UNIVERSITY OF SÃO PAULO
INTERNATIONAL RELATIONS INSTITUTE

SANG JUNE KANG

INTERNATIONAL NORM DEVELOPMENT:
CYCLIC MODEL OF NORM CHANGE AND SELF-DETERMINATION

SÃO PAULO
2018

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Thesis submitted to the Post-Graduate Programme in International Relations of the University of São Paulo in partial fulfilment of the requirements for the award of PhD in International Relations

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Versão corrigida

A versão original se encontra disponível na Biblioteca do Instituto de Relações Internacionais.

SÃO PAULO

2018

Catalogação na publicação
Serviço de Biblioteca e Documentação
Instituto de Relações Internacionais da Universidade de São Paulo

Kang, Sang June
International norm development: cyclic model of norm change and self-determination / Sang June Kang ; orientadora: Cristiane de Andrade Lucena Carneiro. -- São Paulo, 2018.
123 p.

Tese (Doutorado) – Instituto de Relações Internacionais. Universidade de São Paulo, São Paulo, 2018.

1. International norm development 2. Norm change 3. Self-determination 4. Constructivism I. Carneiro, Cristiane de Andrade Lucena, orient. II. Título.

CDD – 327.0218

Responsável: Giseli Adornato de Aguiar - CRB-8/6813

Janus

Universidade de São Paulo

ATA DE DEFESA

Aluno: 101131 - 9219581 - 1 / Página 1 de 1

Ata de defesa pública de Tese do(a) Senhor(a) Sang June Kang no Programa: Relações Internacionais, do(a) Instituto de Relações Internacionais da Universidade de São Paulo.

Aos 05 dias do mês de dezembro de 2018, no(a) realizou-se a Defesa da Tese do(a) Senhor(a) Sang June Kang, apresentada para a obtenção do título de Doutor intitulada:

"Desenvolvimento de normas internacionais: modelo cíclico de mudança normativa e autodeterminação"

Após declarada aberta a sessão, o(a) Sr(a) Presidente passa a palavra ao candidato para exposição e a seguir aos examinadores para as devidas arguições que se desenvolvem nos termos regimentais. Em seguida, a Comissão Julgadora proclama o resultado:

Nome dos Participantes da Banca	Função	Sigla da CPG	Resultado
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Alberto do Amaral Junior	Titular	FD - USP	Aprovado
Liliana Lyra Jubilut	Titular	UNISANTOS - Externo	Aprovado
Janina Onuki	Titular	IRI - USP	aprovado

Resultado Final: Aprovado

Parecer da Comissão Julgadora *

Nada consta.

Giselle de Castro
Chefe do Serviço de Pós-Graduação
e Pesquisa - IRI-USP

Eu, Giselle de Castro _____, lavrei a presente ata, que assino juntamente com os(as) Senhores(as). São Paulo, aos 05 dias do mês de dezembro de 2018.

Alberto do Amaral Junior

Liliana Lyra Jubilut

Janina Onuki

Cristiane de Andrade Lucena Carneiro
Presidente da Comissão Julgadora

* Obs: Se o candidato for reprovado por algum dos membros, o preenchimento do parecer é obrigatório.

A defesa foi homologada pela Comissão de Pós-Graduação em 06.12.2018 e, portanto, o(a) aluno(a) _____ jus ao título de Doutor em Ciências obtido no Programa Relações Internacionais.

Presidente da Comissão de Pós-Graduação
Adriana Schor
Presidente
Comissão de Pós-Graduação

ACKNOWLEGEMENT

I would like to express my heartfelt gratitude to my advisor Prof. Cristiane Lucena Carneiro for her constant support and encouragement. This research could not have been possible without her guidance.

I am grateful to the members of my PhD committee, Prof. Janina Onuki (IRI-USP), Prof. Alberto do Amaral Junior (FD-USP), and Prof. Liliana Lyra Jubilut (UNISANTOS), for their insightful comments and suggestions.

I would like to thank professors and colleagues of the POLMET, research methodology group, who read my papers and gave me constructive feedback. My sincere thanks also go to professors, friends, and staffs at the IRI-USP who always supported me with sincerity.

My appreciation extends to the Ministry of Foreign Affairs of the Republic of Korea and the Korean Consulate General in São Paulo for giving me the opportunity to study and work in Brazil.

My deepest gratitude goes to my family for their unconditional love.

ABSTRACT

With the surge of constructivism, which values non-material factors and ideational variables, norm research became the center of interest in International Relations scholarship. The early constructivist theory is suitable for showing how a norm could be replaced by another but incapable of explaining how a norm itself changes. Hence, the next challenge for constructivism would be demonstrating a norm change mechanism. The purpose of this research is to fill a gap in the international norm literature. From a constructivist perspective, this research suggests a cyclic model of international norm change and verifies its plausibility by examining the empirical evidence of change in the international norm of self-determination. Although self-determination is one of the essential norms in the contemporary international order, it has yet to be investigated within international norm literature. Unlike the static model of early constructivists, the cyclic model of international norm change demonstrates a clear framework to see how the norm of self-determination has changed over time and explains why norm structures are sometimes stable and other times volatile.

Keywords: international norm development, norm change, self-determination, constructivism

RESUMO

Com o surgimento do construtivismo, que valoriza fatores não materiais e variáveis ideacionais, a pesquisa de normas tornou-se o centro de interesse em estudos de Relações Internacionais. A teoria construtivista inicial é adequada para mostrar como uma norma pode ser substituída por outra, mas incapaz de explicar como uma norma se modifica. Assim, o próximo desafio para o construtivismo seria demonstrar o mecanismo de mudança de norma. O objetivo desta pesquisa é preencher uma lacuna na literatura internacional de normas. De uma perspectiva construtivista, esta pesquisa sugere um modelo cíclico de mudança internacional de normas e verifica sua plausibilidade examinando as evidências empíricas de mudança na norma internacional de autodeterminação. Embora a autodeterminação seja uma das normas essenciais na ordem internacional contemporânea, ela ainda precisa ser investigada dentro da literatura internacional de normas. Ao contrário do modelo estático dos primeiros construtivistas, o modelo cíclico da mudança internacional de normas demonstra uma estrutura clara para ver como a norma de autodeterminação mudou ao longo do tempo e explica por que as estruturas normativas são às vezes estáveis e outras voláteis.

Palavras-chave: desenvolvimento de norma internacional, mudança de norma, autodeterminação, construtivismo

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LIST OF ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IL	International Law
IO	International Organization
IR	International Relations
MNC	Multi-National Corporation
NGO	Non-Governmental Organization
SFR	Socialist Federal Republic (of Yugoslavia)
UDI	Unilateral Declaration of Independence
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America

USSR	Union of Soviet Socialist Republics
WWI	World War One
WWII	World War Two

PART I. THEORY OF INTERNATIONAL NORM DEVELOPMENT

1. INTRODUCTION

1.1. Purpose and Research Questions

The advent of constructivism in International Relations (IR)* theory is often linked to the end of the Cold War (McGlinchey et al. 2017, 36). While conventional theories, such as neorealism and neoliberalism, revealed the weaknesses in explaining the impact of ideational factors on international relations, constructivism surfaced within IR theory debates suggesting an alternative view.

"The constructivist turn" in IR theory (Checkel 1998) is based on norm research. Constructivists argued that norms matter in international relations and tried to demonstrate how international norms emerge, diffuse, and affect political outcomes. Norms were regarded as a formidable weapon to overcome the "neo-neo debate" and rationalist dominance in IR (Klotz 1995). Norms were perceived as an immense promise for dismantling the traditional IR research agenda (Finnemore and Sikkink 1998). Rich empirical studies were conducted from the security norm (Katzenstein 1996) to the human rights norm (Klotz 1995; Risse et al. 1999).

The purpose of this research is to fill a gap in the international norm literature. Early constructivist scholars have shown norms' influence on international relations and theorized

* Throughout this research, the abbreviations of 'IR' and 'IL' refer to the academia of scholarships, whereas the general term of 'international relations' means politics/relations among international actors.

a norm emergence model. However, the dominant constructivist norm literature is silent about how norms change over time. The early constructivist theory is suitable for showing how a norm could be replaced by another but incapable of explaining how a *norm itself* changes (Hoffmann 2017). “The first wave of empirical constructivist studies tended to “freeze” norms” (Hoffmann 2017).

All norms change. For example, the human rights norm of the nineteenth century differs from current international relations. From specific norms of certain issue areas, like the prohibition of wartime plunder, to more general mega-norms, like equal sovereignty, no norm remains unchanged over time. Furthermore, the impact of norm change is compelling, creating a new normative structure that constitutes actors’ behavior, revising states’ interests, and thus yielding different political outcomes in the real world. In this vein, the next challenge for constructivism would be explaining how norms change with time and why normative structures are sometimes stable and other times volatile. Here come the research questions.

This research builds a cyclic model of norm change and verifies its plausibility by examining the empirical evidence of change in the international norm of self-determination. Although self-determination is one of the essential norms in the contemporary international order, it has yet to be investigated within international norm literature.

This research pays due attention to the following questions. Firstly, how do norms change? Norms change, whether or not they experience codification, but the literature is silent about that change. Contrary to the emphasis on norm dynamics, the dominant constructivist literature has focused on the emergence of international norms but does not explain what happens after their emergence. This research tries to find the mechanism of international norm change.

Secondly, what triggers the norm change? Rationalists would argue that materialist, self-interest motives are key factors whereas constructivists may argue for ideas, values, culture, knowledge, and identities. This research tries to show that constructivist theory suggests sounder grounds for explaining the change of norm structures.

Thirdly, who are the entrepreneurs that lead the norm change? This research endeavors to demonstrate that non-major powers could lead the change. It would be discussed whether various international actors' shared ideas to construct a collective identity are more influential in the process of norm change than powerful states' self-centered decision-making.

Lastly, what would be the ultimate goal of norm development? Early constructivists argued that it would be internalization into domestic legal systems. However, with fundamental norms, like self-determination or equal sovereignty, the incarnation of international norms into the national level would be discrepant. This research attempts to address the results of international norm change on the international level.

1.2. Methodology and Empirical Study

The purpose of this research is to suggest a cyclic model of international norm change with respect to the norm of self-determination. An adequate methodology to test the validity of the theoretical argument in this research would be an empirical study consistent with the work of many scholars of international norm literature. The empirical study this research adopts is closer to process-tracing analysis that addresses each critical stage of historical development. Process-tracing, which is a useful tool of causal inference to "unfold" the object "over time," is a "systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses" (Collier 2011). Through an empirical study, this research aims to discover the causal sequence of norm development to support the theoretical framework.

In this regard, self-determination would be the best option for the purpose of this research because the norm has historically changed and passed through different stages of development. Self-determination emerged as an international norm of political principle for the post-World War I (WWI) restoration, evolved into a legal principle after World War II (WWII), then transformed into a legal right of peoples in the decolonization era and finally developed into "the highest order within the contemporary international system" (Anaya 1996, 75). Such continuous and drastic changes in the self-determination norm serve as an excellent example of the international norm development.

Besides the value given its historical development, self-determination is a contemporary concern as well. Self-determination was discussed and exercised throughout the twentieth century (Sterio 2010); it is still said that defining self-determination and its relations with other norms such as the sanctity of borders would be one of the most crucial but unsolved issues in international studies of the twenty-first century (Graham 2000). According to the United Nations' website, 36 countries attained UN membership after the

end of the Cold War, and 25 of those were newly independent countries. Still, nearly 5,000 distinctive peoples are in the world, and many armed conflicts are caused by the groups that seek self-determination or by the states that seek territorial integrity (McCorquodale 1994). "Self-determination appears ubiquitous" (Abulof 2016). In numerous parts of the world, such as Catalonia, Crimea, Chechnya, Georgia, Kurdistan, Palestine, Iraq, Kashmir, Tibet, Indonesia and the Philippines, self-determination continues to be at the core of intra-state disputes.

However, there is a gap between the goal of self-determination in its current legal status of supremacy and its preferential applicability in reality because of the complexity of the norm of self-determination. The self-determination norm lies at the intersections of law and politics, domestic and international affairs, state sovereignty and peoples' rights and territorial integrity and democracy/human rights demands. This research tries to seek a compromise between the norm's legal status and political reality.

Meanwhile, the appraisal of self-determination is that the norm is not investigated in IR norm literature. In a relatively short period of time, constructivists have demonstrated the impact of international norms in almost all substantive domains (Sandholtz and Stilles 2009, 2), such as decolonization norm (Goertz and Diehl 1992), racial equality norm (Klotz 1995), human rights norm (Risse et al. 1999), environment norm (Dimitrov 2005), anti-capital punishment norm (Bae 2007), wartime plunder norm (Sandholtz 2008), election monitoring norm (Kelly 2008), gender equality norm (Krook and True 2010), cyberspace norm (Finnemore and Hollis 2016), and anti-piracy norm, sovereign equality norm, anti-terrorism norm, anti-extraterritoriality norm, anti-slavery norm, anti-genocide norm, refugee and asylum norm, humanitarian intervention norm and democracy norm (Sandholtz and Stiles 2009).

As far as this research concerns, the norm of self-determination has yet to be

examined although it is crucial to the current international order. Hence, self-determination is useful for this research to trace the process of international norm development and to verify the validity of the theoretical framework.

1.3. Definitions

Definition of International Norms

There are many definitions of the international norm stemming from various intellectual traditions (Björkdahl 2002). According to rationalists, international norms are considered as regulations, rights, obligations and ought. Krasner (1982) determined norms as "standards of behavior defined in terms of rights and obligations" and "given social setting[s] to the extent that individuals usually act in a certain way" (Axelrod 1986). Raymond (1997) referred to international norms as "generalized standards of conduct that delineate the scope of a state's entitlements, the extent of its obligations, and the range of its jurisdiction." In general, rationalist definitions of international norms emphasize the sanction after a violation of a norm has occurred.

To the contrary, constructivists understand international norms as socially constructed consent. International norms are a "set of intersubjective understandings and collective expectations regarding the proper behavior of states and other actors in a given context or identity" (Björkdahl 2002). The "appropriateness" is stressed when the international norm is seen as "a standard of appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998). Sandholtz, who belongs to the new constructivist stream, equates norms with rules, defining both as statements that identify standards of conduct (Sandholtz 2007, 7; 2009 with Stilles; 2017).

In sum, the rationalist definition gives priority to the regulative aspect of norms whereas the constructivist definition is more inclined toward actors' interactions. However, constructivism also admits that normative structures require actors' compliance.

Brunnée and Toope (2000) point out that the definition of norms in IR literature is typically open-ended. It would be probably because the majority of norm researchers are based on constructivism, and they do not want to confine their research agenda into a certain narrow set. In the same vein, constructivists are not inclined to distinguish social norms from legal norms because both norms matter in international relations.

Definition of Self-Determination

Self-determination, which was incorporated in Article 1(2) of the Charter of the United Nations, is based on the concept that people have a right to determine their own destiny freely. However, as this research will show in Part II, the meaning of self-determination has changed throughout history. Self-determination, in its conventional form, was conceived as the freedom from alien domination and designed to be applied to those peoples under colonial domination and foreign occupation. Accordingly, it was understood as a synonym for secession or independence. And, since self-determination has traditionally been equated with a right to unilateral secession, the international community rejected self-determination, resulting in an artificial narrowing of the scope and content of self-determination (Seshagiri 2010, 566).

The reluctance to recognize self-determination was due to the dominant International Law (IL) tradition of legal positivism, which is intimately connected to conventional IR scholarship of political realism. IR scholarship agreed with legal positivist thought that "legal norms can only exist when they are produced through fixed hierarchies, usually state hierarchies" (Brunnée and Toope 2000).

Mainstream IL and IR perceived that although self-determination is one of the most critical international norms, its content and scope are poorly codified, and its relations with other fundamental norms are not clearly defined. Thus, an inevitable tension between self-determination norm and territorial integrity norm emerged as if should self-determination be allowed for all people, it might dismantle the basis of the current state-centric international order. In legal positivist and (neo)realist world views, self-determination should be understood as narrowly as possible in order to maintain the stable Westphalian state system. Their rigid theoretical frameworks and ignorance of norm development caused confusion leaving the content and scope of the self-determination norm confusing.

However, the completion of decolonization and the end of the Cold War provoked the need for a new theory to cope with the changes. Currently, there seems to be a consensus among IL scholars and international/domestic courts that self-determination should be viewed from two different perspectives—internal and external. Internal self-determination means autonomy or self-government whereas external self-determination is connected to independence or secession (Mueller 2012).

Internal self-determination is a right to pursue "political, economic, social and cultural development within the framework of an existing state" (Supreme Court of Canada 1988). It is a concept that people have a right to enjoy autonomy or to form self-government within their current state. Hence, if a state's political system is oppressive against a particular group of people, the international community may pressure the central government to reform its political system and encourage the claimant group's voice (Sterio 2010). The logic is that as long as internal self-determination is observed by the central government, the people do not need to challenge the territorial integrity of the existing state (Sterio 2010). However, if the central government extremely disrespects a people's political, ethnic and cultural autonomy, external self-determination is triggered.

External self-determination applies to those peoples whose fundamental rights are severely abused by the central government (Sterio 2010). In other words, even though the people are not colonized, "when the group is collectively denied civil and political rights and subject to egregious abuses" such oppressed peoples have a right to external self-determination, which could be concluded with remedial secession and independence (Scharf 2002). In the discourse on external self-determination, remedial secession is at the core.

Remedial secession is the 'new' understanding of self-determination (Burri 2010). Scholars and courts tried to rediscover the corrective aspect of self-determination under conditions when the norm is wholly denied. The 1970 UN General Assembly Resolution 2625 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (Principle Declaration) was adopted unanimously and is regarded as the most authoritative document on self-determination (Malanczuk 2002, 327). Today, many legal scholars argue that the 1970 declaration implied that a claimant group could insist on remedial self-determination "after utmost efforts" to obtain their right of internal self-determination (Shah 2007).

It is also supported by many states, discussed further in this dissertation in Chapter 8. Among those that filed Written Statements to the International Court of Justice (ICJ) for the Advisory Proceedings on the issue of Kosovo in 2009, 40.5% of states, including Russia, Germany, France, Netherlands, Switzerland, Denmark, Norway, Finland, Poland, and Slovenia, acknowledged the existence of the right to remedial secession under current international law whereas 19%, including Spain, Slovakia, Cyprus, Iran, and China, denied such a right (Written Statements of States to the ICJ 2009).

According to this new interpretation, the right to self-determination would normally initially be exercised internally, but in "the most extreme of cases" external self-

determination would be exercised (Vidmar 2010). Such cases occur “when the people is collectively denied civil and political rights and is subject to egregious abuses” (Scharf 2002), and the people has the right to remedial self-determination, which might conclude in remedial secession. The denial of the exercise of the right of democratic self-government is the precondition to the right of remedial self-determination (Scharf 2002).

Internal self-determination and external self-determination, including remedial, are not two different norms, but a right/obligation norm with two aspects. Remedial secession may be lawful as the only possible means to safeguard fundamental human rights but does not justify all territorial fragmentation (Szewczyk 2010). Attention should be given to the fact that the common ground of both aspects of self-determination is democracy.

1.4. Structure

This research is composed of two parts. Part I that encompasses Chapter 2 and 3 is about the theoretical discussion to build a model, and Part II that is composed of Chapters 4 to 8 is an empirical study on the norm of self-determination to test the validity of the suggested model.

Chapter 2 reviews the international norm literature from different perspectives. It introduces the rationalist view and then shows how the more recent constructivist approach is different from the earlier constructivist literature. The debate regarding the IR/IL interdisciplinary approach to norm research is highlighted.

Chapter 3 investigates the theory of international norm change. It tries to explain when international norms are stable/volatile and born/dead. The discussion moves to the trigger and sequence of international norm change. Finally, it suggests a cyclic model of international norm change.

Chapters 4 to 8 each include an empirical study to demonstrate the model's validity. Chapter 4 shows how self-determination emerged as an international norm after WWI through the cycle of the trigger, discourse, norm creation, and norm structure.

Chapter 5 describes the second cyclic change of self-determination after WWII. For the first time in history, self-determination was codified into one of the most important international legal documents—the Charter of the United Nations. The same cyclic stages of the trigger, discourse, norm change, and norm structure are to be used until Chapter 7.

Chapter 6 explains the third cyclic change of self-determination, which enabled the explosive birth of independence for most colonial people. The chapter discusses how even non-feasible entities could gain independence against the interests of major powers.

Chapter 7 shows the fourth change in the norm after the Cold War ended. The norm

of self-determination within the non-colonial context is to be dealt with. The discussion continues in Chapter 8 that analyzes recent applications of the self-determination norm and reveals actors' perception of the norm change.

Chapter 9, as a conclusion, sums up the contribution of this research to the literature. It finds that the empirical study actually supports the cyclic model of international norm change and suggests future studies.

2. LITERATURE REVIEW

2.1. Norm Research in Rationalist Literature

In neorealist literature, norms are treated as intermediate (or dependent) variables between national interests and political outcomes (Krasner 1982; Mearsheimer 1994). Neorealists view norms "as irrelevant" (Sandholtz and Stilles 2009, 2) or "as the powerless product of interest" (Klotz 1995). In the neorealist worldview, norms as well as ideas and institutions, are not independent explanatory variables but rather regarded as dependent intervening variables (Björkdahl 2002) since the distribution of power among states explained all important outcomes of international affairs (Sandholtz and Stilles 2009, 2). If norms are a mere justificatory tool for great powers, neorealists will have difficulty explaining why states invest so much effort and resources in creating and changing international norms. Neorealists' rigid framework is unsuitable for capturing norm change in the real world.

Interest in norms can be found in neoliberal institutionalism and regime theory literature. Such scholars as Young (1980), Krasner (1983), Keohane (1983), Axelrod (1986), and Kegley and Raymond (1990) have tried to explain the role of international norms and their impact on state behavior. They showed that norms are explanatory variables that intervene between power distributions and outcomes (Björkdahl 2002).

Krasner (1983) described norms as one of the components of regimes and defined norms as "standards of behavior defined in terms of rights and obligations." Keohane (1983) argued that norms are essential for international regimes and that states' self-interest and economic rationality are the bases for both. Axelrod (1986) also insisted that norms set the extent of actors' acting behavior and violating norms might be regulated by punishment, such

as sanctions.

Although neoliberal institutionalists and regime theorists treated the normative factor as one of the crucial components comprising international institutions or regimes, it remains difficult to argue that norms drew more attention than other components, such as principles, rules or decision-making procedures. With the same logic, norms were not used independently but only preferentially when explaining institutions and regimes.

In neoliberalist literature, norms are selectively adopted by rational actors who seek to reduce transaction costs (Keohane 1984) and are outputs of self-interested actors' behavior (Krasner 1999). Neoliberal institutionalists allowed for a limited causal role to norms (Björkdahl 2002). The most significant gap between rationalist and constructivist conceptions of norms is that the former considered norms as outcomes whereas the latter treated norms as an independent variable.

Rationalists' excessive reliance on materialist power reveals many discrepancies in what they call real politics. Major powers may frequently violate international norms, but such infringement neither creates a new norm nor an escape from paying costs. The US invasion of Iraq in 2003 was not supported by its allies or the UN Security Council. Sandholtz (2009, 14) points out that "[t]he perception that the US invasion contravened international rules imposed significant costs on the United States."

The Russian annexation of Crimea in 2014 was not recognized by the majority of the international community. Russia had to face such targeted sanctions as US regulations on Russia's finance, energy and defense sectors and the European Union's prohibition of certain Russian individuals' entry into its member states (Carneiro and Apolinário 2016).

If the 2003 US invasion was supported by other states as a preventive attack, "a new rule of permissible preventive self-defense" could have been created (Sandholtz 2009, 15). If the 2014 Russian annexation was followed by other similarly forceful cases, a new norm of

the use of military threat could have been generated. However, no additional acts were made leaving the United States and Russia to pay colossal material and non-material costs.

Neither the creation of new norms nor the exception from existing norms is extracted from the infringement of international norms regardless of the offenders' power. Power does not matter as much as rationalists suggest.

2.2. Norm Research in Constructivist Literature

Early Constructivist Theory

With the surge of the constructivist school in the 1990s, which highly values the role of non-material, ideational factors in international relations, norms became the center of IR scholarship. Constructivism challenged the rationalist approach to international norms and law. Constructivists embraced materialist, rational and state-centric traditional notions, but emphasized the influence of ideas and norms, concepts of which neorealists were not interested. Risse (2004) claims that "human agents do not exist independently from their social environment and its collective shared systems of meaning."

Constructivism embraces "reflectivist ontology and rationalist epistemology" (Björkdahl 2002). Ontologically, constructivism shares non-material factors, like identity and discourse, with reflectivist perspectives, such as postmodernism, poststructuralism and critical theory (Björkdahl 2002). Epistemologically, it adopts causal relations between variables like rationalists (Björkdahl 2002).

Constructivists regarded an international norm as a set "of appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998). The most critical theoretical model on international norm development would be Finnemore and Sikkink's *Norm Life Cycle* (1998). Their work suggests that norms evolve through steps: emergence, cascade, and internalization. They also explain how domestically invented norms become international and how international norms affect state behavior.

In the first stage of norm emergence, the norm entrepreneur role is important. Norm entrepreneurs, which can be individuals, organizations or states, persuade actors, either states or international institutions, to behave in accordance with their ideas (Finnemore and Sikkink

1998). They can be diffuse, provoke or even create new values for dissemination. If a norm reaches a "tipping point," when a number of states are ready to adopt the new norm, it proceeds to the second stage (Finnemore and Sikkink 1998).

The second stage of norm cascade occurs when norms receive broad acceptance and is characterized by a "dynamic of imitation as the norm leaders attempt to socialize other states to become norm followers" (Finnemore and Sikkink 1998). It is said that states' compliance with the norm is related to their identities as members of the international community (Finnemore and Sikkink 1998).

In the last stage of norm internalization, norms reach a "taken-for-granted quality" and are rarely questioned. "Internalized norms can be both extremely powerful (because behavior according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to confirm)" (Finnemore and Sikkink 1998).

Criticisms of the Early Constructivist Approach

Constructivist interest in ideational variables and non-material factors attracted wholehearted attention to international norms. However, the overwhelming trust in sociological constructivism led to yield certain fallacies in their models.

The first fallacy is the *inconsistency between theory and empirical studies*. Constructivists introduce norms as an inter-subjectively constructed social phenomena, but when conducting case studies, they picture norms as "stable things with fixed and unequivocal content" (Hofferberth and Weber 2015). The norm diffusion process was explained as a dynamic process, but the norm *itself* was seen as unchanging (Bloomfield 2016). These oversights probably stemmed from early constructivists' excessive reliance on sociology, which views social norms as static (Hoffmann 2017).

The second fallacy is the *causal irrelevance between each stage*. In the first stage of norm emergence, norms exist from the beginning. Therefore, there is no explanation of how norms arise. It proceeds to the second stage of norm cascade by virtue of the active role of norm entrepreneurs, who act passionately on the basis of moral motivations, such as empathy, altruism or ideational commitment (Finnemore and Sikkink 1998); but, the explanation is too emotional to infer scientific causality. The third stage arises naturally because norms are already unquestioned (Finnemore and Sikkink 1998). In short, what is theoretically meaningful is norm diffusion by entrepreneurs and the rest happens automatically, with no effort.

The third fallacy is *reductionism*. Constructivists borrow the materialist concept of the system. Norms are independent variables that yield state behavior, which comprises an international system (Hofferberth and Weber 2015). However, in most constructivist literature, the last stage of the development of international norms is internalization. Domestic legal adjustment is the last resort of early constructivist norm development and norms are treated as invariable constants that never change. However, such meta-norms as self-determination or equal sovereignty cannot and need not be internalized and codified in domestic law.

The three fallacies mean that constructivism was criticized for failing to demonstrate how norms change (Hoffmann 2003). According to their theoretical assumptions and arguments, how norms change should have been situated in the center of the constructivist norm research.

One more criticism of the early constructivist norm diffusing model is the *West's bias*. The highlighting part of the model is the entrepreneurs' leading role. Actors are divided into entrepreneurs and followers, and norm entrepreneurs, mostly from "the community of dominant Western states," *guide, lead or enlighten* non-Western norm followers to diffuse

liberal norms from human rights norm to arms control and environment norms (Bloomfield 2016).

Newest Model of International Norm Change

Early constructivist thought from the late 1980s until the early 2000s focused on the power of norms to affect domestic and international outcomes and the established political theories of international norm emergence.

Sandholtz accepted almost all constructivist assumptions. However, in the Sandholtz's model, actors invoke norms "not because they believe in" such norms, as the early constructivist model argued, but because the norms "offer the best chance of winning" (Sandholtz 2008). He also admitted the impact of rationalists' material power more than early constructivists did and valued actors' rational choice under cognitive and resource limits. (Sandholtz 2007, 6)

In the Sandholtz's model, each cyclic change has four phases: actions, arguments, norm change, and rule structure. The core of the model is "disputes" that: arise from the inevitable tension between norms and specific actions; and, along with arguments, reshape norms and conduct and accordingly change normative structures (Sandholtz 2007; 2008; 2009 with Stilles). Further analysis of the Sandholtz's model will be addressed in Chapter 3 of this research.

Following Sandholtz, Krook and True (2010) also perceived norms as "processes" and named their approach as "discursive." They valued the role of transnational activists and distinguished "internal" norm dynamism relying on debates among activists and UN organs, from "external" norm dynamism stemming from changes of normative environment (Krook and True 2010).

2.3. Norm Research with Interdisciplinary Approach

Disciplinary Apathy and Détente

IR and IL "and their parent disciplines of law and political science" were separated after World War II, according to Pollack (2013). IR and IL "cover much of the same territory" (Koh 1996), share "substantial common interests" (Pollack 2013) and maintain "overlapping … scholarly agendas" (Dunoff and Pollack 2012). However, the interdisciplinary approach to norm research between the two disciplines has been limited. Because the methodological commitments of IR and IL are quite different (Goldsmith and Posner 2005, 15), the two disciplines followed "different analytic missions" and thus, reached "different conclusions about the function and influence of law" (Koh 1996).

Especially in the traditional IR scholarship of realism, attention was not given to IL, which excluded some exceptional studies (Goldsmith and Posner 2005, 16). In Pollack's (2013) words, post-WWII realists "ignored and disparaged international law, and that the 'l-word' was largely banished from the leading IR scholarship for much of the next half-century." Neoliberal institutionalism and regime theory influenced IL theorizing, but IL did not affect IR theorizing (Sandholtz 2007, 4).

However, the complexity of the post-Cold War international order and the escalation of globalization have triggered the pursuit of academic collaboration between the disciplines to understand the current world better. With the surge of constructivism in IR scholarship, norms constituted the essence of IR literature, and IR scholars started to look IL differently from the earlier period. Constructivists view IL as a discipline that is "all about norms and their significance" (Sandholtz 2007, 4). Moreover, they regarded IL as a comprehensive normative system subject to constant interactions and communicative processes among

various international actors, such as states, international organizations (IOs), non-governmental organizations (NGOs), multi-national corporations (MNCs) and individuals. For constructivists, "identities and interests are not exogenously given but are constituted through interaction on the basis of shared norms such as international law…" (Slaughter, Tulumello and Wood 1998). Hence, IL is not a fixed given rule but should be considered as a dynamic set of norms. Through norms, constructivists built an interdisciplinary bridge between IR and IL.

The "disciplinary détente" in the Post-Cold War era (Pollack 2013) drew more attention from the IL camp. Legal scholars, such as Goldsmith and Posner (2005, 15) argued that: "There is a more sophisticated international law literature in the international relations subfield of political science." However, this statement rankled rigid IL scholars like Koskenniemi (2009a, 2012). Nonetheless, IL's reconciliation with IR became more and more prominent.

Some IL scholars tied the interdisciplinary approach with IR's traditional rationalism. For example, Goldsmith and Posner (2005, 3) suggested an IL theory influenced by the rational choice model asserting that "international law emerges from states acting rationally to maximize their interests." They argued further that "International law is, in this sense, *endogenous* to states interests" (Goldsmith and Posner 2005, 13). However, more international legal scholars welcomed the new tendency of IR and constructivism and conceptualized a bridging opportunity through the constructivist notion of international norms. "The constructivist turn" in IR theory (Checkel 1998) for political scientists equated to "the normative turn in IR theory" (Brunnée and Toope 2000) for legal scholars.

Slaughter, Tulumello, and Wood (1998) argued that "a new generation of interdisciplinary scholarship has emerged," and that "traditional 'positive versus normative' or 'politics versus law' has no sounder ground." The interdisciplinary approach is "one of the

most significant development in the theory of international law and relations" (Roth-Isigkeit 2017).

Meanwhile, criticism of the interdisciplinary approach arose. IR scholars argued that the inherent characteristics of legal scholarship led the IL academics to study norm interpretation and adjustment, but they "seldom seek to explain how or why international law changes" (Sandholtz and Stiles 2009, 4). In other words, despite a "growing volume of sophisticated legal theory," IL scholars' focus was on "identifying what the law is" (Sandholtz and Stiles 2009, 4). The same criticism also came from the IL camp. "Even the newest wave of international relations (IR) theory, denominated 'constructivism,' has proven better at explaining stasis rather than change" (Brunnée and Toope 2000).

Koh's Transnational Legal Process

One prominent legal scholar to accommodate constructivism was Harold Hongju Koh (1996, 1997, 1998) who led *Transnational Legal Process* theory. Koh (1996) explained that there are four distinctive features in Transnational Legal Process theory: nontraditional, nonstatist, dynamic and normative. Koh (1996) rejects the dichotomy of traditional IL: domestic/international and public/private. On the question of why states obey international law, Koh appears skeptical of the rationalist reliance on such variables as power, self-interest or rational choice; doubtful about Thomas Franck's rule-legitimacy theory and questionable on Michael Doyle and Bruce Russet's political-identity explanation (Koh 1998). Koh (1998) argues that states' self-enforcement is more effective and efficient than external enforcement.

According to Koh (1997), international norms are embedded into the "internal value sets" of the domestic legal system as well as into domestic political processes." Transnational actors, such as individuals, private norm entrepreneurs, and NGOs, create an

"epistemic community" (Koh 1997) that is a network of professionals sharing common recognition and knowledge in a given issue area. The community not only persuades people and governments but is actively involved in the interpretation of norms (Koh 1997). The transnational legal process is a recurrent cycle of "interaction, interpretation, and internalization" (Koh 1997, 1998). Through repeated participation in the process, national interests are reconstituted, actors' identities are established and norms "become part of the fabric of emerging international society" (Koh 1997). To answer the question of why states obey powerless IL, Koh wrote:

> [D]omestic obedience to internalized global law has venerable historical roots and sound theoretical footing. Participation in transnational legal process creates a normative and constitutive dynamic. By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities. In a post-ontological age, characterized by the 'new sovereignty,' the richness of transnational legal process can provide the key to unlocking the ancient puzzle of why nations obey (Koh 1997).

Koh's explanation for the internalization of international norms is quite similar to that of constructivists. With the same logic, Delmas-Marty (2009) also stressed the process of "fine-tuning" the internalizing of international norms.

Koskenniemi and Counterdisciplinarity

Attention should be given to Koskenniemi (1990, 1994, 2001, 2006, 2009a, 2009b, 2012) who has worked in legal realism and critical legal studies (Koskenniemi 2009b). This research regards Koskenniemi's dismantling and reconstructing approach to international

law as quite similar to constructivist thinking. Moreover, when undertaking norm research, Koskenniemi's legal work provides much to be adopted.

However, throughout his work, Koskenniemi's critical attitude toward the IR/IL interdisciplinary approach means that he did not hesitate to make biting attacks on IR scholarship. According to Dunoff (2013), Koskenniemi is suspicious of IR's intentions as if IR tries to "conquer and colonize" IL. Further, Koskenniemi contends that lawyers should protect IL's purity of law and protect IL's own realm of autonomy (Koskenniemi 1990, 2001, 2006, 2009a, 2009b, 2012).

In a 2009 article, Koskenniemi (2009a) criticized the IR/IL approach as "not really about cooperation but conquest." Moreover, he argued that interdisciplinarity is "a path to academic takeover" (Koskenniemi 2009b). The criticism intensified in his 2001 book, *The gentle civilizer of nations: The rise and fall of international law 1870–1960*, wherein he argued that interdisciplinarity is academic imperialism and lawyers who collaborate with IR are to be blamed as they merely serve American empire and allow the American crusade to desecrate the soil of legal purism:

> Today, many lawyers in the United States persist in calling for an integration of international law and international relations theory under a "common agenda." This is an American crusade.… What I want to say, instead, is that the interdisciplinary agenda itself, together with a deformalized concept of law, and enthusiasm about the spread of "liberalism," constitutes an academic project that cannot but buttress the justification of American empire…. It is the logic of an argument – the Weimar argument – that hopes to salvage the law by making it an instrument for the values (or better, "decisions") of the powerful that compels the conclusion (Koskenniemi 2001, 483–84).

In his recent work on the IR/IL approach, the *Law, Teleology and International Relations*, Koskenniemi (2012) once again sharply rejected every effort to "update" IL with an IR touch. He demonstrated how IR has historically invaded IL through various political science scholarship, such as realism, behaviorism, institutionalism, regime theory and governance and rational choice and game theory (Koskenniemi 2012).

Not surprisingly, Koskenniemi's critiques have gained little attention from political scientists. However, since Koskenniemi is one of the most influential legal scholars, IL scholars responded. Dunoff (2013) claimed that Koskenniemi criticized the IR approach for "being too Kantian" and at other times "for not being Kantian enough." Pollack (2013) observed that Koskenniemi's counterdisciplinary attitude is based on "the early Cold War IR of our grandfathers rather than the contemporary field," and that his hostility against lawyers with an IR/IL approach is unjust:

> Koskenniemi paints a picture of an IR field dominated by realism, in thrall to American imperialist policy-makers, and firmly committed to an antiformalism that is corrosive to international law and to the international legal profession, whose American practitioners in particular have become so corrupted as to be unable to distinguish the law from the interests of American imperial power (Pollack 2013).

This research regards Koskenniemi's emphasis on legal purism and IR/IL skeptics as rooted in IL's ontology regarding inter- and intra-disciplinary matters. On IL's inter-discipline ontology, Koskenniemi (2009b) wrote that "International law was born from a move to defend a liberal-internationalist project in a time of danger and opportunity." It is true that IL has been defensive against IR because the IR discipline "was historically the counter-project to international law" ever since Morgenthau, facing the failure of the League of Nations, gave up law and opened a new discipline of IR (Roth-Isigkeit 2017). Moreover,

as Brunnée and Toope (2000) suggest, "IR scholars in the realist tradition tr[ied] to 'cleanse' their discipline of all normative ideas, to ignore international law."

Concerning the intra-discipline ontology, skepticism remains over whether IL is law. IL "has long been burdened with the charge that it is not really law" because "it lacks a centralized or effective legislature, executive, or judiciary" (Goldsmith and Posner 2005, 3). Brunnée and Toope (2000) argued that social scientists' misconception of IL is "actually fed by professional deformation within the discipline of law itself." They further confess that: "It should be obvious to any international lawyer who has confronted colleagues' cynical doubts about the existence of international law" (Brunnée and Toope 2000). Even "legal theorists and practicing lawyers [have] trouble understanding … how international law can be law, when viewed from the perspective of seemingly hierarchical domestic legal systems" (Brunnée and Toope 2000).

Need for Interdisciplinary Approach

According to Koskenniemi (2012), "[i]nternational law is not a social science. It is not a (theoretical) science at all – that is to say, it does not operate on the basis of demonstrable, even less empirical truths, nor with ideas about moral goodness." He asserts that IL is *not* "an *intellectual* discipline that would (or should) pay much regard to logical problems" (Koskenniemi 2009b). And, he criticizes international lawyers' use of "political science-inspired language of 'governance,' 'regulation,' or 'legitimacy'" together with those words of "'regimes,' 'actors,' 'interests,' and 'rational choice'" (Koskenniemi 2009b).

This research does not share Koskenniemi's critique of the language borrowed from other disciplines. To the contrary, this research holds that IL and IR should learn one another's language to understand better how other scholars see the world on the same set of

realities. Especially when conducting norm research at the center of their overlapping agendas, interdisciplinarity and language-borrowing are inevitable.

To IR scholars and political scientists, instead of arguing for 'the most important set of rules,' 'enforcement toward all actors' or 'effect of norms,' borrowing such IL language as 'obligation/right *Erga Omnes*,' '*Jus Cogens*,' or 'binding force' gives much more clarity to the concepts. Learning foreign languages of other disciplines would render scholarly debates among disciplines more fruitful as well as make academic thinking in each field more insightful.

As Jubilut and Lopes (2017) rightly pointed out, IL should "coexist and be in sync with international relations so as to benefit from the exchange of analytical structures and to not exist in a vacuum, jeopardizing its applicability." The same is true for IR. However, this research admits that each discipline's inherent differences should be respected.

Interdisciplinarity is not syncretism. The purpose of the disciplinary discussion is not to demolish each independent discipline and to make a new hybrid discipline. We will have taken a step too far if we join different disciplines with fundamentally heterogenous identities into one single mold. IL should remain as law, and IR should be rooted in political science. Thus, the genuine purpose of the interdisciplinary approach is learning from each other's disciplinary achievement "to better understand the enterprise of which we are a part" (Brunnée and Toope 2000).

IR and IL are grounded in the same territory and share common interests and scholarly agendas (Koh 1996; Dunoff and Pollack 2012; Pollack 2013). Especially for the norm research, the interdisciplinarity is strongly needed because the approach enables scholars to comprehend how international norms change. For example, concerning the development of the norm of self-determination, it first appeared as a post-war principle, developed into a codified norm and then into a legal right and finally gained preemptive

legal status. Without examining such legalities of each evolutionary stage, the norm research would be discrepant.

Hence, IL and IR scholars "could both learn more about political and legal change by examining in specific settings whether and how the internal morality of the law has promoted allegiance in the creation of international legal regimes" (Brunnée and Toope 2000). And, therefore, Koskenniemi's critiques of interdisciplinarity could be viewed as a "warning [on] an uncritical enchantment of functional approaches" (Roth-Isigkeit 2017).

Koskenniemi and Constructivism

It would be difficult for constructivism to avoid Koskenniemi's harsh criticism because it is more questioning than offensive. Even in his recent works, he expressed his slight disagreement with constructivist methodology (Koskenniemi 2012) but did not expand his criticism; rather, he attacked IR mainly focused on rationalism.

Regarding constructivism's academic identity and nationality, Brunnée and Toope (2000) rightly pointed out that "constructivism is one of the only strains of contemporary IR theory marked by a complex interplay of European and United States social thought. As such, it is less vulnerable to accusations of veiled support for American hegemony than are other branches of liberal IR theory." Hence, when it comes to constructivism, Koskenniemi may be relieved of his worry of so-called American conqueror analogy.

Most importantly, since Koskenniemi's position is not within the dominant legal positivism or legal liberalism, but on the side of legal realism and critical legal studies, how he sees law and international legal system well describes what political constructivism might argue. On the first page of his 2006 book, *From Apology to Utopia*, he states "This is not only a book in international law. It is also an exercise in social theory and in political

philosophy" (Koskenniemi 2006, 1). This research maintains that Koskenniemi's normativity/concreteness, descending/ascending arguments and utopianism/analogism are basically constructivist on the grounds that he dismantles law's indeterminacy and demonstrates how norms and actors interact to constitute normative structures.

According to Koskenniemi (1990), IL's objectiveness and independence of international politics are possible only when "concreteness" and "normativity" are simultaneously guaranteed. However, "only by integrating both normativity and concreteness scholarship avoids the twin dangers of apologism and utopianism" (Koskenniemi 2006, 21). In other words, normativity and concreteness are both needed to justify international obligation (Koskenniemi 2006, 59–60).

Paradoxical situations arise because IL's "normativity" and "concreteness" are mutually exclusive and cannot occur at the same time (Koskenniemi 1990). Hence, when "normativity" over "concreteness" is emphasized, such values as justice, common interests, and the world community are highly praised whereas when "concreteness" over "normativity" is stressed, each state's behavior, will and interests become more important (Koskenniemi 2006, 59–70). The former could be called a descending argument and merely utopian while the latter can be an ascending argument and no more than an apology for states (Koskenniemi 2006, 59–70).

Law's indeterminacy is the inherent characteristic of its own (Koskenniemi 1990, 2001, 2006, 2009a, 2009b, 2012). In this situation, one should be careful not to let one side overwhelm the other because "normativity" may lead to totalitarianism and imperialism, and "concreteness" may lead to egoistic individualism (Koskenniemi 2006, 476).

According to Koskenniemi's logic, the norm of self-determination's vague content and scope in current international legal order is not worrisome because it is the innate aspect of the norm and law. When "concreteness" of the norm is heightened, the realization of all

forms of self-determination should be allowed for all peoples; when "normativity" of the norm is heightened, self-determination should be adjusted as limited as possible. The solution between the two extremes is reconciliation through interpretation.

For Koskenniemi, the law is "an interpretative craft" and "an argumentative practice that operates in institutional contexts characterized by adversity" (Koskenniemi 2012) and "legal vocabularies and institutions as open-ended platforms on which contrasting meanings are projected at different periods . . . each devised so as to react to some problem in the surrounding world" (Koskenniemi 2001, 969). Furthermore, he states that law is "a 'construction'" and is "always both unstable and contested" (Koskenniemi 2012).

Hence, the norm of self-determination, too, should be viewed from the contextual interpretation that reflects each period. The norm is not a fixed, given thing but constantly changing to adapt with the times. This research regards this process as the procedure of norm-reframing.

Koskenniemi's worldview is totally different from those of the legal positivist and political rationalist, but more akin to constructivist thinking. The argument that the law is composed of "a dynamic and contextual use of language that is continuously reshaped through legal practice" is commonly shared by both Koskenniemi and constructivists like Kratochwil and Onuf (Roth-Isigkeit 2017).

Amaral Júnior and Koskenniemi

Amaral Júnior (2008) introduces the concepts of "justice (*justiça*)" and "certainty (*certeza*)." "Justice" corresponds to the value of peace or order that enables the prediction of consequences of conduct, and "certainty" corresponds to the value of equality that guarantees the expectation of non-discriminatory treatment (Amaral Júnior 2008). Hence,

Amaral Júnior's "justice" could be linked to Koskenniemi's "normativity," and "certainty" to "concreteness."

According to Amaral Júnior (2008), the existence of contradictory norms would not ensure either "justice" nor "certainty" because the application of an impartial interpretation of contradictory norms would be complicated. The "dialogue" of sources is suggested as a solution, but the dialogue will be substituted by "monologue" when certain norms encounter *Jus Cogens* norms (Amaral Júnior 2008). The *Jus Cogens* norm introduced by Article 53 of the Vienna Convention on Law of Treaties is "a peremptory norm of general international law … accepted and recognized by the international community of states as a whole … from which no derogation is permitted." It assumes a hierarchy among norms, and the incompatible norm of inferiority to the *Jus Cogens* norm had to be eliminated (Amaral Júnior 2008).

Hence, the norm of self-determination should speak to other relevant norms, such as equal sovereignty, states' territorial integrity, humanitarian intervention, human rights or democracy. Furthermore, if a certain form of self-determination is regarded as possessing the character of *Jus Cogens*, it would prevail over all the other norms. In the current situation, the traditional form of self-determination has already achieved *Jus Cogens* status.

2.4. Summary

With the surge in the constructivist school in the 1990s, norms research became the center of IR scholarship. Constructivists are pioneers in theorizing the norm development mechanism, and their contribution cannot be diminished. However, self-contradiction between theoretical argument and empirical evidence; excessive reliance on nonobjective factors that cannot be observed; silence on the emergence and evolution of norms; and reductionist conclusion must all be revised for better comprehension of international norm development.

In response to these problems, another constructivist, Sandholtz tried to explain how norms change. Sandholtz argues that there is inherent dynamism between norms and norm system, and his disputes-driven model of norm change tries to complete the after-story of earlier constructivists' norm emergence theories.

The complexity of the post-Cold War international order with the surge of constructivism in IR scholarship called for an interdisciplinary approach. The academic collaboration between IR and IL may widen scholars' view to understand the current world better.

3. THEORIZING INTERNATIONAL NORM DEVELOPMENT

3.1. Stability and Volatility of International Norms

Although norm research is the main area of constructivist literature, few scholars deal with norm change, and we do not understand how norms change over time (Sandholtz 2008). Contrary to the frequent use of the terminology of "norm dynamics," almost all norm literature since early constructivism is a simple, flat model. Norms emerge from nowhere and stand still: in Hoffmann's (2017) word they "freeze," regardless of the flow of time. Only actors are dynamic, persuading others and diffusing norms, but norms themselves are not dynamic. To the contrary, the next generation of constructivism argues that norm change is inherent in all normative system because "norms collide with the infinite particularity of social life," and the dissonance provoke arguments on the implication of norms (Sandholtz 2007, 3). Norms change from arguments and debates, and modified norms build new normative structures (Sandholtz 2007, 3-4).

Norms do change. Even a law, the most codified norm, changes. However, it does not mean that norm structures are constantly moving. Conversely, norms and norm structures are stable at a given moment. This research emphasizes that there are stable and volatile moments in the evolution of a norm. Although Sandholtz's model is far more focused on a norm changing mechanism, he also fully admits to the stable aspect of international norms, thus stability and volatility of international norms are not contrary to his model.

In order to explain international norms' stable and volatile moments, this research borrows insights from IL theories suggested by Koskenniemi (1990; 2006; 2012) and Amaral Júnior (2008). According to Koskenniemi (2012), the law is "a construction" and is "always

both unstable and contested." Hence, the volatile moments of international norms are not extraordinary. On the other hand, norms have stable moments when they are installed in established structures of systems. In such moments, norms acquire legitimacy and compliance and suggest the expectation and prediction of conducts.

As will be explained below, the volatile moment is the period when norms start to change from triggering events; provoking discourse on the quality and direction of the change; and legal practices finalizing the change. The stable moment comes when volatile moment ends. Changed norms construct new normative systems, and each system comprises a whole set of international order. As Amaral Júnior (2008) wrote: "International law is a conglomeration of subsystems that are unrelated to each other." Therefore, the volatile moments of international norms are Koskenniemi's "ascending" moments when "concreteness" overrides "normativity;" the stable moments are "descending" moments when "normativity" overrules "concreteness." To Amaral Júnior (2008), the former situation would be when "certainty" is emphasized, the latter when "justice" prevails.

Ascending/volatile moments and descending/stable moments cannot occur simultaneously, as Koskenniemi (1990, 1999) explains, because the two are mutually exclusive and the inherent nature of international law's indeterminacy. Normative systems can secure stability and legitimacy until a new need for change erupts. The stability and volatility make the norm change cyclic, and each cycle connected to past and future cycles.

3.2. Birth and Death of International Norms

One of the theoretical problems in early constructivism is the lack of explanation for the origins of norms. Norms emerge from nowhere, and norm entrepreneurs are vigorous to diffuse norms that already exist in society. Koskenniemi (1990) explains that liberal principles, such as freedom, equality, and the rule of law, could be applied to the organization of international society. If there are no pre-existing norms and principles, man is born free and equal, and freedom and equality are observed where society is ruled by law (Koskenniemi 1990).

This research suggests that in the process of the emergence of the self-determination norm, the philosophical background would be its source. Such philosophical streams of pacifism, liberalism, egalitarianism, cosmopolitanism, and humanitarianism lead to a specific, initial form of normative needs to be widely shared. One may argue that not all modern norms are rooted in such philosophies. But during the initial period of norm formation, dividing different sources of ideas is difficult, and it is a matter of discourse and understanding.

The origin of self-determination norm is said to be the ideas of Social Contract that emphasized peoples' will (Cassese 1995, 11). However, one may dissent saying that self-determination stems from the rule of the predominance of power and war because its first usage as a norm was to dismantle the defeated states' territories. It is true, too. But even the norm had been used to secure the victorious interests; it was not officially proclaimed so. Whatever the genuine purpose was, the victories used the norm under the title 'for the sake of the peoples under oppression.' It is the expression that states acknowledge the existence of self-determination as an international norm and admit the normative power of the norm.

Norms may die. After experiencing several cycles of evolutionary changes, a norm may die when a stronger counter-norm appears. For example, the extraterritorial norm vanished when legal equality and non-intervention norms gained power. In the past era, slavery was generally accepted, apartheid was under domestic jurisdiction, and colonization was unquestioned. But today, slavery and the slave trade, racial segregation, and foreign aggression are banned by the international community of states.

The most apparent case that one may observe the death of a norm is the moment when the norm meets a peremptory norm of its own realm with *Jus Cogens* character. As explained in Chapter 2 of this research, the incompatible norm of inferiority to the *Jus Cogens* norm is to be eliminated (Amaral Júnior 2008).

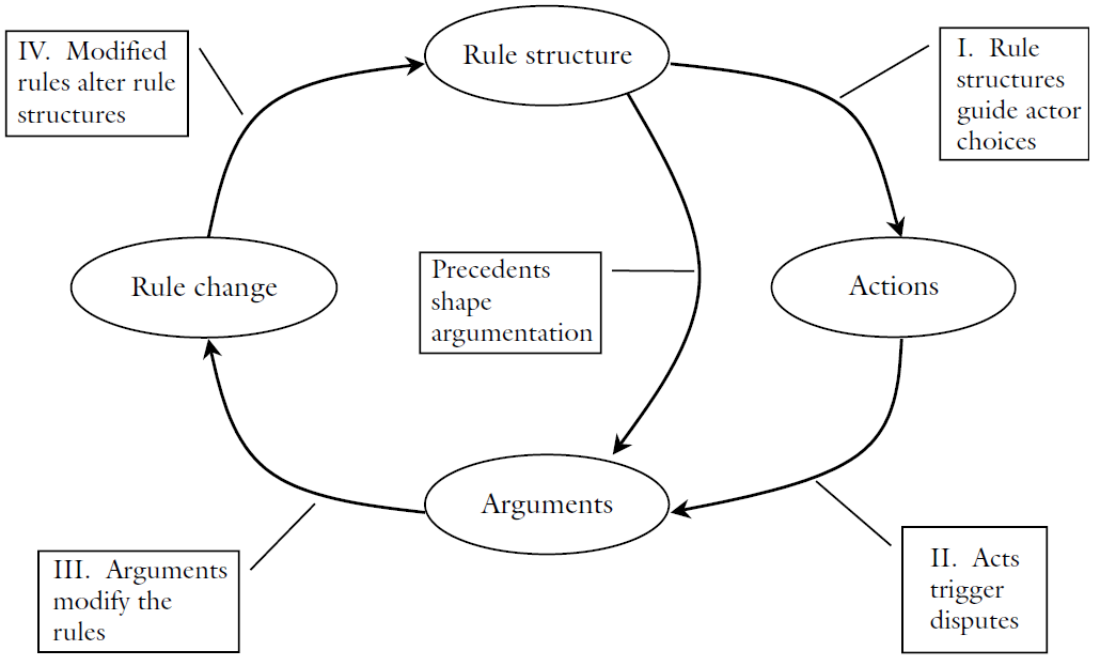
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Vienna Convention on the Law of Treaties, Art. 53).

In other cases, norms may not become extinct but become incorporated into a new bigger norm of overlapping the issue area. For example, the nineteenth century's seas norm with three-nautical-mile territorial waters was incorporated into the broader United Nations Convention on the Law of the Sea (UNCLOS) norm with the contiguous zone, exclusive economic zones, and continental shelf as well as 12-nautical-mile territorial waters. The old sea norms vanished but did not die as in previous cases because it encountered its bigger kin, not a foe. A norm may, therefore, melt into a newly expanded family of norms.

3.3. Source of International Norm Change

Figure 1.

Sandholtz's Cycle of Norm Change (Original Version)



Source: Sandholtz (2007, 11; 2008), Sandholtz and Stilles (2009, 8)

Sandholtz's model includes four stages of norm changing mechanism: rule/norm structure, actions, arguments, and rule/norm change. Each stage has a causal relationship with previous and forthcoming stages. Actions provoke arguments, arguments yield norm change, and norm change creates a new norm structure. The four phases are explanations of causality.

Although not seen in the four stages, "disputes" occur in stage two between actions and arguments. Sandholtz and Stilles (2009, 3) hold that actions link to disputes, and disputes generate arguments. The emphasis on disputes is at the center of Sandholtz's model. Every norm system generates "disputes" and the process of "disputes resolution" changes

rules/norms (Sandholtz and Stiles 2009, 6). Hence, in his model, "disputes" are the sources of norm change. However, as demonstrated in the third stage, "arguments" modify the rules/norms.

In Sandholtz's rich empirical studies, disputes were used as debate or discussion, and arguments as dispute settlement. But in many texts, Sandholtz seems to intentionally interchange the term disputes or dispute settlement with arguments as he equates rules with norms. Sandholtz declares his model as a dispute-driven theory of norm change (Sandholtz and Whytock 2017).

This research, however, prefers *discourse* to "disputes/arguments." The two may mean the same procedure, but the connotation does not. "Disputes" are more prone to conflicts. There are tensions and actors debate the discrepancies and interpretations of current norms, but the consequence is not always finalized by the victory of one party over another. It would be more constructivist to define the procedure as *a process of intersubjective persuasion in searching for a common identity*. In this regard, the term *discourse*, which encompasses "disputes/arguments" and persuasion, would be more suitable. This research finds the source of norm change in discourse and tries to suggest a *discourse-oriented theory* of norm change.

3.4. Sequel to Norm Changing Cycles

Sandholtz argues that changes of international norms are continuous. The first change may also move to the next change over time. So, there must be a sequence to changes. In Figure 1 of Sandholtz's original model, however, circling is infinite *inside* the cycle. "Actions" trigger "disputes/arguments," "disputes/arguments" modify "rules/norms," changed "rules/norms" create "rule/norm structure," the structure reinforces "actions," "actions" trigger (once again) "disputes/arguments," and on it goes. In the Sandholtz's model, there is no exit or starting point.

Surely, this is not Sandholtz's interpretation. He intended one cycle to be followed by another cycle in a continuous sequel of norm changing cycles. But there is no exit, nor starting point because Sandholtz focused on actions and tried to emphasize the norm structure's influence on actors.

Instead of "actions," therefore, this research suggests adding a *trigger or triggering event* as the first stage of the cycle. A *trigger* here refers to an exogenous stimulus that may provoke the norm changing discourse. In fact, "actions" are so intimately connected with "disputes/arguments" that the division is not clear. "Disputes/arguments" do not wait until "actions" accumulate: Every small or big action violating or enforcing norms may instantly provoke small or big "disputes/arguments." Hence, "actions," "disputes," or "arguments" could be incorporated into a single stage of *discourse*. Plus, by setting the *trigger* as the starting point of a visible change of norms, the curse of continuous circulation inside a cycle is avoided and to know where the cycle starts and ends.

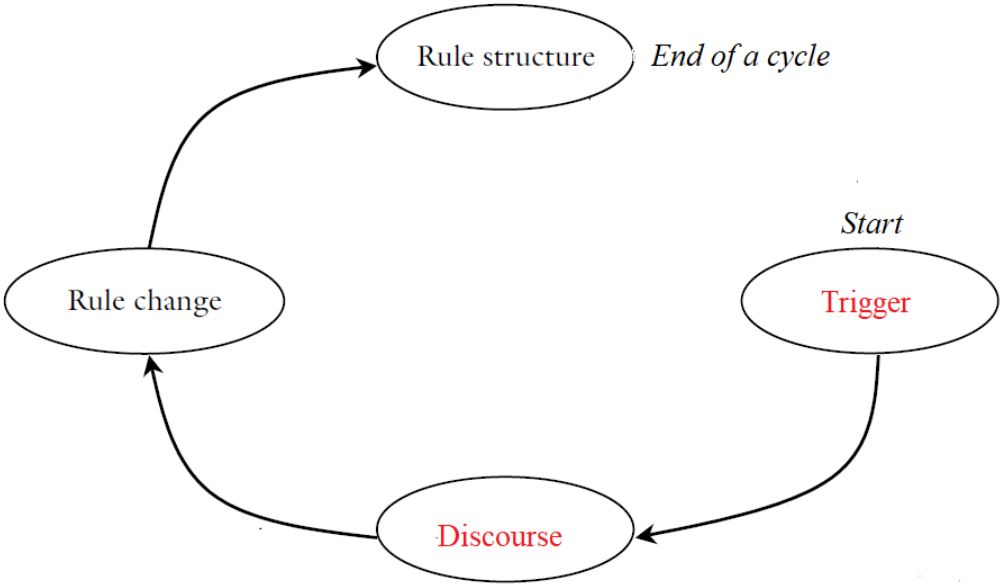
Figure 2 shows the modified version of the Sandholtz's model. Now, it has starting and ending points, so once a circling is completed, a norm escapes the cycle and enjoys the stable moment. The stage of "actions" is switched with a *trigger*; the stages of

"arguments/disputes" is substituted by *discourse*.

If there happens another *trigger*, the norm moves to the second cycle; experience volatile moments of *discourse* and *norm change*; finally escapes the cycle by constructing a new *norm structure*.

Figure 2.

Sandholtz's Cycle of Norm Change (Modified Version)



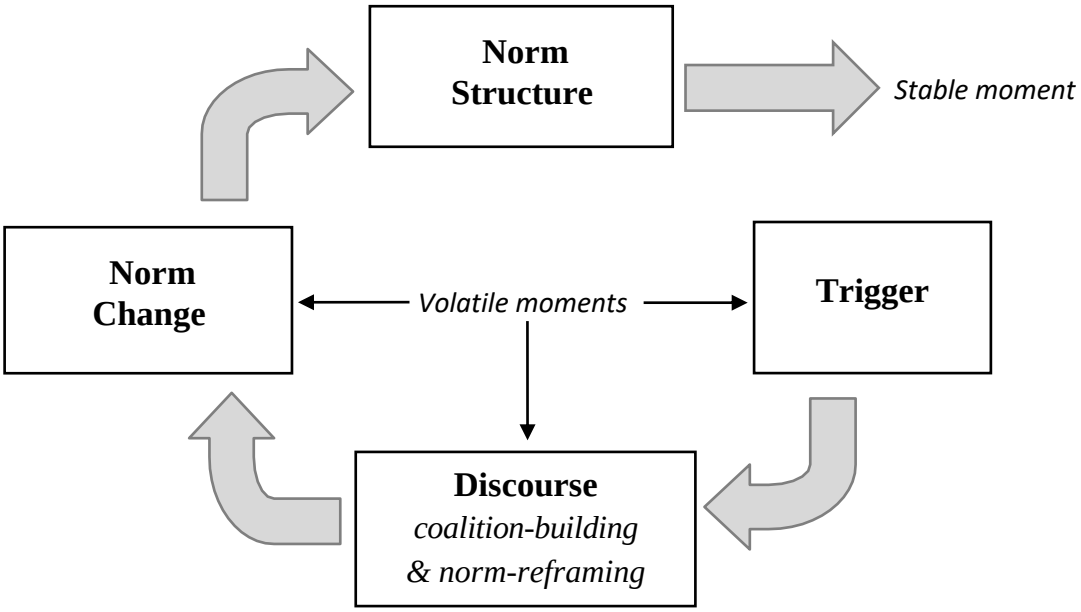
Source: Sandholtz (2007, 11; 2008), Sandholtz and Stilles (2009, 8)

Modified by the author of this research

3.5. Cyclic Model of International Norms Change

Figure 3.

Cyclic Model of International Norm Change (Final Version)



Source: Author; inspired by Sandholtz's cycle of norm change (2008; 2007, 11; 2009, 8)

Figure 3 suggests the final version of the cyclic model of international norm change. The cycle starts with the first stage of the *trigger*, such as war or major political fluctuation. The trigger provokes *discourse* composed of 'coalition-building' among actors and 'norm-reframing' by entrepreneurs. Discourse leads to the change of norms, and *norm change* constitutes a norm structure. By creating a new *norm structure*, one cycle of the norm change ends. Then, the norm structure is stable, which continues until a new trigger provokes the norm's next cyclic change.

1st Stage: Trigger

Björkdahl (2002) argues that a norm change can be caused by exogenous shocks, yet how shocks lead to norm change is unknown. Muller and Wunderlich (2013, 30) also argue that "indeed, norm change, like norm emergence, might be triggered by extrinsic events, such as shocks or other exogenous crisis situations." Sandholtz (2009, 11) explains further that "certain types of international environments are likely to generate behaviors that challenge international rules and provoke disputes." According to these scholars, then, norm emergence and change happens through exogenous stimulus. Sandholtz (2009, 11) suggests examples of stimuli, such as wars, significant technological changes, and grand political changes.

Norms may evolve continuously, but the international community does not perceive such an invisible evolution. When a triggering event occurs, the need for a norm change is recognized. A trigger is the source and impetus of norm change. Hence, a grand-scale political fluctuation, what this research refers to as a 'trigger,' would be a useful starting point to see the emergence and evolution of norms.

However, a trigger itself does not automatically create a new norm structure. It only becomes the background of changes. A trigger yields *discourse* among actors, and through *discourse,* norms might be changed.

2nd Stage: Discourse

In Sandholtz's model, disputes or arguments are prominent. Here, the discourse between actors is regarded as an independent variable of the trigger and as a dependent variable for the norm change. As described in Section 3.1, discourse is *a process of intersubjective persuasion in searching for a common identity*. Under the anarchic conditions of the international sphere,

the initial formation of norms is done by persuasion, not by coercion as in domestic society. Actions, disputes, arguments, and persuasion are encompassed in discourse. Brunnée and Toope (2000) argued that in the constructivist context, actors are required to "learn to be 'discursively competent,' that is, capable of persuading." The constructivist "discursive competence" is a contrary concept to rationalist "strategic competence" (Brunnée and Toope 2000).

This research suggests discourse be composed of two factors: *coalition-building* among actors and *norm-reframing* by entrepreneurs. Coalition-building, which is pairing or grouping, means actors form a coalition with like-minded actors in order to gain more power to persuade others. Constructivists put "the priority of identity over interest, to the relevance of nonmaterial explanations of actor behavior, to the possibility of 'collective intentions' or shared understandings, and to the mutual construction of agent and structure" (Brunnée and Toope 2000). In this vein, this research argues that in the process of 'coalition-building,' identity and mutual understanding are more important than power. The first mover (entrepreneur) need not be a major power, and the coalition need not be a league of powerful states. Those actors who lead the change are not requested to possess great power. They can be any state or even domestic entity that was not perceived at the moment. Power may matter, but what is more critical than the materialism is the identity of like-mindedness. The first mover does not make a coalition with major states but with like-minded actors that share critical values regarding the given issue. Hence, *non-major powers, even non-feasible entities, may lead to the creation/change of international norms*.

A new normative need occurs because current international norms cannot cope with social reality. And, the emergence and change of international norms are directly connected with the changeability of the current international order. Hence, "norm-reframing" is needed for entrepreneurs to persuade others. Entrepreneurs massage and soften the norm in order to

be easily accepted by international society.

Norm-reframing is a process to reconstruct interests by interpretation and persuasion. According to Koskenniemi (1999), from the same norm, the contradictory conclusion is derived; in the same legal literature, contradictory norms are embedded. It is not because of the manipulation to make the law/norm suitable for their governments' policy goals, but simply because of the inherent character of law's indeterminacy that lies within the law itself (Koskenniemi 1999). Hence, "[l]aw became argumentation, "language-games," rhetoric--a linguistic practice oriented toward social reality" (Koskenniemi 1999).

Constructivists highly value softer factors like culture, discourse, and social norms, but do not exclude cost-benefit analysis (Roth-Isigkeit 2017). In the same vein, interests and preferences are not exclusive properties of rationalists. But the difference from the rationalist perspective is that interests and preferences are continually moving factors and not fixed and given. Actors' preferences change along with the emergence and evolution of norms (Sandholtz and Stilles 2009, 2).

Constructivism picks up the correlation between interest and identity formation (Roth-Isigkeit 2017). As Brunnée and Toope (2000) rightly point out, "[i]nterests are defined both in material and non-material terms." *Norms may emerge and change although major powers' interests or preferences are unchanged at the given moment*. By virtue of the norm-reframing that re-comprises identities and interests of states, major powers also accept the change, although it may be contrary to their current materialist interests. The identity and perception that major powers themselves are responsible members as well as leaders of the international community allow them to recognize normative changes that may construct new normative orders. "[L]aw can help to create the conditions upon which changes of identity and interest rest" (Brunnée and Toope 2000).

3rd Stage: Norm Change

Through discourse, norms change. Such a change should be observed by unrebutted evidence. With this evidence, international society recognizes and admits that the norm was established and changed. A changed norm requests compliance of states and constructs a new norm structure.

Sandholtz (2009, 9) supports the internalization of international norms. His understanding of internalization is more compatible with Koh's Transnational Legal Process theory than early constructivist norm literature. Early constructivism saw internalization as the last resort of international norms, and the theory stops within the domestic legal system. However, Sandholtz's approach to internalization cannot be redeemed as reductionist because it is not the last stop for the international norm development. Rather, internalizing international norms is a pre-step for the next leap of norm change.

However, unlike Sandholtz's support for internalization and relative negligence of international proof finding, this research argues that norm changes should be observed by commonly accepted evidence of proof finding. The proof finding could be treaty laws, customary international law, political declarations, international and domestic courts' rulings, legal documents, and *juris opinio* (legal scholars' opinions).

4th stage: Norm Structure

The result of the norm change is the creation of a new norm structure. It redefines the status, content, and scope of the changed norm. In the realm of international norms, *the value-based structure of norms is more important than the material-based structure of power politics.* The norm structure is not segregated from international society. Rather, norms do affect outcomes

in international relations (Sandholtz 2007, 3).

According to Wendt (1992), “an institution is a relatively stable set or ‘structure’ of identities and interests. Such structures are often codified in formal rules and norms.” Like IL scholars, defining a norm structure should be an interpretation of the newly emerged/changed international norms. The interpretation includes the norms’ status, content, and scope. However, the new norm structure need not necessarily be codified as it often works “through uncodified and informal practices” (Brunnée and Toope 2000).

3.6. Summary

This research argues that norms change. During the process of norm development, norms experience stable and volatile moments. Norms are born from philosophical backgrounds and die when they meet counter-norms with higher value or merge into their bigger kin.

Embracing the constructivist framework and adjusting it to the critics of the literature, this research suggested a new model of cyclic change of international norms. The modified version of the Sandholtz's model has starting and ending points, so once a circle is completed, a norm escapes the cycle and enjoys the stable moment.

One cycle is composed of four stages: trigger, discourse, norm change (or norm emergence), and norm structure. Attention should be given to discourse that is a process of intersubjective persuasion in searching for a common identity. The coalition-building among actors and norm-reframing by entrepreneurs are two key factors of discourse. Through discourse, norms may change.

In the second Part, the emergence and change of the norm of self-determination will be analyzed based on the cyclic model of the four stages explained in this chapter.

PART II. NORM OF SELF-DETERMINATION

4. 1ST CYCLIC CHANGE OF SELF-DETERMINATION (NORM EMERGENCE)

It is said that self-determination first appeared in the late medieval times as a concept of the right to select one's religion (Cassese 1995, 11). However, a more concrete philosophical concept of self-determination dates to the Enlightenment (Cassese 1995, 11). Philosophers of social contract theory, like John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778), suggested the idea that peoples have right to form their own government (Cassese 1995, 11).

The philosophy was reflected in the United States Declaration of Independence (1776) and the French Revolution (1789); these epochal events are regarded as the cases of the incarnation of the modern concept of self-determination (Cassese 1995, 11-12; Anaya 1996, 75–76). Especially, the French Revolution laid the basis for the concept of self-determination by emphasizing the people's will (Shah 2007). However, self-determination "gained prominence in international political discourse around World War I" (Anaya 1996, 76).

4.1. Trigger: World War I

The First World War (1914-1918) triggered the first normative need for postwar treatment. Especially in Europe, four empires—the German, Russian, Austro-Hungarian, and Ottoman— vanished, and the vacuum had to be filled with power or rule. The world needed a new international norm that could secure peace and stability for the future. Self-determination

was introduced as a political principle to draw new frontiers in Europe and to allow independence to non-self-governing regions of the defeated states.

4.2. Discourse

Coalition-Building

In the early twentieth century, the Soviet Union and the United States emerged as the most vigorous entrepreneurs of the norm of self-determination. Vladimir Lenin, in his various writings, firmly and radically advocated the introduction of self-determination; almost simultaneously, US president Woodrow Wilson also claimed self-determination (Cassese 1986, 14-18). Wilson, in his address to a Joint Session of Congress in 1918, insisted:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined (Statement of US President Wilson at the Joint Session of Congress in 1918).

The two norm entrepreneurs, the Soviet Union and the United States, were not superpowers at that time and had different intentions. The Soviet Union needed self-determination to fight against capitalism. Lenin argued that once nations were freed thanks to the right to self-determination, they should eventually strive to join a socialist federation (Shah 2007). “Socialism was to preempt the right of self-determination” (Shah 2007).

To the contrary, the United States needed self-determination to exclude European interference in the Americas. The US’s interest in self-determination was confined to the

Americas and Central and Eastern Europe, with little concern given to the rest of the world (Cassese 1986, 132). However, the US-Soviet coalition shared the common objective of making self-determination an international norm.

Norm-Reframing

Moscow intended to endow self-determination to every kind of people suffering from imperialism (Cassese 1986, 132). As imperialist powers, the United Kingdom and France feared that self-determination might destabilize their overseas colonies. The United States sided with Europe criticizing the Soviet notion of self-determination because it would cause instability in the future (Shah 2007).

At the same time, however, the United States persuaded Europe that the territorial problem of the Austro-Hungarian and Ottoman Empires should be solved for the stability of Europe. The United States reframed this issue as a matter of territorial stability for Europe. For European major powers, the balance of power to prevent war in European homelands was regarded as far more critical than the latent possibility of the loss of overseas colonies. Wilson requested the incorporation of the self-determination principle into the Covenant of the League of Nations (Shah 2007).

4.3. Norm Change

After WWI, for the first time in history, self-determination became an international norm in postwar treatment. Self-determination was realized in the defeated states—Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire. Self-determination was not explicitly incorporated into the Covenant of the League of Nations as Wilson argued but considered as

an international norm under the League of Nations' system.

First, the name of the new international organization, the League *of Nations*, not *of States*, attests to the fact that self-determination was beginning to be regarded as a norm. Second, the League admitted that a colony with autonomy could possess a certain degree of legal personality separated from its colonial state (Cassese 1998, 27). In the first article of its Covenant, the League declared that "*any fully self-governing state, dominion or colony* … may become a member of the League" (League of Nations 1924, Art. 1(2)). Third, the League invented a new device of the *sacred trust of mandate system* for the former colonies of the defeated states (League of Nations 1924, Art. 22). The 1924 League of Nations' perception on self-determination was interpreted by the ICJ in the Namibia case as:

> The mandates system of the League of Nations was based upon two principles of paramount importance: non-annexation, and well-being and development of the peoples. The ultimate objective of the sacred trust was self-determination and independence (ICJ Reports 1971, 19).

4.4. Norm structure

Status of the Norm

In 1920, the Council of the League of Nations called for the International Committee of Jurists and the Committee of Rapporteurs to request an advisory opinion on the Aaland Islands case (Cassese 1998, 28). Concerning the principle of self-determination, the Committees advanced three points: first, self-determination could not be considered as an international "legal" norm; second, self-determination was not mentioned in the Covenant of the League of Nations; and third, its recognition in a certain number of international treaties

could not be considered as sufficient to constitute a positive rule of the Law of Nations (Cassese 1998, 28).

The opinion of the Committees can be rephrased this way: first, during the inter-war period, self-determination was perceived as an international norm although the norm was regarded as a political principle with non-binding force. Second, the Covenant of the League acknowledged the existence of the norm of self-determination although it was not explicitly written. Third, the Committees acknowledged that self-determination was already codified in other legal documents at that time although not to any significant degree.

In short, from the late 1910s, self-determination emerged as a political principle (Shaw 1997, 177) and began to be treated as an international norm. However, its normative status was no more than political rhetoric carrying no binding force.

Scope of the Norm

Regarding the applicable scope of the norm, self-determination was selective under the Covenant of the League system, for it was applied only to Central and Eastern Europe (Cassese 1986, 26). The European major powers intentionally assumed that self-determination was a poorly defined concept of policy and morality. Therefore, deciding whether to hold a plebiscite was under each state's jurisdiction (Shah 2007). Because of the norm's status as a political principle, those who could enjoy the right to self-determination were confined to colonial people of defeated states, but the norm was not applied to the people under the Allies' occupation (Pomerance 1982, 7-8).

4.5. Summary

The First World War triggered the emergence of the international norm of self-determination. In the ashes of the war, the international community sought for a new principle of postwar treatment. However, those who advocated for the creation of the new international norm were not major powers. The change was led by the United States and the Soviet Union before they became superpowers. The two entrepreneurs had different intentions but shared the common objective of making self-determination into an international norm.

The European colonial powers, notably the United Kingdom and France, were against the emergence of such a radical norm as self-determination for it might destabilize their overseas colonies. Facing the reluctance of great powers, the US-Soviet coalition reframed the norm as an indispensable principle for European stability. The security of homeland Europe gave priority to the latent loss of overseas colonies. The interests and preferences of great powers were reconstituted by the discourse of the entrepreneurs' coalition-building and norm-reframing.

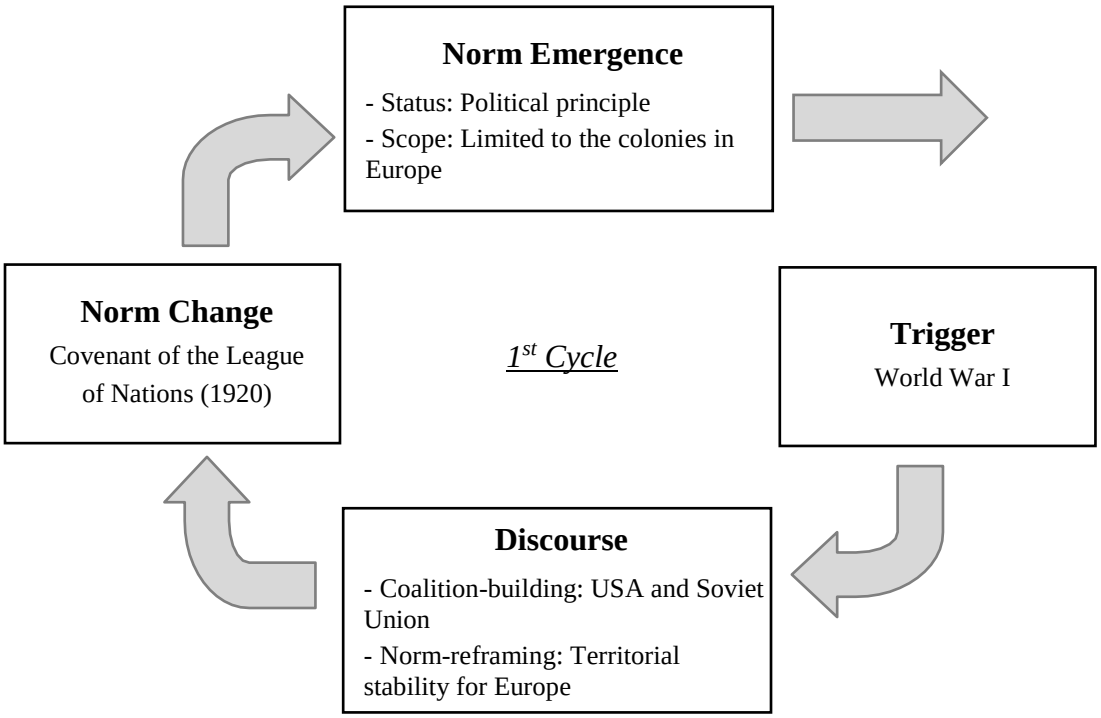
The new international organization, the League *of Nations*, was built on the norm of self-determination. The evidence is the admission of the independent legal personality of colonies and the invention of the sacred trust of mandate system. The existence and the status of the norm of self-determination at that time were reaffirmed by the Committees of jurists and rapporteurs. In the first cycle of the norm change, self-determination emerged as a political principle of postwar treatment and exercised for the independence of the colonies and non-self-governing regions in Europe.

As Koskenniemi (2006, 59–70) theorized, the emergence of the norm of self-determination after WWI was an "ascending" phenomenon when "concreteness" (the postwar treatment in Europe) overridden "normativity" (the world governance). The volatile moment

of the norm entered into the stable moment through the Covenant of the League of Nations system, and the “descending” moment started until the outbreak of the next trigger.

Figure 4.

Emergence of the Norm of Self-Determination in the 1910s



5. 2ND CYCLIC CHANGE OF SELF-DETERMINATION

5.1. Trigger: World War II

From the late 1910s, when self-determination emerged as an international norm, until 1945 when the Second World War ended, the norm enjoyed its stable moment. The evolution, in fact, was in process under the surface, but the normative structure of the status and scope of self-determination remained unchanged until the establishment of the United Nations.

The trigger that led the second cyclic change of the norm of self-determination was WWII. It enabled the norm to move from its initial status of political principle up to the enhanced status of a legal principle. The end of WWII and the advent of the UN opened a new era for the norm of self-determination (Anjos and Klein 2014). Borrowing Koh's (1998) conception, it was the moment when the self-determination norm escaped from the *zone of politics* and entered into the *zone of law*.

5.2. Discourse

Coalition-Building

As in WWI, the main battlefield of WWII was Europe. In the 1940s, the Allies' primary concern was the restoration of Western Europe. In 1941, the United States and the United Kingdom agreed on the Atlantic Charter, which contained a moderate form of self-determination. The UK's Prime Minister Churchill, however, announced in the House of

Commons that self-determination proclaimed in the Charter aimed at restoring sovereignty and self-government to some nations under Nazi Germany (Cassese 1986, 132). As colonial powers, the UK and France wanted to exclude the extension of the self-determination norm to their own colonies. The United States also regarded self-determination as an accomplished norm if only pre-WWII circumstances were restored.

However, the Soviet Union, as a member of the victorious Allies, requested immediate realization of self-determination of all colonial peoples under the Axis powers. Moscow then joined with the Third World bloc to spread the self-determination norm (Shah 2007). In establishing a whole new international organization, the United Nations, a call for self-determination increased from all regions of the world.

Contrary to the League of Nations, in which members were confined to some but not all Western states, the United Nations was intended to encompass almost all of the world's independent countries. The new organization would be truly international. There was a robust normative need for the UN to expand beyond the league of their own. Thus, voices of the Communist and the Third World coalition should be considered since the creation of the new organization could not exclusively depend on the West. At the end of WWII, the norm entrepreneurs of the Communist-Third World coalition led the second cyclic change of self-determination.

Norm-Reframing

Again, the interests of major powers remained unchanged. Western states wanted the restoration of pre-WWII conditions in Europe. Allowing self-determination to all colonial peoples under the defeated was contrary to the interests of major powers because it might provoke immediate calls for self-determination under the Allies, too. However, the

Communist-Third World coalition strongly insisted that the restoration must be undertaken in all colonies of the defeated states. The coalition reframed the self-determination norm as the logic of appropriateness.

The logic of appropriateness is undertaking actions that cope with actors' identity (Hoffmann 2017). The appropriateness becomes important when a norm is regarded as "a standard of appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998). Instead of calculating what may maximize utilities, actors who follow the logic of appropriateness reason "what actors like me should do" (Hoffmann 2017).

The West could not invent more justifiable excuse than the reframed norm of self-determination. Since the creation of the UN could not exclusively depend on Western countries, self-determination after WWII could not be confined in Europe as in the previous cycle after WWI. Major powers accepted the logic of appropriateness and allowed independence of all colonies under the Axis. The logic of appropriateness led the change and restoration was not confined to pre-WWII conditions. For example, the Korean Peninsula was liberated from imperialist Japan in 1945, but Korea had been occupied by Japan since 1910.

5.3. Norm Change

The incorporation of the self-determination norm into the Charter of the United Nations (1945) was a breakthrough in the development of the norm. Contrary to the indirect address of self-determination under the Covenant of the League of Nations, self-determination was clearly declared as one of the purposes of the United Nations. Article 1(2) of the Charter of the UN states that the purpose of the organization is "to develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*."

In addition, Article 55 states that the UN acts through the "creation of conditions of

stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*." For trust territories, the successors of the remaining League of Nations mandates, self-determination could be an option (UN Charter, Art. 76(b)) while for non-self-governing territories, self-government was envisaged (UN Charter, Art. 73(b)).

5.4. Norm structure

Status of the Norm

Thanks to the direct incorporation of the norm of self-determination into the Charter of the UN, self-determination began to be regarded as a legal principle. At the same time, however, self-determination provisions of the Charter are "principles" rather than "rights" (Alston 2014). Other notable articles of the Charter, such as prohibitions against the threat or use of force (Art. 2(4)) and internal intervention into the affairs of other states (Art. 2(7)) explicitly imposed direct and immediate legal duties that might restrict state sovereignty (Shah 2007). To the contrary, the articles on self-determination were composed of loose and vague language that could not infer a binding obligation (Shah 2007).

Self-determination in the Charter was for "friendly relations between states" (Shah 2007), rather than regarded as an independent value to protect "people's rights" (Cassese 1986, 133). Territorial integrity was the UN's paramount value (Cassese 1986, 133) thus inferring independence or secession from the Charter was difficult. The transformation of the norm from political principle to a legal principle was significant, but because it was a principle, not a right of obligation, self-determination carried no binding force.

Scope of the Norm

Self-determination under the UN Charter had considerable importance in the norm development process, but the principle of self-determination of peoples under the UN Charter did not directly mean secession or independence for all colonial peoples. Independence was not guaranteed for trust territories, and only self-governance within the existing states was considered for non-self-governing territories. However, the realization of independence after WWII was not confined to Europe but applied to all colonies of the defeated states.

5.5. Summary

The norm of self-determination experienced stable moment during the inter-World War period leaving the structure of status and scope of the norm unchanged until the end of the Second World War. Around at the end of WWII, the norm entrepreneurs of the Communist and the Third World blocs made a coalition and led the second cyclic change of the norm. They reframed the norm of self-determination as a matter of the logic of appropriateness.

All the great powers, including the United States, then became a superpower, only wanted the restoration of pre-WWII conditions. Endowing independence to other colonies and occupied territories beyond Europe might destabilize great powers' governance. However, the failure of the League of Nations could not be repeated again, and voices of the Communist-Third World coalition should be considered since the creation of the United Nations could not exclusively depend on the West.

Under the situation where major powers' interests were not changed, the norm changed. The norm entrepreneurs were not great powers but formed a strong coalition, reframed the norm and redefined the interests and identities of actors. It was the second "ascending" moment of volatility, and the "descending" moment of stability started by the adoption of the UN Charter.

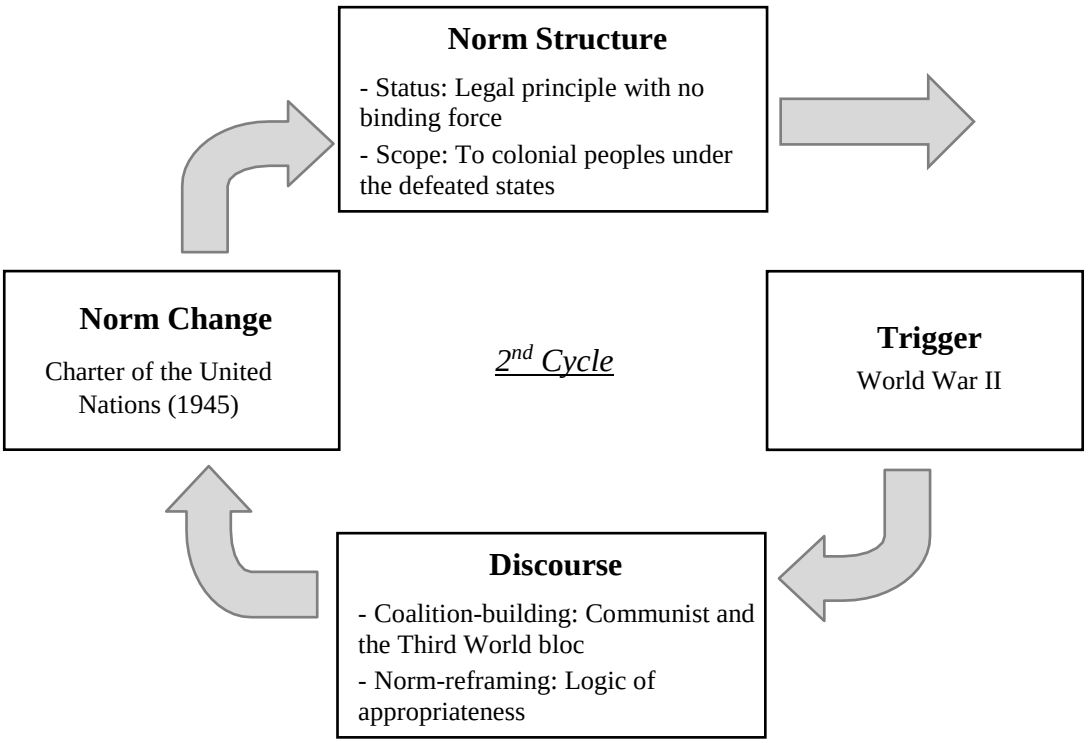
The establishment of the United Nations made the norm enter into the *zone of law* from the *zone of politics*. Self-determination was declared as one of the purposes of the organization (Art. 1(2)) and as a principle for friendly relations among states (Art. 55). The direct incorporation of self-determination into the Charter made it be regarded as a legal principle. Meanwhile, because it was a principle, not a right or obligation, self-determination carried no binding force.

The application of the norm was not confined to Europe but realized in all colonies of

the defeated states. However, other colonial peoples under the West's jurisdiction had to wait for the next trigger that might bring the third cyclic change of the norm of self-determination.

Figure 5.

Evolution of the Norm of Self-Determination in the 1940s



6. 3RD CYCLIC CHANGE OF SELF-DETERMINATION

6.1. Trigger: Decolonization

The stable/descending moment the norm of self-determination, in the aspect of its legality, was maintained for about 15 years since the creation of the UN (1945) until the adoption of the UNGA resolution of the Colonial Declaration (1960). However, as in the previous cycle, the norm change did not pop out from anywhere but indeed, was the result of relentless political negotiation and persuasion.

Decolonization, which doubled the number of sovereign states, could be regarded as one of the most tremendous political fluctuations in history. It paved a solid road for the international norm of self-determination to evolve in an irreversible direction. In 1974, when the last colonial power Portugal declared the abandonment of its colonies in Asia and Africa, the so-called decolonization era officially ended. In the 1960s and 1970s, the norm of self-determination reached the level of *legal right* for *all colonial* people.

6.2. Discourse

Coalition-Building

The intense political and diplomatic tie between the Communist bloc and the Third World bloc continued throughout the 1960s and 1970s. However, the Communist bloc revealed great reluctance in enlarging the scope of the norm of self-determination. Officially, the Soviet

Union still advocated for self-determination. However, in reality, the Communist bloc feared that the spread of self-determination might damage its own interests in the sphere of Eastern Europe and Central and Eastern Asia. Furthermore, as the confrontation between communism and capitalism deepened, whether the liberated state would be communist became more critical to the Communist bloc than the diffusion of the norm of self-determination. As Lenin argued, if the freed nations did not join the socialist alliance, the expansion of self-determination would be meaningless to the Communist bloc (Shah 2007).

Instead, those states that accomplished independence earlier than other colonies built a coalition with elites of other non-independent entities. The coalition-building between newly independent states and political leaders of latent independencies was sufficiently strong to stimulate the liberation movement virtually in all colonies in the world. Once a colony became independent, it reinforced its ties with neighboring states that supported its independence and accelerated the independence of other colonies. As more, newly independent states emerged, the harsher the call for self-determination. In the end, members of the international community doubled.

Norm-Reframing

Although it concerned the norm of self-determination of peoples, the people who enjoyed the right to self-determination lacked common identity or cultural background. Many colonies were the results of the arbitrary combination of different tribes. One tribe might be divided into two groups by artificial frontiers, and tribes with no identical ethnicity or language were bounded as a pseudo-nation.

In this situation, great powers, including the Soviet Union, worried that if self-determination was allowed for all colonial people, the world would be full of hundreds of

mini-states causing serious instability in every corner of the planet. Eleanor Roosevelt once mentioned that allowing self-determination shall cause extreme chaos (Cassese 1986, 108).

The coalition of the new-born states and latent independencies reframed self-determination as a norm compatible with the principle of *Uti Possedetis*. According to the principle, once a state frontier is set, it cannot be modified. The coalition requested independence not according to the people (tribes, races or ethnicity), but by the identical political borders set by colonizers. Thanks to this reframing, almost all colonies in the world could cherish independence. However, the reframing strategy of self-determination compatible with the *Uti Possedetis* principle left substantial internal problems post-independence.

6.3. Norm Change

In the 1960s and 1970s, as more member states entered the international community, the practice of UN organs rapidly made the legal principle of self-determination into a "legal right." In 1960, the first evolutionary work emerged in the UN General Assembly Resolution 1514 (XV) *Declaration on the Granting of Independence to Colonial Countries and Peoples* (Colonial Declaration). Eight colonial powers (Australia, Belgium, France, Portugal, Spain, Union of South Africa, United Kingdom, and the United States) and the Dominican Republic abstained, and the other 89 states voted in favor of the adoption of the Declaration. It declared that self-determination is a part of the state obligations based on the UN Charter.

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (UNGA 1514 (XV) 1960, Para. 2).
>
> All States shall observe faithfully and strictly the provisions of the Charter of the

> United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity" (UNGA 1514 (XV) 1960, Para. 7).

Six years later, the international community conceived two great Human Rights Covenants—the 1966 *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the 1966 *International Covenant on Civil and Political Right (ICCPR).* According to the UN Treaty Collection database, both the ICESCR and the ICCPR entered into force in 1976 with 71 and 74 signatories each, respectively. (Today, the signing parties are 168 and 171, respectively.)

Both Covenants have identical Article 1, and Article 1(1) is the same as the Paragraph 2 of the 1960 Colonial Declaration: "All peoples have the right to self-determination …" In addition, the Covenants impose an obligation on states to permit self-determination (independence) to the peoples under colonial rule:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. (UNGA 1966, Art. 1(3))

In 1970, self-determination became a generally accepted international right by the UNGA Resolution 2625 (XXV)—*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (Principle Declaration). Since the 1970 Declaration was adopted unanimously,

it is regarded as the most authoritative document on self-determination. The Declaration stipulates that "all peoples have the right freely to determine, and every state has the duty to respect this right."

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter… (UNGA 2625 (XXV) 1970)

In addition to the above mentioned legal documents, *the Final Act of the Conference on Security and Cooperation in Europe* (1975), also stated that "the participating states will respect the equal rights and self-determination of peoples" (Helsinki Final Act 1975, Art. 8).

6.4. Norm structure

Status of the Norm

Together with the treaty law of the two 1966 Covenants that imposed state responsibility to respect self-determination, the two Declarations of 1960 and 1970 formed customary international law on self-determination. The UN General Assembly declarations adopted by the majority of UN member states play a vital role in the formation of customary international law. While the UNGA resolutions do not have binding force, they do constitute an

authoritative interpretation of the UN Charter and represent *opinio juris* (opinion of law).

Self-determination was honorably inscribed as Article 1 in all those four landmark documents. According to Alson (2014), "This ranking has, however, turned out to be a mixed blessing." Self-determination was regarded as *sui generis* (of its own kind; unique) rather than *primus inter pares* (first among equals) (Alston 2014). The 1970 Principle Declaration reaffirmed the principle of territorial integrity and sovereignty of independent states and then admitted the right to self-determination. Article 5(7) stated that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states…" Hence, it would be difficult to argue that self-determination had priority over territorial integrity in this period.

Throughout the 1960s and 1970s, the self-determination norm became a "legal right." The change was reaffirmed by the ICJ in 1971 and 1975. In its *Advisory Opinions on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1971),* the ICJ emphasized that "the right of people to self-determination is a fundamental principle of international human rights law" (Aljaghoub 2007, 90). In this case, self-determination escaped from the status of a principle and entered into a people's right to independence (Alston 2014).

In the *Western Sahara Case (1975),* the Court confirmed the validity of the principle of self-determination in the context of international law. The ICJ stated that the principle of self-determination crystallized into a rule of customary international law, applicable to and binding on all states (Scharf 2002, 378).

Scope of the Norm

The 1960 Independence Declaration stated that "the subjection of peoples to *alien subjugation, domination, and exploitation* constitutes a denial of fundamental human rights, is contrary to the Charter [and that] … all people had a right to self-determination." The language of the alien was regarded as a colonial rule. Hence, the right to self-determination was supposed to be applicable to colonial people. The 1970 Principle Declaration placed the principle of territorial integrity and sovereignty of independent states prior to the right to self-determination and emphasized that nothing may impair "the territorial integrity or political unity of sovereign and independent states."

These two Declarations imply two important things. First, during the period of decolonization, self-determination was a legal right of all colonial people, but not of domestic minorities or indigenous people. Second, territorial integrity took precedence over the right to self-determination of people.

6.5. Summary

In terms of the stability of its legal status and scope, the norm of self-determination experienced 15 years of the stable moment (1945-1960). With the completion of the post-WWII restoration in the 1950s, the East-West tension became ever intensified in the 1960s and 1970s.

The Third World bloc maintained a kin relationship with the Communist bloc. However, the latter became reluctant to expand the norm of self-determination, because it might dismantle the communist empires in Eastern Europe and Central and East Asia. In addition, not all not all liberated states joined the socialist alliance.

Those states that accomplished independence earlier than other colonies built a coalition with elites of other non-self-governing entities. The coalition-building between new-born states and latent independencies was sufficiently strong to stimulate the liberation movement virtually in all colonies in the world. Once a colony became independent, it reinforced its ties with neighboring states that supported its independence and accelerated the independence of other colonies. Finally, at the end of the third cyclic change of the norm of self-determination in the 1970s, members of the international community doubled.

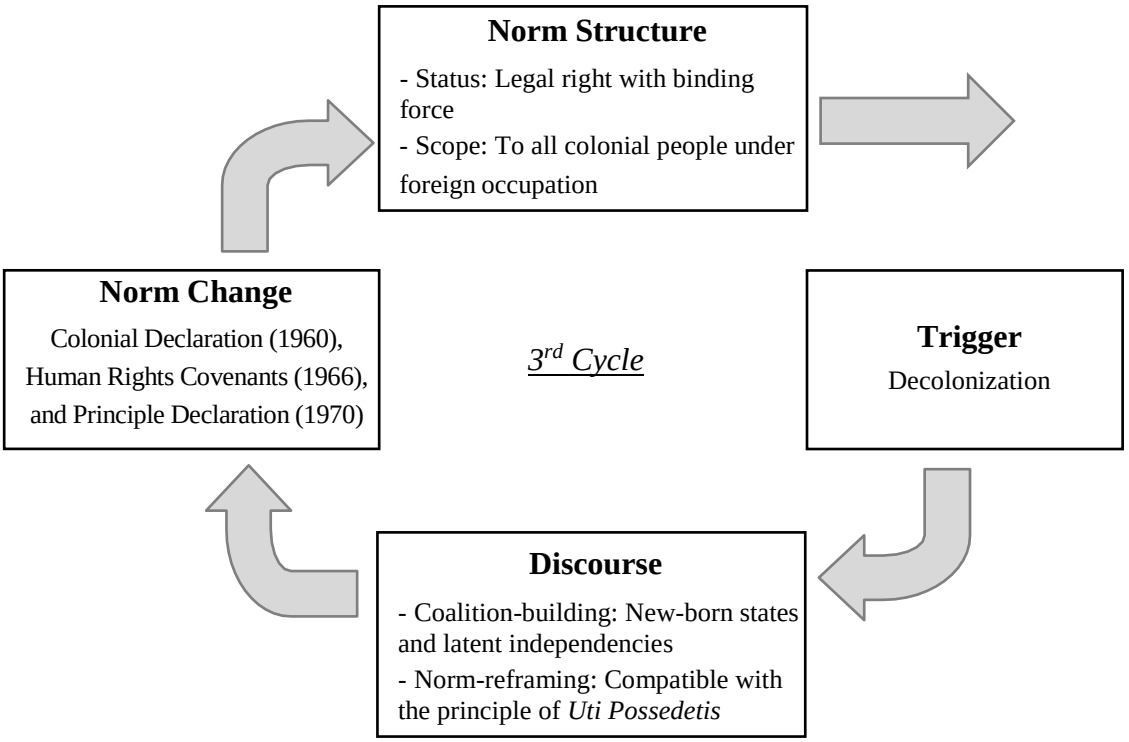
The success of the coalition was possible by reframing self-determination as a norm compatible with the principle of *Uti Possedetis.* The coalition requested independence not according to the tribes, but by the political units set by colonizers. Thanks to this reframing strategy, the coalition could soothe the major powers' anxiety, and almost all colonies in the world could cherish independence. Again, non-major powers, even non-feasible entities in this era, led the norm change in spite of the objection of greater powers.

With the admission of more and more members, the UN organs rapidly accumulated practice. Through the 1966 Human Rights Covenants and the 1960 and 1970 UNGA

Declarations, self-determination became a “legal right,” and it was reaffirmed by the ICJ in its 1971 and 1975 rulings. Furthermore, the right to self-determination should be allowed to all colonial people in every part of the world, and great powers could not reverse the movement of decolonization.

Figure 6.

Evolution of the Norm of Self-Determination in the 1960s-1970s



7. 4TH CYCLIC CHANGE OF SELF-DETERMINATION

7.1. Trigger: Cold War

With the completion of decolonization in the 1970s, the norm of self-determination entered into its third stable moment, and it lasted in the 1980s. The fourth trigger that broke the stability up was the end of the Cold War.

The Cold War was a war, too, and the aftermath was divided into a the victory for the liberal democratic world and the dissolution of the Communist empire of the USSR and Yugoslavia. The end of the War generated a power vacuum, and the call for self-determination that had been suppressed under the East-West confrontation erupted. More than twenty countries became independent in the 1990s and 2000s.** However, more serious situations that may threaten international peace and stability were not these cases. National minorities' call for self-determination within a non-colonial context is in question. The key factor in this era is the issues related to democracy.

7.2. Discourse

Coalition-Building

** Lithuania from the USSR (1990); Namibia from South Africa (1990); Slovenia and Croatia from the Socialist Federal Republic of Yugoslavia (SFR Yugoslavia) (1991); Estonia, Latvia, Russia, Ukraine, Belarus, Moldova, Azerbaijan, Kyrgyzstan, Uzbekistan, Tajikistan, Turkmenistan, and Kazakhstan from the USSR (1991); Macedonia from the SFR Yugoslavia (1991); Bosnia and Herzegovina from the SFR Yugoslavia (1992), Czech Republic and Slovakia from Czechoslovakia (1993); Eritrea from Ethiopia (1993); Palau from the US administered United Nations Trusteeship (1994); East Timor from Portugal/Indonesia (2002); Montenegro from the State Union of Serbia and Montenegro (2006); Kosovo from Serbia (2008); and South Sudan from Sudan (2011)

In the 1990s and 2000s, the circumstances were changed from the earlier evolutionary era of decolonization. Those states that had been the beneficiaries of the norm of self-determination became "the staunchest supporters of a strict interpretation of self-determination" (Cassese 1986, 108). To the contrary, the West changed its position to vigorous facilitators of self-determination.

For example, with the East Timorese right to self-determination, Portugal, the last anti-self-determination imperialist power in the 1970s, advocated the right (ICJ Report 1995), whereas Indonesia, once the beneficiary of the norm, refused to endow such a right to the Timorese. The Communist and the Third World blocs insisted that although the international norm of self-determination has utmost importance, it was already used and accomplished, and there was left no room for self-determination anymore. No secession from secession (Weller 2009).

Post-Cold War self-determination moved in the direction of the right to democracy (Alston 2014). The division of positions on further self-determination in the non-colonial context was identified as democracies versus non-democracies. Many states that had been members of the former Communist and Third World blocs showed reluctance in extending the scope of self-determination.

The new norm entrepreneurs in the post-Cold War era were *democratic norm diffusers* who tried to connect self-determination to democracy and human rights. Attention should be given to the fact that not all Western democracies agreed on the expansion of the norm of self-determination. Especially those states who have internal minority problems like Spain refused to join the coalition. However, whether or not having such problems is not decisive for the admission to the coalition.

The UK, for example, also experienced violent separatist movement and still has national minority problems but became one of the most vigorous norm entrepreneurs after the

Cold War. The UK in its Written Statement to the ICJ concerning the Kosovo case in 2009 argued that the norm of self-determination of peoples was more crucial than the norm of territorial integrity of states.

Hence, the membership to the coalition of the democratic norm diffusers was a matter of will and choice of each democratic state. In Spain's case, state integrity was valued more than people's right to self-determination.

Norm-Reframing

The coalition of democratic norm diffusers linked self-determination to human rights and democracy. International treaties and customary laws were reviewed to discover the democratic aspect of the self-determination norm. Human rights and democracy started to gain universal value that should be applied to every state. Talbott (2000), then US Deputy Secretary of State asserted in an article that: "Democracy is the political system most explicitly designed to ensure self-determination."

The democratic coalition advocated the "democracy, not secession" doctrine (Alston 2014). As long as a state treated its minorities decently, no segregation would be extracted from the norm of self-determination. However, if a state failed to secure democracy and human rights of its minorities, the oppressed may argue for external or remedial self-determination, which means secession. This form of self-determination was realized in East Timor in 2002 and Kosovo in 2008.

Non-democracies' attitude toward self-determination with democratic values is ambivalent. As many authoritarian states have the word of 'democratic' in their countries' names, such as the *Democratic* People's Republic of Korea, People's *Democratic* Republic of Algeria, Lao People's *Democratic* Republic, and the Federal *Democratic* Republic of Ethiopia, democracy is officially an essential value to non-democracies, too. No state, even

non-democracies, explicitly oppose the combination of self-determination and democracy.

Non-democracies' current position with regard to the self-determination norm was described in 2000, at the Action Program of the Group of 77 summit; self-determination was mentioned with a proviso: "in particular of peoples living under colonial or other forms of alien domination or foreign occupation" (Alston 2014). The annual resolutions by the UNGA in 1999 and 2000, too, reaffirmed the universal realization of self-determination to all people "under colonial, foreign and alien domination" (Alston 2014). Alston (2014) laments that this kind of proviso is "little more than a sad relic of a bygone golden era."

7.3. Norm Change

Cogen and De Brabandere (2007) examined the post-conflict situation and concluded that in most cases democracy is a prerequisite for nation-building. In the Kosovar case, the UNSC Resolution 1244 declared that the interim administration in Kosovo should organize and oversee "the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections" (SC Res. 1244, 1999). In the East Timor case, the UNSC Resolution 1272 asked the UN Transitional Administration to "carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions" (SC Res. 1272, 1999).

The Vienna Declaration and Programme of Action adopted by consensus at the World Conference on Human Rights (1993) and the UNGA Resolution 50/6 *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* (1995) reaffirmed the right of self-determination of all peoples.

Importance should be given to international and domestic courts' rulings. In the East Timor case (1995), the ICJ stated that the right of peoples to self-determination "is one of the essential principles of contemporary international law" and has an *Erga Omnes* character (ICJ Reports 1995). *Erga Omnes* means rights/obligations are owed *toward all*, and if a norm has an *Erga Omnes* character, states take a mandatory duty to respect the norm in any circumstance (Parker 2000).

East Timor's right of self-determination, in this case, was uncontroversial. Even Indonesia admitted that the East Timorese had a legal right to self-determination but argued that the annexation was proceeded by the free will of East Timorese (Malanczuk 2002, 132). Hence, self-determination through democratic procedure was questioned in this case.

In the *Reference re Secession of Quebec* (1998), the Canadian Supreme Court ruled that the Quebecois was not entitled to independence from Canada because they were not under alien domination nor denied internal self-determination of self-governing. However, the Court admitted the existence of so-called remedial secession. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case (2004), the ICJ reaffirmed that "international law in regard to non-self- governing territories made the principle of self-determination applicable to all such territories" (ICJ Reports 2004).

Most recently, in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* case (2010), the ICJ claimed that "one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination" and "the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation" (ICJ Reports 2010).

7.4. Norm structure

Status of the Norm

As the ICJ ruled in 1995, there was a consensus among jurists and scholars that self-determination was a right and an obligation *Erga Omnes*. When a norm achieves the status of *Erga Omnes*, which means rights/obligations are owed *toward all*, states are under a mandatory duty to respect the norm in any circumstance because it is an obligation owed to the international community as a whole (Parker 2000).

Consequently, any (relevant or irrelevant) state can raise a question if a breach of the norm occurs because self-determination is general in character and consequently affects all member states of the international community (Cassese 1985, 95). Furthermore, because the norm of self-determination of peoples is a legal right and obligation in international law, denying lawful self-determination of peoples would be an international wrong causing responsibility on the international level.

Meanwhile, there is an argument that self-determination is now regarded as *a Jus Cogens* norm. The Vienna Convention on Law of Treaties defines *Jus Cogens* as "a norm *accepted and recognized by the international community of states as a whole* as a norm from which *no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character" (Art. 53).

Self-determination has attained the status of *Jus Cogens* (Cassese 1986, 169–170; Malanczuk 2002, 327; Shah 2007). Some scholars further argue that the right to self-determination is indisputably a norm of *Jus Cogens*, and even economic and cultural rights, concerning natural resources, habitat, language, religion, and tradition are recognized in *Jus*

Cogens norms because these rights are also part of self-determination (Parker and Neylon 1989).

It could be right when it comes to the conventional, colonial form of external self-determination. However, it would be ironic because there remains no such colonialist claim (Seshagiri 2010). Then, in the case of the non-conventional, internal self-determination that means national minorities' right to self-government or autonomy, it would be questionable.

Scope and Content of the Norm

Gerald Fitzmaurice, then judge of the ICJ, mentioned that because "peoples" are judicially non-existent entities that cannot be the possessor of a legal right, including self-determination (Henkin et al. 1993, 303). However, during the post-Cold War self-determination discourse, defining 'people' became important because the norm is closely related to human rights. In the realm of self-determination, 'a people' is treated as a subject of international law because the norm inheres in people, not in states (Koivurova 2010). Accordingly, the international law grants the right to self-determination to 'peoples' (Supreme Court of Canada 1988, para. 123).

The Supreme Court of Canada comprehended that the people need not be an entire population of a state, but enough to include a portion of the population. The Court broadened the scope of a people not explicitly mentioning the size of the people on purpose. The Court stated that:

> The right to self-determination has developed largely as a human right and is generally used in documents that simultaneously contain references to 'nation' and 'state.' The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting

> of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose" (Supreme Court of Canada 1988, para. 124).

In 1989, the United Nations Educational, Scientific and Cultural Organization (UNESCO) suggested the so-called Kirby-definition of "peoples" under international law. According to the definition, the holders of the right of self-determination are a people (a group of individual human beings) who have some or all of the following common features: common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, and common economic life (UNESCO HQ 1989). In addition, the UNESCO experts stated that "the group as a whole must have the will to be identified as a people or the consciousness of being a people" (UNESCO HQ 1989). According to the UNESCO experts, the people must be of a certain number, which needs not be large but must be more than "a mere association of individuals within a state." The existence of "institutions or other means of expressing its common characteristics and will for identity" is also essential (UNESCO HQ 1989).

Including UNESCO's definition of "peoples," there have been many attempts to enlarge the scope and content of the norm of self-determination. The Canadian Supreme Court noted that Quebec, one of Canada's provinces, is not under any foreign, alien or colonial occupation. It then affirmed the legality of the principle of the right of 'internal self-determination.' However, the Court stated that the Quebecois was neither oppressed nor did it systematically experience civil rights violation (Supreme Court of Canada 1988, para. 123). In other words, the Quebec population had not been stripped of the right of internal self-determination.

The Court implied that if the Quebecois were denied meaningful access to government

to pursue their political, economic, cultural and social development, 'remedial secession' would have been warranted (Scharf 2002). The Court stated that "a right to secession only arises under the principle of self-determination of peoples at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the State of which it forms a part" (Supreme Court of Canada 1988, para. 154). The Court also ruled that "a state whose government represents the whole of the people or peoples resident within its territory, on the basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other States" (Supreme Court of Canada 1988, para. 154). Hence, according to the Court, when a state does not represent peoples within its territory, discriminate minorities, and does not respect internal self-determination, territorial integrity of such a state is endangered. In such cases, remedial secession might be the logical consequence.

The Supreme Court of Canada (1988) stated that Quebec might effectively achieve de facto secession by securing control over its territory and obtaining international recognition. The Court stated that this was possible without infringing upon the lawfulness of the undertaking. According to the Court, if the majority of Quebecois voted for secession when presented with a clear referendum question, then the federal government and other provincial governments were under a constitutional duty to negotiate secession in good faith with the relevant Quebec authorities:

> It is clear that international law does not specifically grant component parts of sovereign States the legal right to secede unilaterally from their 'parent' State. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found

> their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of States to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of 'a people' to self-determination (Supreme Court of Canada 1988, para. 111).

7.5. Summary

The third stable moment of self-determination was interrupted by the end of the Cold War. The call for self-determination that had been suppressed under the East-West confrontation erupted in the 1990s and 2000s. Those states that had been the beneficiaries of the norm of self-determination in the evolutionary era of decolonization started to oppose the extension of self-determination. No secession from secession.

The new norm entrepreneurs in the post-Cold War era were democratic norm diffusers who tried to connect self-determination to democracy and human rights. However, not all Western democracies joined the coalition. Although both the UK and Spain have internal minority problems and experienced violent separatist movements, the former became one of the most vigorous norm entrepreneurs; the latter objected any attempt to enlarge self-determination beyond colonial context. It is a matter of will and choice of each democratic state. The UK saw people's right to self-determination is more important than state integrity, whereas Spain's view was the opposite.

Emphasis on the democratic value of self-determination does not mean independence as in the earlier era. The division of internal and external/remedial self-determination is needed. As long as a state treated its minorities decently, no segregation would be extracted from the norm of self-determination. However, if a state failed to secure democracy and

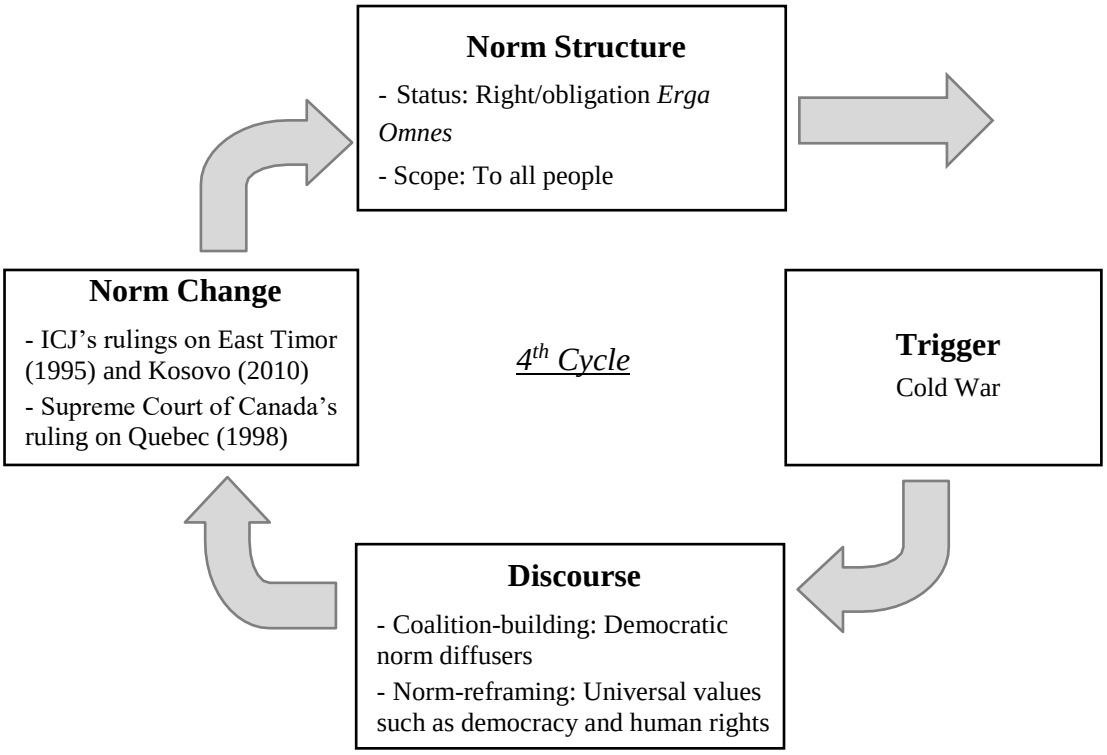
human rights of its minorities, as in East Timor and Kosovo, the oppressed may argue for external or remedial self-determination, which means secession. Non-democracies' attitude toward self-determination with democratic values is ambivalent, but there has been no explicit opposition to the combination of self-determination and democracy.

International and domestic courts' rulings played important roles in determining non-traditional self-determination. In the East Timor case (1995), the ICJ stated that the right of peoples to self-determination has an *Erga Omnes* character (ICJ Reports 1995). In the Reference re Secession of Quebec (1998), the Canadian Supreme Court admitted the existence of remedial secession. Most recently, in the Kosovo case (2010), the ICJ summarized self-determination as "one of the major developments of international law during the second half of the twentieth century" and "a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation" (ICJ Reports 2010).

Self-determination became a right and an obligation *Erga Omnes* and is even regarded as *a Jus Cogens* norm in case of the conventional, colonial form of self-determination. With the introduction of the concept of internal self-determination, the scope of the norm of self-determination extended to *all people*.

Figure 7.

Evolution of the Norm of Self-Determination in the 1990s-2000s



8. EMPERICAL ANALYSIS OF STATES' POSITION ON SELF-DETERMINATION: THE KOSOVO CASE

8.1. Introduction

The fourth cyclic change of the norm of self-determination is summarized like this: after the end of the Cold War, the democratic norm diffusers made a coalition to link self-determination to democracy and human rights; with their efforts, international and domestic courts characterized self-determination as a right or an obligation *Erga Omnes*; every people, including national minorities, may enjoy the norm of self-determination.

This research concluded that the fourth cycle ended in the late 2000s. However, we do not know where we are situated in the whole process of the development of self-determination norm. Are we experiencing the stable moment of the norm waiting for the fifth cyclic change? Did the fifth change already begin perhaps by the revolution of intelligence technology or by the phenomenon of democratic retreat? It would be quite difficult to tell where we are now and in which direction the norm will evolve. In this sense, by analyzing actors' position on the actual application of the norm of self-determination, we may infer the answer.

In its ruling on the Kosovo case in 2010, the ICJ distinguished the declaration of independence from its legal effects. The Court did not address the possible legal ramifications of independence but only concluded that the Unilateral Declaration of Independence (UDI) of Kosovo did not violate international law (Muharremi 2010). However, states voluntarily submitted their opinions on related issues by Written and/or Oral Statements in 2009. This chapter analyses Written Statements of 37 states filed to the ICJ.

8.2. Territorial Integrity *versus* Self-Determination

To the question "does the principle of self-determination take priority over the territorial integrity of states?" 17 out of 37 states (46%: Albania, Austria, Denmark, Estonia, Germany Ireland, Finland, France, Japan, Latvia, Netherlands, Norway, Poland, Slovenia, Switzerland, and the UK) replied yes, whereas 13 out of 37 states (35%: Argentina, Azerbaijan, China, Iran, Brazil, Cyprus, Libya, Spain, Serbia, Egypt, Russia, Slovakia, and Venezuela) answered no.

The UK argued that territorial integrity is not a paramount norm that cannot be modified and does not override *internal development* (for national minorities) especially when the mistreatment has been repeated over time and leads the dissolution of the state (Written Statement of the UK 2009, 85-86).

Slovenia suggested democratic and human rights criteria to judge which principle should be valued more and insisted that the realization of external self-determination in the 1990s and 2000s contributed to both national development and regional peace:

> Self-determination of peoples and territorial integrity of states are basic principles of international law, but the latter has no direct link to democracy. The preservation of territorial integrity is often a reason for gross violations of human rights, but the experiences of the newly independent states in the last two decades, which are no longer based on decolonization, have been stimulating for the development of their societies and contributing to regional stability (Written Statement of Slovenia 2009, 2).

Egypt, quoting the Supreme Court of Canada's Quebec case, admitted the existence of internal and external self-determination, but argued that self-determination could not be used if it threatens international peace:

> According to the Supreme Court of Canada, the scope of the right to self-determination has been defined as either internal self-determination or external self-determination. However, the application of the right to self-determination should not lead to situations threatening international peace and security (Written Statement of Egypt 2009, 18-19).

Some states argued that territorial integrity is the basis of the international law that has never been changed whereas self-determination has differed throughout history. China regarded secession as a non-recognized rule in international law and insisted that it "has always been opposed by the international community of States" (Written Statement of China 2009, 2). Brazil put territorial integrity over self-determination and said: "the right to self-determination does not stand in contradiction with the principle of territorial integrity" (Written Statement of Brazil 2009, 2).

8.3. Recognition of Remedial Self-Determination

To the question of whether the right to remedial secession in international law exists, 15 out of 37 states (40.5%: Albania, Egypt, Estonia, Finland, Germany, Ireland, Maldives, Netherlands, Norway, Poland, Russia, Switzerland, Denmark, France, and Slovenia) answered yes, but seven states (19%: China, Argentina, Iran, Cyprus, Japan, Slovakia, and Spain) answered no.

All those states that mentioned self-determination in their Written Statements admitted that self-determination is a fundamental principle or a legal right with regard to the conventional self-determination in the colonial context. However, some states denied the existence of remedial self-determination (external self-determination in non-colonial context).

Notably, the USA, the UK, and Kosovo did not express their opinions on the

rightfulness of remedial self-determination in this case. One reason would be that the issue is so closely connected to the case that should be dealt with utmost care; the other reason would be that the explicit recognition of remedial self-determination might deliver the wrong message to other national minorities in the world that seek secession from their existing states.

The Kosovo Declaration of Independence (2008) claimed that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation." Many Western states emphasized that the Kosovo case is *sui generis*. The authors of the Declaration argued that they are not creating a new law that applies to other peoples in a similar situation (Cirkovic 2010).

Some Western democracies suggested lawful conditions to exercise external self-determination that leads to remedial secession. According to Germany, external self-determination or remedial secession should be "the ultimate remedy to the persistent denial of internal self-determination," and democratic negotiation within the state should be done first (Written Statement of Germany 2009, 38-39).

Poland insisted that under the condition when "a state gravely violates international human rights and humanitarian law against peoples inhabiting its territory," the right to remedial secession could be exercised (Written Statement of Poland 2009, 25). Denmark also argued that "the denial of meaningful internal self-determination" would create "legitimate claim of independence" (Written Statement of Denmark 2009, 12).

Many states quoted the case of Reference re Secession of Quebec by the Supreme Court of Canada to justify the existence of remedial secession. Albania stated that the Canadian Supreme Court recognized "the right of a people to secede unilaterally when denied the right to exert internally their right to self-determination as in the case of Kosovo" (Written Statement of 2009, 44).

Notably, Russia, who consistently opposed the independence of Kosovo, admitted the existence of a people's right to external/remedial self-determination but denied applying such a right in the Kosovo case. According to Russia's interpretation, "the 'safeguard clause' may be construed as authorizing secession under certain conditions. The conditions are truly extreme circumstances such as an outright armed attack by the parent State, threatening the very existence of the people in question" (Written Statement of Russia 2009, 31-32). Russia argued, in other words, that remedial secession could be allowed "when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people" (Written Statement of Russia 2009, 40).

Countries like China and Argentina did not try to expand the scope and content of self-determination from the conventional colonial concept. The staunchest position in this vein could be found in China's statement: "Even after colonial rule ended in the world, the scope of application of the principle of self-determination has not changed" (Written Statement of China 2009, 5). Argentina argued that remedial secession is just a mere doctrine (Written Statement of Argentina 2009, 34).

8.4. Legitimacy of the Declaration of Independence

To the question of "is the unilateral declaration of independence in accordance with international law?" 21 out of 37 states (57%: Albania, Austria, Czech Rep., Denmark, Estonia, Finland, France, Germany, Ireland, Japan, Latvia, Luxembourg, Maldives, Netherlands, Norway, Poland, Slovenia, Switzerland, UK, USA, and Kosovo) agreed, whereas 14 states (38%: Argentina, Azerbaijan, Brazil, Serbia, China, Cyprus, Egypt, Iran, Cyprus, Libya, Russia, Slovakia, Spain, and Venezuela) disagreed.

On the unilaterality of the declaration of independence, Albania asserted that labeling Kosovo's UDI as 'unilateral' is misleading since Kosovo consulted international community during the negotiation process (Written Statement of 2009, 38). The UK argued that "the phrase 'unilateral' adds little. Declarations of independence are by definition unilateral acts" (Written Statement of UK 2009, 54).

Those states that agreed Kosovo's UDI noted that the UDI is not a breach of international law because there is no law regulating such an act. Austria and Germany pointed out that International law is silent with regard to the UDI (Written Statement of Austria 2009, 14; Written Statement of Germany 2009, 34-38). Albania and Austria argued that secession is neither legal nor illegal in international law, but legally neutral (Written Statement of Albania 2009, 38; Written Statement of Austria 2009, 22).

The USA insisted that the formation of a new state is a matter of fact and international law is for relations among states not for "the conduct of states within states" (Written Statement of the USA 2009, 51). The Czech Republic introduced the possibility of allowing peaceful secession without foreign intervention. "Unless there is a use of force against or an intervention by another state into the affairs of the original State, secession cannot be a breach of the latter's territorial integrity" (Written Statement of the Czech Republic 2009, 8).

Japan's position is interesting because Japan regarded the UDI of Kosovo was lawful for there had been the involvement of the international community. Japan stated that "the Kosovo case is a case outside the colonial context, and we cannot arrive at an appropriate legal interpretation. Rather, the process of continuous engagement by the UN should be noted." (Written Statement of Japan 2009, 4-5)

Those states against the UDI argued that it was illegal because international law does not allow for it. Notably, Spain emphasized consent between entities. "The constitution of a

new State out of a pre-existing sovereign State, without the latter's consent and via a unilateral act emanating from institutions that lack international legal status" (Written Statement of Spain 2009).

8.5. Summary

In the Kosovo case, the ICJ avoided addressing important issues related to external self-determination in non-colonial context, remedial secession, and the legal ramifications of the UDI. However, states voluntarily submitted their opinions, and it was useful to infer where we are situated in the norm development process.

46% of states that submitted Written Statements to the ICJ asserted that the norm of self-determination is more important than the territorial integrity norm. Slovenia's suggestion of democratic criteria to judge which principle should be valued more needs to be noted.

40.5% acknowledged the existence of external self-determination in the non-colonial context that may lead to remedial secession. Even Russia sided with them but refused to apply the right to secession into the Kosovo case. 19% of states argued that the scope of application of self-determination was not changed although there left no colonies in the world.

57% of states agreed that the UDI is lawful under international law, whereas 38% disagreed. Many states that agreed said there is no such law regulating the UDI. Hence the UDI is a legally neutral act. Spain emphasized that the UDI should be conducted with consent between entities. Japan found legitimacy from the involvement of the international community. China was one of the other part of 35% of states and showed the rigid interpretation of self-determination.

States' official stance toward self-determination demonstrates a certain direction of the norm's development.

9. CONCLUSION

Cyclic Model of International Norm Change

This research suggested the cyclic model of international norm change, and the model was tested its validity by the empirical study on the development of the norm of self-determination. Unlike the static model of early constructivists, the cyclic model demonstrates a clear framework to see how norms change. One cyclic change starts with a 'trigger' (WWI, WWII, decolonization or Cold War) and provokes 'discourse' that is composed of coalition-building and norm-reframing.

State power does not play an important role. The coalition of the US and Soviet Union; Communist and Third World; new-born states and latent independencies; and democratic norm diffusers gathered not because they had power, but because they shared common value to be spread. Non-major powers, even non-feasible entities at that time, could lead the change of international norm of self-determination. In many cases, great powers' interests and preferences remained unchanged, but the norm of self-determination changed. It was possible because the coalition reframed the norm and reconstructed interests of actors.

The last stage of each cyclic change is the creation of a new norm structure, which is not necessarily connected with the norm internalization into domestic legal systems. The stable moment lasts until the next trigger provokes the next cyclic change.

Table 1.

Summary of the Development of the Self-Determination Norm

	Trigger	**Discourse**		**Norm Change**	**Norm Structure**	
		Coalition-building	**Norm-reframing**		**Status**	**Scope**
1st Cycle	World War I	USA and Soviet Union	Stability for Europe	Covenant of the League of Nations	Political rhetoric	Colonies in Europe
2nd Cycle	World War II	Communist and Third World bloc	Logic of appropriateness	Charter of the United Nations	Legal principle (with non-binding force)	Colonies under the defeated
3rd Cycle	Decolonization	New-born states and latent independencies	Principle of *Uti Possedetis*	Colonial Declaration, Human Rights Covenants, and Principle Declaration	Legal right (with binding force)	All colonial people
4th Cycle	Cold War	Democratic norm diffusers	Universal value such as democracy and human rights	Courts' rulings on the cases of Quebec, East Timor, and Kosovo	Right/obligation *Erga Omes*	All people

International Norm of Self-Determination

The dominant IL tradition of legal positivism, which is connected to political realism in IR scholarship, has shown reluctance in recognizing non-codified norms. Furthermore, IR's rationalist scholars and IL's legal positivist scholars both maintain that "legal norms can only exist when they are produced through fixed hierarchies, usually state hierarchies" (Brunnée and Toope 2000). With this kind of rigid thinking, an inevitable tension exists between the self-determination norm and territorial integrity norm: if self-determination is allowed for the people, it might dismantle the basis of the current state-centric international order. Consequently, self-determination should be understood as narrowly as possible in order to maintain the stable Westphalian state system.

The controversy over the form of self-determination is ever intensified, but constructivist wisdom holds that norms are to be understood as a mutually constructive discourse between actors and structure. According to Sandholtz (2009, 55), "[m]odern norms of self-determination and territorial integrity have replaced the right of conquest." Contrary to the general perception of the tension between self-determination and territorial integrity, self-determination is not the counter-norm of the territorial integrity norm. Both norms were counter-norms against the use of force, militarism, and imperialism. Liberal democratic values were already incorporated in both norms.

Koskenniemi also argues that among self-determination and territorial integrity, neither can be chosen and discarded "because they are ultimately the same" (Koskenniemi 1990). "When a people call for territorial integrity, they call for respect for their identity as a self-determining entity and vice-versa" (Koskenniemi 1990). With the same logic, Anjos and Klein (2014) also argue that self-determination and territorial integrity are not contradictory, nor opposite, and mutual respect is required. As Jubilut and Lopes (2017) argue, "the

diversity or fragmentation of International Law needs to coexist with the search for its cohesiveness and dialogue with all relevant norms."

In the Western Sahara Case, Judge Dillard stated that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people" (ICJ Reports 1975). Self-determination without individual freedom would be nothing (Koskenniemi 2001, 184). Hence, non-democratic self-determination would be contradictory because self-determination is understood as one form of democracy and human rights, especially in the post-Cold War era. "Self-determination is not separate from other human rights norms; rather, self-determination is a configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order" (Anaya 1996, 77).

The self-determination norm with democratic values further enhances the territorial integrity norm. Confrontation is what actors make of it. /End/

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