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Normative Epistemology of Right to Self-Determination: Indian Perspective

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ABSTRACT

This write-up surveys the applicability of right to self-determination under UN charter in the curious case of India. The paper keeps itself strictly within the ambit and scope of the right to self-determination as granted to peoples under United Nations Charter. I have divided the paper into three parts namely; Facts; the Law; and Analysis. The core question that needs to be answered for the normative application of self-determination is to find out whether India is non-self-governing territory. The central argument of this paper is that India was always a single political unit under the British imperialism. The scheme of British administration in India, structurally, had two units of administrations; one with direct administration under the Parliamentary supremacy of the British Parliament and second unit was the Indian States enjoying their autonomy but losing their sovereignty and international identity to the British Empire. The relationship between the Indian States and the English Crown was that of paramountcy.

I have also attempted to unfold the legal meaning of the term 'colony', and have examined the legal connotation of the same. Also, it has been established that Kashmir had always found its place under the administration of British Empire of India and, needless to say, ancient India is incomplete without the Jammu and Kashmir.

The central argument in the article is premised on the fact that India signed UN declaration in 1942, became a member of

UN charter in 1945 as its original member, therefore, right to self determination of peoples of UN charter is inapplicable in India. It in this light that I have examined the international obligations of India under UN charter and answered the questions such as: Was India a non-self governing territory (NSGT) and yet an original member of UN charter? Was it possible for a State to be NSGT and original member of UN charter simultaneously without violating sovereign equality clause of UN charter? Does India's membership and status as non-self governing territory clause created conflict for India within the UN Charter obligations.

Keywords: Non Self Governing Territory, Self-Discrimination, Normative Epistemology

I. THE FACTS

A. Two Nations Theory-the raison d'être of partition of India

The division of the Indian peninsula on religious grounds is an eccentric and unique case of twentieth-century, carving out a state on religious ideology; not because of persecution thereof but imagined fear of living under Hindu dominance because of numerical inferiority[1].This division was conceived because of a theory called Two Nations Theory. The theory was never defined accurately it always remained a reactionary political retort[2]. It was a theory which was termed as Self-determination in Indian Muslims. Nevertheless, it was vaguely articulated by Jinnah in his Presidential speech at Lahore in 1940 argued that Indian Muslims were not only a religious-cultural minority but formed a nation separate from Hindus and therefore this distinct and separate minority needs its own share of Indian territory to live its life as per its customs and beliefs. This is what is called two nations

theory that lies at the core of partition of Indian civilization on religious line[3]. Further, the most ironical legend of the Two-Nation theory is that its proponents were Muslims elites from those parts of India, present-day UP, which is not a part of present day Pakistan[4]. Furthermore, the Indian subcontinent's Muslims were themselves divided on the division of the civilisational State. In the word of Mushirul Hasan[5], "*India's independence in August 1947 was the culmination of a sustained historical process. This cannot be said about the creation of Pakistan founded on the principle of Two-Nations theory*". Thus, the theory was loaded with assumptions one such assumption was that Muslims of India were a monolithic society. The myopic assertiveness of opportunist leaders could not gauge the monumental mistake they were committing, as it would cost millions of lives in span of a few days, during a time of absolute peace, besides the creation of a State that would lead to its populace being perpetually confused as to their identity and heritage. Thus, Pakistan's creation was a result of reactionary religious ambition rather than for the purpose of Islam, evidence of which can be observed in the Indian centric policy-foreign or domestic-of Islamabad. It was the interest of few people for whose concern Pakistan was created for two major reasons: the protection of economic privileges enjoyed by these few people during the British rule and belief in the concept that Muslims in India were a distinct and separate group[6]. In the words of Francis Robinson,

> "This may appear strange; the UP Muslims were mere fourteen percent of the population of the area and a smaller proportion of the Muslims population of India. Why not choose Bengal or the Punjab, where the Muslim Population was large? The answer is very simple: for much of the period of British rule Muslims from these provinces contributed little to specifically Muslim politics, their politician preferring to use other platforms. UP Muslims, on the other hand, were at the heart of Muslim separatism. They mainly founded and, with the exception of Bombay based Jinnah, mainly led the organizations which represented the Muslim interest in Indian Politics."

They propounded 'ad nauseam', a theory that changed the world forever; the extrapolation of the theory contained a principle that it is incomprehensible for Muslims to co-exist in a Hindu majority State, as it would subjugate them to hegemony of the majority[7] forever without delineating the nuts and bolts of hegemony that they were apprehending. By the same token, this theory in effect nullifies all kinds of possibility for a pluralistic society to exist if Muslims are not in majority in that society. The psyche of Hindu (that they see India not as a secular State but as a Hindu State) hegemony is still firmly etched in the Pakistan today. Their global policy, economic policy, strategic depth policy-continuation of Forward Policy of the British[8] are

all India centric and has led to turmoil in regional and global security[9]. It's a legacy which is forwarded by its founding political body, Muslim League. The Lahore Declaration[10] of year 1940 rightly sum ups the approach of the party,

> "...Well, I ask you ladies and gentlemen, is this the way to show any real genuine desire, if there existed any, to come to a settlement with the Mussalmans? (*Voices of no, no.*) Why does not Mr. Gandhi agree, and. I have suggested to him more than once and I repeat it again from this platform, why does not Mr. Gandhi honestly now acknowledge that the Congress is a Hindu Congress, that he does not represent anybody except the solid body of Hindu people? Why should not Mr. Gandhi be proud to say. "I am a Hindu. Congress has solid Hindu backing"? I am not ashamed of saying that I am a Mussalman. (*Hear, hear and applause.*)...Why then all this camouflage? Why all these machinations? Why all these

methods to coerce the British to overthrow the Mussalmans? Why this declaration of non-cooperation? Why this threat of civil disobedience? And why fight for a Constituent Assembly for the sake of ascertaining whether the Mussalmans agree or they do not agree? (*Hear, hear.*) Why not come as a Hindu leader proudly representing your people, and let me meet you proudly representing the Mussalmans? (*Hear, hear and applause.*) This all that I have to say so far as the Congress is concerned."

And finally, following are the sentences of Lahore Declaration which is cited as the birth of the movement for Pakistan as a sovereign State partitioned from India, although there is nothing specific in the statement of Mr Jinnah which can be attributed to that effect. Following is a part of the speech:

"The problem in India is not of an inter-communal character, but manifestly of an international one, and it must be treated as such. So long as this basic and fundamental truth is not realised, by any constitution that may be built will result in disaster and will prove destructive and harmful not only to the Mussalmans, but to the British and Hindus also. If the British Government are really in earnest and sincere to secure [the] peace and happiness of the people of this sub-continent, the only course open to us all is to allow the major nations separate homelands by dividing India into "autonomous national States." There is no reason why these States should be antagonistic to each other. On the other hand, the rivalry, and the natural desire and efforts on the part of one to dominate the social order and establish political supremacy over the other in the government of the country will disappear. It will lead more towards natural goodwill by international pacts between them, and they can live in complete harmony with their neighbours. This will lead further to a friendly settlement all the more easily with regard to minorities, by reciprocal arrangements and adjustments between Muslim India and Hindu India, which will far more adequately and effectively safeguard the rights and interests of Muslim and various other minorities[11]."

The fear, which was being stoked, invoked and provoked in this concocted 'Two-Nation theory' for Indian Muslims have now taken the shape of a nuclear arsenal. These statements are repeated in verbatim by the Pakistan Army and its leader till date. The hatred was so profound that entire history of the land was rewritten by Pakistan post-independence[12].

The political consequence, inter alia, of the ambiguous and unsound theory is that Pakistan perceives itself as the rightful heir of the Islamic rulers of India from 1200-1750 AD, therefore its armed forces wish to revisit and reclaim that glory by taking over India. However, the argument that the State of Pakistan is a revisionist State[13] and it wishes to follow a

policy of irredentism, generally, does not hold water. This is because, Pakistan would readily agree to conform to its borders with Afghanistan as the British left it. The border between Pakistan and Afghanistan is famously called 'Durand Line' named after the British Colonial Officer, Sir Mortimer Durand.[14] Similarly, it has entered into an agreement with China[15] where they have given up the territory of State of Jammu and Kashmir which is being occupied by them. Therefore, the argument that they are a greedy State which is looking forward to alter its territory, is far from the truth. Its demand for territory is more of a religious war cry of Indian Partition and not a claim premised on its security or any claim based in the rule of international law or rule of law in general.

Nevertheless, it failed in 1971 with the division of East Pakistan from West Pakistan that resulted in the birth of a natural and viable socio-political entit called Bangladesh. Interestingly, Bangladesh i.e. erstwhile East Pakistan had greater population than West Pakistan (present day

Pakistan), yet it never made any claim for Jammu and Kashmir as its territory, nor did it claim the name Pakistan for itself.

B. The bone of contention: in brief

Jammu and Kashmir became the part of the British administration in India as a result of the Treaty of Amritsar, 1846[16] when Dogra ruler, Gulab Singh, of the erstwhile State of Jammu and Kashmir sold it to the British. Before it became part of the British Empire, the State was ruled by a series of Buddhist and Hindu dynasties as recorded by Kalhana in his celebrated treatise 'Rajatarangini'[17] and subsequently by Muslim rulers, some of whom were converted Hindus and some came from outside of India.

As seen above, the Indian subcontinent was divided into two States, India and Pakistan. Out of the British Territory of India the division/partition occurred such that, Pakistan was a Muslim land for the Indian Muslims while India opted for status of a secular country. The native States of the British Empire were asked to join either of the dominions. The political leaders of the Muslim League argued that native Indian States had three choices namely; the right to declare themselves as an independent country; to join Indian Dominion or to join the Dominion of Pakistan[18]. Contrary to this, Indians argued that the native States had only two options either to join the Indian Dominion or to conflate with the Dominion of Pakistan hitherto.

The State of Jammu and Kashmir was one of those rare cases in the Indian subcontinent where the ruler was from the minority religion, in contrast to his subjects who were from the majority community in terms of religious demography[19]. Hence, the Raja was Hindu while majority of his subjects were Muslims. Post 15 August of 1947, Maharaja of Jammu and Kashmir remained ambivalent to the merger of his State to either of the Dominions. The incongruity of the Maharaja grew the impatience of Pakistan and it decided to take the territory by force and merge it with Pakistan. Instead of direct aggression Pakistan army send tribal raiders mixed with the members of their regular regiments[20]. Panicked from this sudden raid Maharaja sought the assistance of India. However, India expressed its inability and doubted that it might turn itself into an aggressor against Pakistan as the princely State of Jammu and Kashmir was not yet an Indian Territory as per the scheme of the Indian Independence Act, 1947, because the Maharaja had not yet signed the necessary instrument of accession to legally merge the territory with the Union of India. Once the instrument of accession was signed;[21] Indian armed forces, still under the command of British, were dispatched to defend its territory of Jammu and Kashmir. The Pakistani forces were halted and repelled. At that point, PM Nehru decided to take the matter to the Security Council of United Nations. Security Council acting under Chapter VI passed a series of resolution in 1948 in which it recommended for a plebiscite at the insistence of India. India had accepted the instrument of accession conditionally and had assumed the responsibility of obtaining the will of the people of Jammu and Kashmir to join secular India or negate it. Though legally the accession was completed, India accepted it conditionally and decided to provide people of Jammu and Kashmir with a chance to decide their own fate given the non-democratic nature of the instrument of accession.

Security Council resolution[22] also recommended the plebiscite predicated on the conditions mentioned in the resolution. The implementation of Jammu and Kashmir resolution was predicated on the condition that the geographical unity of the State would be restored by demilitarisation by Pakistan and that India would maintain the bulk of its forces to maintain security. Alterations in demography would not be allowed thus area must be sanitised of

Pakistani raiders. However, presently the area is divided between three countries India, China[23] and Pakistan, its reunification is impossible; hence the Security Council resolution has been rendered ineffective. The validity of the treaty remains a point of contention whether this treaty is valid given the obligation that Pakistan has under Security Council resolution. According to Art. 103 of the UN Charter, for any conflict between two obligations arising from UN charter and any other treaty, the obligation under the UN charter must prevail over the treaty obligation. However, in this essay, I would examine whether there is a case of self-determination for the people of Jammu and Kashmir.

II. THE LAW

A. Self-determination: Constitutional as well as international law subject matter

Self-determination has traversed a long journey from a political idea[24] to a positive law-under international law-from self-governance to self-determination.

Yet it remains one of the most convoluted concepts of municipal and international law. In normal parlance the very moment one hears the word 'self-determination', one start visualising "an independent State as a result of plebiscite coming out from an existing State" under international law. The starting point off the journey so far traversed was the idea of self-governance by the people themselves. Therefore, self-determination is much more complex and deep-rooted than the widely regarded oversimplified perception thereunder, especially if it is studied in the backdrop of its evolution. Self-determination post-WWI started to take shape in the form of nationalist self-determination. The world order post-WWII sealed this conception thereof.

Therefore, there are two contexts in which self-determination has evolved which must be analysed. Firstly, self-determination concerns international peace, and thus it becomes the subject matter of international law[25]; Secondly, the backdrop or context is the relationship between people, the legal system (State), and legitimacy thereof, thus giving it a constitutional angle[26]. In normal parlance, the constitutional source of self-determination is called an internal aspect of self-determination and its manifestation under the positive international law is called external aspect of self-determination[27]. For example, legal consequence of self-determination may connote self-government in a constitutional context, as it may manifest itself as a collective right for people to participate in self-government individually through democratic means. Further, it may also create human rights, political and civil rights-for minorities and indigenous people. In the context of international law, it may manifest itself in the form of an independent State as a result of decolonisation from its colonial metropolitan master, or as an associated State; and arguably as an independent State under remedial secession.

In this paper, I would examine the application of the right to self-determination as provided under UN Charter as a matter of positive international law governing the non-self-governing territory.

B. Right to self-determination: The normative scheme of UNC

The normative regime is entrenched under Arts. 73 and 74 of UNC. Arts. 1, 55 and 56 provide the framework for the right to self-determination of peoples as one of the kernel purposes of the UN system. The conjoint reading of all these articles makes the decolonisation of the world order a mandate for the UN. The normative scheme of Arts. 73 and 74 of UNC is further complemented by three General Assembly Resolutions (GAR). The first two resolutions passed and adopted on 14th and 15th December, 1960 are Declaration on Granting Independence to Colonial Countries and Peoples'[28] (Res. 1514) and 'Principles which should

guide Members in determining whether or not an obligation exists to transmit the information called for under Art. 73e of the Charter'[29] (Res. 1541) respectively. These two General Assembly Resolutions (GARs) were further perfected by 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with Charter of the United Nations' (Friendly Relations resolution)[30]. However, the Friendly Resolutions were not so much for decolonisation, but had rules pertaining to self-determination for promoting and maintaining friendly relations among States[31].

GAR 1514 emphasises the need and "necessity of bringing to a speedy and unconditional end of colonialism in all its form and manifestations." The proclamation to end colonialism in all its forms and manifestations is the crux to understand colonialism. What constitutes forms and manifestation of colonialism, i.e. non-self-governing territories, can be assessed with the help of GAR 1541(XV)[32]. Now, Principle IV and V lay down the formula to determine whether a territory is a non-self governing territory or not. A territory to be prima facie a non-self governing must be geographically separate and ethnically distinct and/or culturally diverse from the country administering it[33]. Thus, the test would be to determine the distinction between geographical location and ethnicity from the Metropolitan

State and in some cases, even cultural distinction would be added to the test. Hence, the two ingredients to determine the territory as non-self governing territory are:

> "geographical separation + ethic distinction, or in some cases it may be geographical separateness + ethnic distinction + cultural distinction from the Metropolitan State."

Principle V states that once a territory has been prima facie established to be a non-self governing territory, its status as non-self governing territory would be further substantiated through the elements of administrative; political; juridical, economic or historical factors[34]. These elements are to determine whether there is relationship of subjugation between Metropolitan and the territory concerned. If the ingredient of Principle IV and others is present, then the relationship between the Metropolitan and the territory under its influence would be considered as subjugated, consequently as a non-self governing territory.

One more important aspect of the right to self-determination is that once exercised it cannot be exercised again[35].

C. Secession as a right to self-determination:

Secession, or remedial secession, is different from external self-determination, for secession there is no requirement for a State to be qualified as a non-self governing territory. The external aspect of self-determination i.e. allowing secession of a State which is not non-self governing territory is not yet possible under the positive international law[36]. Self-determination as codified under UN charter grants independence which is different from secession. Right to self-determination granting secession of a territory does not require a territory to be a non-self governing territory. There are scholars arguing that extreme situations and serious violations of human rights may give cause to the dismemberment of a State resulting in birth of another state.[37] The dismemberment of a State resulting from the gross and serious violation of human rights is termed as remedial secession. It is

interpreted by many States in their submission to ICJ in the Kosovo case, as an exception to the territorial integrity[38].

It is an interesting question to inquire whether remedial secession can entitle people to form a State which flouts all other norms of international law, especially peremptory norms. For example, can people come along to form a State which openly proclaims its assistance to international terrorism[39] and allows such activity openly on its soil without any fear of

sanctions[40]?

The bone of contention in Jammu and Kashmir is not of remedial secession. It's a case pertaining to Chapter XI, UN Charter.

III. THE ANALYSIS

A. Peoples

The right to self-determination under UNC is to be exercised by the peoples and not by the State. Therefore, only peoples of non-self governing territory are beneficiary of this right, peoples in this context are autochthonous people of the colony.[41] Peoples who constitute distinct ethnicity must have subjective as well as an objective element. In other words, they should not only be bound by common features such as language, race, religion, culture or similar other features but they must also share common conviction as to their unity on these elements. However, mere religion has never been considered as a ground for a group of individuals to be considered as people envisaged under UN Charter. Such construction of People, i.e. demography, constituted on the elements of race, language etc., qualifies them to have the right to self-determination is termed as naturalist concept of peoples[42]. The other construction is the 'Territorial' conception of people. Territorial peoples would be those people who have lived on a given

part of a land for time immemorial[43], such as aboriginals[44]. Other examples includes those who have lived on territory for time immemorial with a certain political organization, such as the Indian people of India, Egyptians, Chinese, Romans etc. The crucial element for territorial peoples to have the right to self-determination is a political organization in their existence. It seems GAR 1541 supports the naturalist approach regarding the rightful entitlement to the peoples[45].

The converging point of all the international scholars regarding the rightful claimant of right to self-determination is for those peoples who have territoriality attached to their identity[46]. In the words of Prof. Oeter, "*There has never been any serious international support for a claim of self-determination raised by a simple 'ethnic group' having no firm territorial basis in a pre-existing political entity.*"

B. Grund Norm Theory and Peoples

Kelsen in his magnum opus Pure Theory of Law analysed that State is nothing but a social order. A social order is resultant of moral order and legal order. A coercive legal order is the foundational basis of institutions that form State and transforms it into a normative order. The legal order is a system of hierarchy of norms; a system where posterior norm derives its validation from an anterior norm thus making anterior norm a higher norm. He further analysed the crucial concept that constitutes the unity of multitude of norms and postulated that it is a basic norm or ground norm which provides for the unity and validity of a multitude of norms. A basic norm is a result of a specific constitution, established by custom or statutory creation.[47] Hence, basic norm furnishes the validity of the constitution so created. A basic norm is presupposed, that is, it is the first act of peoples desires to form a legal order and subject their physical manifestation of conduct to this constitution. This is what constitutes nations or ethnicity in terms of a legal order. Constitution of India in its present form does not derive its validity merely from the constituent assembly which as a matter of fact constituted it. There has to be some normative foundation that

validates the constitution. Constituent Assembly derived its basic structure from Government of India Act, 1935. Constituent Assembly was not only for British India, but had its members from the Indian States also[48].

Admittedly, the theory that the British politically constituted India is a factual miscarriage. In reality, they merely consolidated and unified the Indian States.

Constitution cannot be a subject matter of the factual inquiry. If it has to be a valid legal order, it must vest itself with will of people. Will is a subjective element that completes the equation. Otherwise factually, i.e. objectively, a colony is as good as a State. This is the theoretical precinct of the right to self-determination; where a colony which has all the ingredients of a State, yet remains a colony because the will of the people is not appropriated. The will of the people and the fact of constitutional ingredients, i.e. governmental structural in a given territory, would produce a legal order which is democratic[49] in its essence; hence a State. When we say a legal order, international or national, its factual aspect would be the procedures that provides for democratic form thereof such as election; separation of power; rule of law etc. However, content of the same would be when people subject themselves to the rule of law freely and voluntarily. The objective procedures need subjective interpretation for these procedures to be valid. In the words of Kelsen, *"How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?"* He epistemologically answered the question in following words, *"By pre-supposing the basic norm that one ought to behave as the constitution prescribes, that is, one ought to behave in accordance with the subjective meaning of the constitution creating act of will-according to the prescription of the authority creating constitution."* Now, the Constitution of India became effective only on 26 January-1950, prior to its enactment the constitutional mandate was flowing from Government of India Act, 1935 (GoI Act, 1935). In the interim period of 15-August-1947 to 26-January-1950, the constitutional law was GoI Act, 1935, and indeed it was this law that provided for federal structure for India. The native Indian states were subject to this law of which Jammu and Kashmir was an integral part. GoI Act, 1935 was a culmination of many other laws providing for government of India. Government of India always included the government of the native States, not in its form but certainly in its content. Now, in order to determine who are the peoples of India, the validity of these laws is presupposed

as the will of the people who accepted it and thus ruled by it. For the purpose of the self-determination, people of India as a whole have a right to self-determination. The change in religious practice and beliefs would not change their identity as Indians.

C. Application of UN Charter

Few words are warranted here regarding the application of UN charter to Indian case for self-determination in Jammu and Kashmir. UN charter would be applicable in this case for the simple fact that India is an original member of UN charter and is a signatory thereof. It is imperative here to highlight that India become an original member before even it became an independent and sovereign State. Therefore, it is not required to establish if the relevant provision of UNC are customary or not, as it is applicable as treaty rule.

Though the first opportunity to discuss the implication of right to self-determination in public international law arose in *Aaland Islands case*[50] between Sweden and Finland during the regime of League of Nations and not UNC; however, at that time it was decided that right to self-determination had no mention in Treaty of Versailles, 1919, consequently, right to self-determination was not a subject matter of positive international law. Hence, the principle had no application in the case of Aaland Island. However, at the time of colonization there were no such laws to prohibit colonization or entitling people to claim right to self-determination, it was a must to investigate if UNC is applicable because removal of colonization

from the face of earth through the evolution positive international law of right to self-determination is a classic example of *de lege ferenda*. Since, facts become crucial for the further crystallization of law especially for those cases where facts precede law. The World Court in *Namibia Case*[51] laid down the law regarding the relationship between facts and law of self-determination, and later it was approved in *Western Sahara case*[52]. The World Court made following rule regarding the development of international law vis-à-vis non-self-governing territory,

> "the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law"[53].

It will be interesting to see what component of self-determination has crystalized and which component needs further evolution. However, one thing is quite established that principle of UNC has no application beyond the question of non-self governing territory.

Colonization and responsible government: Kautliya in 300 BC, an Indian scholar, wrote a treatise called Arthashastra[54], the book contained the principle of governance, economics and statecraft for India (however, it had universal application), yet it become a non-self-governing territory, or in other words, India was colonized by various invaders which culminated with British consolidation followed by independence of India in 1947. We need to find out what is the rationale behind this. Thus, having laid the law pertaining to the right to self-determination it is imperative here to write a few words about the conceptual layout of colonisation. Right to self-determination is not the antithesis of the colonisation; it's the refinement thereof. It is the product of churning of the world order through colonisation. Had there been no colonisation of the world; there would never have been any trace of the right to self-determination. A State and a society must be distinguished. Sometimes the state fails and sometimes the society[55]. However, the remedy in international law for both cannot be same.

The process of colonisation was the process of imposition of governance model on a society which was unknown therefrom; such imposition is

termed as 'subjugation' in GA Res. 1514 and 1541. Hence, colonisation was a governance model which was neither evolved nor managed at the highest level by those who were subjected thereto[56].

Ian Coupland had very aptly described the British colonial model in India in his seminal treatise, 'Constitutional Problem in India'. The long and short of it is that the British colonisation was nothing but replication of English self-government on societies other than the British. The English self-government saw rapid development beyond its prototype when applied to societies other than British. The story of colonisation is therefore incomplete, if we don't try to understand the English self-government hitherto. It all commenced with the call for first ever representative-government, by summoning of the maiden British Parliament, in the thirteenth century. It can be considered as the first stage. However, the executive government was still controlled by the sovereign and not by the Parliament. Thus, it was a representative but not responsible government. This lasted for four centuries where Sovereign, the Crown, was merely responsive to the Parliament and in full control of the executive part of the government. The scene started to change post-1688 revolution in England that witnessed the Sovereign gradually relinquishing the control over the executive part government. This led to the introduction of a responsible government to the United Kingdom, and this process achieved the responsible governance for the British society. Responsible government in this context meant that the executive ministers must be held responsible to the Parliament and not to the Crown[57]. The system of responsible government, in due course of time, was gradually affirmed in the practice till the government became the complete parliamentary or like cabinet system of today.

The application of similar principles of responsible government was introduced to the

territories outside British Islands. This system or model of governance is popularly termed as a 'colony'. This was a system of governance that the British knew. They took this knowledge along with them to places outside Britain and effectuated it on all those territories that came under their control.

The colonial executive remained responsible not to the colonial legislature but to the Government and Parliament at Westminster[58]. Hence, constitutional law is the source of the right to self-determination, and constitutional here is certainly the basic norm, i.e. the first constitution which

gave people territorial claim. International law in the garb of self-determination protects this territoriality.

D. The subjugation of peoples

Colonisation, the process, was teaching the coloniser as well as the colonised that there was no fixed form or manifestation of a colony[59]. The so-called subjugation was to be considered "subjugation" because those people subjugating and those subjugated did not share the same cultural heritage. Some sort of visible cruelty through armed forces was enacted to perpetuate subjugation. In the Indian context, this proposition is outrageous. There were only a few Englishmen to physically control or suppress the vast population of India. Thus subjugation was not possible through the might of force. It had to have subjective as well as objective elements. According to the Oxford dictionary, the word subjugation means 'bring under domination or control or make someone subordinate to'. The word subordinate thus means to bring someone under the authority or control of another within an organization. Objective element of subjugation may be usage of lethal and cruel armed force but subjectively subjugating someone would require a structure of authority and convince that person that he must surrender himself/herself to this authority. India was made a part of the British, if not in its objective sense but in their subjective sense. Princely states in India accepted this system too and made their people subjects of the British Empire.

E. Colonies and Dominions-legal definition

Colonies had no legal existence in international law at any point of time. They also had no legal personality either; therefore colonies could not be viewed outside the framework of its master; i.e. its empire. What was the legal status of a princely States; under the empire? Were they colonies or something else? It is extremely important to underscore the distinction, administrative and constitutional, between the Indian States and British India for innocuous inquiry of the legal status of the former within the British Empire of India. Moreover, was 'colony' a term of art, a legal term or a merely a term for the administration of a given territory?

Colonies and Dominions were different entities. Definition of the 'colony' can be traced back to the Colonial Laws Validity Act, 1865 whereas the meaning of the term Dominion was provided in the Statute of Westminster,

1931. Colonial Laws Validity Act, 1865[60] provided the definition of Colony in the following terms:

> "The term colony shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands...and such territories as may for the time being be vested in her Majesty under or by virtue of any Act of Parliament for the Government of India."

The legal position, under the definition of Colonial Laws Validity Act, 1865 is that India was a member of the International Community, a member of the Commonwealth, and was of a colony. Even as the British let India grow constitutionally, its status remained intact. The constitutional growth of India witnessed participation of the Princely States and British India both as a

monolith[61]. The definition makes it amply clear, that though the Indian Princes had the special position under the scheme of the Empire in India, their foundational classification remains similar to the colonies within the Government of India as understood hitherto. Hence, they never had any international life in British Empire. India in constitutional structure had two governmental systems, one in British India and other in the Indian States. However, it was always a single unit-constitutionally as well as internationally. The political reality was also in consonance to this legal proposition[62]. The landmark judgments of *R.* v. *Burah*[63] and *Hodge* v. *R.*[64], which were upheld by *Powell* v. *Apollo Candle Co. Ltd.*,[65] gave the law that colonies were not incorporated. If the colonies were not incorporated what was their legal standing? What would have been the status of subjects of native States? Did they have dual nationality? Were they owing their allegiance to British Crown or their Crown? If the former be the case, its natural corollary would be that the grant of Indian Independence Act, 1947 lead to the independence of the subjects of native States, from their British nationality. Since the Indian States were not the subject matter of International Law as it existed then, they did not have any remedy under it for the dispute resolution that they might have against other Indian States; because a dispute with States outside the Indian States would have amounted to a matter of "foreign relations", which was not a matter within the scope of the limited sovereignty that the Indian States possessed. Therefore, for

constitutional purpose of native States was to seek Crowns assistance; should they have the dispute between or among themselves[66]? Would the subjects of the Indian States also become the subjects of British Empire in the same sense as the subjects of the British India or Britain per se? Were the native States in a federated system with rest of the British Colony? Whatever be the constitutional answer to these many questions, the answer under international law was that they had no existence outside colonial yoke of British Empire.

F. Defining India: The geographical definition of India

The British acquisition of the Indian Territory and paramountcy over the Indian States was a fait accompli. It was never by design until late eighteenth century that British realised their potential and future in India. In each and every act passed by British Parliament, the Company was discouraged to wage war or acquire more territory, as it was denting a hole in the exchequer's pocket and expected the return on investments. The present day political map of India is the result of British consolidation of Indian Territory and treaty alliances with the native princes. In this part of paper we will see, how Britishers perceived India and whether Kashmir was an integral part thereof while conquering length and breadth thereof.

George Campbell defined India as, *"India beyond the desert comprises Cashmere (a large valley surrounded by hills), the Punjab and Scinde*[67] *(sic)".* Great British historian Mount Stuart Elphinstone[68] defined India as, "India is bounded by the Hemalaya Mountains, the river Indus, and the sea. Its length from Cashmir to Cape Comorin is about 1,900 British miles; and its breadth from the mouth of Indus to the mountains east of the Baramputra considerably upwards of 1,500 British miles." The Butler Committee report defined Indian States,

> "In the Indian States nature assumes its grandest and its simplest forms. The eternal snows of the Himalaya gather up and enshrine the mystery of the East and its ancient lore...The Indian States still form the most picturesque part of the India: they also represent, where the Prince and his people are Hindus, the ancient form of government in India... In the great State on the north (Kashmir) the ruler is Hindu whilst most of his subjects are Moslem."

Kashmir had always been integral in the scheme of British Empire[69] in India as part of the Indian States, which was under the suzerainty of British India.

G. Status of India in international Law-pre-independence

The modern international legal and political order is primarily based on UNC; however, it was its predecessor, League of Nations that laid down the foundational stone thereof. I shall be examining the UN charter in order to determine the status of India as a non-self-governing territory. However, it would be inappropriate to leave out the examination of the Indian status at the first prototype of world order. Thus, the relationship between League and India should be the starting point for ascertaining India's status under the modern international law. The concept of non-self-governing territory has its genus in Mandate system of League of Nations. In politico-administrative terms, India hitherto could be described as a sum total of British India and various other Indian States.

India was a party to Treaty of Versailles, 1919 (the treaty), a constitutional document for League of Nations despite the fact that it was a British colony. Therefore, few questions arise vis-à-vis the signature for joining the League by India. One of these questions is whether the colonies could become a party to an international treaty constituting League of Nations? If yes, how was India represented at League of Nations? To simplify this question we need to go into the depth of the argument. Was there only a single signatory for both British India and various native rulers of India? Or whether both British India and the various Indian States had different representatives? Few questions which arise are how India was a represented at the League of Nations signing ceremony, who signed it for India? The question is significant because if every Indian ruler had an international identity as States beyond their colonial identity, it would have required 600 odd princely States and other States to sign the Treaty. However, the records of the signature of League of Nations documents shows that the aforementioned argument (of 600 odd states signing the League) and the real case was much different[70]. In order to answer all these questions, it is imperative to examine the capacity of Indian States to sign the Treaty of Versailles, 1919 here.

Before starting, we need to know the constituent of the law of treaty in this regard. The very foundation of the law of treaties as codified under Vienna Convention of Law on Treaties, 1969 (VCLT) is that only a State can be a signatory to a treaty[71]. Further, Art. 4 provides for

non-applicability of VCLT, 1969 on those treaties, which were entered into prior to it's coming into force, barring those provisions thereof, which were codification of customary international law. Therefore, the norm that only a State could sign a treaty could only be invoked, in present case, if it is a customary international law, because at the time of League VCLT was not into existence. Additionally, VCLT mandates that if in a given treaty one of the parties is not a State; it does not affect the legal status of the treaty and application of those provisions of the VCLT, which are customary international law. Further, rules of VCLT could be invoked for interpretation of any treaty, which came into existence prior thereto, provided the corresponding provision of VCLT is codification of the customary international law. The wording of Art. 3, VCLT makes it clear that a treaty could have been signed by other subjects of international law which were not State[72]. It is highly improbable that only the international organizations or similar entity would qualify under this criterion of Art. 3 as at that time, in eighteenth and nineteenth century, international organizations were limited in number. International organization as a subject and subject matter of international law is quite a recent phenomenon. The practices show that colonies and dominions were usually made the part of treaty despite the absence of sovereignty in those political bodies.

In fact, if we do a combine reading of Art. 3 VCLT and Art. 1, Treat of Versailles together; it becomes amply clear that hitherto dominions and colonies were a subject of the International Law as they were expressly invited under the Treaty of Versailles to sign it. Now, as to the Indian status prior to her independence as a sovereign Republic on January 26, 1950, does the League have answer to all the above questions?

If we peruse the Treaty of Versailles, 1919, we can witness that Art. 1 thereof provided for its original Members as given in the Annex[73], and

India was one of the signatories as an original member[74] thereof[75]. Even at that time, the British treated India as one singular political unit as it is established by the fact that British India was represented by Mr Montague and the whole of the native States (rest of India) was represented by one Maharaja collectively[76].

H. UN Charter and India-Was it Non self-governing territory or Sovereign State

Now, coming back to the new world order, which was heralded by the UN Charter. A perusal of UN charter makes the case of the legal status of India even more intriguing. It is uncontested that only States could become a party to UNC as is stated under Art. 3[77] thereof. It is Art. 3, which provides for the original members of UNC, and therefore, its comparison with Art. 1 of Treaty of Versailles is inevitable. Unlike treaty of Versailles, the corresponding clause (Art. 3, UNC) did not use the word dominion or colony. Treaty of Versailles envisaged three kinds of political entity as the subject of international law i.e. fully self-governing State, Dominion or Colony. The usage of word 'fully self-governing State' gives the clue how the world order was constituted at that point of time. The idea of modern statehood was lying in between this classification of political entities across the globe, i.e. fully self-governing State and Dominions or Colony.

Further, Art. 3 and Art. 4 of UNC[78] heralded a new world order, as it did not mention the words Colony and Dominions or fully governing self territory and used the word State instead. It provided that all the States that signed UN declaration of 1942 would be its original member under Art. 3 and those all other States would be entitled to acquire membership of the

UN under Art. 4. India was one of the signatories in 1942[79]. Therefore, an original member, hence a State.

One of the natural corollaries of the only State being allowed to become the party of UNC is that any political entity allowed to become a party to UNC, would ipso facto accord it the status of a Sovereign State. An act of admission of a new member as per Art. 4 would amount the recognition of that political entity as a State. In this part of the paper, I will scrutinise how India was placed in the design and scheme of the UNC, and whether her international legal status was changed by UNC in 1945 or she maintained her status of the colony as she was in League of Nations. However, before doing that, we need to examine the scheme of UNC and the addresses of its international legal rights and obligation.

As seen above, UNC did not have provisions for colonies or dominion to be made party thereto like its predecessor. This argument is further strengthened if we examine the principles[80] on which UN needed to functions and formulated rules for it's functioning as international organization and also to regulate the behaviour of States inter se[81]. Moreover, in Arts. 1 and 2, UNC that spells out the purposes and principles for parties therein. Art. 2 of UNC provides for the principles that create an international legal obligation for; a) Member of the UNC, b) UN as an organization, and c) States. This is so because Art. 2 uses either states or Members as the bearer of international legal obligation therein, in addition to the usage of the word 'Organization'[82]. In light of the Art. 2, it will be absurd to argue that obligations under UN charter were created for any body/institution other than the States except for UN itself. A member under UN charter is basically a State which is evident form Art. 3, and all those States which were not the founding signatories of the charter were distinguished by using the term 'any State.'[83] There is no use of word colony or dominion even for those States

that were not the signatory of UN. Thus, UNC drastically changed the taxonomy of political entities from 1919 to 1945. The new taxonomy saw States as the only international subjects and encouraged them to give up those territories that could have been a State but for being a non-self-governing territory.

This was the reason that initially not all political entities qualified to be a State became a part of UN system, in addition to the enemy State[84]. To illustrate, Art. 2(4) proscribes the use of force by Member State against 'any States'. Here the word Member State is different from 'any State' because hitherto not all the States were a member of UNC, so it distinguishes between States party to UN charter and the non-signatory States to UNC. It did not recognize any other political entity such as colony or Dominion. For example, if there have been the use of force against a non-self-governing territory and since it is not usage of the force against 'any State', therefore, Art. 2(4) has no application whatsoever. Thus, the UN charter classified the political entities capable of being the subject matter of UN as Member State, Enemy States and non-self-governing territories. However, they considered non-self-governing territories as States of future, as they had no other political identity other than becoming a State. What was apparent in 1945 was made explicit in 1960 through GAR 1541[85]. One more important point, in the context of India, is that under UN scheme of things no State could be Member State, Enemy State and non-self governing territory at the same time. If a State was a member State, it could not have been enemy State of Art. 107 and, also, it could not have been a non-self-governing territory[86]. Thus, a question arises as to did UNC recognise colonies to be its member? If this question is break down into simple language, it would mean could India have become an original member despite being a colony?

To find this answer we need to examine some more provisions of UNC. Art. 93, UNC mandates that all members of UN are ipso facto members of Statute of International Court of Justice (ICJ). If we further examine the scheme of UN charter, we would notice that International Court of Justice Statute (ICJ), which is annexed to UN charter[87], provides that only

States could seize the court for a matter over which it had any jurisdiction[88]. Further, UNC also provided that the non-member States of UNC may also access the ICJ, by becoming a party to the ICJ statute[89]. It will not be overarching an argument that Art. 34 of the ICJ statute is a jus cogens[90]. If only States were/are permitted to access the World Court, it is very logical to construe that Member under UN could only become a State. Any other possibility would block a member which is not a State to have its disputes settled by it. This means that if every time a contentious proceeding is started the first task of the court would be to determine if the party seeking dispute resolution is a State or not as per the Art. 34 ICJ. It will be more stimulating to argue that perhaps ICJ would not even besieged of a matter if a party is not a State; therefore question of having the competence to try a matter and the decision on the merit of the case would not arise at all or would be void ab initio.

This is established that in UN scheme, colony or non-self governing territories had no place. However, our question is still unanswered that is could a colony become a member of UN, and after becoming a member, did it remain a non-self governing territory? For UNC both the terms, Colony and non self-governing territory are interchangeable words.

I. Non Self-Governing Territory and UN Membership-An Act of Recognition

The answer to our question might be traced in the provision related to membership of UN. In this part of paper I would examine these provisions[91]? We have learned that by 1960 UNGA made it clear that non-self-governing territory would acquire the status of State as mentioned therein after the decolonization. However, decolonization did not mean membership to UN ipso facto because a non-self-governing territory could have also opted for associate State

status[92].The natural corolloary of this is that grant of membership to a political entity would ipso facto have removed the status of a colony or a non-self-governing territory for that applicant State. This would happen because a political entity cannot wear

the two hats of being a State and non self governing territory at the same time because a State for UN charter was any political entity which was self governing. If, however, in arguendo, a non self-governing territory becomes a member of UN while retaining the politico-legal status of non self-governing territory it would have meant that there would be a colony within a State of its own people or non-self-governing territory within a State on the territory of its own. This proposition would be running counter to the one that is envisaged under GAR 1514! Consequently, a question arises that what would be an obligation under Art. 73e for a State for its own territory and peoples? It is established that when a colony became a member of UN Charter, it acquired the sovereignty, and consequently ceased to be a non-self-governing territory. It acquired sovereign powers over all its territory and people under the international law. Thus, membership to the UN had a constitutive impact of a declaratory action by other existing States. The admission of a non self-governing territory amounted to de jure recognition. It is, therefore, crucial for this article to examine the UN charter vis-a-vis its membership.

It is Art. 4 of the UN charter that deals with the question of membership of all other States which were not original Members. Although, this provision has no application in the case of India, as she was Art. 3 original member State, yet it would be prudent to see if there was any such case where non self-governing territory was given membership keeping its status as a non self-governing territory intact. Art.4, states that "*Membership in the UN is open to all other peace-loving States which accept the obligation contained in the present charter and in the judgment of the organization, are able and willing to carry out these obligations*." In that regard i.e. the membership of non self-governing territory-there is a precedent before us of the membership of Ukraine and Belorussia who at the time of being accepted as an original member of UN were not sovereign countries as they confederated with former USSR[93].

This example draws a parallel with the case of Indian admission to the United Nations albeit not an accurate one. In contrast to this example, at the time of her admission, India was neither a dominion nor a sovereign State

nor a republic of UK nor had any constitutional tie-up beyond the imperialism. In the case of Ukraine and Belorussia, it was the USSR that requested for the membership of all the sixteen Republics thereof. Although USSR did not get the representation of all the sixteen republics, however, as a compromise it was granted three votes in UNGA with three seats[94]. In the case of India, there was no distinction made by the British Empire as to its constitutional nature-i.e. British India and numerous local rulers. In his article on Russian perspective of granting membership to Ukraine and Belorussian Dolan writes that the[95] "*Russian claims that their member-States be recognized as subjects of international law and members of Comity of Nations rests on the amendment of the Constitution of the U.S.S.R. by the decree of February 1, 1944*." However, as stated earlier, the definition of Colony in the English law inherently meant that they did not have any power to enter into an international relationship.

In the USSR's case, Ukraine was not merely a colony but was a republic nation and the question was whether the sovereignty of Ukraine should be seen from the prism of international law or constitutional law of federal polity?

Interestingly, Art. 4(1), UNC was the first one to occasion the Advisory Opinion[96] by the ICJ, though the question asked by the UNGA did not ask about the status of a colony specifically. Nevertheless, the ambit of the question was large enough to give us some clue as to what was

judicial view thereon. In '*Conditions of Admissions of a State for Membership in the United Nations*'[97] UNGA asked the ICJ to render its opinion on the question that whether it is possible for a member of UN to predicate its vote upon any criteria which is not mentioned in the Art. 4 (1).[98] Conditions and requirements laid down under Art. 4(1) are the sole condition on which membership of an applicant must be assessed[99]. As to the question that concerned the demand on the part of a Member making its consent to the

admission of an applicant dependent on the admission of the other applicant, the World Court opined[100],

> "...Such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Art. 4. It (the consent) is entirely different category from those conditions, since it makes admission dependent not on the conditions required of applicant, qualifications which are supposed to be fulfilled, but on an extraneous considerations concerning States other than the applicant States."

This does not answer our question directly, however, if a State is accepted as the member of the UN, such act would have a most important political and international law ramification on the applicant State. The ramification would be that applicant State would acquire the ability to carry out and create international rights and obligation in the eyes of all the other States. This is known as declaratory recognition of a State or constitutive theory of recognition under Art. 4(1). Thus, question pertaining to membership of State under UNC therefore satisfies both the theories[101].

As we know, India was still a colony when it became the original member then what prevented other colonies from being recognized as the States that were capable of undertaking obligations of UN Charter in 1945[102]? There is only one answer to this question that international recognition of Indian statehood was there in 1942 when India signed the declaration and hence in 1945 it was accorded the legal status to that political recognition of 1942.

J. Contradictory obligations

Can we still argue that India remained, as an exceptional case, a State that donned the hat of original membership of UN and yet maintained the international legal status of non self-governing territory? The question is inherently international law question and the answer, therefore, should not be sought in constitutional provisions between India and Britain. The question of non self-governing territory created international rights and

obligations for India against all the members of UNC hitherto. It will be safe to argue that Art. 103 would have prevailed over the constitutional argument at that point of time.

Nevertheless, let me focus on the possibility of India maintaining the dual identity of non-self governing territory and member State both. Did this juxtaposition of India created a conflicting obligation for her in UNC and therefore making the argument of her wearing both the hat at the same time untenable?

Now, admission of colonies would have presented inherent contradiction within the scheme and purpose of UN charter. Let me chart out one inherent conflict that these obligations had inter se. With a caveat that Art. 103, UN charter speaks of contradiction in the obligation arising for a Member of UN charter under it and their obligation under any other international agreement, in which UN obligation prevails. However, this is not the case here as we are dealing with the conflict within two or more UN obligations[103]. In such case if India had dual status, then Art. 103 has no application here.

For example; what interpretation would have been given to the joint reading of the Art. 2(4) and Art. 73, UN charter? A colony, which did not have any protection of 'territorial integrity and

political independence' clause because it was not a state, needed no fortification thereof. The protection of territorial integrity and political independence was guaranteed by Art. 2(4) to only the Member States[104]. By the same token, a State, needed no application of Art. 73 because a) it was not a non-self governing territory for a territory which is constituting its core territory as a member (in simple words India could not have send a report for its own territory to UNSG), and b) also it could not have had any obligation for another Member State for the very same reason that both could become party to UN charter for not being a non-self governing territory. The obligation under Art. 73 was for a metropolitan State to a non-self-governing territory and UN was playing the role of observer at the most. If there were no metropolitan State

and territory, Art. 73e would have no application whatsoever. For example; UK had no obligation under Art. 73e to send a report to United Nation Secretary General (UNSG) of its own territory, and it neither had an obligation to send the report on Indian Territory because India herself was a member of the UN. The abovementioned example is relevant because the question that we are trying to answer is, does India have an obligation for self-determination for her territory and for her own people under UN?

The consequence of India being a colony was that it had no power to constitute any international obligation for herself. Natural corollary of this legal position of India being a colony is that for international obligations India and UK were same for UN charter (as Britain signed League of Nations for British territory of India). Therefore, UK's obligation was India's obligation or UK could decide what international obligation India will have or Indian Territory of UK will have along with its local Indian rulers. Thus, India and UK being being two different independent member would not have made sense. It would not also explained Art.2 (1) which states the principle of UN charter for which all members were equal and sovereign. Further, India went to war in 1935 as UK declared that UNC did not make any distinction between India that was British influence and that was under the influence of local rulers. India was one single India for UNC. Further, the Indian territory of Britain would have its protection under Art. 2(4), that means its political independence would be impeached if UK were supposed to send report under Art. 73e to UNSG. Furthermore, Art. 2(4) does not merely prohibit the usage of force, it also prohibits any action which is inconsistent with the purposes of UN. Thus, by making India the original member, UK's territorial integrity and political independence could not have been jeopardized. Since, India was member of UNC, the protection of Art. 2(4) could not have been taken away from her, if she did not have territory what protection would have been provided by Art. 2(4) against her, because usage of force was proscribed in international relations against the political independence or territorial integrity of a State.

Moreover, people of India could have claimed under Art. 73 only if India were a colony or non-self governing territory; that means Indian people had right against India only because there was no other territory that India was holding as a metropolitan State. Thus, this claim of self determination could not have any international legal basis under the UN charter whatsoever. This establishes that in the new world order, India was considered as a single unit to have the prerogative to sign an international treaty[105] as we have seen the definition of 'British Historians' who defined India to understand the area they are defending and ruling.

Again, how was it that India as the original member could

have claimed the right to self-determination against British without affecting the territorial integrity of Britain if Britain and India was one and same thing for UN Charter? If the answer is in affirmative, than how do we explain Art. 2(1) that states that UN is premised on the principle of sovereign equality of all its Members? A non self-governing territory cannot be sovereign equal with its imperial master.

Additionally, if we examine the internal aspect of this question that is the application of self-determination within India, we again come across legally and factually incomprehensible situations. For example, did the people of India have right to exercise the self-determination under UN charter in a two-dimensional sense, i.e. once against their colonial Master; and the other against India herself? The later proposition is absurd as there cannot be a two dimensional exercise of the right to self-determination for the same set of facts and territory. For self-determination relationship of the metropolitan and alien State is crucial, India could not have been alien to herself and her people.

It must be clarified that by two-dimensional application of self-determination, I mean that UN granted the self-determination to non-self governing territory vis-à-vis British Raj, and not against princely States of India. It will be an absurd argument that people of princely States had self-determination against their native rulers. Non self-governing territory had the alien ruler part as sine qua non for its application, the form or nature of governance was not the criteria for a territory to be non self-governing under UN charter.

Two-dimensional application of the right to self-determination for identical facts and territory invoked from UN charter would inherently contradict the mandate thereof to preserve the territorial integrity of a member, which India posses under Art. 2(4). Once British decided to transfer the power to India through Independence of India Act, 1947, the process of decolonization was over. India became one singular political unit. Since power was transferred through the Act of Parliament, the condition of India's division did apply to the extent of the statutory term. In that regard, the only option that princely States had was having a statutory right under Indian Independence Act, 1947[106] and nothing under UN charter or international law, to join either India or Pakistan. They never had any other options.

Again, Art. 73 uses the word Members of the “United Nations”, i.e. the responsibility of granting self-governance is on the Member of the UN and not on any other entity who is not a member of UN. A colony, for all practical intents and purposes that India, i.e. her constituent princely States and British India, was, could not have granted independence to her. Otherwise it would be a colony within a colony, i.e. (India as a colony of Britain and the constituent unit of India as a colony of India), could this even be possible as India means its constituents only. Arising from this would be an interesting question that could Indian states has applied for the membership of UN, despite British protest? If they could, 562 princely states in India had similar claims or right. However, the definition of a colony under the British Law had expressly prohibited because a colony never had the power to tread into the realm of foreign relations because it was prerogative of Empire. People of India had their claim to the right to self-determination against the British. However, this right was not extended to the people of princely India against their own rulers. If we did not take India as one unit, for international law purpose and not for constitutional or administrative sense this would lead to every Indian State undergoing the exercise of self-determination in the sense of UN charter, because every Princely Indian territory would become a non-self governing territory.

The administrative and constitutional idea of India, hitherto, was the territory of British India and its native States cumulatively. Therefore, we need to look upon the issue from native States' point of view. The question arises who would have granted independence to whom- British India to native States or native States to the subject of other States or their own subjects? For example; in Indian federation a unit of the State of India is not entitled to the protection of Art. 2(4), UN Charter. If there is any dispute between two Indian States, or between the State(s) and union; it is protected under Art. 2(7) of the UN Charter as a domestic domain of India. India being an original member must have meant India as a whole because no other plausible and rational interpretation is possible, i.e. India as a sum total of British India and the Princely States. Another question which arises is what do we mean by self-governing

territory under Art. 73; would the rule of people by their own sovereigns (native) constitute a non-self governing territory? The arguments discussed above suggest that non-self-governing territory had nothing to do with the structure or form of governance but it merely meant alien rule.

Let us see the General Assembly resolution on Decolonization[107] it provides following:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. 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.

It is imperative that Art. 73 only meant dependent people. The reason behind this dependence was the element of subjugation of peoples by aliens. Aliens would simply mean people who do not have a common language, culture, food and cultural heritage. Thus, the proposition that people have right to self-determination against their native rulers would be a preposterous proposition.

Another question warranting examination would be; what is the procedure for the assessment of grant of self-determination? Is it only plebiscite or any other mechanisms would also be equivalent to determine that people have exercised that right to self-determination? In the democracy it is a continual process; it is not a onetime phenomenon. For example, China does not hold an election in the sense democracy understands election, does that mean its people are living under non-self-governing territory?

The Permanent Court of International Justice (PCIJ) in Electricity Company of Sofia and Bulgaria[108] made an important decision regarding the facts to be taken into consideration for a dispute. The decision of PCIJ was reaffirmed in Right to Passage over *Indian Territory case*[109] by ICJ. The court in this case stated that "*situations to which regard must be had in connection to a given dispute are those with regard to which it has arisen or, in other words, only those facts must be considered which are source of dispute.*"

To sum up, the material fact in the present case is that India was its original member in UNC and League both, yet it was not a sovereign country. This also establishes that native States were political autonomous but did not have any international life. Otherwise, all the native rulers would have become the member of League of Nations and subsequently of UN charter.

Additionally, the collective representation of native States by HH of Bikaner confirms the political unity of India at the time of signature of League of Nations and again at the time of UN Charter, the native States were not asked by the British to sign the charter independent of British India. When Pakistan, right after its partition from India, asked for its recognition of being an original member of UN charter, the Legal Committee retained the legal identity of India, which means it succeeded British India and its native States, as it was pre-partition.

IV. CONCLUSION

The inclusion of India as an original member of United Nations was a political act of recognition of an ancient civilization as a modern State. By admission into UN India was neither constituted nor formed for the first time, it was merely an act of recognition of one of the oldest political entities of the human civilization. Additionally, as we know the de jure act of recognition is non-revocable, thus admission of India in the UN provides for non violability of

Indian territory as it existed in August, 1947, not even the revolt of people could change the identity thereof, all it could change is political dispensation. Futher, whether one subscribes to the constitutive theory-State's exists because another State recognizes it to be a State, or subscribe to recognition theory-the act of recognition is merely declaratory in nature of an existing State, the act of recognition is complete under international law because in 1945, India qualified both these tests as the admission of India into UN was de *jure* recognition of whole of its territory. One of the legal consequences of original membership of UN is that India ceased to be a non-self-governing territory in 1945 itself for the purpose of UN charter and general principles of international law. The UK was now duty bound under international law to transfer the power to local hands which it accordingly did in August 1947. The status of India as non-self governing territory would be incoveivable without its political relationship with the UK as it is relative concept. Hence, any claim of self-determination that Indian people had, it was against the British imperialism and not against the native Indian rulers.

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[1] *See*, Anand K. Verma, *Reassessing Pakistan: Role of Two-Nation Theory*, (2001) New Delhi. Also see, P.C. Mathur, "Theories of Nation-Building in the Indian Sub-Continent: A Political Analysis with Special Reference to the Emergence of the State of Bangladesh", 38 Indian Journal of Political Science, 1977, pp. 435-443.

[2] *See*, P.C. Mathur, "Theories of Nation-Building in the Indian Sub-Continent: A Political Analysis with Special Reference to the Emergence of the State of Bangladesh", 38 Indian Journal of Political Science, 1977, pp. 435-443.

[3] *See*, Simonetta Casci, "Muslim Self-Determination: Jinnah Congress Confrontation", IL Politico, 1998, LXIII, pp. 67-85.

[4] *See*, Francis Robinson, *Separatism Among Indian Muslims: The Politics of United Provinces*, 1860-1923, (1974) Cambridge, p. 40.

[5] *See*, Mushirul Hasan, "Adjustment and Accommodation: Indian Muslims after Partition", Social Scientist, vol. 18, no. 8/9, pp. 45-65.

[6] *See*, I.H.Qureshi, *The Muslim Community of the Indo-Pakistan Subcontinent* (610-1947) (1962) The Hague. Also see, Syed Sharifuddin Pirzada (ed.), *Foundations of the Pakistan: All-India Muslim League Documents*, 1906-1947, (1970) Karachi, vol. II, pp. xi-xxxv.

[7] On the principle and concept of majority in context of self-determination see, Kelsen, *General Theory of Law and State*, p. 286, online available at (https://archive.org/stream/in.ernet.dli.2015.275060/2015.275060.GeneralTheory#page/n319/mode/2up/search/self-determination (accessed 31 October, 2017). He writes, The ideal self-determination requires that social order be created by the unanimous decision of all its subjects and it shall remain in force only as long as it enjoys the approval of all.... Usually, an individual is born into a community constituted by a pre-existing social order. The problem thus can be narrowed down to the question how an existing order can be changed. The greatest possible degree of individual liberty, and that means, the greatest possible approximation to the ideal of self-determination compatible with the existence of a social order, is guaranteed by the principle that a change of the social order requires the consent of the simple majority of those subjects thereto. According to this principle, among the subjects of the social order, the number of those approving thereof will always be larger than those who-entirely or in part-disapprove but remain bound by the order. At the moment when the number of those who disapprove the order, or one of its norms, becomes greater than the number of those who approve, a change is possible by which a situation is reestablished in which the order is in concordance with a number of subjects which greater than the number of those with whom it is in discordance. The idea underlying the principle of the majority is that the social order shall be in the concordance with as many subjects as possible, and in discordance with as few as possible. Since political freedom means the agreement between the individual will and the collective will expressed in the social order, it is the principle of a simple majority which secures the highest degree of political freedom that is possible within a society."

For the detailed concept of collective will and individual will see, J.J. Rousseau, *Social Contract*, Book II, p. 23. Self-determination, in its early phase of evolution, was envisaged as self-government for the legitimacy of those claiming to have governmental authority. It was the beginning of the process of legitimacy to be drawn from people and nothing else, whatsoever be the source. Since, self-determination proposed the constitution of State for every nations for this see, Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, 1795, New York, p. 120.

[8] British Government of India in order to protect its Indian Territory on its western border from ever increasing Russian influence and its possible fall out on Afghanistan and Indian territories, formulated the Forward Policy (1877-1947). The policy was evolved to protect British Indian interest by advancing its authority beyond its natural or administrative border of India to ensure that any threat is neutralized at the very source or nipped in the bud. The policy preceded the Close-border Policy (1843-1875), a close-border policy meant British Power remained within the confined of Indian Border, as territories beyond river Indus were considered terra incognita and thus those territories remained outside the British control and influence. See, Christian Tripodi, *Edge of Empire: The British Political Officer and Tribal Administration on the North-West Frontier* 1877-1947, (2011) Ashgate Publication (Surrey).

[9] Strategic depth in Afghanistan was the continuance of British Forward policy of its colonial era. The North-West Frontier Province, largely tribal province, consists of Pakhtun speaking Pathan tribe in, some of it is in Pakistan and some part is in Afghanistan. This has been wonderfully analyzed in Christine Fair, *Fighting to the End: The Pakistan Army's Way of War*, (2012) Oxford.

[10] It is cited in Pakistan as the declaration for the demand of Pakistan as a sovereign State. The declaration also demands the solution of Palestine problem it says, "Then the next point was with regard to Palestine. We are told that endeavours, earnest endeavours, are being made to meet the reasonable, national demands, of the Arabs. Well, we cannot be satisfied by earnest endeavours, sincere endeavours, best endeavours. (*Laughter*) We want that the British Government should in fact and actually meet the demands of the Arabs in Palestine. (*Hear, hear*)"

[11] Address by Quaid-i-Azam Mohammad Ali Jinnah at Lahore Session of Muslim League, March 1940 (Islamabad: Directorate of Films and Publishing, Ministry of Information and Broadcasting, Government of Pakistan, Islamabad, 1983), pp. 5-23.

[12] See, K.K. Aziz, *The Murder of History: A Critique of History Textbooks Used in Pakistan*, (1998) New Delhi.

[13] For this argument, as mooted by Dr. Christine Fair for Pakistan and its revisionist acts see, C. Christine Fair, *Fighting to the End: The Pakistan Army's Way of War*, (2014) Oxford. Dr. Fair argues that Pakistan is a greedy State as it wishes to reverse status quo of its territory. For revisionist State see; J.J. Suh, Peter J. Katzenstein and Allen Carlson, "Rethinking Security in East Asia: Identity, Power, and Efficeincy", (2004) Stanford, p. 38; Stephen L. Quackenbush, *International Conflict Logic and Evidence*, (2015) New Delhi. For the relationship between armed conflict and revisionist tendencies on arms race see John A. Vasquez, *The War Puzzle*, p. 182.

[14] The Durand Line was an agreement signed between Amir Abdur Rahman Khan and British representative of Government of India Sir Henry Mortimer Durand on 12 November 1893. For this see, John F. Shroder, *Natural Resources in Afghanistan: Geographic and Geologic Perspectives on Centuries of Conflict*, San Diego, 2014, p. 289. For the nature of the dispute between Pakistan and Afghanistan regarding the border see, Eighth Report of House of Commons Foreign Affairs Committee 2008-2009 titled as "Global Security: Afghanistan and Pakistan", p. 68. The report is online available at https://books.google.de/books?id=LEykWNn9-9EC&pg=PA68&dq=durand+line&hl=en&sa=X&ved=0ahUKEwjMjbfSgvPOAhULC8AKHQfMCC4Q6AEIQDAH#v=onepage&q=durand%20line&f=false (accessed 3 September 2016).

[15] *See*, Infra note 23.

[16] *See*, Victoria Schofield, *Kashmir in Conflict: India, Pakistan and Unending War*, (2010), New York; Also see, V.P. Menon, *The Story of the Integration of the Indian States*, (1955) Delhi. Book by V.P. Menon is online available at https://hidf1.files.wordpress.com/2011/02/the-story-of-the-integration-of-the-indian-states-by-v-p-menon.pdf.

[17] *See*, M.A. Stein, *Kalhana's Rajatarangini: A Chronicle of Kings of Kashmir*, (1990) Delhi.

[18] *See*, Sisir Gupta, *Kashmir: A Study in India-Pakistan Relations*, (1967), p. 74; Indian Annual Register, 1947, vol. I, p. 124.

[19] *See*, Sumantra Bose, *Roots of Conflict, Paths to Peace*, (2003) Harvard.

[20] *See*, Shuja Nawaz, "The First Kashmir War Revisited", India Review, vol. 7, no. 2, pp. 115-154.

[21] *See*, V.P. Menon, *The Story of the Integration of the States*, (1955) London.

[22] S/RES/47 (1948).

[23] *See*, 1963 Sino-Pakistan Treaty. The treaty has altogether VII article and one protocol. It is named as, "Agreement between the Government of the People's Republic of China and the Government of Pakistan on the boundary between China's Sinkiang and the contiguous areas, the defense of which is under the actual control of Pakistan, signed in Peking, 2 March 1963. Arts. II and III lay down the geographical coordinate of the areas being ceded to Pakistan. It contains a very interesting clause in Art. V, which provides that, "the Parties have agreed that after settlement of Kashmir dispute between Pakistan and India, the sovereign authority concerned will reopen negotiations with the Government of People's Republic of China".

[24] *See*, A. Cobban, National Self-Determination, London, 1945. online available at https://archive.org/stream/nationalselfdete00cobb/nationalselfdete00cobb_djvu.txt (last visited on 2 November, 2017). He wrote, "It is, as we have said, a theory, a principle, or an ideal, and no simple, unconscious national movement can be identified with it. Struggles such as the rising of the French under the inspiration of Joan the Maid...are fundamentally different from the national movements of the last hundred years because of the a theory of national self-determination, which could only appear in the presence of a democratic ideology. Now, democracy, in the modern sense of the word, was born in the second half of the 18th century. Such democratic tendencies as are to be found before this time take the form of assertions of a right of representing the people in the government, of checking the government by political action of the people, or of directing it in the interests of the people. But with French Revolution democracy became something more than this. It was not merely the representation of individuals, much less of classes or corporations, in a parliament exercising a constitutional court over the government: the people itself become the supreme authority, the single active principle in the state. It passed from the role of subject to that of sovereign." Also see, See, Sarah Wambaugh, A Monograph on Plebiscites: With a collection of Official Documents, New York, 1920, p. 1. Online available at https://archive.org/details/amonographonple00wambgoog (last visited on 2 November, 2017). Further see, A. Cassese, Right to Self Determination of Peoples: A Legal Reappraisal, Cambridge, 1996, p.33

[25] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", 43 ICLQ, 1994, pp. 241-269. This, that the natural state of affairs among human is of war or violence, was echoed by Kant too.

[26] *See*, Universal Declaration of Human Rights, Art. 21(3).

[27] *See*, generally, Antonio Cassese, "Political Self-Determination — Old Concepts and New Developments", in *UN Law/Fundamental Rights: Two Topics in International Law*, (ed. Antonio Cassese), 1979.

[28] GA Resolution 1514 (XV), 14 December 1960.

[29] GA Resolution 1541 (XV), 15 December 1960.

[30] GA Resolution 2625 (XXV), 24 October 1970.

[31] "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, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order: .....(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."

[32] The Belgians suggested widening the interpretation of non-self-governing territory in 1953. Their suggestion was to include all those territories also in which homogenous peoples differing from the rest of the population in race, language and culture residing in any territory i.e. self-governing or non-self-governing. See, UN General Assembly, A/AC, 67/2, 8 May 1953, pp. 3-31, the speech of Belgian representative, Joseph Nisot, in the Ad Hoc Committee of Factors.

[33] Principle IV, GA Resolution 1541 (XV), 15 December 1960.

[34] *Ibid.*

[35] See, Antonio Cassese, *Self-Determination of Peoples — A Legal Reappraisal*, (1996) Cambridge, p.101.

[36] Stefan Oeter, "The Role of Recognition and Non-Recognition with Regard to Secession", in *Self-Determination and Secession in International Law*, (2014) Oxford.

[37] *See*, Christian Tomuschat, "Secession and Self-Determination" (2006), Secession (ed. Marcelo Kohen), Cambridge; States such as Kingdom of the Netherlands (17 April 2009, 7 et sq), Switzerland (15 April 2009, 14 et sq), Germany (17 April 2009, 32 et sq). Supreme Court of Canada had an opportunity to

[38] For case study and analysis of remedial secession see, Christian Walter, Self-Determination, Secession, and the Crimean Crisis 2014, (2014), *Self-Determination and Secession in International Law*, (eds. Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov, Oxford, pp.295-300.

[39] International terrorism has been declared as a force for the purpose of Art. 2(4) and a threat to international peace and security, UN Charter. See, S/RES/1368 (2001).

[40] For the duty of State regarding its territory to maintain and promote friendly relation see GA Resolution 2625 (XXV), 24 October 1970.

[41] *See*, Stefan Oeter, "The Role of Recognition and Non-Recognition with Regard to Secession", in *Self-Determination and Secession in International Law*, (2014) Oxford University Press. Prof. Oeter discusses the theory for identification of people who are eligible for self-determination on the basis of historically pre-constituted political entities within the specified territory. Also, see, Thomas M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", (1996) AJIL 359-83.

[42] Stefan Oeter, "The Role of Recognition..."; Ved P. Nanda, "Self-Determination under International Law: Validity of Claims to Secede" (1981) 13 CWRJIL 257-80.

[43] For a detailed discussion of peoples, see, James Summers, *Peoples and International Law*, vol. 17 (2014) Leiden.

[44] For the status indigenous inhabitants as people as opposed to settlers, see, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/5800/Rev.1), 19 GAOR (1964) Annexes vol. I, p. 284, para 48.

[45] Stefan Oeter, "The Role of Recognition and Non-Recognition with Regard to Secession", in *Self-Determination and Secession in International Law*...

[46] *Ibid.*, also see Thomas M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice" (1996) 90 AJIL 359-83; See, Kelsen, *Pure Theory of Law*, p. 286; Also see, James Crawford, *The Creation of States in International Law*, (2007), Oxford, p. 94.

[47] Kelsen, *Pure Theory of Law*, p. 202.

[48] *See*, N. Jayapalan, *Modern Governments*, (1999) Delhi. Also see, Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (1966) Oxford.

[49] The democratic element here means validity to laws of a given society, does not necessary means rule of law or electoral governance; it simply means recognizing ruler as one of them; the rule of law would be the most advanced form of State.

[50] *See*, *League of Nations, Ten Years of World Cooperation* 28-29 (1930). Also see, Antonio Cassese, "Self-Determination of Peoples — A Legal Reappraisal", (1996) Cambridge University Press, p. 27; P.M. Brown, "The Aaland Islands Question", 15 AJIL, 1921, 268-72; A.J. Toynbee, "Self-Determination", (1925) 494, The Quarterly Review 330; Denys P. Myers, *Handbook of the League of Nations Since 1920*, 298-99 (1935). For further analysis of the self-determination and *Aaland Islands case* see Oliver Diggelmann, "The Aaland case and Sociological Approach of International Law", (2007) EJIL vol. 18 nos. 135-143.

The facts of the case are interesting it involved the fate of people of Aaland Island who were mostly Swedish in origin. The Island was ceded by Sweden to Russia in 1809. At that time Finland was also ceded to Russia. Post Bolshevik Revolution Finland declared its independence from Russia and became an independent State on 15 November 1917, which was recognized by the Russia on 4 January 1918 as part of Russian doctrine of peoples right to self-determination. On 20 August 1917 delegates communes of Aaland Island passed a resolution to express their desire to be reunited with the Sweden. A plebiscite to this effect was conducted and around 95% of communes expressed their desire to be the part Aaland Island. A deputation of people of Aaland met with the King on 3 February 1918. Thereafter, the King of Sweden formally requested the Finland to arrange plebiscite in recognition of their right to self-determination, this request was turned down by the Finland. The ground of rejection of holding of plebiscite was the principles of Peace Conference that decided the questions pertaining to territoriality, in case of conflict, as was the present case, between the wishes of minority and the economic and military security of a nation.

[51] *See*, ICJ Reports 1971, p. 31.

[52] ICJ Reports, 1975, p.12.

[53] ICJ Reports 1971, p. 31. This paragraph was cited in *Western Sahara Case* at para 56.

[54] *See*, Charles Waldauer, William J. Zahka, & Surendra Pal, "Kautilya's Arthashastra: A Neglected Precursor to Classical Economics", 31 Indian Economic Review, 1996, pp.101-108. For the concept of good governance in Arthashastra see, S.S. Ali, "Kautilya and the Concept of Good Governance", 67 The Indian Journal of Political Science, pp. 375-380.

[55] Are human societies and nations one and same thing; it's a matter of further investigation.

[56] *See*, Ian Coupland, *The Princes of India in the Endgame of Empire 1917-1947* (2002) Cambridge. On India State also see R.P. Bhargava, *The Chamber of Princes*, (1991) New Delhi.

[57] *See*, Arthur Berriedale Keith, *Responsible Government in the Dominions*, (1928) Oxford, p. 1453.

[58] *Ibid.*

[59] *See*, R. Coupland, *The Indian Problem: Report on the Constitutional Problem in India*, (1944) Oxford.

[60] 28 & 29 Vic. C. 63.

[61] *See*, K.M. Panikkar, *Biography of H.H. Bikaner*, pp. 139-140.

[62] *See*, T. Baty, "The Structure of the Empire", Journal of Comparative Legislation and International Law, vol. 2, no. 4 (1930), pp. 157-167. Also see, Keven Booker, "*Plenary within Limits: Powell* v. *Apollo Candle*", (ed.) George Winterton, State Constitutional Landmarks (2006) (NSW, Australia).

[63] (1878) 3 App Cas 889.

[64] (1883) 9 App Cas 117.

[65] (1885) 10 App Cas 282.

[66] *See*, T. Baty, "The Structure of the Empire", JCLIL, vol.12, no. 4 (1930), pp. 157-167.

[67] *See*, George Campbell, "Modern India: A Sketch of the System of Civil Government" to which is the prefixed some account of the natives and native institution, (1852), London, pp.3

[68] *See*, Honourable Mountstuart Elphinstone, *The History of India*, vol. I, (1841) London, pp.4

[69] *See*, Report from the Select Committee on the Affairs of the East India Company.

[70] *See*, T. Baty, "Sovereign Colonies", Harvard Law Review, vol. 34, no. 8, pp. 837-861.

[71] *See*, Art.1, Art. 3 and Art. 4, VCLT, 1969.

[72] Art. 3, VCLT reads: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: the legal force of such agreements;"

[73] Art. 1, League of Nations stated that, "The original Members of the League of Nations shall be those of the Signatories

which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant Notice thereof shall be sent to all other Members of the League. Any fully self-governing State, Dominion, or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments. Any Member of the League may, after two years notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal."

[74] Annex provided, inter alia, for British Empire and India both as signatory and original member of Treaty of Versailles.

[75] Britain was represented for the purpose of signature by five Scots and English Gentlemen and India was represented by H.H. the Maharaja of Bikaner and Mr. Montague. See, T. Baty, "Sovereign Colonies", Harvard Law Review, vol. 34, no. 8, pp. 837-861.

[76] On the topic of unity of princes of natives States within the governance of India and scheme of its governance and proposed federation in its rudimentary form in 1919 and to its full strength 1935 within British Crown; crown becoming titular head like other Dominions hitherto such as Canada or Australia, see, Ian Copland, *The Princes of India in the Endgame of Empire*, 1917-1947, (2002) Cambridge,

[77] Art. 3 UNC read, "The original Members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Art. 110."

[78] Art. 3, UNC, provides, "The original Members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110."

[79] The Declaration was signed by 26 Governments, of which India was one government, in addition to these 26 original signatories there were 21 nations who adhered to the Declaration. For this see, https://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&page=36&searchType=advanced (accessed 27 May 2018).

[80] For the distinction between rule and principle see, Ronald Dworkin, "The Model of Rules", 35 U. Chi. L.Rev, 1967, pp. 14-46, particularly at p. 23, online available at http://legacydirs.umiacs.umd.edu/~horty/courses/readings/dworkin-1967-model-of-rules.pdf.

[81] For the argument that UN addresses different matters which are categorised as internal and external aspect of UN Charter see Grant Thomas D. Grant, "Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization", Leiden, 2009, p. 8.

[82] For example, Art. 2(4) proscribes use of force for Member against any States. Here the word Member is different from any State because hitherto not all the States were member of UNC. Similarly Art. 2(7) proscribes intervention for the Organization of UN, except for Ch. VII action by Security Council.

[83] For the purpose of UNC any State could be either enemy State or non-self-governing territories. One may argue that could non-self-governing territory be classify as "any State" used under Art. 3, UNC? I, for one, am convinced that non-self-governing territories would certainly become "any State" post-decolonization.

[84] See, Art. 107, UN Charter. It states that "nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

[85] Principle VI, GA Resolution 1541 (XV), 15 December 1960 provides the outcome of decolonization of the non-self-governing territory which are following,

(a) emergence as a sovereign independent State;

(b) free association with an independent State; or

(c) integration with an independent State.

[86] For a chronicle list of UN membership see http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html (accessed 27 February 2018).

[87] See, Art. 92, UN Charter.

[88] Art. 34, ICJ statute.

[89] See, Art. 93(2), UN Charter.

[90] See, Rafael Nieto-Navia, "Are Those Norms Truly Peremptory?: With Special Reference to Human Rights Law and International Humanitarian Law", in *The Global Community: Yearbook of International Law and Jurisprudence*, ed. Giuliana

Ziccardi Capaldo, 2015, pp. 47-71.

[91] The issue of colony was discussed in the Consultative Group (USA, USSR, Britain France and China) and committee II/4 discussed the situation of colonies. See, Russell, History of the United Nations Charter, 1958, p. 813. For the proposals of committee see UNCIO DoC. vol. 3, pp. 548-609.

[92] *See*, Steven Hillebrink, *The Right to Self-Determination and Post-Colonial Governance: The Case of Netherlands Antilles and Aruba, Amsterdam*, 2008, p. 34.

[93] *See*, Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, Leiden, 2009, p. 26. On history of membership of Ukraine and Belorussia and the concept of sovereignty within the former USSR constitution see, Edward Dolan, "The Member-Republics of the U.S.S.R. as Subjects of the Law of Nations", The International and Comparative Law Quarterly, 1955, pp. 629-636. There is also precedent of Argentina that longed to be the original member of the UN, however, was resisted by certain countries such as Russia as for most of the second world war Argentina remained close ally of Axis power, it is only in the fag end of the conflict that it joined the Allied power, albeit Argentina was accepted as original member of the UN. For Argentina question see, Woods, "Conflict or Community? The United States and Argentina's Admission to the United Nations", 46 Pacific Historical Review, 1977, pp. 361-386.

[94] *See*, Edward Dolan, "The Member-Republics of the U.S.S.R. as Subjects of the Law of Nations", The International and Comparative Law Quarterly, 1955, pp. 629-636. Also see, E.R. Stettinius, *Roosevelt and the Russians: The Yalta Conference*, London, 1950, pp. 172.

[95] *See*, Edward Dolan, "The Member-Republics of the U.S.S.R. as Subjects of the Law of Nations"... pp. 629-636.

[96] Seem Art. 96, UN Charter; Art. 36(1) ICJ Statute.

[97] *See*, ICJ rep 1948, p. 57. The court identified five conditions as required in Art. 4(1), UNC; these conditions were; an applicant must (a) be a State; (b) be peace loving; (c) accept the obligations of the Charter; (d) be able to carry out these obligations; and (e) willing to do so.

[98] Such applicant could be non-self-governing territories or already existing full States who were hitherto an enemy State under Art. 107 of the UNC.

[99] These criteria are termed as requirements and not mere guidelines. See, ICJ Report 1948 pp. 57, 60.

[100] *Ibid*. p. 65.

[101] *See*, J. Crawford, *The Creation of States in International Law*, Oxford, 1979, p. 16. Also see, H. Lauterpacht, *Recognition in International Law*, 1947, pp. 38-66; Ti-Chiang Chen, *The International Law of Recognition*, 1951, pp.13-29; I. Brownlie, *Recognition in Theory and Practice*, 52 British Yearbook of International Law, 1982, pp. 197-211; J.A. Frowein, "Recognition", in Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, vol. 4, 2000, pp. 33-41.

[102] *See*, Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, Leiden, 2009, pp. 25-30.

[103] *See*, Gaja, Third Report A/CN.4/553, 13 May 2005, pp. 7-9, paras 18-23. The report dealt with the question whether internal law of an organization is governed by general international law or solely a matter of constitutive instrument, like UN charter.

[104] One may argue that Art. 2(4) uses the term territorial integrity and political independence for any State and not just for member-State of UN. Thus, there was a possibility that there existed full-fledged State capable of being UN member yet they were not made member of UN. The argument is valid as hitherto many States were not non-self-governing territory yet they were not member of UN because they were considered enemy nation (Art. 107, UN charter). However, a careful perusal of scheme of UN charter makes it amply clear that there were obligation on member State to furnish information on non-self-governing territory of which they had mandate and later Trusteeship or were political master. These non-self-governing territories were not the subject matter of Art. 2(4) as their territory was not yet dissociated from the imperial power.

[105] One must keep in mind that India became an independent country by virtue of Indian Independence Act, 1947 and UN charter was signed in 1945.

[106] The Indian Independence Act, 1947, 10 & II Geo 6. Ch. 30. Art. 1 thereof created two Dominions — India and Pakistan. Art. 3 thereof divided the British Territory of Bengal in India as constituted under Government of India Act, 1935, and Art. 4 divided the British Territory of Punjab as constituted under Government of India Act, 1935, this division constituted dominions of India and Pakistan, especially dominion of Pakistan as without this division no Pakistan would have ever be constituted. Art. 2(3) of the Indian Independence Act, 1947 provided that no area not forming part of territories shall be included in either of the dominion without their consent; and similarly area forming part of the territory of the dominions could not have been excluded without the consent of the dominion. Interestingly, Art. 2(4) provides that, "Without prejudice to the generality of the provisions of the sub-s. (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions." The law can be online accessed at http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf (accessed 28 January 2018).

[107] *See*, General Assembly Resolution, 1514 (XV) on Declaration on the granting of independence to colonial countries and peoples, 14 December 1960. Online available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1514(XV) (accessed 26 January 2018).

[108] *Belgium* v. *Bulgaria*, 1939 PCIJ (ser. A/B) No. 77 (Apr. 4).

[109] *Portugal* v. *India*, 1960 ICJ Rep 6.