Part II
UN Charter Chapter XI: Non-Self-Governing Territories

6 The Scope of Application of Chapter XI

6.1 Chapter XI, Articles 73 and 74

Chapter XI is titled 'Declaration Regarding Non-Self-Governing Territories'. It consists of Articles 73 and 74. Chapter XI states binding rights and

obligations.[369] This is explicit from the wording, such as 'Members of the United Nations (...) accept (...) the obligation' in Article 73.[370] There is no indication in the text to assume that Chapter XI were merely a declaration of a non-binding character set within the Charter which is an instrument that contains binding rights and obligations.[371]

369 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (Library of World Affairs no 11, FA Praeger 1951) 551; Josef L Kunz, 'Chapter XI of the United Nations Charter in Action' (1954) 48(1) American Journal of International Law 103, 103; Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (vol 1 – Peace, Longmans, Green & Co 1955) 240; SKN Blay, 'Self-Determination Versus Territorial Integrity in Decolonization' (1985-1986) 18 New York University Journal of International Law and Politics 441, 471; Mohammed Bedjaoui, 'Chapitre XI: Declaration Relative aux Territoires Non Autonomes: Article 73' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Centre de Droit international de Nanterre, Economica 2005) vol II 1755; Ulrich Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 para 5.

370 Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 554; Humphrey Waldock, *General Course on Public International Law* (Académie De Droit International 1962) 29, 183-84.

371 'The provisions of Articles 73 and 74 are not a unilateral 'declaration' of some states, but the content of the treaty to which all Members of the United Nations are contracting parties (...). The obligations established in Articles 73 and 74 do not differ in any way from other obligations imposed upon Members by the Charter. They are binding also upon states which did not participate in the San Francisco Conference but became, or will become later, Members of the United Nations' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 552-53). '(No) declaration apart from signing and ratifying the text of the Charter should be made. As a matter of fact, no such declaration has been made. And the provisions of Chapter XI are binding upon all Members concerned, without any special 'declaration' made in addition to the act by which a state becomes a Member of the United Nations' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 553, n 2. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 5; Jean-Pierre Cot, 'United Nations Charter' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 14. See however the deliberations regarding the meaning of the term 'declaration' at San Francisco, leading up to the adoption of the Charter (Documents of the United Nations Conference on International

UN Charter

Chapter XI: Declaration Regarding Non-Self-Governing Territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
(c) to further international peace and security;
(d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of

Organization, San Francisco, 1945, United Nations (1954) vols XVII-XXII, vol XVII, 307, 367). See also Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 554, n 3; Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) n 15. The binding nature of the obligations in Chapter XI still had to be argued in the General Assembly for some time after adoption of the Charter (see eg Repertory of Practice of United Nations Organs (1945–1954), volume 4, Supplement No 3 (1959-1966), United Nations (1959-1966) 3 para 76).

a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74
Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

6.2 The Practice of the United Nations Regarding Chapter XI

In the practice of the UN and its organs, Chapter XI has been treated as a matter of historic decolonization.[372] A list has been compiled and updated, containing the respective Non-Self-Governing Territories (NSGTs) and the General Assembly commissioned regular reports on these NSGTs.

Under Article 73(e) the Secretary General of the United Nations (The Secretary General) has the competence to receive 'statistical and other information of a technical nature relating to economic, social, and educational conditions (in the NSGTs).'[373] Per Resolution 9(I), the General Assembly prompted the Secretary General to pass this information on to it.[374] To receive information from other organs is a competence vested in the General Assembly by the Charter.[375] In addition, the General As-

372 In December 2020, the General Assembly recalled that 'the eradication of colonialism has been one of the priorities of the United Nations and continued to be one of its priorities (...)' and that this plays out in the Non-Self-Governing Territories of Chapter XI of the Charter (Resolution on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 73/123 (7 December 2018) UN Doc A/RES/73/123 (2018)).

373 Art 73(3) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

374 Resolution on Non-Self-Governing Peoples, GA Res 9 (I) (9 February 1946) UN Doc A/RES/9/(I) (1946), no 2.

375 Arts 15(2) and 98 Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945).

sembly may discuss any question or matter within the scope of the Charter or relating to the powers and functions of any organs provided for under the Charter.[376] In line with his competence under the Charter, the General Assembly can delegate the exercise of his functions to subsidiary organs.[377] Per Resolution 66(I), the General Assembly installed an ad hoc committee to prepare its sessions regarding the topic of Chapter XI.[378] In subsequent years, this task fell upon a special committee.[379] By Resolution 569(VI) that body in turn became the Committee on Information from Non-Self-Governing Territories.[380] Following the seminal Resolution 1514 on colonial peoples,[381] the Special Committee on Decolonization, also known as Committee of 24, was established by Resolution 1654 (XVI), as well as special committees for certain territories.[382] The Special Committee on Decolonization was soon thereafter tasked with the competence to also receive information under Article 73(e) and instead the Committee on Information from Non-Self-Governing Territories was dissolved.[383] To merge the issue of NSGTs with the task of historic decolonization under one committee reflected the practice of the

376 Art 10 UN Charter (n 375). 'Since the administration of the territories to which Chapter XI applies is certainly a matter within the scope of the Charter, the Assembly may discuss the matter to which Articles 73 and 74 refer and make recommendations on these matters' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 551).

377 Arts 7(2), 22 UN Charter (n 375); Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 562.

378 Resolution on Transmission of Information under Article 73e of the Charter, GA Res 66 (I) (14 December 1946) UN Doc A/RES/66/(I) (1946).

379 See eg Resolution on Special Committee on information transmitted under Article 73e of the Charter, GA Res 219 (III) (3 November 1948) UN Doc A/RES/219(III) (1948).

380 Resolution on New Title for the Special Committee on Information Transmitted under Article 73e of the Charter, GA Res 569 (VI) (18 January 1952) UN Doc A/RES/569/(VI) (1946).

381 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) (14 December 1960) UN Doc A/4684 (1961).

382 Resolution on The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1654 (XVI) (27 November 1961) UN Doc A/RES/1654/(XVI) (1961). See eg Resolution on The Situation in Angola, GA Res 1603(XV) (20 April 1961) UN Doc A/RES/1603(XV) (1961).

383 Resolution on Question of the continuation of the Committee on Information from Non-Self-Governing Territories, GA Res 1970 (XVIII) (16 December 1963) UN Doc A/RES/1970(XVIII) (1963).

General Assembly – following Resolution 1514 – to focus on the matter of independence for historic colonies recognized as NSGTs under Chapter XI.[384] The Special Committee on Decolonization continues to hear statements from representatives of NSGTs, dispatches visiting missions and organizes seminars on the political, social and economic situation in the territories.[385] The General Assembly periodically refers to these respective working products and reiterates that the issue of NSGTs is still on the agenda.[386]

The General Assembly and its organs compiled and maintained a list of NSGTs and their corresponding administrators.[387] Originally, the list contained only those territories for which a State accepted its responsibility to submit information under Article 73(e) – thus accepting its role as administrator of that territory.[388] Following Resolution 1514 on colonial peoples,[389] the UN started to unilaterally add territories onto the list of NSGTs.[390] Meanwhile those territories that had achieved self-government

384 Leland Goodrich, Edvard Hambro, and Anne Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia University Press 1969) 453; Bedjaoui (n 369) 1761. See Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) paras 8-12. For a detailed account of the shaping of the respective committees and their tasks in the respective political climates, see Makane M Mbengue, 'Non-Self-Governing Territories' in Petra Minnerop, Rüdiger Wolfrum, and Frauke Lachenmann (eds), *International Development Law: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2019) para 9ff. See also 6.6.1.1 Independence v Self-Government, 121ff.

385 See Resolution on Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 2621(XXV) (12 October 1970) UN Doc A/RES/2621(XXV) (1970) para 9.

386 See eg Resolution on Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations, GA Res 74/93 (13 December 2019) UN Doc A/RES/74/93 (2019).

387 See eg GA Res 66(I) (n 378).

388 GA Res 66(I) (n 378). See Goodrich, Hambro, and Simons (n 384) 453-54 for more details on the initial process. See also the critique at 6.4.2 To 'Have' Responsibilities, 111ff.

389 Res 1514 (n 381).

390 See eg Resolution on Transmission of Information under Article 73e of the Charter, GA Res 1542 (XV) (15 December 1960) UN Doc A/RES/1542(XV) (1960) (Portuguese territories); Resolution on The Question of Southern Rhodesia, GA Res 1747 (XVI) (28 June 1962) UN Doc A/RES/1747(XVI) (1962) (Southern Rhodesia).

– in the view of the General Assembly – were taken off the list.[391] The General Assembly set its own criteria to define when self-government had been achieved and amended these criteria over time.[392] Its strong focus on matters of historic decolonization in the aftermath of Resolution 1514 led the General Assembly to assimilate the topic of self-government – which belongs to Chapter XI – with the separate question of independence.[393] By 1960, the General Assembly would only remove from the list of NSGTs those territories whose peoples had exercised their right to independence.[394] Since 1990, the General Assembly has explicitly pursued its agenda to eradicate colonialism under the aegis of Chapter XI, with the goal to bring the list of NSGTs to zero.[395] The UN still maintains its list of NSGTs which started out at 72, counted a total of 114 territories

391 See 6.5.2 Historic Colonies, 116ff.

392 Annex to Resolution on Future procedure for the continuation of the study of factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government, GA Res 567 (VI) (18 January 1952) UN Doc A/RES/567(VI) (1952); Annex to Resolution on Factors which Should be Taken into Account in Deciding whether a Territory is or is not a Territory whose People Have not yet Attained a Full Measure of Self-Government, GA Res 742 (VIII) (27 November 1953) UN Doc A/RES/742(VIII) (1953); Resolution on Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV) (1960). For a more detailed account, see Goodrich, Hambro, and Simons (n 384) 460-62. See also 6.5.2 Historic Colonies, 116ff.

393 See 6.6.1.1 Independence v Self-Government, 121ff. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 13; Mbengue (n 384) paras 14-15.

394 GA Res 1541 (n 392), Principles I, VI ff. Goodrich, Hambro, and Simons (n 384) 462. See also 1.2.4 Self-Determination and Related Claims to Territory, 37ff.

395 In 1988 the General Assembly declared the decade starting in 1990 to be the International Decade for the Eradication of Colonialism and has renewed this declaration three times so far for three further decades each, lasting until the end of 2030 (Resolution on International Decade for the Eradication of Colonialism, GA Res 43/47 (22 November 1988) UN Doc A/RES/43/47 (1988); Resolution on Second International Decade for the Eradication of Colonialism, GA Res 55/146 (8 December 2000) UN Doc A/RES/55/146 (2000); Resolution on Third International Decade for the Eradication of Colonialism, GA Res 65/119 (10 December 2010) UN Doc A/RES/65/119 (2010); Resolution on Fourth International Decade for the Eradication of Colonialism, GA Res 75/123 (10 December 2020) UN Doc A/RES/75/123 (2020)).

over time and 17 as of the year 2017.[396] No new territory has been added to the list since 1965.[397]

6.3 'Members' and 'Territories'

Chapter XI applies to situations of military occupation. The terms 'Members of the United Nations' and 'territories' encompass occupying States and occupied territories.

The occupant must be a UN Member State to be subject to the rules of Chapter XI. The term 'Members of the United Nations' appears in the plural.[398] Just as there can be several occupants having obligations under military occupation law, there can be several States that have obligations under Chapter XI.[399] The occupying force must be attributable to at least one UN Member State for Chapter XI to apply to a situation of military occupation.[400] The UN Members are the sole subjects of the obligations mentioned in Chapter XI. The UN itself only has the right, per Article 73(e), to receive statistical and technical information regarding the NSGTs.[401] Beyond that, the UN receives no binding legal role under Chapter

396 See ia GA Res 66(I) (n 378); Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations: Report of the Secretary-General, GA A/72/62 (3 February 2017) UN Doc A/72/62 (2017).

397 In 1965, the General Assembly recognized Spain as the administering power of Western Sahara (Resolution on Question of Ifni and Spanish Sahara, GA Res 2072 (16 December 1965) UN Doc A/RES/2072(XX) (1965)). In 1986 and in 2013, respectively, the General Assembly – following regional and international political pressure to reinscribe New Caledonia and French Polynesia, on the list of NSGTs – recalled that both had been NSGTs in 1946 and have remained so (Resolution on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 41/41 (2 December 1986) UN Doc A/RES/41/41A (1986); Resolution on Self-Determination of French Polynesia, GA Res 67/265 (17 May 2013) UN Doc A/RES/67/265 (2013)).

398 Art 73 UN Charter (n 375) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

399 1.3 'Hostile Army', 41ff.

400 For the attribution of forces to a State see 1.3 'Hostile Army', 41ff.

401 Art 73(e) UN Charter, reprinted in 6.1 Chapter XI, Articles 73 and 74, 99. See also 6.2 The Practice of the United Nations Regarding Chapter XI, 102ff.

XI.[402] This follows *e contrario* from a comparison of Article 73 of Chapter XI with Article 81 of Chapter XII, which concerns the trusteeship system of the UN Charter. The latter explicitly mentions 'the Organization itself' as a possible administering authority for trusts, while Article 73 omits to mention such a role for the UN with respect to NSGTs.[403]

Besides the Members that assume responsibilities for the administration of an NSGT, the obligations of Chapter XI may also apply to third States.[404]

For occupied territories to qualify as NSGTs, the term 'territories' in Article 73 must mean foreign territory, since only foreign territory can be occupied.[405] The verbal context of the term 'territories' in Article 73 suggests that what is meant is indeed foreign territory: A UN Member is itself a territory,[406] and the term 'territories' in Article 73 is not introduced as belonging to the UN Member itself, but rather the two terms are used in contrast.[407] Accordingly, only territory that is foreign to the

402 See Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul Ltd 1951) 144; Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 6.

403 Art 81; Art 73 UN Charter reprinted in 6.1 Chapter XI, Articles 73 and 74, 99. 'The Charter does not provide for any direct involvement of the United Nations in the Territory concerned' (Masahiro Igarashi, *Associated Statehood in International Law* (Kluwer Law International 2002) 227). Mbengue (n 384) paras 1, 13.

404 Such an *erga omnes* validity may be implied also from the General Assembly Resolution which urges governments to take 'legislative, administrative or other measures in respect of their nationals and the bodies corporate under their jurisdiction that own and operate enterprises in the Non-Self-Governing Territories that are detrimental to the interests of the inhabitants of those Territories, in order to put an end to such enterprises' (Resolution on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, GA Res 65/109 (10 December 2010) UN Doc A/RES/65/109 (2010)).

405 1.2.1 The Scope of the Term 'Hostile State', 26ff.

406 1.2.2 Equal States as a Territorial Order, 30f.

407 Art 73 UN Charter reprinted in 6.1 Chapter XI, Articles 73 and 74, 99. Note also that while some delegates at San Francisco considered the wording to be ambiguous, they nevertheless agreed that peoples within the metropolitan areas of an administering power were to be excluded from Chapter XI (Documents of the United Nations Conference on International Organization, San Francisco, 1945, United Nations Information Organizations (1945) vols I-XVI, vol X, 498).

UN Member can qualify as a NSGT.[408] The NSGT can be any foreign territory, including that of another UN Member – in full or in parts.[409] When and where exactly a territory is foreign is subject to the question if there exists an opposing claim to it.[410]

6.4 *To 'Have or Assume Responsibilities for the Administration of Territories'*

6.4.1 'Responsibilities for the Administration of Territories'

Regarding foreign territory, the term 'responsibilities for the administration of territories' is a reference to military occupation and its applicable law.

It follows from the syntax of Article 73 that the term 'responsibilities for the administration' does not refer merely to the obligations in Chapter XI itself. Instead, those who have 'responsibilities for the administration', 'recognize the principle' and 'accept as a sacred trust' the obligations under Chapter XI.[411] The obligations under Chapter XI are thus separate from the 'responsibilities for the administration' of the territory. The term 'responsibilities for the administration' also does not refer to an agreement that would be necessary under Chapter XI to establish the respective responsibilities.[412] The 'responsibilities for the administration' therefore must arise outside of Chapter XI.

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408 Kunz (n 369) 105. See Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 18. See also 6.5.2 Historic Colonies, 116ff. Resolution 1541 says that all territories fall *prima facie* under Article 73, as long as they are geographically separate and culturally or ethnically distinct from the UN Member State that administers it (GA Res 1541 (n 392) Principle IV).

409 The Charter uses the term 'territory' for UN Member territories (Arts 104, 105 UN Charter (n 375)) as well as other territories (See Art 78 UN Charter). Included in the 1946 initial list of NSGTs was the Panama Canal Zone – a part of the territory of the UN Member State Panama (GA Res 66(I) (n 378)).

410 1.2.3.1 Delimitation in General, 32ff.

411 Art 73 UN Charter (n 375) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

412 This follows *e contrario* from a comparison with Article 79 of Chapter XII UN Charter (n 375), which requires an agreement for the terms of trusteeship. See also 6.4.2 To 'Have' Responsibilities, 111ff.

'Responsibilities for the administration' can apply to both foreign and own territory. A State has 'responsibilities for the administration' over his own territory per the equality that States grant to each other over their respective territorial units.[413] Over foreign territory, a State can only have 'responsibilities for the administration' if such rights and obligations have been declared in an agreement with the other equal State who has a claim to the territory.[414] Between equals, rights and obligations over the territory of the other can only exist by virtue of international law that is binding between them.[415] The law of military occupation is one example of such binding international law containing responsibilities for the administration of foreign territory.[416]

The Charter employs the term 'administration' not only in connection with NSGTs, but also with trusts. The Charter describes the administrator of the trust territory – or the trustee – as 'authority'[417] and 'administering authority'.[418] Accordingly, the term 'administration' under the Charter implies 'authority' on the respective territory. Chapter XI does, however, not concern trust territories, since these are subject to the separate Chapter XII of the Charter.[419]

Instead, under Chapter XI, it is the 'authority' as exercised by the occupant in foreign territory, which qualifies as 'administration'.[420] In fact, occupation law explicitly employs the term 'administration' to describe the foreign authority in an occupied territory. The Hague Regulations speak of the 'administration of the occupied territory'[421] and of the 'ad-

413 1.2.2 Equal States as a Territorial Order, 30f. Note that territory owned by the parent State included that of historic colonies, before they enjoyed a right to independence 6.5.2 Historic Colonies, 116ff. See also 1.2.4 Self-Determination and Related Claims to Territory, 37ff.

414 Recall that territory is foreign when it can be claimed by at least one additional equal State 1.2.3.1 Delimitation in General, 32ff.

415 n 122.

416 1.1 Hague Regulations, Article 42 and Customary International Law, 25ff.

417 Art 81 UN Charter (n 375).

418 Art 84 UN Charter (n 375).

419 'Chapter XI applies to *all* said territories, except those put under the trusteeship system' (Kunz (n 369) 103). Goodrich, Hambro, and Simons (n 384) 448. cf however Bentwich and Martin (n 402) 143. See 6.5.4 Trusts, 120ff.

420 See 1.4.1 Instances of Authority, 43ff.

421 Art 48 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) (entered into force 26 January 1910), (authentic text: French).

ministration of the territory in question.'[422] The Fourth Geneva Convention refers to 'occupation forces and administration personnel'[423] and to 'members and property of the occupying forces or administration.'[424] Occupation law formulates the comprehensive rights and obligations of an occupant and therefore his 'responsibilities for the administration' of an occupied territory.[425] These 'responsibilities for the administration' in the sense of Chapter XI apply from the moment and for as long as an occupation takes hold.[426]

If military authority as exercised by the UN itself were regarded as a *sui generis* form of UN administration, and not as military occupation,[427] the 'responsibilities for the administration' would in that case stem from the respective UN resolution, instead of from occupation law.[428]

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422 Art 49 Hague Regulations (n 421).

423 Art 55 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War (12 August 1949) (entered into force 21 October 1950) 75 UNTS 287.

424 Art 64 GCIV (n 423).

425 'The occupying power assumes responsibility for the administration of the occupied territory, when this occupation is effective' (Eric De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff 2009) 118.
'[T]he occupying power, as *de facto* administrator, assumes responsibility for the occupied territory' (Tobias Ackermann, 'Investments Under Occupation: The Application of Investment Treaties to Occupied Territory' in Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2013) 69). See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

426 See 1.4.1 Instances of Authority, 43ff.

427 cf 1.4.1 Instances of Authority, 43ff

428 The UN administrations of Namibia and East Timor, for example, were authorized by the General Assembly and the Security Council, respectively, and both were treated as NSGTs by the UN until their independence in 1990 and 2002, respectively (Resolution on Question of South West Africa, GA Res 2248 (19 May 1967) UN Doc A/RES/2248 (1967); Security Council Resolution on The Situation in East Timor, SC Res 1272 (25 October 1999) UN Doc S/RES/1272 (1999); Resolution on Dissolution of the United Nations Council for Namibia, GA Res 44/243A (11 September 1990) UN Doc A/RES/44/243A (1990); Resolution on Question of East Timor, GA Res 56/282 (1 May 2002) UN Doc A/RES/56/282 (2002)).

6.4.2 To 'Have' Responsibilities

To 'have' responsibilities is a question of fact alone and not subject to the discretion of the UN Member or the UN itself.

On foreign territory, a UN Member has responsibilities for the administration when occupation law applies.[429] Occupation law applies from the moment and for as long as the occupant factually exercises military authority in the foreign territory.[430] Accordingly, an occupant has responsibilities for the administration of the occupied territory, as a matter of fact, for the entire duration of the occupation.[431]

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429 n 425.

430 1.4.1 Instances of Authority, 43ff.

431 It was therefore correct of the General Assembly to register South Africa as administering power of Namibia (called South West Africa at the time) after terminating its Mandate under Article 22 Covenant of the League of Nations (28 April 1919) (entered into force 10 January 1920), (expired 9 April, 1946), despite the observation that South Africa 'had no other right to administer the territory of South West Africa', but was instead occupied (Resolution on Question of South West Africa, GA Res 2145 (27 October 1966) UN Doc A/RES/2145(XXI) (1966) para 4; ICJ, *Case Concerning East Timor (Portugal v Australia)* (Judgement) (1995) paras 115, 119 .
It was however incorrect of the General Assembly to still regard Spain as the administrator of Western Sahara after Spain withdrew from the territory in 1976, following the Madrid Accords (Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania (Madrid, 14 November 1974) (entered into force 19 November 1975) 988 UNTS 259). Conversely, it is the presence of the occupying forces of Morocco that should have subsequently triggered the responsibility of Morocco for the administration of the relevant parts of the territory of Western Sahara (see Hans-Peter Gasser, 'The conflict in Western Sahara – an unresolved issue from the decolonization period' (2002) 5 Yearbook of International Humanitarian Law 375, 379; Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 15).
It was also incorrect of the General Assembly to retain Portugal as administrator of East Timor in the years 1975-1982, when East Timor was already factually occupied by Indonesia (cf however *East Timor* (n 431) para 31). For the factual application of occupation and its timely scope see 1.4.1 Instances of Authority, 43ff. Cf however Brandi J Pummell, 'The Timor Gap: Who Decides Who is in Control?' (1998) 26(4) Denver Journal of International Law and Policy 655, 685, 689.

Chapter XI applies regardless of the consent of the State that has responsibilities for the administration of the territory.[432] This results from a comparison of Chapter XI with Chapter XII which concerns trust agreements. Under Chapter XII, a State must agree to be the trustee while no such agreement is mentioned in Chapter XI.[433] Chapter XII speaks of 'an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements'.[434] Chapter XII further requires that 'The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned (...)'.[435] In contrast, Chapter XI requires no agreement and instead 'applies to all non-self-governing territories from the time the Charter entered into force'.[436] Accordingly, the initial practice of the General Assembly to compile a list of administrators based upon their own acceptance of responsibilities under Article 73(e) cannot claim exclusivity.[437]

Likewise, the General Assembly does not need to agree if a UN Member does have responsibilities under Chapter XI. This again results from a comparison with Chapter XII, where approval of a trusteeship agreement by the General Assembly is explicitly required. Article 79 of Chapter XII says 'The terms of trusteeship for each territory to be placed under the trusteeship system, (...) shall be approved as provided for in (Article 85)'.[438] Article 85 in turn says 'The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assem-

432 Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 565, n 9; cf James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 621-22.
433 See also GA Res 9(I) (n 374); Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 554.
434 Art 75 UN Charter (n 375).
435 Art 79 UN Charter (n 375).
436 Goodrich, Hambro, and Simons (n 384) 448; Kunz (n 369) 104.
437 See n 388.
438 Art 79 UN Charter (n 375).

bly.'[439] Chapter XI on the other hand mentions no such approval function of the General Assembly.[440]

The UN also has no legal capacity to designate NSGTs and therefore its selection does not enjoy or even claim exclusivity.[441] This emanates likewise from a comparison of Chapter XI with Chapter XII on trusts. Under Chapter XII, the UN receives the explicit role to establish the international trusteeship system. Article 75 of Chapter XII says 'The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.'[442] Chapter XI, on the other hand, attributes no such constitutive capacity to the UN.[443]

6.4.3 To 'Assume' Responsibilities

Chapter XI mentions not only those responsibilities, which Members of the United Nations 'have', but also those which they 'assume'.[444] That the Charter mentions both 'have' and 'assume', indicates that it can target not only those responsibilities that existed at the time of conclusion of the Charter but also those which arise in the future. To 'assume responsibilities' certainly applies where a different UN Member takes over the administration of a territory that already was an NSGT.[445] But the term 'assume responsibilities' equally lends itself to any future situation where a UN Member occupies and thereby assumes responsibilities for the administration of a territory that has not been an NSGT before.[446]

439 Art 85(1) UN Charter (n 375).
440 See Arts 73 and 74 UN Charter (n 375) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.
441 6.6.1.2 The Role of the General Assembly, 124ff.
442 Art 75 UN Charter (n 375).
443 See Arts 73 and 74 UN Charter (n 375) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.
444 Art 73 UN Charter (n 375) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.
445 Eg the substitution of Morocco for Spain as the administering authority of Western Sahara (See GA Res 2072 (n 397)).
446 n 425.

6.5 *'Full Measure of Self-Government'*

6.5.1 Occupied Territories

6.5.1.1 Following Invasion

An occupied territory loses its full measure of self-government.

A literal reading of the term 'self-government' suggests that the territory is governed by the State to which it belongs. When a foreign State occupies a territory, the foreign State governs on that territory by military authority.[447] Occupation law now prescribes the administration of the territory and the occupied territory has lost its full measure of self-government.[448] In addition, the State to which the occupied territory belongs also loses its equality over the territory for the duration of occupation, since self-government is a feature of equality.[449] The occupied territory is thus an NSGT.[450]

The full measure of self-government may already be lost during hostilities and before an invasion. This is the case where one State effectively caps the foreign relations of another through measures of warfare.[451] To be inhibited in its foreign relations does, however, not yet make a territory into an NSGT. To come under the aegis of Chapter XI, there must

447 1.4.3 The Relationship to Sovereign Equality, 46f.

448 See 3.1 The General Scope of Authority, 59ff.

449 1.4.3 The Relationship to Sovereign Equality, 46f.

450 See Shabtai Rosenne, Louis B Sohn, and Myron H Nordquist (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 5, Martinus Nijhoff 1989) 480; James K Kenny, 'Resolution III of the 1982 United Nations Convention on the Law of the Sea and the Timor Gap Treaty Comments' (1993) 2 Pacific Rim Law & Policy Journal 131, 141, referring to the matter of NSGTs in the Final Act of United Nations Convention on the Law of the Sea (10 December 1982) (entered into force 16 November 1994) 1833 UNTS 3 as a matter of 'territories under foreign occupation'. The UN Legal Counsel, Hans Corell, treated an occupied territory as an NSGT 'by analogy' (Hans Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in Neville Botha, Michèle Olivier, and Delarey van Tonder (eds), *Conference on Multilateralism and International Law with Western Sahara as a Case Study: Pretoria, December 2008* (VerLoren van Themaat Centre for International Law, University of South Africa 2010) 238).

451 The General Assembly took the free exercise of international relations to be an attribute of self-government (GA Res 742 (n 392), Annex, first part, A.3).

be an administrator who has responsibilities over the territory and this is only the case once military occupation has been established.[452]

6.5.1.2 Invitation Turned to Coercion

A State loses the full measure of self-government over its territory under occupation law as well as under any other agreement that decrees rights over the territory to another State.

An international legal agreement that grants the use of land to a third State – such as a land lease – inevitably reduces the degree of self-government which the State normally enjoys on its territory.[453] This is true also if the land is leased to a non-State actor – whose exercise of authority on the territory is likewise governed by international law.[454] The agreement should define the material and timely scope within which the State stipulates its self-government.[455] The full measure of self-government is therefore lost on the respective territory even when no military occupation has taken place.[456] Such territory is however not yet an NSGT. To qualify as an NSGT under Chapter XI, the foreign State must have responsibilities for the administration.[457] Administration implies sweeping responsibilities, which are hardly granted in an agreement that regulates economic matters of peacetime. Conversely, under occupation law the occupant is being granted extensive rights that amount to administration.[458] Once an invited foreign force turns to coercion or a hostile army invades and exercises military authority in the

452 n 425.
453 See 1.4.3 The Relationship to Sovereign Equality 46f.
454 Yaël Ronen, 'Territory, Lease' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 22).
455 If there were no time limit, the agreement should be regarded as coercive and therefore void (Art 52 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331) and the foreign presence would amount to military occupation from the start (1.4.1 Instances of Authority, 43ff).
456 See Ronen, 'Territory, Lease' (n 454) para 4.
457 6.4.1 'Responsibilities for the Administration of Territories', 108ff. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 550.
458 6.4.1 'Responsibilities for the Administration of Territories', 108ff.

territory, occupation law comes into force.[459] Now, responsibilities for the administration of the territory apply by way of occupation law and the territory becomes an NSGT.[460]

6.5.2 Historic Colonies

Before they reached independence, the territories of historic colonies were self-governed by the parent State to which they belonged from the perspective of international law at the time. Only since the emergence of the right to independence have historic colonies been non-self-governed and only if the parent State remained on the territory. In fact, these territories were now occupied.

Prior to the existence of the right to independence, a historic colony that was ruled by its parent State was not under foreign government but under self-government.[461] The parent State was not foreign on the territory of its own colony because the colonized peoples had no claim yet to their own equal territory opposite their parent States.[462] Although

459 1.4.1 Instances of Authority, 43ff.

460 n 425; n 450.

461 The right to independence is part of the right to self-determination which was proclaimed by the General Assembly only in 1960 (Res 1514 (n 381)) but soon thereafter became binding law (n 66). For Trusts under the UN Charter (n 375) and Mandates under the League of Nations Covenant (n 431), see 6.5.4 Trusts, 120ff.

462 cf n 68. This is true from the view of international law at the time, even though historic colonies were treated as sovereign entities before the advent of historic colonialism (Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 3, 25ff; Raoul Jacobs, *Mandat und Treuhand im Völkerrecht* (Universitätsverlag Göttingen 2004) 104; Ram P Anand, 'New States and International Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 9). Vitoria argued already in the 16th Century that 'The barbarians possessed true public and private dominion. The law of nations, on the other hand, expressly states that goods, which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title' (Francisco De Vitoria, 'On the American Indians' in Anthony Pagden and Jeremy Lawrance (eds), *Vitoria: Political Writings* (Cambridge Texts in the History of Political Thought, Cambridge University Press 1991) 264-65). For the question of the validity of agreements that ceded territory to colonial powers, see Jörn Axel Kämmerer,

the parent States had responsibilities for the administration of their own colonies,[463] these territories were not yet NSGTs, because they were self-governed – by the parent State – from the perspective of international law at the time.[464]

With the emergence of the right to independence, the historic colonies became foreign to their parent States.[465] A colonial people could now choose its political status freely.[466] The right to independence is therefore unconditional.[467] If a former parent State stayed on the territory, it can factually prevent the colonial people from realizing independence or even from choosing independence, but it cannot prevent the application of the right to independence.[468] Thus, if a former parent State inhibits the colonial people from the exercise of its unconditional right to independence, it uses coercion.[469] The parent State therefore becomes the occupant on the now foreign territory.[470] Consequently, occupation

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'Colonialism' in Petra Minnerop, Rüdiger Wolfrum, and Frauke Lachenmann (eds), *International Development Law: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2019) para 14.

463 6.4.1 'Responsibilities for the Administration of Territories', 108ff.

464 n 461. It was thus with some justification at that point in time that States refused to recognize their colonial affairs as matters of Chapter XI and instead invoked Article 2(7) UN Charter (n 375) prohibiting United Nations intervention in 'matters which are essentially within the domestic jurisdiction of any state' (See Goodrich, Hambro, and Simons (n 384) 452).

465 1.2.4 Self-Determination and Related Claims to Territory, 37ff.

466 Res 1514 (n 381) para 2.

467 n 73.

468 n 66. Recall, that a colonial people can freely choose to be an independent entity or to join another State (1.2.4 Self-Determination and Related Claims to Territory, 37ff). As an independent entity, it can also enter into a treaty of association with another State – 'on the basis of absolute equality' (GA Res 1541 (n 392), Annex, principle 6).

469 See Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 13.

470 The ICJ spoke of 'territories occupied by Spain' with respect to Western Sahara, which the UN had regarded as an NSGT with Spain as the administering power since 1965 (ICJ, *Western Sahara* (Advisory Opinion) (1975) para 139; GA Res 2072 (n 397)). The General Assembly called the presence of South Africa in Namibia – post Resolution 1514 – a 'colonial occupation' (Resolution on Situation in Namibia resulting from the illegal occupation of the Territory by South Africa, GA Res 41/39A (20 November 1986) UN Doc A/RES/41/39A (1986). The 2030 Agenda for Sustainable Development likewise speaks of 'peoples living under colonial and foreign occupation' (Resolution on Transform-

law applies and the territory is thus foreign-governed by the former parent State.[471] Accordingly, historic colonies became NSGTs in the sense of Chapter XI because and from the moment that they were occupied.[472]

Some parent States recognized that their colonial territories were foreign when they declared them to be NSGTs even before the existence of the right to independence. They did so by accepting their obligations under Article 73(e).[473] After 1960, the right to independence became unconditional and binding,[474] and a parent State did no longer need to recognize its obligations under Article 73.[475] All historic colonies were from now on foreign to their parent States unless and until they chose to remain with their parent States.[476] The practice of the General Assembly was therefore correct – following the 1960 Resolution 1514 on colonialism[477] – to identify territories as NSGTs regardless if the parent States had recognized the independence of those territories.[478]

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ing our World: The 2030 Agenda for Sustainable Development, GA Res 41/39A (25 September 2015) UN Doc A/RES/70/1 (2015) para 35). See 1.4.1 Instances of Authority, 43ff for the use of coercion and the resulting occupation.

471 n 425; n 450.

472 See also Rosenne, Sohn, and Nordquist (n 450) 480; Kenny (n 450) 141, referring to the matter of territories 'under colonial domination' in the Final Act of UNCLOS (n 450) as a matter of 'territories under foreign occupation'.

473 n 388. See Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 1.

474 n 73; n 66. See James Crawford, 'The Right of Self-Determination in International Law: Its Developments and Future' in Philip Alston (ed), *Peoples' Rights* (IX/2 Collected Courses of the Academy of European Law, Oxford University Press 2001) 19.

475 6.4.2 To 'Have' Responsibilities, 111ff.

476 1.2.4 Self-Determination and Related Claims to Territory, 37ff. In 1970, the General Assembly proclaimed that 'The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.' (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (1970)).

477 Res 1514 (n 381).

478 See n 390.

The initial proposition by the General Assembly to define the attainment of a full measure of self-government by degree of political participation is however outdated.[479] Colonial peoples have in the meantime received a right to independence and if they did not choose to join their former parent State, their territory reaches *a full measure* of self-government only when it was vacated by the parent State.[480] Accordingly, the General Assembly was right to remove from the list of NSGTs those territories from which the parent States actually withdrew.[481]

6.5.3 UN Administration

Administration of territory by resolution of the General Assembly or Security Council should be viewed as ordinary occupation rather than as a *sui generis* form of UN administration.[482] As with all other instances of military occupation, the government exercised by the foreign force follows from occupation law, which in turn is a consequence of the establishment of military authority.[483] If, however, UN administration were viewed as a *sui generis* form and not as military occupation, the legal capacity of the dispatched forces to govern would be based not on the fact of military authority but on Security Council or General Assembly resolution.[484] Either way, the forces present on foreign territory exercise administration there and the territory thereby loses its self-government.[485]

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479 See n 392.

480 Self-government may exist in degrees or may be an aspect of self-determination (n 68. See Louis B Sohn, 'Models of Autonomy within the United Nations Framework' in Yoram Dinstein (ed), *Models of Autonomy* (Edited papers of a conference convened in January 1980, under the auspices of the Faculty of Law of Tel Aviv University, Transaction Books 1981) 21-22).
But Chapter XI requires nothing less than the full measure of self-government of a territory, thus precluding the administration by a foreign State of the same territory (See GA Res 567 (n 392) para 1. See also 1.4.3 The Relationship to Sovereign Equality, 46f). See also Repertory of Practice 1959-1966 (n 371) paras 76, 80.

481 See n 394; 428.

482 n 91; n 105; n 295.

483 n 425.

484 See eg SC Res 1272 (n 428). See also n 296.

485 cf n 425; n 450.

6.5.4 Trusts

The establishment of a trust under Chapter XII follows rules that are entirely different from those for the formation of an NSGT under Chapter XI.

Like occupied territories, trusts lack self-government.[486] Usually, self-government is lost only if a foreign State exercises authority on a territory that is independent.[487] A trust, however, has no independence opposite its trustee State and yet the trust is under foreign government by that State.[488] A trust has a *sui generis* status in international law.[489]

Territory that is already foreign cannot be made into a trust.[490] Chapter XII explicitly precludes territories as trusts if they enjoy sovereign equality.[491] Sovereign equality, in turn, exists opposite all territory to which any other equal State has a potential claim and which is therefore foreign to all until the claims are settled.[492] Additionally, Article 77 of Chapter XII requires that a territory can only become a trust if the future trustee is already 'responsible for their administration'.[493] Article 77 omits to say that such a territory must also be non-self-governed.[494] This is further indication that to be placed under the system of trusteeship, a territory must belong to the State which would become the future trustee. Consequently, historic colonies could be given into trust only before the right to independence came into existence.[495] No trust territories currently exist, but following from the above it would still be theoretically possible

486 Art 76 UN Charter (n 375).
487 See 6.5.1 Occupied Territories, 114ff; 6.5.2 Historic Colonies, 116ff.
488 Art 76(b) UN Charter (n 375).
489 See Jacobs (n 462) 101ff. The same was true of Mandates under Article 22 of the League of Nations Covenant (n 431) (see Jacobs (n 462) 79ff).
490 The exception are 'territories which may be detached from enemy states as a result of the Second World War' (Art 77(1)(b) UN Charter (n 375)).
491 Art 78 UN Charter (n 375).
492 1.2.2 Equal States as a Territorial Order, 30f; 1.2.3.1 Delimitation in General, 32ff.
493 Art 77(1)(c) UN Charter (n 375). See also 6.4.1 'Responsibilities for the Administration of Territories', 108ff.
494 Art 77(1)(c) UN Charter (n 375).
495 See 6.5.2 Historic Colonies, 116ff. Transformed into trusts were also those historic colonies that had been Mandates per Article 22 of the League of Nations Covenant (n 431), with the exception of Namibia (See n 431).

for a State to voluntarily submit a part of its own territory to the international trusteeship system.[496]

Since occupied territory is foreign to the occupant, he cannot give it into trust.[497] An occupied territory remains foreign to the occupant, despite its loss of equality.[498] In addition, giving a territory into trust after it has been occupied would take the independence from that territory and therefore violate also the prohibition to acquire territory by force.[499] It follows that an NSGT cannot become a trust.[500]

6.6 'Not Yet Attained'

6.6.1 The Question of a Historic and Closed Catalogue of Territories

6.6.1.1 Independence v Self-Government

Despite being independent, a territory can still lack a full measure of self-government.

Focusing on the agenda of historic decolonization, the General Assembly eventually requested independence for historic colonies under the concept of self-government per Chapter XI.[501] Self-government and the right to independence are however two different concepts.[502] The

496 Gerald B Helman and Steven R Ratner, 'Saving Failed States' (1992-93) 89 Foreign Policy 3, 16f. cf also Jacobs (n 462) 236-37.

497 1.2.1 The Scope of the Term 'Hostile State', 26ff.

498 1.4.3 The Relationship to Sovereign Equality, 46f.

499 2.2 The Prohibition to Acquire Territory by Force, 56ff.

500 There is also no cause in the text of the UN Charter to assume that Chapter XI applies also to trusts. The two regimes are contained in two respective chapters of the UN Charter – Chapter XI and Chapter XII – neither of which mentions such a connection. See however Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 550.

501 n 394. See Bedjaoui (n 369) 1761. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) paras 8-13, 21.

502 See Resolution on Offers by Member States of study and training facilities for inhabitants of Non-Self-Governing Territories, GA Res 74/96 (26 December 2019) UN Doc A/RES/74/96 (2019) para 3. The two terms were the bones of contention among the delegates in the negotiations leading up to the adoption of Chapter XI. For the delegates from parental States holding historic colonies, the idea of independence was going too far, and they seemed to have hoped that the term self-government instead would give them more leeway to hold

Charter accordingly distinguishes the terms independence and self-*government*.[503] The right to independence is a right granted to colonial peoples as part of their right to self-*determination*.[504] The term self-determination, too, is used separately from the term self-government by the Charter.[505]

Per the right to independence, a colonial people has a claim to a territory like an equal State does.[506] This claim exists, regardless if it has been realized in fact, yet.[507] Accordingly, the right to independence of a colonial people applies also while their territory is still an NSGT.[508] Conversely, Chapter XI requests the realization of the full measure of self-government.[509] A territory is not self-governed, merely because a people has received a claim to their own territory per the right to independence. Such a territory is fully self-governed only when the foreign State has *in*

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their colonies (see eg San Francisco Conference vols I-XVI (n 407), vol VIII, 138-39, 145, 609; vol X, 434, 440, 453-54, 562. See also Goodrich, Hambro, and Simons (n 384) 451; Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) paras 3-4). This view of self-government was however rendered quite useless already by the final adoption of the wording '*a full measure* of self-government'. The emphasis on the full measure has been recalled by the General Assembly (GA Res 567 (n 392) para 1). Finally, the coming into force of the right to independence soon after adoption of the Charter made the colonial territories foreign to their former parent States and therefore a full measure of self-government could no longer allow any part on behalf of the former colonial government (n 480).

503 Art 76 UN Charter (n 375). 'In general usage of language the term 'self-government' is sometimes used as identical with 'independence'. The Charter, however, differentiates 'self-government' and 'independence', independence meaning – in the Charter – 'sovereignty' Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 559. See also 1.2.4 Self-Determination and Related Claims to Territory, 37ff.

504 1.2.4 Self-Determination and Related Claims to Territory, 37ff. See also San Francisco Conference vols I-XVI (n 407), vol X, 441.

505 Respectively, Arts 1 and 73 UN Charter (n 375).

506 1.2.4 Self-Determination and Related Claims to Territory, 37ff. See Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 559.

507 1.2.4 Self-Determination and Related Claims to Territory, 37ff.

508 The situation was similar for mandates under the League of Nations Covenant (n 431), which could be provisionally recognized as independent, despite still being mandates (Art 22(4) League of Nations Covenant (n 431)).

509 GA Res 567 (n 392) para 1; 6.5.2 Historic Colonies, 116ff; 6.5.1 Occupied Territories, 114ff.

fact withdrawn or if the people freely chose to join that State.[510] One could say that the full measure of self-government is the factual realization of the right to independence.[511] It makes sense, therefore, that independence – or the claim to territory – cannot be lost because of foreign occupation,[512] while self-government is lost during occupation.[513]

The subject of Chapter XI is to install the full measure of self-government and not to award the right to independence.[514] The application of Chapter XI should therefore not be limited to the territories of peoples that were never independent before.[515] Instead, Chapter XI applies also to the territories of independent States when they have lost their self-government because they are occupied.[516]

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510 n 480.

511 Article 1 of the ICCPR seems to suggest just that by requesting that 'Those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the *realization* of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations' (Art 1(3) International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171 (emphasis added). The attainment of a full measure of self-government is thus the same as was demanded with respect to historic colonies under the postulate of 'unrestricted self-determination' (see Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 13).

512 1.4.3 The Relationship to Sovereign Equality, 46f. 2.2 The Prohibition to Acquire Territory by Force, 56ff.

513 6.5.1 Occupied Territories, 114ff.

514 Bentwich and Martin (n 402) 143. See also Bedjaoui (n 369) 1760. See however Thomas D Grant, 'Extending Decolonization: How the United Nations Might Have Addressed Kosovo' (1999) 28 Georgia Journal of International and Comparative Law 9, 35f. Note that to develop self-government is the core obligation of Chapter XI (6.6.2 Meaning in Context, 128ff); Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 2.

515 'East Bengal clearly qualified as a non-self-governing territory in 1971, after the election result had been cancelled and the territory placed under a repressive military rule from Islamabad (Crawford, *The Creation of States in International Law* (n 432) 393).

516 The representative from China suggested in the deliberations leading up to Resolution 1541 that a colony existed also when a territory was in a subordinate position, economically exploited, or 'when territories were held for military reasons' (Repertory of Practice 1959-1966 (n 371) para 82).

6.6.1.2 The Role of the General Assembly

The past practice of the General Assembly to treat only historic colonies as NSGTs does not frustrate the future application of Chapter XI to occupied territories.

The General Assembly has no competence to compile a final and binding catalogue of NSGTs.[517] The UN enjoys only limited explicit competence under Chapter XI.[518] The General Assembly has no exclusive competence per the Charter to decide which UN Members have responsibilities over which territories.[519] Chapter IV of the Charter, regarding the functions and powers of the General Assembly, mentions no role at all for the General Assembly in matters of Chapter XI, while it does mention its functions regarding Chapters XII and XIII.[520] Chapter XII even

517 'The Assembly may – in form of a recommendation – specify these territories. But a recommendation of the Assembly has no binding force' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 556). Recommendations of the General Assembly are of a political, not legal character (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 195-96, 198-99). See also Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 245.
The General Assembly itself called its own role in enumerating NSGTs an expression of 'opinion' (Resolution on Territories to which Chapter XI of the Charter applies, GA Res 334 (IV) (2 December 1949) UN Doc A/RES/334(IV) (1949); Resolution on General questions relating to the transmission and examination of information, GA Res 1467 (XIV) (12 December 1959) UN Doc A/RES/1467(XIV) (1959). There is still 'very considerable dispute over the authority of the General Assembly to adopt resolutions which lay down general and abstract rules of conduct binding upon States' (Stephen M Schwebel, *Justice in International Law: Selected Writings of Stephen M Schwebel, Judge of the International Court of Justice* (Cambridge University Press 1994) 504).

518 Namely to receive information per Article 73(e) (See 6.3 'Members' and 'Territories', 106ff).

519 Chapter XI lacks 'institutional or substantively binding machinery' (Mbengue (n 384) para 8. See 6.4.2 To 'Have' Responsibilities, 111ff; Igarashi (n 403) 10. See also Repertory of Practice of United Nations Organs (1945–1954), United Nations (1945-1954) 4 paras 229-54 for the initial discussions in the General Assembly regarding the respective competence of the General Assembly. The issue remained contentious in the General Assembly (see Repertory of Practice 1959-1966 (n 371) paras 72, 96).

520 'The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII,

provides for the creation of a specific sub-organ for the General Assembly to exercise its functions with regard to the trusteeship system.[521] In Chapter XI, however, no such sub-organ is mentioned.[522] No organ of the UN receives any capacity under Chapter XI besides the general competence to discuss matters, to make recommendations and to receive information under Article 73(e).[523]

Because the General Assembly and its organs have no specific competence under Chapter XI, their practice to enumerate NSGTs does not limit the interpretation of Chapter XI as subsequent practice in the sense of the Vienna Convention on the Law of Treaties (The VCLT).[524] The General Assembly also lacks the competence to interpret the Charter in a legally binding way.[525]

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including the approval of the trusteeship agreements for areas not designated as strategic.' (Art 16 UN Charter (n 375)).

521 'The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions.' (Art 85(2) UN Charter (n 375)).

522 Chapter XI UN Charter (n 375), reprinted in 6.1 Chapter XI, Articles 73 and 74, 99. Kunz (n 369) 104.

523 Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 551; Goodrich, Hambro, and Simons (n 384) 448. See also 6.3 'Members' and 'Territories', 106ff; 6.2 The Practice of the United Nations Regarding Chapter XI, 102ff.

524 Article 31(3)(a, b) VCLT (n 455) provides that for the interpretation of a treaty 'There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Note that it is questionable in the first place, if resolutions of the General Assembly do at all reflect the subsequent practice of States in the sense of the VCLT (Julius Stone, 'Conscience, Law, Force and the General Assembly' in Gabriel M Wilner (ed), *Ius et Societas: Essays in Tribute to Wolfgang Friedmann* (Martinus Nijhoff 1979) 336; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Legal Aspects of International Organizations, Vol 51, Brill | Nijhoff 2009) 136. See however Georg Schwarzenberger, 'Neo-Barbarism and International Law' [1968] Year Book of World Affairs 191, 196.

525 Stone, 'Conscience, Law, Force and the General Assembly' (n 524) 336; Ulrich Fastenrath, 'A Political Theory of Law: Escaping the Aporia of the Debate on the Validity of Legal Argument in Public International Law' in U Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of*

The fact that the General Assembly has in the past mingled the two topics of independence and self-government is therefore no legally binding indication that Chapter XI deals exclusively with historic decolonization.[526] Finally, effective interpretation of the Charter demands that none of its provisions be made obsolete by interpretation.[527] Chapter XI namely does not say that its purpose has been achieved, once a specific set of territories – such as historic colonies – have attained self-government.[528]

More importantly, however, the practice of the General Assembly to include only historic colonies on its list of NSGTs was not wrong in its result.[529] It was merely not inclusive enough.[530]

Bruno Simma (Oxford University Press 2011) 70; Cot (n 371) para 60. See however Mbengue (n 384) para 8.

526 See 6.5.2 Historic Colonies, 116ff.

527 'The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective' (WTO Appellate Body, *United States - Continued Existence and Application of Zeroing Methodology* WTO Doc. WT/DS350/AB/R (2008) para 268). '(It is advisable to interpret) the Charter in a manner which would be as appropriate in the case of any other international treaty, that is, treaty clauses must be interpreted as a whole and so as to give, if at all possible, practical effect to all of the clauses of the treaty' (Georg Schwarzenberger, 'The Problem of International Constitutional Law in International Judicial Perspective' in Jost Delbrück, Ipsen Knut, and Dietrich Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976* (Duncker & Humblot 1975) 243 with reference to the dissenting opinion of Judge de Visscher in the *International Status of South West Africa Case* (1950)).

528 See 6.1 Chapter XI, Articles 73 and 74, 99ff.

529 See 6.5.2 Historic Colonies, 116ff.

530 Note that back in 2006 it was held that it was yet practically unlikely that Chapter XI would embrace non-colonial situations of an analogous nature (Crawford, *The Creation of States in International Law* (n 432) 612). Recall however that after Resolution 1514 in 1960, the General Assembly operated in the face of 'systematic obstruction' and its practice to enumerate NSGTs against the will of the administrators reflected a 'momentous transition' (Grant (n 514) 34-35. See also Alain Pellet, 'The Road to Hell is Paved with Good Intentions: The United Nations as Guarantor of International Peace and Security: A French Perspective' in Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International 1995) 122).
It shall therefore not be ruled out that the General Assembly can again expand the scope of Chapter XI in practice. This may even include investigating by the

Notably, the General Assembly did not explicitly claim that historic colonies were the only category of territories to qualify as NSGTs.[531] The future practice of the General Assembly, can therefore still include all occupied territories under Chapter XI.[532] This is particularly true since

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General Assembly and its organs of possible disputes with respect to the application of Chapter XI (See Derek William Bowett, 'The United Nations and Peaceful Settlement: Report of a Study Group of the David Davies Memorial Institute of International Studies' in Humphrey Waldock (ed), *International Disputes: The Legal Aspects* (The David Davies Memorial Institute of International Studies, Europa Publications 1972) 195 para 49).
Finally, it shall be possible soon that not only third States but the United Nations itself demand the performance of the obligations *erga omnes* under the Charter (Fassbender (n 524) 127). This shall include the obligations under Chapter XI (See n 404).

531 'The territory of a colony *or other* Non-Self-Governing Territory' (emphasis added) (Friendly Relations Declaration (n 476); MN Shaw, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, 70, 89; Vaughan Lowe, *International Law* (Oxford University Press 2007) 113). Even Resolution 1541 avoids to claim exclusivity on behalf of historic colonies with its open wording that 'The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.' (GA Res 1541 (n 392), Principle 1). See also n 516; n 536; n 589.

532 The General Assembly is in no way precluded from changing its political course – its recommendations being of a political and not of a legal nature (n 517). Chapter XI has been said to be of an evolutionary nature (Crawford, *The Creation of States in International Law* (n 432) 608). It shall ring true again that 'Chapter XI in action (is) a mirror of the world as it is today' (Kunz (n 369) 110). In the same vein, the question was asked, 'Is there a pressing demand for reconsidering the definition of what constitutes a non-self-governing territory?' Mbengue (n 384) para 19. 'It does not (...) seem extravagant to claim that the Assembly is in a position to play a crucial rôle on a selective basis in adapting international law to a changing political environment; that is, to participate in the essence of the legislative process at work in rudimentary form in international society' (Richard A Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60(4) American Journal of International Law 782, 790). The General Assembly expresses 'international society's stand on certain issues, but also its needs, its values and its *desiderata*' (Georges Abi-Saab, 'Whither the International Community?' (1968) 9(2) European Journal of International Law 248, 260). 'The intention was to establish the General Assembly as 'town meeting of the world,' the 'open conscience of humanity,' that is to say, as a deliberative and criticising organ' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 199-200).

historic colonies themselves only qualified as NSGTs because and when they became occupied territories.[533]

6.6.2 Meaning in Context

On all NSGTs, there exists an obligation to develop self-government. The wording 'not yet attained a full measure of self-government' underlines that this obligation is not fulfilled until the occupation has ended.

Per Article 31(1) of the VCLT, the interpretation of a term shall proceed in good faith and in accordance with its ordinary meaning in context.[534] Article 31(1) is part of customary international law.[535]

> **VCLT**
>
> **Section 3. Interpretation of Treaties**
>
> **Article 31. General Rule of Interpretation**
>
> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> (...)

At the outset, it must be recalled that neither the words of Chapter XI nor the practice relating to Chapter XI claim to refer only to historic colonies.[536] Interpretation of the term 'self-government' showed that his-

533 See 6.5.2 Historic Colonies, 116ff.

534 'The ordinary meaning of a term can only be determined by looking at the context in which it is used' (Georg Ress, 'The Interpretation of the Charter' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 13).

535 See Ress (n 534) para 8, and the relevant ICJ practice cited there.

536 'The word "colony" is nowhere mentioned in Chapter XI' (Kunz (n 369) 109). 'The Charter does not define a non-self-governing territory' (Goodrich, Hambro, and Simons (n 384) 458. See also Derek William Bowett, *The Law of International Institutions* (4th edn, Library of World Affairs no 60, Stevens & Sons 1982) 84-85; Igarashi (n 403) 10; Cot (n 371) para 16). 'The formula "non-self-governing territories" is usually interpreted to mean only non-self-governing colonies; but the term "colony" is no less ambiguous than the term "non-self-governing". (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 555). 'The scope of the term 'colony' is fairly unclear and no universally accepted definition can be attached to it in

toric colonies were in fact occupied territories at the point they came under Chapter XI.[537] Accordingly, military occupations should generally fit under the ambit of Chapter XI.[538] A good faith interpretation of the term 'not yet attained' must therefore enable the application of Chapter XI not only to historic colonies but to all occupations.[539] The approach

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public international law. This corresponds with the difficulty in defining colonialism as such.' (Kämmerer (n 462) para 16). More importantly, however, the General Assembly speaks of 'colony or other Non-Self-Governing Territory' (n 531).

537 6.5.2 Historic Colonies, 116ff.

538 It has been observed that it would be at least formally possible for Chapter XI to embrace non-colonial situations of an analogous nature (see Crawford, *The Creation of States in International Law* (n 432) 612). And further, 'The situation could arise in which a United Nations Member did have "responsibilities" (for example, at the invitation of a puppet government) for the administration of the territory of a recognized State (...). Such situations may well be, in practice, equivalent to those of colonial type, and (...) the argument that Article 73 applies only to colonies and not to States need not prevail' (Crawford, *The Creation of States in International Law* (n 432) 612). It has also been said that 'Article 73 applies to colonies and to territories which resemble colonies' (Peter Malanczuk and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 330).

539 Taking analogous situations under the ambit of a provision by interpretation according to the rules of the VCLT satisfies the principle of good faith (See Ress (n 534) para 11).

Good faith does not demand an investigation into the exact intent of the parties, but rather leaves room for the bargaining expectations that any party may have had in the terms of a treaty (See Sohn (n 480) 22. see Rudolf Bernhardt, 'Homogenität, Kontinuität und Dissonanzen in der Rechtsprechung des Internationalen Gerichtshofs, Eine Fall-Studie zum Südwestafrika/Namibia-Komplex' (1973) 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law 1, 36).

The principle of good faith demands that no interpretation is adopted that was precisely not intended by the parties to the treaty (See Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 120).

Per the principle of good faith, a party must not evade an obligation under a treaty by formalism or otherwise (*abus de droit*) – the contrary of which is the case with the interpretation suggested here (See Jörg P Müller and Robert Kolb, 'Article 2(2)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 32).

Proof that the parties did not intend to limit the application of Chapter XI to historic colonies may be found in the fact that, in 1946, shortly after adoption

followed here is to evaluate intent by looking at 'either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law'.[540] Reading the term 'not yet attained a full measure of self-government' in its context within Article 73, the term not yet should be understood to emphasize the fact that the obligations under Chapter XI persist as long as no full measure of self-government has been attained.[541] The obligations under Chapter XI apply from the moment the UN Member has responsibilities for the administration of the NSGT. This is the moment when military occupation has taken hold.[542] The obligations expire only when the occupation has terminated, since before that, a territory is not fully self-governed.[543]

The establishment of self-government is itself an obligation under Chapter XI.[544] Per Article 73(b) the development of self-government

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of the Charter, the Secretary General sent out a letter to the Members of the United Nations inviting them to give their opinions on the factors to be taken into account in determining which territories should be considered non-self-governing in the sense of Chapter XI. The United States suggested that 'Chapter XI should apply to any territory which did not enjoy the same measure of self-government as the metropolitan area of the State administering that territory'. Similarly, India suggested that non-self-governing territories are those 'where the rights of the inhabitants, their economic status and social privileges are regulated by another State in charge of the administration of such a territory' (cited from Sohn (n 480) 10-11. See also n 589, for the drafting history). Both these definitions fit the situation of military occupation.

540 William Blackstone, *Commentaries on the Laws of England: Book the First* (Oxford, 1765) 59. See also Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2017) 369. See 6.6.3.1 In the Light of Peace, 132ff; 6.6.3.2 In the Light of Sovereign Equality, 137ff; 6.6.4 Historic Interpretation, 140ff.

541 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government (...) accept as a sacred trust the obligation to (...) (Art 73 UN Charter (n 375), reprinted in 6.1 Chapter XI, Articles 73 and 74, 99ff.

542 6.4.1 'Responsibilities for the Administration of Territories', 108ff; 6.5.1 Occupied Territories, 114ff; 6.5.2 Historic Colonies, 116ff.

543 The attainment of a full measure of self-government has been called the 'ultimate objective of Chapter XI' (Repertory of Practice 1959-1966 (n 371) para 302). See 6.5.1 Occupied Territories, 114ff; 6.5.2 Historic Colonies, 116ff.

544 The obligation to develop self-government has been described as 'central' to the Charter (Repertory of Practice 1959-1966 (n 371) para 279. See also Quincy Wright, *The Role of International Law in the Elimination of War* (Manchester University Press 1961) 28; Karl Doehring, 'Self-determination' in Bruno Simma

can be gradual and lead through political participation first.[545] But the term 'not yet attained a full measure' underlines that the obligation to develop self-government in Article 73(b) is fulfilled only when occupation has ended and not when partial features of government or political participation have been granted.[546]

A historic colony that became occupied upon gaining independence receives self-government as an independent entity for the first time when the occupation ends.[547] Any other occupied territory has lost its self-government at the beginning of the occupation and at its end regains it.[548] The wording 'not yet attained a full measure of self-government' stresses that the obligations under Chapter XI persist all through the foreign occupation.[549] Chapter XI should thus apply to all situations of occupation, past, present and future.[550]

(ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 13).

545 Art 73(b) UN Charter (n 375) speaks of the obligation 'to develop self-government (...) to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.'

546 n 480. At San Francisco, 'The word "yet" was held to apply to any degree of self-government short of a "full-measure", up to which the responsibilities of the member exists' (San Francisco Conference vols XVII-XXII (n 371), vol XVII, 308).

547 6.5.2 Historic Colonies, 116ff.

548 Remarkably, already in the Atlantic Charter – the prequel to the UN Charter – the United States and Great Britain stated that 'they wish to see sovereign rights and self-government *restored* to those who have been *forcibly deprived* of them' (emphasis added) (The Atlantic Charter: Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom (14 August 1941)). See 6.5.1 Occupied Territories, 114ff.

549 n 543.

550 It was accurately stated that while Chapter XI has fulfilled most tasks with respect to historic decolonization, 'territories can still find themselves in a new state of dependence' (Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 21). In the same vein, the representative of the Philippines had held in the deliberations leading up to Resolution 1541 that 'the territories of the colonial type referred to included not only those in existence when the United Nations Charter was drafted but also any territories lacking a full measure of self-government which might have come within the scope of the classification since then' (Repertory of Practice 1959-1966 (n 371) para 86). See also n 539; n 538.

6.6.3 Meaning in the Light of the Object and Purpose of the Charter

6.6.3.1 In the Light of Peace

In the light of the goal of peace as enshrined in the Charter, the term 'not yet attained a full measure of self-government' must be read to underline the obligation of the occupant under Article 73(b), to install or re-install self-government and therefore to retreat his occupation.

The interpretation of a term in the light of the object and purpose of a treaty has at least the same legal value as the interpretation of a term in its context.[551] The general rule of interpretation per the VCLT mentions the two methods together without any indication of a hierarchy between them.[552] To interpret a term in light of the object and purpose of a treaty is thus equally part of customary international law.[553] For matters of interpreting the Charter, focusing on the object and purpose might even be the dominant approach.[554]

> **UN Charter**
>
> **Preamble**
>
> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

551 In fact, the functional method for the interpretation of the Charter is now 'the predominant one', 'emphasizing the purpose of the organization with elements of the *effet-utile*' (Ress (n 534) paras 1, 35). See also n 527.

552 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*' (Art 31(1) VCLT (n 455)) (emphasis added). See however Sinclair (n 539) 130.

553 n 535.

554 'This approach has paramount relevance for agreements establishing a long-term framework for co-operation, especially for founding treaties of international organizations (...)' (Matthias Herdegen, 'Interpretation in International Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 30). See also n 527.

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom,
AND FOR THESE ENDS
to practice tolerance and live together in peace with one another as good neighbours, and
to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,
(...)

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The primary object and purpose of the Charter is peace.[555] The preamble opens with 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war (...)'. It continues, 'And for these ends: to practice tolerance and live together in peace with one another as good neighbours'. The preamble concludes, '(We the peoples of the United Nations) have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations'.[556]

In its Article 1, the Charter states the purposes of the United Nations and opens with the words 'to maintain international peace (...)'. And the second paragraph closes with the words 'to strengthen universal peace'. Finally, in Chapter XI itself, the Charter urges 'to further international peace and security'.[557]

Occupation law with its economic incentive to occupy prevents the Charter from reaching its object and purpose of peace.[558] The prohibition of the use of force is powerless against occupation and the inevitable application of occupation law.[559] The Charter therefore must have another remedy installed against occupation.[560] Chapter XI is this remedy

555 Declaration on the Right of Peoples to Peace, GA Res 39/11 (12 November 1984) UN Doc A/RES/39/11 (1984); Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 11-13, 19; Goodrich, Hambro, and Simons (n 384) 451; Cot (n 371) paras 3, 25.

556 The preamble is part of the Charter and as such has the same binding force as the other parts of the Charter (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 9).
The Preamble 'sets forth the context within which the Charter's other provisions must be read. It is thus an element of interpretation of the Charter in accordance with Art 31(2) VCLT' (Cot (n 371) para 22. See also Rüdiger Wolfrum, 'Preamble' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 13. cf however Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 10).

557 Art 73(c) UN Charter, reprinted in 6.1 Chapter XI, Articles 73 and 74, 99. To further peace is broader than to maintain the condition of peace (San Francisco Conference vols XVII-XXII (n 371), vol XVII, 367). This subparagraph was adopted without comment and 'is another example of the emphasis throughout the Charter upon this primary objective of the Organization' (Goodrich, Hambro, and Simons (n 384) 451).

558 1.4.2 The Relationship to Peace, 46f; 5 Concluding Summary of Part I, 93ff.

559 n 143; n 145.

560 'In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives mean-

against occupation and thus a safeguard for peace.[561] Chapter XI contains the obligation to gradually retract military authority, until the occupation is completely dissolved and peace can be restored.[562] The obligation to retract the occupation is decisively aided by the economic obligations which the occupant faces under Chapter XI.[563] In the light of the goal of peace, the obligations of Chapter XI must accordingly be understood

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ing to all of them, harmoniously"' (WTO Appellate Body, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* WTO Doc. WT/DS98/AB/R (1999) para 81, citing WTO Appellate Body, *Argentina - Safeguard Measures on Imports of Footwear* WTO Doc. WT/DS121/AB/R (1999) para 81).
'The intention of the framers of the Charter was often unclear and sometimes was purposely left so; but where there is doubt as to their meaning it is surely legitimate to have recourse to the principle of effectiveness, and to interpret the provision at issue by reference to the purpose of the Charter as a whole' (Lawrence Preuss, 'Reviewed Work: The Law of the United Nations: A Critical Analysis of its Fundamental Problems. by Hans Kelsen' (1950) 44(4) American Journal of International Law 792). See also n 527. For a critical review of the principle of effective interpretation in international law, see Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22(2) European Journal of International Law 571, 581-83 f.

561 'In this formula as now worded is the blueprint of the completed peace – not a subject peace achieved under the iron heel of authority, but a peace of mutual respect, designed by and for each member of the great family of mankind', as stated about Article 73 by the delegate of the Philippines at San Francisco. He continued that the obligation to develop self-government in Article 73(b) 'is in itself proof that the fight for freedom has been won' (San Francisco Conference vols I-XVI (n 407), vol VII 138).

562 n 544; n 546. This view of Chapter XI is also in line with the right to peace, which 'may be invoked in the context of application of legal norms, especially as a source of interpretation' (Djacoba Liva Tehindrazanarivelo and Robert Kolb, 'Right to Peace' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 29. See Right to Peace Declaration (n 555)). 'The right to peace is mainly a solemn proclamation of the constitutional nature and of the centrality of the UN Charter, interpreted dynamically, in modern international relations. The right stresses that *nothing can be achieved* if the fundamental principles enshrined in the UN Charter — peace, settlement of disputes, promotion of human rights, furthering of the economic and social well-being of peoples — are not taken with utmost care and pursued in States' policies to the utmost extent feasible' (emphasis added) (Tehindrazanarivelo and Kolb (n 562) para 24).

563 See 7 The Economic Regime of Chapter XI, Article 73, 145ff.

to apply to all situations of occupation and not just to a historic set of colonies.[564]

The term 'not yet attained a full measure of self-government' must be read as an emphasis that the obligations of Chapter XI persist until the occupation has ceased entirely.[565] Only then does Chapter XI accurately state that it operates 'within the system of international peace and security established by the present Charter' (Article 73).[566]

564 'The Preamble and Art. 1(1),(2), and (3) indicate that peace is more than the absence of war. These provisions refer to an evolutionary development in the state of international relations which is meant to lead to the diminution of those issues likely to cause war' (Rüdiger Wolfrum, 'Purposes and Principles' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 9).
This is also well in tune with the idea of peaceful change for which there are 'various potentials (...) available under the UN Charter from a legal, as well as political, point of view' (Hisashi Owada, 'Peaceful Change' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 24). 'In a world fraught with conflict and instability there is a widely felt need to find ways to adapt the international legal order to the changing character of social and political demands, to develop techniques of peaceful change as an alternative to violence and warfare' (Falk (n 532) 785).

565 n 549. The result of the interpretation suggested here is also in line with the practice to interpret the Charter 'dynamically to accommodate new threats, challenges, and opportunities without requiring Charter amendment (but) within the normative context embodied by the Charter' (Ian Johnstone, 'The UN Charter and Its Evolution' in Simon Chesterman, David M Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019) 31). That normative context, as expounded here, is represented foremost in the goal of peace.

566 '(Chapter XI) is part of a Charter – a Charter with one overriding aim – to eliminate the frightful scourge of war, which has caused untold misery twice in a generation (...) It must be looked at in relation to the rest of the Charter and the aims which the Charter seeks to achieve' (San Francisco Conference vols XVII-XXII (n 371) vol XVIII, 145). To focus on the obligation to end occupation under Chapter XI also fits with the timeless observation that 'War itself will finally conduct us to peace as its ultimate goal' (Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres: On the Law of War and Peace, Book 1* (Francis W Kelsey tr, first published 1646, The Classics of International Law, Clarendon Press 1925) 33. See also Tehindrazanarivelo and Kolb (n 562) para 1).

6.6.3.2 In the Light of Sovereign Equality

In the light of the principle of equality, the term 'not yet attained a full measure of self-government' must be read to underline the obligation of the occupant per Article 73(b) to install or re-install self-government and therefore to retreat his occupation.

> **UN Charter**
>
> **Article 2**
>
> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
> (...)

The Charter lays down that equality is the principle in pursuit of its purposes.[567] Equality is therefore essential for the Charter to reach its goals.[568] Equality applies to the territory of all States.[569] It equally applies to all disputed territory to which any State – including a nascent State – has a yet unfulfilled claim.[570] During occupation, the territory of the occupied State is foreign-governed by the military authority of the occupant and therefore has no full measure of self-government.[571] Consequently, equality is suspended during occupation.[572] By suspending equality, occupation frustrates the pursuit of the purposes of the Charter.

Besides the purpose of peace, the one purpose that evidently depends on the principle of equality is the purpose of equal rights as contained

567 Art 2(1) in connection with Art 1(1) UN Charter (n 375) reprinted in 6.6.3.1 In the Light of Peace, 132. Cot (n 371) para 30.
568 It is 'the first organisational principle of the Charter' and as such marks out the 'consensual *ius cogens* of the Organisation' (Georg Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' [1976] Year Book of World Affairs 307, 308, 311). As such, it 'defines the structure of the system' (Abi-Saab (n 532) 257).
569 n 26.
570 1.2.3.1 Delimitation in General, 32ff.
571 n 425; n 450.
572 1.4.3 The Relationship to Sovereign Equality, 46f.

in Article 1 of the Charter.[573] Equal rights do not exist during occupation when one State governs the other.[574] The purpose of achieving international co-operation is equally dependent upon equality.[575] The requirement of co-operation should by its nature preclude that one State dictates to the other – via military occupation – the solution of 'international problems of an economic, social, cultural, or humanitarian character.' Likewise, the pursuit of international co-operation in 'Promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' per Article 1 of the Charter depends on the principle of equality and therefore must not be achieved by military occupation.[576]

While it is true that States can stipulate their equality, and have done so under occupation law, the latter can, if applied alone, obtain a permanent hold on equality, since it prescribes no end to military authority.[577] Occupation law thus defeats equality and with it the principle in pursuit

573 Art 1(2), reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.
The meaning of an equality of rights in international law was aptly described by American President Woodrow Wilson in a speech to the American Senate (22 January 1917): 'The equality of nations upon which peace must be founded if it is to last must be an equality of rights; the guarantees exchanged must not imply a difference between big nations and small, between those that are powerful and those that are weak. Equality of territory or of resources there of course cannot be; nor any other sort of equality not gained in the ordinary peaceful and legitimate development of the peoples themselves. But no one asks or expects anything more than an equality of rights.' See also Juliane Kokott, 'States, Sovereign Equality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 2.
Note also that 'the special privileges granted in the Charter to greater Powers in the guise of permanent members of the Security Council do not impair the status of the underprivileged many as sovereign and equal subjects' (Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' (n 568) 333. See also Wolfrum, 'Preamble' (n 556) para 7. See however Kokott (n 573) paras 17-18, 30).

574 See 1.4.3 The Relationship to Sovereign Equality, 46f.

575 Art 1(3) UN Charter, reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

576 Art 2(1) in connection with Art 1(3) UN Charter (n 375), reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

577 n 126; n 175. The following statement would thus be turned on its head: 'Sovereign equality means non-subordination to other States, it by no means excludes subordination to international law' (Kokott (n 573) para 28). Some have therefore argued that prolonged occupations or those which factually apprehend territory should be considered illegal (Orna Ben-Naftali, Aeyal M Gross,

of the purposes of the Charter.[578] Recall that the prohibition of the use of force is powerless against occupation and the inevitable application of occupation law.[579] The Charter therefore must have another remedy installed against occupation.[580]

Chapter XI contains the obligation to gradually retract military authority, until the occupation is completely dissolved and equality is restored.[581] Chapter XI is the remedy against occupation and the vital safeguard for equality.[582] The obligation to retract the occupation is decisively aided by the economic obligations which the occupant faces under Chapter XI.[583] In the light of equality as the principle in pursuit of the purposes of the Charter, the obligations of Chapter XI must accordingly be understood to apply to all situations of occupation and not just to a historic set of colonies.[584] The term 'not yet attained a full measure

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and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 551, 556, 608).

578 See 5 Concluding Summary of Part I, 93ff. cf also n 558.

579 n 143; n 145.

580 cf n 560. After all, sovereign equality is 'the first principle of the Charter (...) from which all the rest flows' (Abi-Saab (n 532) 257).

581 n 544; n 546. Chapter XI thus achieves what has been requested from the law of belligerent occupation, namely that it would draw 'a firm line between wartime occupation and any pretension to the acquisition of a definitive territorial title through unilateral annexation' and that it would emphasise 'the purely provisional character of belligerent occupation' (See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (vol 2 – The Law of Armed Conflict, Stevens & Sons Limited 1968) 163).

582 'The normal order of affairs is based on the principle of sovereign equality between states that are, at least to some extent, presumed to be founded on the ideas of self-government and self-determination. The severance of the link between sovereignty and effective control, and life under foreign rule, constitute an exceptional state of affairs (...) it is to be managed so as to ensure return to normalcy' (Ben-Naftali, Gross, and Michaeli (n 577) 606. See also Gilles Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 94).

583 See 7 The Economic Regime of Chapter XI, Article 73, 145ff.
The disincentive against occupation as presented by the economic regime of Chapter XI may satisfy the notion that 'The time has come for the international community to promulgate clear time limitations for the duration of an occupation' (Ben-Naftali, Gross, and Michaeli (n 577) 613.

584 This view of Chapter XI is also in line with the observation that 'The great political, economic, social and scientific changes that have occurred in the world

of self-government' must be read as an emphasis that the obligations of Chapter XI persist until the occupation has ceased entirely.[585]

6.6.4 Historic Interpretation

Historic interpretation supports the argument that Chapter XI should apply not only to a closed catalogue of historic colonies but to all military occupations.

Having arrived at a meaning of the term 'not yet attained a full measure of self-government' through interpretation of the term in its context and in the light of the object and purpose of the treaty,[586] that meaning may now be confirmed by recourse to the preparatory work and the circumstances of the conclusion of the Charter.[587]

Taking recourse to the preparatory work is controversial in international law.[588] The preparatory work for the Charter did not determine an

since the adoption of the Charter have further emphasized the vital importance of the purposes and principles of the United Nations and of their application to present-day conditions' (Resolution on Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, GA Res 1815(XVII) (18 December 1962) UN Doc A/RES/1815(XVII) (1962)).

585 n 549. The same conclusion must be arrived at if one takes the statement that Chapter XI applies to all situations whereby 'one territory is subjected to (...) another State, without the status of equal rights, or without its free decision' (Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 369) para 1. See also n 548.

586 n 549; 6.6.3.1 In the Light of Peace, 132ff; 6.6.3.2 In the Light of Sovereign Equality, 137ff.

587 Article 32 VCLT (n 455) provides that 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.'

588 See Fassbender (n 524) 132-33. The ICJ held in 2014 that 'The Court does not need, in principle, to resort to supplementary means of interpretation, such as the *travaux préparatoires (...)*' (ICJ, *Maritime Dispute (Peru v Chile)* (Judgement) (2014) para 66. Recourse to the *travaux préparatoires* is at best a supplementary means of interpretation (Sinclair (n 539) 141).
It was even held with respect to international organizations that 'their purpose constitutes an element of such predominant weight for the exercise of interpre-

exclusive set of historic colonies to fall under Chapter XI.[589] The drafters did therefore not explicitly exclude any present or future situation of occupation from the realm of Chapter XI, even if they may have focused on the historic colonies existing at the time.[590]

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tation that the will of the parties is derogated to an almost subsidiary means of interpretation' (Ress (n 534) para 1. See also n 551). And finally, 'An interpretation based on the original will or intent of the constitutional founders is inappropriate. Such an approach would unduly subject the present and future to whatever a bygone generation declared to be the law, and this would impede the solution of contemporary problems' (Fassbender (n 524) 131). It is further unclear how much or how little *travaux préparatoires* do in fact reveal about the true intentions of the drafters (See Sinclair (n 539) 142. See also n 539).

589 In fact, the records of the San Francisco Conference do not shed much light on what the drafters of the Charter had in mind (Goodrich, Hambro, and Simons (n 384) 458-59). The drafting history contains such ambiguous statements as 'The whole field of dependent peoples living in dependent territories is now covered. (Chapter XI) deals with that larger extension, and it puts countries, *especially* colonial powers who have colonies to look after, under certain obligations (...)' (emphasis added) (San Francisco Conference vols XVII-XXII (n 371) vol XVIII, 127). The question of the exact meaning of the term 'non-self-governing territories' was raised during a discussion in a sub-committee appointed by the Fourth Committee of the General Assembly ((Doc A/C.4/68, 3) cited from Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 556 n 6.). The report of the sub-committee contains the following statements: The Indian representative was of the opinion that the formulation 'not yet attained a full measure of self-government' is sufficiently clear and that Chapter XI applies to any territories administered by a Member of the United Nations which do not enjoy the same measure of self-government as the metropolitan area of that Member. The representative of the Soviet Union proposed that the definition should be: all territories the people of which have not yet reached self-government and do not possess the right to elect local self-governing bodies, or to take part in the legislative bodies of the governing country on the same terms as the people of the governing country (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 556 n 6). All of these definitions would encompass occupied territories. The representatives from Cuba, France, Australia and the UK were against a formal definition. It was, therefore, agreed to note the territories enumerated as subject to Chapter XI but not to attempt a definition for the time being (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 556 n 6).

590 'When interpreting treaties - in particular, the Charter of the United Nations - (it is necessary) to look ahead, that is to have regard to the new conditions, and

With respect to the circumstances of its conclusion, it must be recalled that the Charter was drafted during and in the aftermath of World War II.[591] The Charter makes express reference to the World Wars when it states in its preamble, 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind:'[592] The expansion of territory by military occupation was a decisive feature of the World Wars.[593] The aim of the Charter was to avoid the recurrence of such wars,[594] and therefore also the recurrence of occupation.[595] Chapter XI should therefore be read to remedy all military occupations and not just historic colonialism.[596]

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not to look back, or have recourse to *travaux préparatoires*' (ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) (1950) Dissenting opinion of Judge Alvarez 18). See also n 539.

591 Chapter XI itself was drafted under the heavy influence of the experiences of WWII as most impressively recalled by the delegate of the Philippines at San Francisco, saying that 'The death of millions is in these words' (San Francisco Conference vols I-XVI (n 407), vol VIII, 140). Daniel-Erasmus Khan and Wilhelm Grewe, 'Drafting History' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I paras 1-3.

592 '(This) phrase sets forth the United Nations' principle raison d'Être (and) places the Charter in its historical context' (Cot (n 371) para 23). The wording was accepted by all delegates from the outset (Wolfrum, 'Preamble' (n 556) para 5). 'The founders (were) primarily concerned with maintaining international peace and security' (Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 371).

593 See generally Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Carnegie Endowment for International Peace 1944). Note that the Hague Regulations, which contain the definition of occupation (n 2) had been signed and ratified by Germany and Japan before the World Wars.

594 Wolfrum, 'Preamble' (n 556) para 5.

595 It should be noted that the occupations of enemy territories by the Allies, shortly after they concluded the Charter, were exempt from the application of Chapter XI by Article 107 UN Charter (n 375) (See Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 369) 805ff). The practice by the founding Member States to disregard Chapter XI with respect to these enemy territories (See eg GA Res 66(I) (n 378) accordingly does not contradict the argument submitted here that the stated mission of the Charter to prevent war must include the prevention of military occupation.

596 n 538.

A historic interpretation thus confirms the view that the term 'not yet attained a full measure of self-government' must be read to underline that the obligations of Chapter XI persist until the occupation has ceased entirely.[597]

597 n 549; 6.6.3.1 In the Light of Peace, 132ff; 6.6.3.2 In the Light of Sovereign Equality, 137ff.

7 The Economic Regime of Chapter XI, Article 73

7.1 Four Main Elements of Article 73 Pertinent to the Economy

Chapter XI regulates the economic activities of an occupant in an NSGT via rights granted to the inhabitants and obligations imposed upon the occupant.[598] Suggested here are four elements of Article 73 of Chapter XI that regulate the economic conduct of an occupant.[599]

> **UN Charter**
>
> **Article 73**
>
> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government **recognize the principle that the interests of the inhabitants of these territories are paramount**, and **accept as a sacred trust the obligation to promote to the utmost**, within the system of international

598 The obligations are binding (n 369). They may be called 'development aims' but this is without prejudice to their character as obligations (Ulrich Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 para 19).

599 cf Thomas D Grant, 'Extending Decolonization: How the United Nations Might Have Addressed Kosovo' (1999) 28 Georgia Journal of International and Comparative Law 9 30-31; Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, SC (12 February 2002) UN Doc S/2002/161 (2002) para 25.

> peace and security established by the present Charter, **the well-being of the inhabitants of these territories**, and, **to this end:**
> (a) **to ensure, with due respect for the culture of the peoples concerned**, their political, **economic**, social, and educational **advancement** (...)
> (...)
> (d) **to promote constructive measures of development** (...)
> (...)[600]

The first element is the principle that the interests of the inhabitants are paramount.[601] The second element is the obligation to promote to the utmost the well-being of the inhabitants.[602] The third and fourth elements are the conditions under which well-being must be pursued.[603] This emanates from the fact that the subparagraphs which contain the third and fourth elements (Art 73(a) and (d)) are introduced by the formula 'to this end', which relates back to the obligation to promote well-being. The third element is the obligation to ensure the economic advancement of the peoples of the territory with due respect for their culture. The fourth

600 Emphasis added. Art 73 Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945) reprinted in 6.1 Chapter XI, Articles 73 and 74, 99.

601 The formulation 'to recognise the principle' states a binding obligation, just like the rest of Article 73 does (Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (Library of World Affairs no 11, FA Praeger 1951) 553-54, n 2); 6.1 Chapter XI, Articles 73 and 74, 99ff.

602 The well-being of the inhabitants had already been the primary objective under Article 22 of the Covenant of the League of Nations (28 April 1919) (entered into force 10 January 1920), (expired 9 April, 1946) concerning Mandates (Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul Ltd 1951) 142). Likewise, the formulation 'sacred trust' was already present in Article 22 of the League of Nations Covenant (n 602), but in Chapter XI of the Charter is more explicitly determined as an 'obligation' (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 601) 557. See also UN Legal Counsel Opinion (n 599) para 7).

603 See Resolution on Non-Self-Governing Peoples, GA Res 9 (I) (9 February 1946) UN Doc A/RES/9/(I) (1946); Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 601) 554, 559; Leland Goodrich, Edvard Hambro, and Anne Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia University Press 1969) 448.

element is the obligation to promote constructive measures of development.

The four elements are abbreviated in the following subtitles as: 'the interests of the inhabitants', 'well-being of the inhabitants', 'economic advancement' and 'constructive measures of development'.

7.2 'The Interests of the Inhabitants'

Any economic activity by the occupant with respect to the occupied territory must be in the interest of the inhabitants of the territory. What lies in their interest is determined by the inhabitants themselves.[604]

Article 73 obliges the administrator to 'recognize the principle that the interests of the inhabitants of these territories are paramount (...)'.[605] To meet the interests of the inhabitants is thus the overarching obligation that defines all economic activity of the occupant under Chapter XI.[606] Decisively, it is not the interests of the occupant but the interests of the inhabitants which are paramount.[607] All economic interests gained from the territory belong to the inhabitants and not to the occupant.[608] Upon occupation, the occupant loses his existing direct or indirect interests in the territory, in favour of the inhabitants.[609]

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604 Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 69.

605 Art 73 UN Charter (n 600) reprinted in 7.1 Four Main Elements of Article 73 Pertinent to the Economy, 145.

606 '[A]ny economic or other activity that has a negative impact on the interests of the peoples (...) is contrary to the purposes and principles of the Charter' (Resolution on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, GA Res 65/109 (10 December 2010) UN Doc A/RES/65/109 (2010)).

607 'Article 73 of the UN Charter emphasizes the *priority* of the interests of the inhabitants' (Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 598) (emphasis added) para 1. See also Documents of the United Nations Conference on International Organization, San Francisco, 1945, United Nations Information Organizations (1945) vols I-XVI, vol VIII, 130.

608 UN Legal Counsel Opinion (n 599) para 25.

609 n 607. See also Resolution on Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and

Interests are not only of an immediately tangible nature, such as the proceeds from the exploitation of natural resources.[610] Instead, interests are all advantages accruing from the use of the territory. An advantage accrues not only from profits, but also where the occupant transforms existing industries or the entire economy to accord with his own economic vision. Even a transformation that slows economic growth, such as for political, religious or other reasons, is an emanation of the interest of the occupant. All such changes to the economic status quo must per Chapter XI be in the interest of the inhabitants and not of the occupant.[611] The interests of the inhabitants must be determined by ballot.[612] This is warranted from a contemporary interpretation of the term 'interests.'[613]

Peoples, GA Res 2621(XXV) (12 October 1970) UN Doc A/RES/2621(XXV) (1970) para 3(4).

610 The General Assembly speaks of 'the need to utilize (natural) resources for the benefit of the peoples of the Territories' (Resolution on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the specialized agencies and the international institutions associated with the United Nations, GA Res 65/110 (10 December 2010) UN Doc A/RES/65/110 (2010) para 10.

611 n 607.

612 Chapter XI as portrayed here is thus in stark contrast to occupation law, as expressed by the statement that 'The government of an occupied territory by the occupant is not the same as a State's ordinary government of its own territory: a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population' (John H Jackson, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 Israel Yearbook on Human Rights 104, 116; Danio Campanelli, 'The Law of Military Occupation Put to the Test of Human Rights Law' (2008) 90(871) International Review of the Red Cross 653, 667). Under occupation law, 'the authority of the occupying power is based on a balancing act between the interests of the occupied state and its population, on the one hand (...) and the interests of the occupying power and its military, on the other hand' (Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill | Nijhoff 2018) 136.

613 In the early days of the Charter, there was still a view that the competence to decide what are the interests of the inhabitants vests 'in the first place' with the administering power (Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 601) 557). This view is diametrically opposed by any reading of the term 'interest of the inhabitants' and does not even depend upon the emergence of a right to democratic governance as a rule of international law applicable between the parties in the sense of Article 31(3)(c) Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331. See Gregory

To hold a ballot is no practical obstacle for an occupant, since he already exercises effective control in the territory.[614] The electorate encompasses all inhabitants, since Article 73 speaks of 'the interests of the inhabitants' of the territory and not only of individual groups or peoples.[615] Not included under the term 'inhabitants' is the population of the occupying State that was transferred into the occupied territory, since such transfer violates international law.[616]

The inhabitants must approve all new economic activity that the occupant wants to undertake, for these potentially grant him an interest.[617] They must equally approve all new legislation to be installed by the occupant.[618] Even if the existing laws of the territory allow a particular economic activity, a ballot must still be held where these laws grant interests

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H Fox, 'Democracy, Right to, International Protection' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 4-5, 37; Daniel Thürer and Thomas Burri, 'Self-Determination' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) 33, for the development of such a right to democratic governance in international law).

614 1.4.1 Instances of Authority, 43ff.

615 See Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2002) 56-57; Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2018) 242.
Finding the eligible inhabitants is much less difficult than determining the constituent people for the exercise of the right to self-determination (cf n 76).

616 The Fourth Geneva Convention requests 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' (Article 49(6) Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War (12 August 1949) (entered into force 21 October 1950) 75 UNTS 287). The provision leaves little room for interpretation and does not provide for exceptions (Christian Tomuschat, 'Prohibition of Settlements' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 20). Such population transfers further constitute a war crime per Article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court (17 July 1998) (entered into force 1 July 2002) 2187 UNTS 3.

617 cf n 607.

618 See 3.1.2 New Legislation and Existing Laws, 64ff, regarding the capacity of the occupant to introduce new legislation.

to the occupant instead of exclusively to the inhabitants.[619] Otherwise, an occupant could use a proxy to change the law prior to the occupation or during occupation and without the support of the inhabitants at large. Likewise, an international agreement between the occupied territory and the occupant is not without doubt in the interest of the inhabitants.[620] Agreements from which the occupant profits – directly or through third parties – are in his interest and not in the exclusive interest of the inhabitants.[621] Accordingly, they remain valid only if the inhabitants receive from the occupant all interests resulting from the continued application of the agreement or if they consent by vote that the agreement remain in force.[622]

Only in case of emergency may immediate economic measures be warranted before the inhabitants can be consulted.[623] This may be the case at the very beginning of an occupation, if following from hostilities,[624] when relief efforts can be assumed to be in the immediate interest of the inhabitants.[625]

7.3 'Well-Being of the Inhabitants'

An occupant must undertake economic activity but not at his own discretion.

The occupant has the obligation to promote to the utmost the well-being of the inhabitants.[626] The term 'well-being' has received a definition in the Charter. Besides Article 73 it appears in Article 55, where it

619 See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff, for the continuous application of laws in force in the territory.

620 See n 187, for the continuous application of international agreements in force in the territory.

621 n 607.

622 See also 8.1.3 Priority over the Interests of the Occupant from Foreign Direct Investment, 161; 8.3 Safeguarding of International Economic Ties per Article 74, 163ff; 9 Excursus: Maritime Zones, 169ff.

623 cf Art 55 GCIV (n 616).

624 See 6.5.1.1 Following Invasion, 114ff.

625 Relief measures and relief consignments are also allowed under occupation law (Arts 55, 59-62 GCIV (n 616); Art 69f Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) (entered into force 7 December 1978) 1125 UNTS 3.

626 Art 73 UN Charter.

stands for 'higher standards of living, full employment, and conditions of economic and social progress and development.'[627]

> **UN Charter**
>
> **Article 55**
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> (...)

The term 'well-being' accordingly implies some form of progress.[628] At the same time, the obligation to promote 'well-being' is subordinate to the interests of the inhabitants, which are 'paramount.'[629] Therefore, the occupant can maintain his pre-existing economic activities in the now occupied territory but the interests thus accrued must now go to the inhabitants.[630] The occupant must let the inhabitants proceed with their own economic endeavors and must not inhibit their capacity for any further progress.[631] By neglecting the existing economic foundation in the territory, including infrastructure, an occupant would jeopardize progress and thus the 'well-being' of the inhabitants.[632]

Since 'well-being' requires progress, the occupant also needs to undertake new economic activity. Under the Charter, the term 'well-being' is

627 Art 55(a) UN Charter (n 600).
628 Mohammed Bedjaoui, 'Chapitre XI: Declaration Relative aux Territoires Non Autonomes: Article 73' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Centre de Droit international de Nanterre, Economica 2005) vol II 1755.
629 n 607.
630 n 609.
631 This is in line with the idea that the well-being of the people, as a sacred trust of civilization, is essential to develop an international legal order based on fiduciary obligations (Evan J Criddle, 'The DoD Conception of the Law of Occupation' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014), 421).
632 cf n 171.

not receptive to the discretion of the occupant.[633] Per the Preamble of the Charter, the United Nations declare that they want progress – but together and in peace as good neighbours.[634] Accordingly, an occupant cannot decide for another State what progress is.[635] Per Article 55 of the Charter, 'well-being' requires that economic progress be accompanied by social progress.[636] Since the interests of the inhabitants are paramount, it is not the occupant, but the inhabitants who decide which economic measures qualify as social progress and thus satisfy their notion of 'well-being.'[637] Finally, the economic activity that an occupant may pursue in the NSGT must pay 'due respect for the culture of the peoples' and be 'constructive measures of development.'[638]

633 Recall that 'In truth, since the world has been the world, colonial enterprises of all places and races have been presented as philanthropic works intended to spread the benefits of civilization. Each epoch of man's adventure produces its myths, motivations, alibis and instruments of camouflage' (translated) (Bedjaoui (n 628) 1755).

634 The Preamble says: 'We the Peoples of the United Nations determined (...) to promote social progress and better standards of life in larger freedom – and for these ends – to practice tolerance and live together in peace with one another as good neighbours' (emphasis added) (Preamble UN Charter (n 600) reprinted in 6.6.3.1 In the Light of Peace, 132.

635 The danger of an arbitrary notion of 'well-being' is thus averted under the Charter, while it was prevalent in historic colonialism with its civilizing mission (Antony Anghie, 'Berlin West Africa Conference (1884–85)' in Petra Minnerop, Rüdiger Wolfrum, and Frauke Lachenmann (eds), *International Development Law: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2019) paras 3, 7; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 55-57).

636 Art 55(b) UN Charter.

637 n 607. See also Karl Doehring, 'Self-determination' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 13. Note that the term 'well-being' appears also in the Covenant of the League of Nations with respect to the treatment of Mandates but does not receive any qualification there, either in Article 22 or the remaining text, and may thus have been more open to discretion (League of Nations Covenant (n 602)).

638 7.1 Four Main Elements of Article 73 Pertinent to the Economy, 145ff.

7.4 'Economic Advancement with Due Respect for the Culture of the Peoples'

Any economic activity by the occupant must respect minorities in the territory and their economic way of life.

The pursuit of well-being demands economic activity in the interest of the people.[639] In addition, Article 73 demands that all economic advancement must respect the culture of the peoples.[640] Respecting the culture of the peoples is thus a condition for any economic measure taken by the occupant.[641] Respect for their culture forbids the suppression or economic marginalization of the existing means of support of a people in the name of economic advancement.[642] Land or resources must not be used in a way that displaces the traditional livelihood of a people.[643] Mere participation in the gains from an enforced economic transformation does not suffice, since the interests of the people remain paramount under Chapter XI.[644] Respect for the culture of the peoples is thus a matter of granting them economic freedom.[645] No economic advancement shall be to the detriment of the economic choices of a people.[646] The notion of 'due respect for the culture' therefore not only protects tradi-

639 n 628; n 607.

640 Art 73(a) UN Charter. Doehring (n 637) para 13.

641 Bentwich and Martin (n 602) 143. See 7.1 Four Main Elements of Article 73 Pertinent to the Economy, 145.

642 cf Article 27 International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171 and the relevant practice (Nigel Bankes, 'International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples' (2009-2010) 47 Alberta Law Review 457, 465-66, 476).

643 That Chapter XI should protect the arable land of the peoples of an NSGT was confirmed by the United States delegate at San Francisco (San Francisco Conference vols I-XVI (n 607), vol VIII, 619).

644 n 607. cf also Art 28 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (2007).

645 cf Arts 26, 27 Indigenous Peoples Declaration (n 644), which essentially promote full and effective participation in all matters that concern the peoples and their right to remain distinct and to pursue their own visions of economic and social development.

646 The General Assembly wants to 'ensure that all economic activities in those Territories are aimed at strengthening and diversifying their economies in the interest of their peoples, including the indigenous populations (...)' (GA Res 65/109 (n 606) para 13).

tional forms of subsistence against more profitable ones, but any form of economic life as chosen by the peoples under occupation.

The term 'peoples' is in the plural and so the occupant should not be free to act upon a majority decision of the inhabitants about which economic transformation lies in the interest of the majority alone.[647] The occupant is bound by the obligation to pay due respect for the culture of all the peoples concerned. A majority decision by the inhabitants therefore does not let the occupant dominate a minority people economically – alone or in concert with the majority.[648] Minority peoples should receive final say when their own economic culture is disproportionately affected. Only in case of emergency do the immediate interests of the inhabitants prevail and economic relief measures may be taken at the expense of a minority.[649]

7.5 'Constructive Measures of Development'

The occupant is bound to adhere to sustainable development in the NSGT. The inhabitants decide what kind of economic measures this warrants.

Any economic action taken by the occupant in the pursuit of the well-being of the inhabitants must promote constructive measures of development.[650] The term 'development' contains much tension between notions of economic growth and the quality of life for humanity and its environment.[651] Similar tension is reflected by the term 'well-being' per

647 See 7.2 'The Interests of the Inhabitants', 147ff.

648 See James Crawford, *Democracy in International Law: Inaugural Lecture* (Cambridge University Press 1993) 5. It should be kept in mind that 'the protection and promotion of culture is a general interest of the international community as a whole' (Tullio Scovazzi, 'Culture' in Simon Chesterman, David M Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019), 320).

649 See n 623.

650 Art 73(d) UN Charter. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (n 601) 554. Constructive measures of development are a focal point of the social, economic and cultural objectives under Article 73 (Bedjaoui (n 628) 1756).

651 See generally Daniel D Bradlow, 'Development Decision-Making and the Content of International Development Law' (2004) 27 Boston College International and Comparative Law Review 195. Some seem to equate development

Article 55 of the Charter, which allows economic progress only together with social progress.[652] The addition of the term 'constructive' to the term 'development' dissolves this tension and moves the meaning away from the realm of pure growth towards sustainability.[653] The exploitation and therefore depletion of non-renewable resources is hardly sustainable or 'constructive development', but rather destructive, even in the presence of immediate profits.[654] Economic operations that existed prior to an occupation may continue as mandated by the pursuit of well-being, even if

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with growth (See Richard A Posner, 'Creating a Legal Framework for Economic Development' (1998) 13(1) World Bank Research Observer 1, 1).

652 Art 55 UN Charter (n 600) reprinted in 7.3 'Well-Being of the Inhabitants', 150.

653 See Onita Das, *Environmental Protection, Security and Armed Conflict* (Edward Elgar Publishing 2013) 8-9, 19-21. The General Assembly 'requests the administering Power to cooperate in establishing programmes for the sustainable development of the economic activities and enterprises of the Territory' (Resolution on Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, Saint Helena, the Turks and Caicos Islands and the United States Virgin Islands, GA Res 64/104A-B (10 December 2009) UN Doc A/RES/64/104A-B (2009) B VI para 3). Note also that 'development' was already required for the treatment of Mandates but did not receive the qualification of 'constructive' under Article 22 of the League of Nations Covenant (n 602) (cf also n 637).

654 The General Assembly confirms the right of the peoples of an NSGT to the 'enjoyment of their natural resources and their right to dispose of those resources in their best interest' and is concerned about the 'exploitation to the detriment of their interests, and in such a way as to deprive them of their right to dispose of those resources' (Resolution on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, GA Res 75/103 (18 December 2020) UN Doc A/RES/75/103 (2020)). Chapter XI thus essentially confirms the application of PSNR to NSGTs (cf 320. See ICJ, *Case Concerning East Timor (Portugal v Australia)* (Judgement) (1995) Dissenting opinion Judge Weeramantry 180-81). The advantage of Chapter XI over the application of PSNR directly lies in the fact that under PSNR alone it is unclear if the rights apply to the State or to the people, or both, and a resulting conflict of interest may be to the detriment of the people (See Richard N Kiwanuka, 'The Meaning of People in the African Charter on Human and Peoples' Rights Notes and Comments' (1988) 82 American Journal of International Law 80, 97). Chapter XI thus makes the direct link between armed conflicts and natural resources, which has been missing in international law (See Marco Pertile, 'The Changing Environment and Emerging Resource Conflicts' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1094).

they are potentially unsustainable.[655] Where they entail the exploitation of non-renewable resources, they must generate proceeds and thus at least some form of 'development' rather than mere depletion.[656] All proceeds must be passed on to the inhabitants.[657] With respect to *new* economic activity, it is the inhabitants who decide what they want.[658] Therefore, the inhabitants decide what sustainability means to them until that term has received a legally binding definition in international law.[659] The inhabitants can thus approve also such economic measures which the occupant suggests as progress but which are not sustainable. In this case, however, the inhabitants must be made aware of the risks involved beforehand, otherwise the obligation 'to promote constructive measures of development' is by no means fulfilled.[660] Only in case of emergency may an occupant deplete resources for relief purposes (such as oil or timber for heating or fish for food) without consulting the inhabitants.[661]

655 See 7.3 'Well-Being of the Inhabitants', 150ff.

656 This is already required under occupation law (See Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 232; Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 405).

657 n 609.

658 n 637.

659 Chapter XI thus achieves the application of an individual notion of sustainability, thus circumventing the problem of norm creation which the principle of sustainability still faces (See John Martin Gillroy, 'Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence' (2006) 42(1) Stanford Journal of International Law 1, 2).

660 cf Art 28 Indigenous Peoples Declaration (n 644). See Laurence Boisson de Chazournes and Makane M Mbengue, 'The Principles of Precaution and Sustainability' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar Publishing 2017) 622.

661 n 623.

8 The Relationship of Chapter XI to Other International Law Pertinent to the Economy

8.1 Priority of Chapter XI

8.1.1 Priority over Occupation Law

Chapter XI enjoys priority over occupation law.

The economic rights of an occupant under occupation law are in conflict with his obligations under Chapter XI. Per occupation law the occupant enjoys his own economic interests,[662] while per Chapter XI, the interests of the inhabitants are paramount.[663] The conflict was arguably solved, since Chapter XI has put its own set of obligations as 'paramount' in front of the prior 'responsibilities for the administration' from traditional occupation law.[664] It is thus by the wording of Article 73 itself that the obligations from Chapter XI trump the prior economic rights of an occupant under occupation law.[665]

662 3 The Applicable Law Pertinent to the Economy, 59ff.
663 n 607.
664 See n 607.
665 n 425. This result should also be arrived at when applying a value judgment that considers the UN Charter and ia its principle of equality as the overarching legal order (n 567; n 580. See Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17(3) European Journal of International Law 483, 498).

If it were assumed, however, that Article 73 did not by itself solve the conflict between Chapter XI and the economic rights of the occupant from occupation law, it would need to be established which regime prevails. It is unclear if there exists a hierarchy of norms in international law.[666] Chapter XI, as treaty law, is therefore at least on the same level as the rules of occupation law stemming from the Hague Regulations, the Geneva Conventions and customary international law rules of occupation law.[667] A conflict between Chapter XI and occupation law should thus be solved by the conflict rule contained in Article 103 of the Charter.[668]

> **UN Charter**
>
> **Article 103**
>
> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 speaks of 'any other international agreement'. The Charter thus clearly takes priority over treaty-based occupation law stemming from the Hague Regulations and the Geneva Conventions.[669] If there is no hierarchy in international law, customary international law could

666 See Erika De Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 626. See also Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (2006) 38 George Washington International Law Review 33, 96, 105, for a critical appraisal of the view expressed by the *Institut de Droit International* that treaties prevail over customary law.

667 Note also that the customary rules of occupation law pertinent to the economy do not influence the interpretation of Chapter XI by way of Article 31(3)(c) Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331, particularly because those rules of custom are older than the Charter (See n 674; Sands (n 666), 102).

668 Note that if it is assumed that Article 103 of the Charter itself presents a hierarchy of sources, instead of a conflict norm, any further elaboration can be spared in favor of Chapter XI (See De Wet (n 666) 635).

669 Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press 2014) 319.

theoretically come into play here, again.[670] But customary international law, too, should be regarded as a form of agreement, and thus Article 103 prevails.[671] Specifically, ICRC Rule 51 is an emanation of the alignment of States with the treaty law of the Hague Regulations and thus reflects that agreement.[672] Similarly, the question of *lex temporis*[673] is no obstacle to the priority of the 1945 UN Charter over the 1996 ICRC Rule 51 of customary international humanitarian law which represents the rules of the earlier 1927 Hague Regulations.[674] Chapter XI of the Charter thus prevails per Article 103 over any conflicting rules of occupation law.[675]

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670 cf however n 668.

671 See Jean-Pierre Cot, 'United Nations Charter' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 76; Zdzislaw Galicki, 'Hierarchy in International Law within the Context of Its Fragmentation' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill | Nijhoff 2008) 58.
The same should be true of *ius cogens*, which is 'necessarily of a consensual character' (Georg Schwarzenberger, 'The Problem of International Constitutional Law in International Judicial Perspective' in Jost Delbrück, Ipsen Knut, and Dietrich Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976* (Duncker & Humblot 1975) 241). The issue is moot, however, for the present purpose, since the economic rights of an occupant under occupation law are not part of *ius cogens* (cf Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Oxford University Press 2015) 81. See also David J Scheffer, 'Beyond Occupation Law' (2003) 97(4) American Journal of International Law 842, 852).

672 See Jean Marie Henckaerts and others, *Customary International Humanitarian Law* (vol 1, Cambridge University Press 2005) 178-181.

673 Art 30 VCLT (n 667).

674 See n 672; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (Library of World Affairs no 11, FA Praeger 1951) 113.
In fact, Article 103 may even establish priority over later agreements (Pulkowski (n 669) 139).

675 'The generality of the principle of superiority of Charter obligations over any other obligations, past or future, confers to the Charter a normative superiority' (Cot (n 671) para 76. See also De Wet (n 666) 636).

8.1.2 Priority over Measures of UN Administration

The obligations under Chapter XI prevail over conflicting Security Council Resolutions.

The competence of the Security Council to pass binding resolutions does not extend to rendering provisions of the Charter void.[676] The Security Council equally has no capacity to make authoritative interpretations of Chapter XI.[677]

The obligations of an occupant under Chapter XI can thus not be overruled by measures prescribed for the territory by the Security Council.[678] Recall also that it is immaterial for the purpose of applying Chapter XI if UN administration of territory is seen as a *sui generis* form or as ordinary military occupation.[679] The Security Council is unable to dictate economic activity in a territory under coercion, due to Chapter XI.[680] The danger of arbitrariness accompanying Security Council resolutions

676 Article 25 of the Charter provides that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with the present Charter*' (emphasis added). The Charter thus imposes built-in limits on the Security Council (Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43(1) The International and Comparative Law Quarterly 55, 90; Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017) 375. See also Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Legal Aspects of International Organizations, Vol 51, Brill | Nijhoff 2009) 125).

677 See Philip Kunig, 'United Nations Charter, Interpretation of' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 7.

678 Or by the General Assembly, for that matter (n 296).

679 n 428. Notably, the General Assembly treated Namibia as an NSGT under Chapter XI until its independence in 1990, having established the UN as administrator there in 1966 and having called Namibia occupied (Resolution on Question of South West Africa, GA Res 2248 (19 May 1967) UN Doc A/RES/2248 (1967); Resolution on Situation in Namibia resulting from the illegal occupation of the Territory by South Africa, GA Res 41/39A (20 November 1986) UN Doc A/RES/41/39A (1986); Resolution on Dissolution of the United Nations Council for Namibia, GA Res 44/243A (11 September 1990) UN Doc A/RES/44/243A (1990)).

680 Without the application of Chapter XI to military occupation, there would be allowed what has been called 'transformative occupation', whereby a mandate by the Security Council could 'modify the legal regime applicable to a belligerent occupation' (Michael Bothe, 'The Administration of Occupied Territory' in

can thus be averted by the application of Chapter XI to military occupations.[681]

8.1.3 Priority over the Interests of the Occupant from Foreign Direct Investment

Chapter XI takes precedence over any foreign investments in the NSGT that grant the occupant an interest.

Per Article 103 of the Charter, Chapter XI enjoys priority over a conflicting investment agreement between the occupant and the NSGT.[682] In fact, any investment under an agreement with the occupant or third States that grants the occupant an interest in the territory is suspended, since such interest of the occupant is conflicting with the interests of the inhabitants, which are paramount per Chapter XI.[683] Only if the inhabitants agree that the occupant shall not be enjoined from the direct or indirect benefits of an investment do his interests under an investment agreement persist under Chapter XI.[684] An occupant can thus not procure new foreign investments, pass pertinent legislation or enter into investment agreements without the consent of the inhabitants.[685]

Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 117.

681 cf n 299. Recall that the Security Council has in the past allowed economic reconstruction and therefore possibly 'the creation of new institutions in the economic sphere that would *change the nature of the economy*' (emphasis added) (Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 411, referring to Security Council Resolution 1483, SC Res 1483 (22 May 2003) UN Doc S/RES/1483 (2003). See also Nehal Bhuta, 'The Antinomies of Transformative Occupation' (2005) 16(4) The European Journal of International Law 721, 735).

682 Art 103 Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945) reprinted in 8.1.1 Priority over Occupation Law, 157.

683 8.1.1 Priority over Occupation Law, 157ff.

684 n 621.

685 Note that the General Assembly approves of 'foreign economic investment, when undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes (...)' (Resolution on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, GA Res 65/109 (10 December 2010) UN Doc A/RES/65/109 (2010)). Under Chapter XI, an occupant can thus no longer

8.2 *Survival of Human Rights and PSNR*

Human Rights and the human rights aspect of PSNR continue to apply under Chapter XI.

The application of human rights is warranted under Chapter XI as 'interests of the inhabitants',[686] since it is the classic function of international human rights law to serve the interests of the inhabitants opposite their governing authorities.[687] Meanwhile, the human rights aspect of PSNR[688] is warranted by the demands of 'constructive measures of development'.[689] Further, the occupant must promote to the utmost the 'well-being' of the inhabitants and by 'well-being' the Charter understands also 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[690] At the same time no economic measures can be taken based on an interpretation of human rights that is not also in the interest of the

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transform the investment environment, as happened in practice in Iraq under the guise of occupation law (See Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661, 679; Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100(3) American Journal of International Law 580, 615). Chapter XI thus enables what the General Assembly demanded with the Charter of Economic Rights and Duties of States that 'No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force' (Art 16(2) Charter of Economic Rights and Duties of States, GA Res 3281(XXIX) (12 December 1974) UN Doc A/RES/3281 (1974)).

686 7.2 'The Interests of the Inhabitants', 147ff.

687 See Amy Gutmann, 'Introduction' in Michael Ignatieff (ed), *Human Rights as Politics and Idolatry* (Princeton University Press 2001) ix-x; Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (n 685) 590.

688 n 321.

689 n 654.

690 Art 55(c) reprinted in 7.3 'Well-Being of the Inhabitants', 150. In this way, the obligation to observe human rights is directly imported into Chapter XI despite the absence of a more direct reference to human rights in Article 73 itself (cf however Ulrich Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 para 2).

inhabitants.[691] It is, therefore, immaterial for the application of human rights in the interest of an NSGT, if either human rights or the Charter would normally enjoy priority.[692]

8.3 Safeguarding of International Economic Ties per Article 74

Per Article 74 of Chapter XI, an NSGT retains the benefits from treaties of international economic law, such as international trade or investment agreements.

691 n 621. The interest of the inhabitants prevents that various interpretations of human rights are being used to expand the economic leeway of the occupant available under occupation law (See eg Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (n 685) 622; Yaël Ronen, 'The DoD Conception of the Law of Occupation' in Michael A Newton (ed), *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press 2019) 332; Sylvain Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property' (2008) 90(871) International Review of the Red Cross 629, 651. See also the debate at Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 64-67, regarding application of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) (entered into force 3 January 1976) 993 UNTS 3 to occupied territory).

692 cf n 671. Chapter XI may thus answer the call that 'Addressing the issue of the applicability of human rights law in occupied territories is therefore of the utmost importance at present' (ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 691) 54). But Chapter XI aims for the termination of occupation and not just for the application of human rights (n 544; 546). In this vein it may be recalled that 'It is far wiser to acknowledge that violations of human rights are a necessary consequence of military occupation and to address ways of ending this situation so that the cycle of violence is replaced by the increasingly difficult, but increasingly necessary, quest for peace and security' (Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, GA A/57/366 (29 August 2002) UN Doc A/57/366 (2002) 4).

> **UN Charter**
>
> **Article 74**
>
> Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

The term 'policy' should include any practice by the occupant regarding the performance of rights and obligations resulting from international agreements. 'Good-neighbourliness' obliges the occupant to reconcile his own interests with those of others.[693] He must do so as much on his own ('metropolitan') territory as on the territory of the NSGT.[694] More specifically, the occupant must take due account of 'the interests and well-being of the rest of the world, in social, economic, and commercial matters'.[695] Accordingly, an occupant cannot economically isolate an oc-

693 See Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 690) Article 74 para 2.

694 The principle of good-neighbourliness precludes discrimination (Norman Bentwich and Andrew Martin, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul Ltd 1951) 145). Recall that 'the principle of non-discrimination in international trade (...) has been central to the post-Second World War trading system' (John H Jackson, 'Equality and Discrimination in International Economic Law (XI): The General Agreement on Tariffs and Trade' (1983) 25 The Year Book of World Affairs 224, 239).

695 It could thus be argued that the principle of good-neighbourliness mandates not only good relations, but equal treatment in commercial matters, as embodied by the principles of non-discrimination and national treatment (See Aziz Hasbi, 'Chapitre XI: Declaration Relative aux Territoires Non Autonomes: Article 74' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Centre de Droit international de Nanterre, Economica 2005) vol II, 1780-81).

cupied territory.[696] Instead, an occupant must allow the NSGT to retain the benefits from its international agreements with third States.[697]

In contrast to Article 73, the obligations of Article 74 arguably apply not only to the occupant but to all UN Members regarding 'their policy in respect of the territories to which this Chapter applies.[698] Accordingly, all UN Members must maintain their international economic law agreements in force with an NSGT. No UN Member should reduce the benefits enjoyed by an NSGT under an agreement in force between them by invoking any potentially lesser legal ties that may exist between the occupant and the NSGT or by invoking the fact of occupation itself.

Meanwhile, the interests of the inhabitants remain paramount under Chapter XI.[699] Accordingly, the inhabitants must be the exclusive recipients of the benefits from the economic agreements, unless otherwise approved by them.[700] If the occupant wants to grant to the territory international economic relations that it did not previously have, the inhabitants must affirm if those are in their interest. It should not be possible under Article 74 to impose economic ties onto a territory against the will of the inhabitants.

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696 'The Article was, apparently, directed in particular against such policies as the closed-door in commercial relations, discriminatory immigration restrictions, and exclusion of or discrimination against nationals of countries other than the administering state in the granting of concessions' (Leland Goodrich, Edvard Hambro, and Anne Simons, *Charter of the United Nations: Commentary and Documents* (3rd edn, Columbia University Press 1969) 463. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 690) Article 74 para 2). The same was already true for Mandates under Article 22 of the Covenant of the League of Nations (28 April 1919) (entered into force 10 January 1920), (expired 9 April, 1946). There had to be equal opportunity for the trade and enterprise of the subjects of all Members of the League and no preference or discrimination towards the subjects of the mandatory power (Bentwich and Martin (n 694) 142).

697 n 621.

698 This follows *e contrario* from a comparison with Article 73 which refers to 'Members of the United Nations which have or assume responsibilities for the administration', while Article 74 refers only to 'Members of the United Nations' (See n 425. See also Goodrich, Hambro, and Simons (n 696) 463). In this respect it is also worth noting that Article 74 was adopted without discussion at San Francisco (Goodrich, Hambro, and Simons (n 696) 463).

699 n 607.

700 n 621.

8.4 Reconciliation with the Munitions of War Rule

An occupant retains his right to seize or destroy military capacity, despite the contrary interests of the inhabitants under Chapter XI.

Occupation law contains a right of the occupant to seize or destroy munitions of war.[701] This right naturally collides with the interests of the inhabitants under Chapter XI.[702] Chapter XI would normally prevail in a conflict with occupation law.[703] However, the destruction of military capacity during war is a necessary attribute of self-defence.[704] Self-defence, in turn, is a right granted by Article 51 of the Charter. A conflict thus occurs between Article 51 and Chapter XI of the Charter.[705] The conflict is solved by Article 51 itself, which provides that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence (...)'.[706] The confiscation or destruction of munitions of war should thus be allowed in an NSGT even against the interests of the inhabitants.

The choice of items which may be confiscated or destroyed during occupation should be guided by the capacity of the occupied territory to launch an attack on the metropolitan territory of the occupant.[707] This would be in line with the purpose of self-defence which may only be directed against 'armed attack'.[708]

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701 3.3.3 Confiscation of Munitions of War, 73f.

702 n 607.

703 8.1.1 Priority over Occupation Law, 157ff.

704 See David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24(1) European Journal of International Law 235, 267, 270, with reference to proportionality.

705 Note that for this constellation to be considered a conflict of norms, it must be assumed that the aspect of self-defence as proposed here reaches into occupation under considerations of necessity and proportionality (See Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 87).

706 Art 51 UN Charter (n 682) reprinted in 2.1 The Legality of Occupation, 51.

707 See Travers Twiss, *The Law of Nations Considered as Independent Political Communities: On the Right and Duties of Nations in Time of Peace* (Oxford University Press 1861) 13; Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (n 704), 273. See also 3.3.3 Confiscation of Munitions of War, 73f.

708 '[T]he aim should be to halt and repel an armed attack' (Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 159). Art 51 UN Charter (n 682) reprinted in 2.1 The Legality of Occupation, 51.

As *ius in bello*, the munitions of war rule applies to all occupants alike, attacker or defender.[709] But in order for this rule of occupation law to prevail over Chapter XI of the Charter, the occupant must act under the right to self-defence as provided by the Charter itself.[710] An occupant did presumably act in self-defence, if or as long as no act of aggression has been determined by the Security Council.[711] Some also allow pre-emptive or anticipatory self-defence.[712] But even if an occupant has committed an act of aggression, it might still be in the interest of the Charter to grant him the right to destroy the munitions of war in an NSGT, since it is the goal of the Charter that peace be restored.[713] To restore peace, an occupant must leave the occupied territory again.[714] It seems likely to assume that an occupant only leaves a territory if he feels safe from a counter-attack.[715] To avoid such a reaction and enable a lasting peace, any occupant, attacker or defender, should be allowed to seize or destroy the war-waging capacity in an occupied territory, despite the contrary interests of the inhabitants under Chapter XI, but no more than that.[716] As a result, warring parties may have to fight more swiftly, instead of re-

709 n 143; n 145.
710 n 705.
711 2.1 The Legality of Occupation, 51ff.
712 '[W]e must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation' (Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82(5) Michigan Law Review 1620, 1634). See Eric Posner and Alan O Sykes, 'Optimal War and Jus Ad Bellum' (2004) 93 Georgetown Law Journal 993, 1022.
713 n 555.
714 1.4.2 The Relationship to Peace, 46f.
715 See Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (n 704) 262, 268.
716 This suggestion should be close enough to the realities of warfare to avoid the critique that, 'As swords seem half-beaten into ploughshares, and the wartime "excesse" are relegated to the museum of horrors of a disappearing institution, the law of war suffers equally under wartime passions and peacetime euphoria' (Julius Stone, 'Book Review: Oppenheim, International Law, Volume 2' (1954) 17(1) Sydney Law Review 270, 270).

lying on occupation – all the while remaining within the ambit of the munitions of war rule as the epitome of self-defence.[717]

717 Consider that 'The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief' (Art 29 Lieber Code: Instructions for the Government of Armies of the United States in the Field (24 April 1863) (Adjutant General's Office; General Orders No 100, prepared by Francis Lieber 1863)). This statement, while very open, is not subject to abuse if it is clearly restricted by the munitions of war rule (See Jens David Ohlin, 'Sharp Wars are Brief' in Jens David Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War: Combatants and Civilians* (Oxford University Press 2017) 58-59).

9 Excursus: Maritime Zones

In the maritime zones appurtenant to the occupied territory, occupation law applies but is as much overruled by Chapter XI as on land.

In maritime delimitation, the principle applies that 'the land dominates the sea'.[718] It is the land territory of the coastal State, which generates the claim to the adjacent maritime zones.[719] The existence of appurtenant maritime zones is thus a corollary to the existence of equal States as territorial units.[720] Accordingly, the maritime zones of a State, like its land territory, cannot be unilaterally acquired.[721] 'The land dominates the sea' further means that the State which has sovereignty over the land also has sovereignty over the maritime zones.[722] Since an occupied territory loses its sovereignty over the land to the occupant, the same applies to its maritime zones.[723] The appurtenant maritime zones are therefore occupied as much as the land territory.[724] Because occupation of the maritime zones is a result of the occupation of the land it is immaterial that the definition of occupation from the Hague Regulations refers only to

718 ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgement) (1969) para 96.

719 Note that claims extending to the outer limits of the continental shelf zone beyond 200 nautical miles depend not on the surface land territory alone, but on its submerged prolongation beyond 200 nautical miles (Art 76 United Nations Convention on the Law of the Sea (10 December 1982) (entered into force 16 November 1994) 1833 UNTS 3).

720 'The territory of a state by definition and legal implication includes a territorial sea (...)' (Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 118). See n 27. The regimes of the territorial sea, exclusive economic zone and continental shelf up to 200 nautical miles are part of customary international law (Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33 New York University Journal of International Law & Politics 703, 717, 723).

721 See 1.2.3.1 Delimitation in General, 32ff; 2.2 The Prohibition to Acquire Territory by Force, 56ff.

722 'There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same (...)' (*North Sea Continental Shelf Cases* (n 718) para 43). Art 2(1) UNCLOS (n 719).

723 cf 1.4.3 The Relationship to Sovereign Equality, 46f.

724 Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 56.

land territory.[725] Physical occupation of the sea or seabed, however, generates no rights over maritime zones.[726] To blockade a maritime zone also does not constitute occupation but instead triggers the respective regime of sea blockades.[727]

A coastal State enjoys sovereign rights in its appurtenant sea to the degree defined by the legal regimes applicable in the respective maritime zones. During occupation, it is the occupant who enjoys those same sovereign rights in these maritime zones.[728] The sovereign rights applicable in the respective maritime zones are designated in UNCLOS.[729] In the internal sea, sovereignty is equal in degree to that over the land.[730] In seaward zones, the sovereignty of the coastal State receives limitations. In the territorial sea, sovereignty is limited by compulsory navigation rights of third States.[731] Further out, in the exclusive economic zone (EEZ) and the continental shelf zone, sovereignty is constituted by a positive enumeration of rights. These entail, most prominently, the right to explore and exploit the natural resources of the seabed and superjacent waters.[732] Beyond the maritime zones of the coastal States lie the high seas and

725 See Art 42 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) (entered into force 26 January 1910), (authentic text: French).

726 Art 77(3) UNCLOS (n 719). Bernard H Oxman, 'The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)' (1979) 73 American Journal of International Law 1, 24; Brilmayer and Klein (n 720) 703-04, 706.

727 See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994) (adopted 12 June 1994) 309 International Review of the Red Cross 583 paras 93-104.

728 For the application of sovereign rights during occupation, see 1.4.3 The Relationship to Sovereign Equality, 46ff. See however Pamela Epstein, 'Behind Closed Doors: 'Autonomous Colonization' in Post United Nations Era - The Case for Western Sahara' (2009) 15(1) Annual Survey of International & Comparative Law 107, 134. The ICJ implied that a *lawful* occupant may even dispose over the continental shelf resources by treaty with another State in the area of overlapping claims (See n 194).

729 Arts 2, 56, 77 UNCLOS (n 719).

730 Art 2(1) UNCLOS (n 719).

731 Arts 2(3), 17ff, 211(4) UNCLOS (n 719).

732 Articles 56(1)(a) and 77(1) UNCLOS (n 719) for the EEZ and continental shelf, respectively. Further sovereign rights of the coastal State apply per Articles 73, 193, 297(1) and 297(3)(a) UNCLOS (n 719).

their sea floor – the Area. No coastal State has sovereignty over them.[733] The high seas are the remainder of the historical *mare liberum*, which has been continually enclosed by maritime zones and the corresponding sovereignty of the coastal States.[734]

Occupation law does not limit the rights of the occupant with respect to the exploitation of natural resources in the respective maritime zones.[735] The occupant is only required to adhere to the rule of usufruct with respect to existing installations and not with respect to the sea as such.[736]

Chapter XI, however, overrules occupation law.[737] Chapter XI also overrules the rights of the occupant stemming from the regimes of the respective maritime zones.[738] Under Chapter XI, the exploitation of the natural resources of the maritime zones is subject to the 'interests of the inhabitants'.[739] In addition, such exploitation is restricted in an NSGT by the requirements of the 'well-being of the inhabitants',[740] 'constructive development'[741] and 'due respect for the culture of the peoples'.[742] By way of Chapter XI, the occupant is thus, for example, precluded from entering into agreements that dispose over the natural resources of the maritime zones contrary to the interests of the peoples.[743]

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733 Arts 89, 137 UNCLOS (n 719).

734 See Bernard H Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100(4) The American Journal of International Law 830, 832.

735 See 3 The Applicable Law Pertinent to the Economy, 59ff.

736 The rule regarding administration of property namely applies only on land (3 The Applicable Law Pertinent to the Economy, 59ff).

737 8.1.1 Priority over Occupation Law, 157ff.

738 See James K Kenny, 'Resolution III of the 1982 United Nations Convention on the Law of the Sea and the Timor Gap Treaty Comments' (1993) 2 Pacific Rim Law & Policy Journal 131, 139. cf 8.1.1. Priority over Occupation Law, 157ff.

739 Epstein (n 728) 134. See n 607. The General Assembly 'Calls upon the administering Powers to ensure that the exploitation of the marine and other natural resources (...) is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories' (Resolution on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, GA Res 65/109 (10 December 2010) UN Doc A/RES/65/109 (2010) para 7).

740 7.3 'Well-Being of the Inhabitants', 150ff.

741 7.5 'Constructive Measures of Development', 154ff.

742 7.4 'Economic Advancement with Due Respect for the Culture of the Peoples', 153f.

743 n 621. See Kenny (n 738) 152-55.

In fact, the Final Act of UNCLOS itself explicitly refers to NSGTs and stresses that the 'Provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory (...)'.[744]

744 Resolution III(1)(a) of Annex 1 to the Final Act of the Third United Nations Conference on the Law of the Sea, pertaining to UNCLOS (n 719). Resolution III is binding (Kenny (n 738) 147). Note that Resolution III is only applicable to occupied territories, if they are considered to be NSGTs. Occupied territories were mentioned in a draft text during negotiations of UNCLOS, but are not explicitly mentioned in the adopted Convention (See Kenny (n 738) 141-145, 147-48).

10 Concluding Summary of Part II

All occupied territories and not only historic colonies qualify as NSGTs under Chapter XI.[745] In occupied territories, an occupant has responsibilities for the administration of the foreign territory stemming from occupation law.[746] Those are the responsibilities to which Article 73 of Chapter XI refers.[747] Neither the UN nor the occupant have the competence to decide, if, and when these responsibilities apply. They apply as a matter of fact from the start and for the entire duration of the occupation.[748]

Based on his military authority, the occupant governs in the occupied foreign territory.[749] During occupation, the foreign territory is thus no longer self-governed.[750] Historic colonies became foreign to their parent States with the emergence of the right to independence.[751] If the former parent State remained in the now foreign territory of the historic colony, that territory was now occupied.[752] The former parent State thus governed based on military authority as the occupant and the historic colony became non-self-governed.[753]

The General Assembly so far treated only historic colonies, instead of all occupations, as NSGTs under Chapter XI.[754] The practice of the General Assembly does however not restrict the interpretation of Chapter XI, nor is the General Assembly precluded from applying Chapter XI to situations of military occupation in the future.[755]

The wording 'not yet attained a full measure of self-government' stresses that the obligations under Chapter XI persist all through the foreign occupation.[756] Since the obligations of Chapter XI apply to a

745 6 The Scope of Application of Chapter XI, 99ff.
746 See 3 The Applicable Law Pertinent to the Economy, 59ff.
747 6.4.1 'Responsibilities for the Administration of Territories', 108ff.
748 6.4.2 To 'Have' Responsibilities, 111ff.
749 1.4.3 The Relationship to Sovereign Equality, 46f.
750 6.5.1 Occupied Territories, 114ff.
751 1.2.4 Self-Determination and Related Claims to Territory, 37ff.
752 6.5.2 Historic Colonies, 116ff.
753 6.5.2 Historic Colonies, 116ff.
754 See 6.2 The Practice of the United Nations Regarding Chapter XI, 102ff.
755 6.6.1.2 The Role of the General Assembly, 124ff; 6.6.1.1 Independence v Self-Government, 121ff.
756 6.6.2 Meaning in Context, 128ff.

parent State in historic colonies as well as to an occupant in any other occupied territory, Chapter XI applies to all situations of occupation, past, present and future.[757] Further, the obligation to develop a full measure of self-government requires the occupant to completely retract his occupation.[758] Peace as the primary purpose of the Charter likewise demands the dismantling of military occupation in all occupied territories and therefore supports the application of Chapter XI to those territories.[759] The purposes of the Charter also demand that Chapter XI be interpreted in light of the principle of sovereign equality, which supports the application of Chapter XI to all military occupations.[760] A historic interpretation confirms that military occupation must be remedied by the Charter because occupation was a standard feature of the World Wars which in turn motivated the foundation of the United Nations through the Charter.[761]

Chapter XI does not constitute a risk of renewed colonialism.[762] The status of a territory as an NSGT exists only because and so long as the territory is occupied.[763] To recognize occupied territories as NSGTs does not create new factual situations of dependency. On the contrary, Chapter XI subjects the occupant to an additional set of economic obligations and to the obligation to retract the occupation per Article 73(b).[764]

Under Chapter XI, the occupant must let the inhabitants proceed with their own economic activities. He must not hamper progress or neglect the conditions for progress in the territory.[765] If the occupant continues with his own economic activities in the territory, they are now subject to

757 6.5.1.1 Following Invasion, 114f; 6.5.1.2 Invitation Turned to Coercion, 115f; 6.5.2 Historic Colonies, 116ff.
758 6.6.2 Meaning in Context, 128ff.
759 6.6.3.1 In the Light of Peace, 132ff.
760 6.6.3.2 In the Light of Sovereign Equality, 137ff.
761 6.6.4 Historic Interpretation, 140ff.
762 Regarding the different idea of a new system of trusteeship (see n 496) there was criticism that 'Rather than focusing on various forms of dependency, we should explore creative mechanisms to assist, rather than direct, peoples in determining and realizing their ambition to determine and control their own destiny' (Hollin K Dickerson, 'Some Legal Problems with Trusteeship' (1995) 28(2) Proceedings of the ASIL Annual Meeting 302, 346-47. This concern should be fully satisfied by the application of Chapter XI to occupied territories, as suggested here.
763 6.4.2 To 'Have' Responsibilities, 111ff.
764 6.6.2 Meaning in Context, 128ff.
765 7.3 'Well-Being of the Inhabitants', 150ff.

the interests of the inhabitants. This means that all economic advantage accruing in the territory belongs to the inhabitants of the territory and not to the occupant.[766] The same applies to the appurtenant maritime zones.[767] An agreement concerning an investment by the occupant or a third State remains valid only if the occupant is not among the beneficiaries.[768] The exploitation of non-renewable resources can only be continued if there is actual production and not just depletion – with the proceeds going to the occupant.[769] Existing economic activity at the expense of individual peoples and their way of life is no longer admissible.[770]

For the sake of progress, the occupant cannot neglect the territory, but must undertake new economic activity.[771] Yet, the occupant enjoys no discretion to decide what constitutes progress. Instead, the inhabitants determine which actions they themselves consider progress.[772] This applies to any change in the economic status quo, even if the occupant is not the exclusive beneficiary of such change.[773] The inhabitants must be polled about any new economic action taken by the occupant. Since the occupant exercises effective control in the occupied territory, he has the factual capacity to hold ballots.[774] The interests of the inhabitants must be confirmed also where existing legislation allows an economic action, if the occupant benefits from that action, directly or indirectly.[775] New economic activity at the expense of individual peoples and their way of life are not admissible, even if the majority of the inhabitants are in favour. Under Chapter XI, minorities must not be economically marginalized.[776] Finally, any *new* economic activity must be sustainable. Until the latter term receives a legally binding definition, the inhabitants decide what is sustainable in view of their interests.[777] Before they decide

766 7.2 'The Interests of the Inhabitants', 147ff.
767 9 Excursus: Maritime Zones, 169ff.
768 7.2 'The Interests of the Inhabitants', 147ff; 8.1.3 Priority over the Interests of the Occupant from Foreign Direct Investment, 161f.
769 7.5 'Constructive Measures of Development', 154ff.
770 7.4 'Economic Advancement with Due Respect for the Culture of the Peoples', 153ff.
771 7.3 'Well-Being of the Inhabitants', 150ff.
772 7.3 'Well-Being of the Inhabitants', 150ff.
773 7.2 'The Interests of the Inhabitants', 147ff.
774 7.2 'The Interests of the Inhabitants', 147ff.
775 7.2 'The Interests of the Inhabitants', 147ff.
776 7.4 'Economic Advancement with Due Respect for the Culture of the Peoples', 153ff.
777 7.5 'Constructive Measures of Development', 154ff.

upon any economic action, the inhabitants must be made aware of the risks involved.[778] Only for emergency relief may an occupant take new measures that bypass the decision of the inhabitants.[779]

The economic obligations of Chapter XI displace conflicting rules of occupation law. Chapter XI prevails over occupation law per Article 103 of the Charter.[780] Chapter XI also prevails over investment agreements from which the occupant profits and thus invalidates any forcible assertion of foreign interests.[781] Human rights remain valid under Chapter XI.[782] Finally, Article 74 of Chapter XI provides that an NSGT continues to benefit from its international economic relations with third States. It is thus not possible under Chapter XI to isolate an occupied territory from the world economy.[783] The only provision from occupation law that survives the conflict with Chapter XI is the 'munitions of war' rule. Under Chapter XI, an occupant can thus still exercise self-defence, but he can no longer make a territory economically dependent.[784]

Chapter XI prohibits an occupant from making any economic use of an NSGT against the will of the inhabitants and instead makes the occupant bear the costs of his occupation.[785] Chapter XI thus makes it unattractive to remain in foreign territory by force. The lack of economic benefits for the occupant makes the obligation to end occupation, as contained in Article 73(b), practically feasible.[786]

778 7.5 'Constructive Measures of Development', 154ff.
779 7.2 'The Interests of the Inhabitants', 147ff.
780 8.1.1 Priority over Occupation Law, 157ff.
781 8.1.3 Priority over the Interests of the Occupant from Foreign Direct Investment, 161ff.
782 8.2 Survival of Human Rights and PSNR, 162f.
783 8.3 Safeguarding of International Economic Ties per Article 74, 163ff.
784 8.4 Reconciliation with the Munitions of War Rule, 166ff.
785 See 7.2 'The Interests of the Inhabitants', 147ff.
786 6.6.2 Meaning in Context, 128ff; 6.6.3.1 In the Light of Peace, 132ff; 6.6.3.2 In the Light of Sovereign Equality, 137ff.