *Panama*, *Peru*, *Poland*, *Portugal*, *Roumania*, the *Serb-Croat-Slovene State*, *Siam*, and *Uruguay*, and *Germany*, signed at Versailles, art. I, June. 28, 1919, 225 CONSOL. 188 [hereinafter Treaty of Versailles]. Additionally, Wilsonianism also made universal doctrine of self-determination, but the real policy was not toward the philosophy. For example, it was not until 1946 when U.S. grant formal status of independence to its colony, the Philippines. And American anti-communism soon made Washington the defender of conservatism in the Third World. ERIC HOBSBAWM, AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914–1991, at 217 (1994).

achieved independence.[66] Empires like Britain and France had to agree to the creation of certain independent nation-states in East Europe because they thought the new nation-states could "serve British and especially French imperial strategy" and help them to suppress Germany.[67] Likewise, decolonization as well as the making and the recognition of new nation-states were decided selectively according to the convenience of the empires, especially as their defense mechanism.

Second, under the name of peace, the Allies dealt with the outer territories of the German Empire. The Treaty of Versailles commandeered the authority of German colonies and gave it to the Allies.[68] Accordingly, the control on the German colonies in Africa was handed over to the Allies in the General Treaty in 1919, which came into effect in 1920.[69]

Third, the new system somehow resolved the nationalism disputes inside Europe and the independence claims in German colonies in Africa, but did not dissect the whole imperial system, neglecting disputes among empires and independence movements by subjugated peoples throughout colonial regions. President Wilson, the head of a new empire, did not desire to see an immediate end to Western imperialism in the non-European world.[70] Neither did the British Empire's Prime Minister David Lloyd George nor the French Empire's president Georges Clemenceau.[71] One historian described the doctrine of self-determination as "Hope Torture" for non-European nations and explained that the doctrine was enough to instill expectation of

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[66] WHITE, NATION, STATE, AND TERRITORY: ORIGINS, EVOLUTIONS, AND RELATIONSHIPS 210 (2004); MASON, *supra* note 45, at 111–112.

[67] WHITE, *supra* note 66.

[68] Treaty of Versailles, *supra* note 65, at arts. 22, 23.

[69] *See id.*

[70] Victor Kattan, *supra* note 61.

[71] *Id.*

liberation to subjugated peoples outside the Western World, but there was no real intention or practice to resolve colony matters.[72] Rather, it re-divided and re-shared the colonies among victors.[73] Another scholar described "the legal import of the principles of nationality and self-determination was thus confined to Europeans only; the others had to suffer what they must."[74] Most of the non-European people had to endure more severe mobilization and exploitation by empires until the end of the next war. The liberal powers asserted the self-determination doctrine as much as was necessary to suppress Germany, while the Soviet Union claimed to overturn the imperial system with the doctrine, so that the resistances of subjugated peoples at that time had no choice but to follow the Soviet line.[75] Like peace, self-determination belonged to the privileged and was given selectively.

D. Post-World War II system: Legal Institutionalization of Decolonization and the New War.

A monumental transition of decolonization in international law occurred after the end of World War II. While there were numerous treaties and agreements made before and after the war,

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[72] The Paris Peace Conference (1919), in which The Treaty of Versailles has been signed, totally neglected the self-representation and opinion of subjugated nations like Ireland, Egypt, India, and Korea. And, for instance, the Washington Conference (1921-1922) between the U.S. and the Japanese empire decided to grant German rights on Chinese territory to Japan. JEONG, *supra* note 62.

[73] *Id.*

[74] BARTELSON, *supra* note 27, at 127. And also, "the imagined congruence of nation and state was used to legitimize imperial rule over non-European peoples believed unable to attain such a congruence for themselves." *Id*. at 131. He put "Although Wilson did not exclude non-European peoples from the right of self-government and was generally averse to European imperialism, he was not prepared to abolish imperial system altogether but insisted that non-European peoples would attain self-government through gradual reform under the auspices of the League of Nations rather than through a worldwide revolution as proposed by Lenin." *Id*. at, 153.

[75] JEONG, *supra* note 62.

Part D focuses on the San Francisco Peace Treaty between the Allied Powers and Japan in 1951, the General Treaty in 1952 between the Allies and Germany, and other related subsidiary treaties.

The traditional lens of peacemaking might gloss over the big picture of peace treaties during this era. Rather, this could be more clearly understood through the lens of a defense mechanism. Three points about the treaties that ended the war should be pointed out in terms of defense mechanisms of the victors.

First, the military arrangements shown in the treaties were not only asymmetric but also done in preparation for a potential war. For example, the Allies proclaimed the disarmament of Japan with the Potsdam Declaration in 1945,[76] and the U.S. forcibly disarmed Japan and took over its sovereignty at the end of the war before establishing a peace treaty.[77] However, neither these treaties, nor any subsequent treaties, restricted any of the military or physical power of the Allies. Nor was there any action taken to prevent the use of nuclear bombs that had caused tremendous casualties. In the meantime, the Cold War arms race among empires previously that were part of the Alliance had already intensified.[78] The General Treaty expressly proclaimed that they would be stationing armed forces in Germany for their defense purpose.[79] The treaty legally confirmed

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[76] *See* The Heads of Governments, United States, China and the United Kingdom, Proclamation Calling for the Surrender of Japan, Approved by the Heads of Governments, United States, China and the United Kingdom, *in* U.S. DEP'T. STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945 VOL. II, at 1474, 1475; *See also* Roosevelt et al., Final Text of the Communiqué, *in* U.S. DEP'T. STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS THE CONFERENCES AT CAIRO AND TEHRAN 1943, at 448 (William M. Franklin & William Gerber eds., 1961).

[77] Japan restored its sovereignty six years later by the recognition of the Treaty of San Francisco. Treaty of Peace with Japan art. 1(b), Sep. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

[78] Recent scholars maintain that the origin of the Cold War rooted from even before the end of the Second World War.

[79] Convention on Relations Between the Three Powers and the Federal Republic of Germany, art. 4, May 26, 1952, 6 U.S.T. 4251, 331 U.N.T.S. 327.

the military stationing of the Three Powers (U.S., Britain, and France) in Germany.[80] On the other hand, the U.S. military was stationed in Japan right after the war,[81] and the Japan-U.S. Security Treaty in 1951, which was signed together with the Treaty of San Francisco on the same day, provided legal recognition to the American military to maintain its bases in Japan.[82] Further, the treaty enabled Japan's near disarmament – mere 1 percent of its GNP - in the post-war period and "assured a uniquely close relationship between the two Pacific powers."[83] As such, by signing the treaty, Japan gave up certain amount of both its diplomatic and military autonomy to the US.[84] Soon later, the former security treaty was replaced with the Treaty of Mutual Cooperation and Security between the United States and Japan in 1960. While this treaty gave the US additional obligations and limitation, it cemented US as a linchpin of Japan's long-term foreign policy.[85]

Second, the Potsdam Declaration and the Treaty of San Francisco each legally defined the territories of the Axis Powers and decolonized Japan-colonized regions.[86] As mentioned in Parts 2-3, German colonies were no longer in German control in 1919-1920. Article 2 of the Peace of

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[80] *Id.*

[81] The General Head Quarters of the Allies and United States Army Forces in the Far East were stationed in Japan. Emperor of Japan, Instrument of Surrender, Sep. 2, 1945, 59 Stat. 1733 ("The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.").

[82] Security Treaty between the United States of America and Japan, art. I, Sep. 8, 1951, 3 U.S.T. 3329, 136 U.N.T.S. 211; JAMES L. HUFFMAN, JAPAN IN WORLD HISTORY 114 (2010).

[83] HUFFMAN, *supra* note 82.

[84] *Id.*

[85] Treaty of Mutual Cooperation and Security Between Japan and the United States of America, art. VI, Jan. 19, 1960, 11 U.S.T. 1632, 373 U.N.T.S. 179.

[86] Treaty of Peace with Japan arts. 1–2, Sep. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

San Francisco re-confirmed that Japan renounced all rights, title, and claim to Korea, the Kurile Islands, and other occupied territories.[87]

Though there was a gap in time between decolonization of Asian regions and that of other colonies by the Western empires, the empires that won the second war, like Britain and France, also turned to sudden decolonization of the non-European world.[88] But, as mentioned in the Introduction, the reason for the turn to decolonization remained in question. The empires among the Allies did not want to reopen the repeated internal disputes in Europe, so they agreed to undo geographical and territorial boundaries to their pre-war status in order to avoid repeating the failure of the Treaty of Versailles in 1919.[89]

Third, the whole defense system that the new powers tried to establish was not only for the purpose of defense from the Axis powers, but also with the intention of preparing for the new war: the Cold War. And decolonization during this time is directly related to the preparation for the Cold War. For example, Korea had been decolonized from the Japanese Empire in August 1945, but was then re-mobilized by the strategies of the new powers. The USSR and U.S. militaries each stationed themselves in the Korean Peninsula in August and September of 1945. The Korean Peninsula had been colonized by the Japanese Empire since 1910.[90] The USSR and U.S. militaries ran military

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[87] *Id.* at art. 2.

[88] *See* HOBSBAWM, *supra* note 65, at 217–222.

[89] WHITE, *supra* note 66, at 241.

[90] *46 Nyeon Jeon Soryeongun Hanbando Cheot Jinjuhwamyeon Gonggae* (*46 년 전 소련군 한반도 첫 진주화면 공개*), KBS NEWS (Aug. 14, 1991), https://news.kbs.co.kr/news/pc/view/view.do?ncd=3707020 (S. Kor.) (including a video of the first entrance of Soviet military to Korean Peninsula on 12th and 13th August 1945); Douglas MacArthur, Proclamation No. 1, *in* U.S. DEP'T. STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS 1945 VOL. VI THE BRITISH COMMONWEALTH THE FAR EAST 1043 (E. Ralph Perkins et al. eds., 1969) ("By

governments each in the Southern and Northern parts of the Peninsula from 1945 to 1948. Additionally, the U.S. military officially sustained the Japanese colonial legacy to keep the region and the people in control,[91] and denied Korea's self-owned government.[92] Soon, in 1948, both the South and North established separate governments with a certain sovereignty, which culminated in the "Hot" War between the two Koreas. This is sometimes regarded as a proxy war between the liberal camp and the socialist camp.[93] Just like for the Koreas, the decolonization from former empires did not mean the liberation from the imperial system for many colonized nations. Instead, the Suzerain empires and the type of imperial system were replaced with new forms of dominance. The world entered a new war, and the peace treaties became markers of its beginning.

III. Conclusion

The history of international law, as examined through the lens of peace treaties, reveals a pattern of legal mechanisms serving as instruments of imperial defense rather than genuine peacemaking. This analysis challenges the prevailing narrative that international law has always been a progressive force for peace and equality. Instead, it underscores that peace treaties have historically functioned as defense mechanisms, designed to manage the empire system rather than

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virtue of the authority vested in me as Commander-in-Chief, United States Army Forces, Pacific, I hereby establish military control over Korea south of 38 degrees north latitude and the inhabitants.").

[91] GENERAL HEADQUARTERS ARMY FORCES, PACIFIC, ANNEX 8 TO OPERATION INSTRUCTION NO. 4, art.1, Aug. 19, 1945.

[92] CHŎNG PYŎNG-JUN (정병준), 1945-YŎN HAEBANG CHIKHUSA: HYŎNDAE HAN'GUK ŬI WŎNHYŎNG [HISTORY AFTER LIBERATION IN 1945: THE ORIGIN OF CONTEMPORARY KOREA] (1945 년 해방 직후사: 현대 한국의 원형) 305, 307 (2023) (S. Kor.). Actually, the separation and commandeering of Korea had been already discussed and decided by the victors before the end of the second war. *See* Roosevelt et al., Final Text of the Communiqué, *in* U.S. DEP'T. STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS THE CONFERENCES AT CAIRO AND TEHRAN 1943, at 448 (William M. Franklin & William Gerber eds., 1961).

[93] The Korean War and the Vietnam War were thought of as wars by proxy because third parties took interest from a war from local parties. Yaacov Bar-Siman-Tov, *The Strategy of War by Proxy*, 19 COOP. & CONFLICT 263, 263–264 (1984).

dismantle it. Even as international law shifted from colonialism to decolonization, it remained fundamentally tied to the interests of powerful states. By reinterpreting peace treaties through the prism of defense mechanisms, this study contributes to a critical understanding of international law as an evolving system shaped by power struggles rather than idealistic principles.

In the early modern era, colonization of 'others' or 'non-Europe' was the dark side of the peace treaties. The common senses of Christianity and civilization among European empires that were bedrocks of modern peace treaties were used to justify colonizing others. Colonization was also an outlet to distract from the hostile mood in Europe toward non-Europe and a treatment for them to recover from the suffering of wars among imperial and nationalist powers. It is widely believed in academia that nation-states with equal sovereignty have replaced empires; however, empires and the imperial system have persisted.

Later, the transition from colonization to decolonization in international law was not solely driven by altruistic notions of peace, justice, or self-determination. Instead, it was largely dictated by the pragmatic interests of empires seeking to safeguard their power, manage conflicts, and adapt to changing global conditions. Confronting their suffering from wars among themselves and changing global conditions, the empires tried to minimize the dismantlement of their imperial systems by establishing partial nation-states and decolonizing colonies, rather than dismantling the systems themselves.

To be more specific, each of the four major treaty systems analyzed—the Peace of Westphalia, the Peace of Vienna, the Peace of Versailles, and the post-World War II settlements—illustrates how international law evolved to reinforce imperial dominance while selectively granting sovereignty based on strategic necessity. The Peace of Westphalia institutionalized the Christian imperial order under the guise of sovereign equality, while the Congress of Vienna

formalized nationalism as both a tool for consolidating European power and an excuse for continued colonial expansion. The Treaty of Versailles introduced self-determination as an ideological principle but applied it selectively to serve the interests of the victorious empires, rather than as a universal right. Finally, the post-World War II legal framework institutionalized decolonization, not as a benevolent concession, but as a recalibration of imperial control in response to geopolitical shifts, particularly the Cold War.

There could be arguments against my periodization on the ground that it could not overcome the traditional periodization of international law because it is not only regionally Western-oriented, but also modern-oriented in terms of time. This article articulated the objective of its analysis as an examination of "the modern Western" international law, and this expression was the result of assumptions that there have been other international laws outside Western modernity. Moreover, this article elaborates on the limitations of modernists' views on the myths of nation-states and international law. It was modernists' thinking that presumed the system of nation-states as a product of modern Western international law, rather than the system representing modernity. The Imperial system survived throughout the history of international law.

By recognizing the historical functions of international law, we can work toward a system that moves beyond empire-driven legal structures and fosters a truly inclusive and equitable global order. Additionally, this historical view in this article might provide a clearer view on the making of the new peace treaties that the world is now confronting and must deal with.

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