Jonas Attenhofer

The Application of UN Charter Chapter XI to Military Occupations

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Introduction

> One of the methods of scientific research,
> particularly when it is concerned with the forms of life,
> is the comparison between similar phenomena;
> firstly in order to discover their essential characteristics;
> secondly in order to place them in the historical perspective
> which will throw light on their true nature
> and the seeds of development they bear within them.
>
> Max Huber, *On the Place of the Law of Nations in the History of Mankind*, 1958

For States with territorial ambitions, military occupation is still a tool of choice. Traditional occupation law allows the occupant to use the resources of an occupied territory and to transform its economy, so as to make it dependent upon the occupying State. The similarities between military occupation and historic colonialism are apparent. Notably, military occupation *per se* is not illegal. It is only illegal to start the war that precedes the occupation. But even if the occupant started the war, his economic rights under occupation law apply regardless. This is due to the distinction of *ius ad bellum* and *ius in bello* – meaning that, no matter who started, the same rights apply to each party. The prohibition of the use of force in the Charter of the United Nations is thus powerless against traditional occupation law and the economic benefits it grants to the occupant.

While historic colonialism has been largely defeated under the Charter, military occupation has not received the same treatment. With the help of Chapter XI, historic colonies may have been freed, but foreign domination persists elsewhere. Notably, Chapter XI does not speak of 'colonialism'. It is not a historic relic, but a timeless provision. Chapter XI simply refers to territories that do not govern themselves. An occupied territory is governed by the occupant and not by itself, and therefore should fall under Chapter XI. Yet, so far, the application of Chapter XI to

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military occupations has not been thoroughly explored. The time is ripe to take a fresh look at Chapter XI and how it can counter the economic incentive to occupy that still comes with traditional occupation law.

A contemporary interpretation of Chapter XI will reveal that it subjects an occupant to extensive economic obligations. Chapter XI prescribes that all interests belong to the inhabitants and not to the foreign power. Under Chapter XI, an occupant does not dispose of the land and its proceeds and cannot transform the economy at will. He also must not make a foreign territory dependent upon him by isolating it from the world economy. These obligations render it economically unattractive to stay in foreign territory by force.

Military occupation is a state of war not of peace, and it suspends the equality of an occupied territory. But peace and equality are the main goals of the United Nations as stated in the Charter. Therefore, the Charter must offer an alternative to traditional occupation law and its incentive to occupy. This alternative is found in Chapter XI. Chapter XI is the neglected link in the Charter towards the goal of peace and equality.

This book operates in two parts. It compares the rules of traditional occupation law (Part I) with the rules of Chapter XI (Part II). Both parts show how each legal regime applies and how other rules of international law interplay. Part I illustrates the dire economic situation of an occupied territory subjected to traditional occupation law. The territory and its inhabitants largely find themselves at the mercy of the occupant. In stark contrast, Part II shows how the economic situation of an occupied territory would improve legally, if Chapter XI were applied. Finally, the Synopsis recalls that Chapter XI presents a paradigm shift for the law of military occupation while leaving the right to self-defense intact.

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Part I
Military Occupation

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1 The Scope of Application of the Status of Military Occupation

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1.1 Hague Regulations, Article 42 and Customary International Law

The status of military occupation applies as a matter of fact and does not depend upon the consent of the occupant to be bound by occupation law.[1] The definition of military occupation is contained in Section III, Article 42 of the Regulations Respecting the Laws and Customs of War

1 Eyal Benvenisti, 'Occupation, Belligerent' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 9-10.

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on Land (The Hague Regulations).[2] This definition is part of customary international law.[3]

> **Hague Regulations**
>
> **Section III. Military Authority over the Territory of the Hostile State**
>
> **Article 42**
> (1) Territory is considered occupied when it is actually placed under the authority of the hostile army.
> (2) The occupation extends only to the territory where such authority has been established and can be exercised.

1.2 'Territory of the Hostile State'

1.2.1 The Scope of the Term 'Hostile State'

There are many ways for a territory to qualify under the term 'hostile State'. Arguably it even suffices that a territory is foreign to the occupying force.

The definition of occupation as contained in Article 42, Hague Regulations being part of customary international law, the term 'territory of the hostile State' encompasses not only signatory States, but all States.[4] Therefore, the territory of any State, even if it is disputed, can come under military occupation.[5] From the point of view of international law, there are many ways for an entity to be regarded as a State. Membership in the United Nations (The UN) is probably the least disputed proof of

2 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).

3 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) (2005) para 172; Benvenisti, 'Occupation, Belligerent' (n 1) para 4.

4 n 3.

5 Benvenisti, 'Occupation, Belligerent' (n 1) para 10.

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the existence of an entity as a State.[6] This is implicit in the nearly universal coverage of the surface of the Earth by UN Member States.[7] That UN membership should qualify an entity as a State even from an outside perspective, may also be due to the high legal plane on which the Charter of the United Nations[8] (The UN Charter) stands.[9] But the United Nations does not claim to be the only system of States.[10] The UN Charter explicitly recognizes the existence of further States that are not members of the UN. Article (2(6)) speaks of 'states which are not Members of the United Nations' and Article 2(4) contrasts UN Members with 'any State'. The question thus arises, when an entity qualifies as a State.

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6 See 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) 79.

7 This fact has lead many to assume universality on behalf of the UN (See Georges Abi-Saab, 'Whither the International Community?' (1968) 9(2) European Journal of International Law 248, 261; 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) 242; Christian Tomuschat, 'International Law' in Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International 1995) 285; 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 34; Masahiro Igarashi, *Associated Statehood in International Law* (Kluwer Law International 2002) 300).
Naturally, the way international law itself came about and how it divided the world into its subjects is not free from criticism (see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 20ff. See also Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Martinus Nijhoff 2010) 270ff).

8 Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945).

9 This is implicitly supported by the idea of the Charter as a world constitution (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 66, for a summary of prominent references to this idea. See also Ress (n 7) paras 1-2).

10 See 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 1.

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One way for an entity to be considered a State in international law is through recognition by other States.[11] If it is assumed that recognition of an entity as a State is not restricted by preconditions, such recognition is constitutive of the existence of a State from the perspective of the recognizing State.[12] By way of recognition, States thus create each other – including on occupied territory.[13] However, when a UN Member or any other State recognizes another entity as a State, this entity becomes a State only from the perspective of the recognizing State and not from the perspective of all UN Members or even all States.[14] In practice, entities regularly receive multiple recognitions as States before they become UN Members.[15] A State can recognize an entity as a State by explicit unilateral declaration, or implicitly by establishing a bilateral relationship on an equal footing.[16] Since the UN recognizes the existence of States outside its membership circle, there should be a threshold amount of

11 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 74.

12 Dionisio Anzilotti, *Lehrbuch des Völkerrechts: Band 1: Einführung – Allgemeine Lehren* (Walter de Gruyter & Co 1929) 119-25. See also James Crawford, 'State' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 44.

13 Hans Kelsen, *Principles of International Law* (Rinehart & Company Inc 1952) 77. Meanwhile, the occupant himself does not legally acquire a territory through recognitions, if such acquisition has been the result of an illegal use of force (Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010) 678-79. See however Rudolf L Bindschedler, 'Die Anerkennung im Völkerrecht' (1961-1962) 9 Archiv des Völkerrechts 377, 388).

14 See Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 88-89, who however rejects as a matter of principle that States should establish the competence of other States. It should be recalled however that this is how States created each other under modern international law in the first place (See Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (n 7) 40ff, 60, for a critique of recognition in the context of historic colonialism).

15 See eg James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 393.

16 See Jochen A Frowein, 'Recognition' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 9, 17.

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recognitions above which a State comes into existence with binding effect also upon those States that have not recognized it.[17]

The more established way for an entity to be considered a State in international law today is by fulfilling constitutive factual criteria of statehood.[18] The exact content of these factual criteria is disputed.[19] It has been argued that once an entity fulfils the relevant factual criteria, its existence as a State is binding upon all other States.[20] If States do indeed come into existence in this organic way, a recognition by other States is merely of declaratory nature.[21] An entity that has once fulfilled the criteria and thus became a State does not lose its statehood if it no longer meets one or more of the criteria due to military occupation.[22] A State may also come into existence in this organic way, while occupied.[23]

Arguably it is not even necessary that an entity be a proper State for it to fall under the definition 'territory of the hostile State', but only that its territory is foreign to the occupying force.[24] This also finds some support in the wording of the Hague Regulations. Granted, the title of their

17 That threshold should therefore be below the two thirds majority of UN Member States required for accession to the UN itself by Article 18(2) of the Charter. See also Frowein, 'Recognition' (n 16) para 10, who requires 'all or practically all States'.
See however James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1(1) European Journal of International Law 307, 309, who stated in 1990 that 'There is no rule that majority recognition is binding on third states in international law').

18 Crawford, 'State' (n 12) para 44.

19 See Crawford, 'State' (n 12) para 12ff.

20 See Lauterpacht (n 11) 63-66; Brownlie (n 14) 90.

21 William Edward Hall, *Treatise on International Law* (Pearce Higgins ed, 8th edn, Oxford, The Clarendon Press 1947) 103; Lauterpacht (n 11) 75.

22 Hollin K Dickerson, 'Some Legal Problems with Trusteeship' (1995) 28(2) Proceedings of the ASIL Annual Meeting 302, 336; Raoul Jacobs, *Mandat und Treuhand im Völkerrecht* (Universitätsverlag Göttingen 2004) 236; Andreas Zimmermann, 'Continuity of States' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) 10-11. See however Kelsen, *Principles of International Law* (n 13) 75-76.

23 See John Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' (1997) 30(3) Cornell International Law Journal 717, 724-29.

24 See PCA, *Eritrea-Ethiopia Claims Commission* (Partial Award: Central Front - Ethiopia's Claim 2, Decision) (2004) para 29; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661, 686; Marco Sassòli, 'The Concept and the Beginning of Occupation' in Andrew Clapham, Paola Gaeta, and

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Section III reads 'Territory of the Hostile State'. However, Article 55 of Section III describes the occupying force as 'occupying State', but the occupied territory merely as 'occupied country'. Further, Article 2 of Section I, Hague Regulations, speaks of an approaching 'enemy' and of a 'territory' without mention of a State. It could thus be argued that the Hague Regulations merely employ the term 'State' to contrast two foreign entities and do not mean to qualify these entities as States or even Member States. Any territory would thus qualify as 'territory of the hostile State' unless it belongs to the State whose occupying forces are invading.

To be certain that a territory belongs to one State and is therefore not foreign to the occupying forces of that State, territory needs to be delimited.[25]

1.2.2 Equal States as a Territorial Order

Equal States constitute territorial units.

The international legal order of States is based upon the principle of equality.[26] For equality to exist, there need to be entities. In international law, these equal entities have historically been understood to be land territories.[27] The UN Charter explicitly employs a territorial concept of States, by granting 'any state' its 'territorial integrity' (Art 2(4)). Because States have divided the world among themselves into territorial units vested with equality, all States potentially have a claim in the allocation of undelimited territory.[28]

Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 53.

25 See 1.2.3.1 Delimitation in General, 32ff.

26 The principle is part of customary law (Georg Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' [1976] Year Book of World Affairs 307, 312 para 3; 33 para 6) or a general principle of international law (See Juliane Kokott, 'States, Sovereign Equality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 15).

27 Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 294.
Note that besides States, international law can vest other entities with specific legal rights relevant to territory (See 1.2.4 Self-Determination and Related Claims to Territory, 37ff, for the right of historic colonial peoples to territory).

28 1.2.3.1 Delimitation in General, 32ff.

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To divide the land surface of the world into territorial units may or may not be the final world order.[29] The concept of equality in international law was influenced by the idea of equality of man.[30] The complete embodiment of this idea would therefore be a world where all humans share equal rights on all territory.[31] The surface of the world would be undelimited and an international law of States obsolete. But which rights and obligations exactly should be shared among all humans has been much debated to this day.[32] It is thus not clear if a single world entity would serve humanity better than several territorial units.[33] Meanwhile,

29 See Peter Vale, 'Engaging the World's Marginalized and Promoting Global Change: Challenges for the United Nations at Fifty' (1995) 36(2) Harvard International Law Journal 283, 291ff.
'Yet the question of the legitimacy of an international law without or with little anchorage to territory remains largely unanswered' (Enrico Milano, 'The Deterritorialization of International Law' (2013) 2(3) ESIL Reflections, 5).

30 For the origins of the idea of equality in international law and its establishment in the age of enlightenment, see Kokott (n 26) paras 9-10.

31 'The idea of a cosmopolitanism is not a fanciful and extravagant imagination of the law, but a necessary addition to the unwritten codex of public law and international law towards a public human right and therefore towards perpetual peace (...)' (Immanuel Kant, *Zum Ewigen Frieden* (first published 1795, Philipp Reclam jun Stuttgart 1984) 24).

32 'For the further development of international law the recognition of a juridico-political postulate arises, that only those rules of law can gain universal recognition whose content does not meet the resistance of special legal ideologies in individual legal civilizations, those which realize universally recognized values and interests' (Paul Guggenheim, 'What is Positive International Law?' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953) 30). See Abi-Saab (n 7) 264; Yasuaki, *A Transcivilizational Perspective on International Law* (n 7) 377ff; Cot (n 9) paras 84-88.
Finally, 'Premature international legalism takes normative development and sensible trade-offs out of the realm of both international and domestic politics without the necessary political deliberation' (J Patrick Kelly, 'Naturalism in International Adjudication' (2008) 18 Duke Journal of Comparative & International Law, 421).

33 On one hand, 'The striving for expansion – this economic monopoly on a territorial basis – causes a fundamentally hostile confrontation and locking up of States. War is, if not the constant, then at least the normal form of communication of these States' (Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Internationalrechtliche Abhandlungen, Verlag Dr Walther Rothschild 1928) 18).
On the other hand, the substitution of the territorial order with a global order governed by private economic interests is no proven guarantee for the peaceful

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States, as enclosed territorial components of the world, each experience within themselves the difficulty of life as a community of diverse people.[34] Maybe this experience will eventually guide humanity towards the best model for a legal cosmopolitanism.[35]

1.2.3 The Territorial Delimitation of Equal States

1.2.3.1 Delimitation in General

A State can only make an exclusive claim to territory when its title to that territory is valid opposite all other States. Valid title results in a boundary and that boundary can only be drawn with the consent of all States concerned or by a competent legal forum.

To avoid being regarded as an occupant, a State might argue that a territory is not foreign, but its own.[36] Because States are equals as territorial units, they cannot unilaterally alter their own territorial expanse.[37] When one State seeks to add land to its territory, claims of other equal States to the same land may arise. This is the corollary to the *erga omnes* validity

coexistence of humanity (See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (3rd edn, first published 1950, Duncker & Humblot 1988) 208-12).

34 Yasuaki, *A Transcivilizational Perspective on International Law* (n 7) 83-84.

35 CG Weeramantry, 'Cultural and Ideological Pluralism in Public International Law' in Nisuke Andō and others (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International 2002) vol 2, 1492.

36 See Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 10-13. See also 1.2.1 The Scope of the Term 'Hostile State', 26ff.

37 'This principle of the stability of boundaries constitutes an overarching postulate of the international legal system and one that both explains and generates associated legal norms. It enshrines and reflects the need felt within the international legal and political system for a significant element of permanence and continuity with regard to the spatial configuration of the state in order to prevent as far as possible constant disruption based upon challenges to the territorial integrity of states' (Malcolm N Shaw, 'Boundary Treaties and their Interpretation' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C Wellens* (Queen Mary Studies in International Law, Vol 5, Brill | Nijhoff 2012) 242). See 1.2.2 Equal States as a Territorial Order, 30f.

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which a boundary has opposite all States.[38] Among the equal States that have a potential claim to the land, there can also be States which one or more of the parties to the dispute do not recognize as equal States. Such equal States may however exist as a matter of fact – including on occupied territory.[39] Because States are equals as territorial units, all disputed territory that is not delimited should be regarded as foreign – and therefore 'territory of the hostile State' for matters of military occupation – to all States until the conflicting claims are settled.[40]

If States fail to solve a dispute over a common boundary – be it as a matter of general title or precise delimitation – they must seek dispute settlement.[41] This obligation to resort to dispute settlement stems from the UN Charter (Arts 1(1), 2(3) and 33), as well as customary international law.[42] The competent legal forum determines if a boundary already exists

38 PCA, *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea* (Award of the Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute) (1998) para 153; 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.
This is true even if the State in question does not abut on the disputed territory – such as in case of an island (See PCA, *Island of Palmas Case (or Miangas) (United States v Netherlands)* (Award) (1928) 10).
With respect to boundaries, the *erga omnes* validity and the concurrent interests of third States are especially relevant, since a boundary is permanent (Shaw, 'Boundary Treaties and their Interpretation' (n 37) 239-42. See also Art 62(2)(a), Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331; ICJ, *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgement) (1978) para 85).

39 1.2.1 The Scope of the Term 'Hostile State', 26ff.

40 n 28. Note that this does not require that all boundaries are determined in exact detail, as long as title to the territory is not contested in general (Brownlie (n 14) 120).

41 'The principle of the peaceful settlement of disputes occupies a pivotal position within a world order whose hallmark is the ban on force and coercion.' (Christian Tomuschat, 'Article 2(3)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 2).

42 Or even from *ius cogens* (Cot (n 9) para 32; Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' (n 26) 308, 316).
A dispute exists if tensions rise above the possibility to 'live together in peace with one another as good neighbours' as demanded by the Preamble of the Charter. And the obligation to seek dispute settlement applies 'as soon as a dispute has become such a serious problem for one of the parties involved that it has

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between the parties per an explicit or tacit agreement.[43] When the legal forum is called upon to draw a new boundary itself, it considers if the actions of either one State on the undelimited territory give that State a better claim to the territory.[44] Such acquisition of territory between equals can only be effected by dispute settlement and not unilaterally.[45]

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formally addressed its opponent' (Tomuschat, 'Article 2(3)' (n 41) paras 17, 25; Preamble of the UN Charter (n 8) reprinted in 6.6.3.1 In the Light of Peace, 132.

43 See Steven R Ratner, 'Land Feuds and Their Solutions: Finding International Law beyond the Tribunal Chamber' (2006) 100(4) American Journal of International Law 808, 810.

44 'Actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty' (*Island of Palmas Award* (n 38) 10).
Almost a century later it is still recalled that 'effective control of territory and its legitimizing logic (is what) the territorial order of today's international society is based (upon)' (Sookyeon Huh, 'Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)' (2015) 26(3) European Journal of International Law 709, 709. See also eg ICJ, *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgement) (2012) paras 66-84, with references to prior case law).
In fact, the idea of effectivity has been expounded already in the 18th Century (Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns: On the Law of War and Peace, Book 1* (Charles Fenwick tr, The Classics of International Law Ed 4, Vol 3, Ohio State University 1758) 84-85).
Weighing various State actions in the process of determining effective control is an operation of equity and should follow a topical approach that ultimately takes into consideration the legitimate expectations of the parties involved (See Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press 2015) 630-31, 634-35). In the context of military occupation it may be worth noting that the increase, in the disputed territory, of a population affiliated with one party to the dispute, is not a topical factor relevant for the award of title over that territory (ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon Nigeria: Equatorial Guinea intervening)* (Counter-claims) (2002) para 221).

45 See PCA, *Eritrea - Ethiopia Boundary Commission* (Decision Regarding Delimitation of the Border) (2002) para 3.29; Brownlie (n 14) 86. See however Zimmermann, 'Continuity of States' (n 22) para 10. Original title – that is acquisition of *terra nullius* or acquisition irrespective of the will of the former title holder – is thus relegated to the exclusive domain of dispute settlement, once it is disputed.

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When drawing a boundary between disputing parties, judicial authorities strive not to infringe upon the potential claims of third States.[46] This is an emanation of the rule that judicial awards are without prejudice to States that are not parties to the dispute.[47] A judicial authority should also be competent or even compelled to examine, if an entity exists – including on occupied territory – that has a potential claim to the disputed territory, even if that entity has not yet been recognized as a State.[48] In the same vein, an international dispute and the concurrent obligation to seek dispute settlement exists also between a State and an entity whose status as a State still has to be confirmed.[49]

Where two States agree upon a boundary, that boundary is not automatically binding upon all other States.[50] With each delimitation, the balance of power changes for all States, since they granted each other equality as confined – even if not delimited – territorial units and not beyond.[51] All equal States therefore have a potential claim when other States delimit territory by treaty.[52] It follows that an agreement is not valid if it disregards the claims of a third State to the same territory, even

46 '[T]he Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected' (*Nicaragua v Colombia Case* (n 44) para 228).

47 Art 59 Statute of the International Court of Justice (San Francisco, 26 June 1945) (entered into force 24 October 1945) (The ICJ Statute).

48 See n 20; Arbitration between Great Britain and Costa Rica, *Tinoco Case* (1923) 1 RIAA 369, 381; Brownlie (n 14) 87.
This idea has been supported already in the 19th century: 'The newly formed State has a right to join the international community and to be recognised by the other States if its existence is unquestionable and secure. It has this right because it exists and because international law unites the States of the world into a common legal order' (Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten: als Rechtsbuch dargestellt* (2nd edn, C H Beck 1872) 74).

49 See Tomuschat, 'Article 2(3)' (n 41) paras 21-22; Christian Tomuschat, 'Article 33' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I paras 8-9.

50 Art 34 VCLT (n 38) (VCLT); *Island of Palmas Award* (n 38) 10; ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Judgement) (2018) para 123.

51 n 37. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 302.

52 n 38. 'This special category of treaties (...) represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*' (*Eritrea/Yemen, First Stage* (n 38) para 153).

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if the parties to the agreement do not recognize that entity as a State.[53] A boundary agreement is equally invalid, if it has not been concluded with the competent *Zentralgewalt* but instead with a proxy, to eg effect a *Anschluss*.[54] Finally, the illegal use of force to obtain a boundary agreement bars its validity.[55]

1.2.3.2 Practical Scenarios

In all of the following scenarios, the territory in question remains foreign – and therefore a 'territory of the hostile State' for matters of military occupation – to the State that has no claim at all or no exclusive claim to that territory.

If one State seeks to acquire territory of another State by altering an existing boundary, it cannot do so unilaterally. The equal States with a claim to the territory need to agree to its re-allocation.[56] Even when a part or parts of the territory of a State become independent, a third State cannot unilaterally enforce claims to it, since a boundary is still in place.[57]

If two entities vie to be the legitimate State on any given territory, both have a claim to it, if they both are in fact States.[58] Neither of them can then acquire all or parts of the territory by unilaterally delimiting it opposite the other or opposite third States.[59]

If several States jointly administer a territory per a treaty without allocating its territory, no individual State can unilaterally acquire the territory.[60] If the territory has not been delimited opposite third States either, all equal States have a potential claim to it.[61]

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53 n 20.
54 See Art 7 VCLT (n 38).
55 Art 52 VCLT (n 38). See also 2.1 The Legality of Occupation, 51ff.
56 n 37.
57 1.2.4 Self-Determination and Related Claims to Territory, 37ff.
58 n 37; n 20.
59 1.2.3.1 Delimitation in General, 32ff.
60 See eg Art 4(2) The Antarctic Treaty (1 December 1959) (entered into force 23 June 1961) 402 UNTS 71, which explicitly excludes the establishment of claims to territory among the signatories. At the same time, the Vienna Convention on Succession of States (n 60) does not refer Antarctica to the common heritage of mankind (Victor Prescott and Gillian D Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Martinus Nijhoff 2008) 402-03).
61 n 37.

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If a new State succeeds a preceding State on the entire territory, historic claims of third States to the territory are not revived.[62] This is true although the existing boundary has been concluded with an equal State that no longer exists on the territory. Third States have no claim to the territory because they had granted equality to the preceding State as a territorial unit separate from their own.[63] The relationship between the new State and third States is regulated by the rules of State succession.[64]

1.2.4 Self-Determination and Related Claims to Territory

The right to self-determination in international law contains a right for some peoples to separate their territory from the parent State. Per that right, territory becomes foreign to the parent State and therefore 'territory of the hostile State' for matters of military occupation.

With its Resolution titled 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (Resolution 1514), the General Assembly of the United Nations (The General Assembly) in 1960 proclaimed a right of former colonial peoples to become independent from their parent States.[65] This right has since become customary international law or even *ius cogens*.[66]

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62 See also n 77.

63 Art 11 Vienna Convention on Succession of States in respect of Treaties (23 August 1978) (entered into force 6 November 1996) 1946 UNTS 3; MN Shaw, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, 240. See also 1.2.2 Equal States as a Territorial Order, 30f.

64 See Andreas Zimmermann, 'State Succession in Treaties' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 4ff, for the difficulties surrounding that field of law.

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

66 Robert T Vance Jr, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara' (1980) 7 Yale Journal of International Law 45, 1; 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 1765-66; 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 57. See however Daniel Thürer and Thomas Burri, 'Self-Determination' in Rüdiger Wolfrum (ed), *The Max Planck*

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Resolution 1514

'The General Assembly, (...) Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations; And to this end Declares that: (...) 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status (...) 4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.'[67]

Self-determination in international law thus contains a claim for colonial peoples to a part of the territory of their parent State.[68] They receive a 'right to complete independence' and 'integrity of their national territory' and thus a claim to unilaterally alter existing territorial units and to create their own.[69] A new entity thus created has the same claim to the territory as if it were an equal State – regardless if it is a State in fact or by recognition of other States.[70] The right to self-determination is therefore an exception to the territorial order of equal States, as it grants independence to a people as if they were a sovereign equal.[71] The right to self-determination, applying by virtue of *ius cogens*, overrules the claim of

Encyclopedia of Public International Law (2nd edn, Oxford University Press 2013) para 45.

67 Res 1514 (n 65).

68 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.' (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)).
For further, internal, aspects of the principle of self-determination, see eg Thürer and Burri (n 66) 33ff; Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2018) 243-44.

69 Ratner (n 43), 811. See Res 1514 (n 65) para 4.

70 See Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (n 7), 3. cf 1.2.1 The Scope of the Term 'Hostile State', 26ff.

71 The people thus receive the status of a subject of international law (Bedjaoui (n 66) 1760). See also Kelsen, *The Law of the United Nations: A Critical Analysis*

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the parent State to its territorial unit.[72] This right of the colonial peoples to their own territory is not tied to conditions.[73] All former colonial territories therefore became foreign to their former parent States at the latest when the right to self-determination received *ius cogens* status and unless and until the peoples freely chose to remain with their parent States.[74]

Once independent, the peoples are free to join their territory to a third State.[75] Their territory is then no longer foreign to that State. Before they have freely chosen to do so, however, their territory remains foreign to the third State.[76] Historic claims of third States to the newly independent territory do not trump the *ius cogens* right to self-determination or even the existing boundary with the former parent State.[77] In practice, the ad-

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of Its Fundamental Problems: with Supplement (n 6) 559. cf 1.2.2 Equal States as a Territorial Order, 30f.

72 n 66. See Galicki (n 38) 55, for a detailed portrait of the priority treatment that norms of *ius cogens* are awarded in the application of international law. 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 12, who argues that the right to self-determination is not linked with a right to independence in a peremptory fashion.

73 Res 1514 (n 65) para 4. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 72) para 13. Further evidence on this point is provided by the fact that the use of force against the right to self-determination is prohibited under Article 2(4) in connection with Article 1(2) of the UN Charter.

74 Res 1514 (n 65) paras 2, 4. The emphasis is on the free choice of the peoples, regardless of the outcome of their vote (Resolution on Question of Western Sahara, GA Res 64/101 (10 December 2009) UN Doc A/RES/64/101 (2009)).

75 Res 1514 (n 65) para 2.

76 Res 1514 (n 65) para 2 in connection with para 4. In practice, allegiances of the inhabitants can be split and therefore the question of who belongs to the people that is entitled to choose can be contentious (See eg Security Council Resolution 2494, SC Res 2494 (20 October 2019) UN Doc S/RES/2494 (2019), extending until 2020 the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO), which had been established in 1991 by Security Council Resolution 690, SC Res 690 (29 April 1991) UN Doc S/RES/690 (1991). See also Ivor W Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 56; Trinidad (n 68) 241-43).

77 'Historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium' (ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgement, Intervention Procedure) (2001) Separate opinion of

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ministrative boundaries from colonial times were regularly left in place opposite third States.[78]

The question arises, if the right to self-determination applies only to a historic category of colonial peoples or to all peoples that seek independence from their parent State. Resolution 1514 speaks of 'colonialism in all its forms and manifestations'. In its paragraph 2, Resolution 1514 grants the right to self-determination to 'all peoples'.[79] The same is true of Article 1(1) of the International Covenant on Civil and Political Rights (The ICCPR), which opens with 'All peoples have the right of self-determination'.[80] In its paragraph 6, however, Resolution 1514 cautions that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[81] It is there-

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Judge ad hoc Franck, para 5. See also Thomas Franck, 'The Stealing of the Sahara' (1976) 70(4) American Journal of International Law 694, 695. See however Crawford, *The Creation of States in International Law* (n 15) 640-47).

78 This is a result of the application of *uti possidetis*, 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power' (ICJ, *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgement) (1986) para 20.).
Historic legal ties were therefore regularly rejected (See eg ICJ, *Western Sahara* (Advisory Opinion) (1975) para 162; Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 73-74). The rationale behind this was described as 'Any doctrine that authorizes the consolidation of inchoate "legal ties" into territorial sovereignty will prove, at the least, mischievous and at the most, calamitous for regional order' (Michael W Reisman, 'African Imperialism' (1976) 70(4) American Journal of International Law 801, 802). Nevertheless, the principle of *uti possidetis* 'lived always somewhat uneasily with the official ideology of decolonisation as a restoration of authentic communities' (Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43(2) International and Comparative Law Quarterly 241, 243).

79 Res 1514 (n 65) para 2.

80 International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171.

81 Res 1514 (n 65) para 6. And in 1970 the General Assembly even cautioned not to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described

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fore not entirely clear, if and when peoples – besides the historically colonial ones – have a claim to their own territory or if they need to respect the national unity and territorial integrity of their parent State.[82] In case of grave breaches of humanitarian law or human rights abuses against a people by its parent State, the question may arise more forcefully, if a people should be granted its separate territory.[83] Only for peoples who do enjoy the right to independence will their unilateral secession become binding upon the parent State. Their territory thus becomes foreign to the now former parent State for matters of military occupation.[84] The newly independent territory can join a third State or it will remain foreign to that State as well.[85]

1.3 'Hostile Army'

Any foreign force on 'territory of the hostile State' can qualify as 'hostile army.'

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above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' (Friendly Relations Declaration (n 68)).

82 Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) International and Comparative Law Quarterly 537, 537. See also Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (n 78) 242ff.
In 1997 it has been argued that the rationale behind the principle of *uti possidetis* (n 78) may apply outside the historic colonial context as well (Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8(3) European Journal of International Law 478, 503). In 2006 it was held that 'States are still under no general duty to consult or act according to the wishes of the population of a disputed territory with respect to its future status' (Ratner (n 43), 811). In 2010, the ICJ was of the view that the right to independence apply to 'peoples subject to *alien* subjugation, domination and exploitation' (emphasis added) (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) para 79).

83 See Willem Van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104(1) American Journal of International Law 29, 39ff.

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

85 See 1.2.3.1 Delimitation in General, 32ff.

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The Hague Regulations employ the term occupying 'State' in Article 55, where they lay out the obligations that apply during occupation.[86] However, in Article 42, which contains the definition of occupation, the Hague Regulations describe the occupying force merely as 'hostile army' without mention of a 'State' and Article 45 speaks of the 'hostile Power' and does not mention a 'State' either.[87]

It seems reasonable to follow that the occupying force does not have to be the designated army of a State in order for that State to qualify as the occupier. The force merely needs to be attributable to any one foreign State.[88] Any force attributable to a foreign State qualifies as a 'hostile army' or 'hostile power' and not merely as a security force or the like, if it is capable to establish military authority.[89] A joint force – such as a coalition – qualifies as 'hostile army' if it consists of troops attributable to at least one State.[90] A UN force likewise qualifies as 'hostile army', while its troops are attributable to one or more foreign Member States and not just to the UN itself.[91]

86 Art 55 Hague Regulations (n 2) reprinted in 3.2 Administration of Property (Usufruct), 66.

87 Article 42 of the Hague Regulations reads 'Territory is considered occupied when it is actually placed under the authority of the hostile army' and Article 45 says 'It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.'

88 This is the case when the force is 'placed under a command that is responsible to (a) party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by the adverse party' (Art 43 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).

89 'The definition in Art 43 Additional Protocol I (n 88) is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces' (Jean-Marie Henckaerts, 'Armed Forces' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 12).
The definition likewise encompasses paramilitary and armed law enforcement agencies, when the facts are met (Henckaerts (n 89) para 14). See 1.4.1 Instances of Authority, 43ff, for the definition of 'military authority'.

90 See Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 24.

91 See Henckaerts (n 89) 19. See also 1.4.1 Instances of Authority, 43ff.

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The Hague Regulations use the word 'hostile' for both parties – 'hostile army' in Article 42 refers to the occupying force, while 'hostile State' in the title of Section III means the occupied territory. The word 'hostile' therefore merely indicates that the two parties are foreign to each other and disputing.[92]

1.4 'Military Authority'

1.4.1 Instances of Authority

The status of military occupation applies when military authority has been established and while it lasts. Military authority is a question of fact, regardless of the reasons behind the foreign presence.

Forces that still actively maintain their presence on foreign territory as a result of hostilities have established military authority there.[93] This is reflected in the separation of the Hague Regulations into three Sections of which Section I is titled 'On Belligerents', Section II 'Hostilities' and Section III 'Military Authority over the Territory of the Hostile State'.[94]

The conduct of hostilities is, however, not a precondition for the establishment of military authority.[95] A State namely does not have to offer armed resistance to be considered occupied.[96] A territory must merely

92 Konstantinos Mastorodimos, 'How and When Do Military Occupations End?' (2009) 21(1) Sri Lanka Journal of International Law 109, 119. This follows also from the fact that the status of military occupation does not depend upon the prior conduct of hostilities. (1.4.1 Instances of Authority, 43ff).

93 *Armed Activities Case* (n 3) Dissenting opinion of Judge Kooijmans, paras 45, 49, with reference to Article 41 The Laws of War on Land (Oxford Manual) (Institute of International Law 9 September 1880) as well as US and UK law of war manuals. See however Benvenisti, 'Occupation, Belligerent' (n 1) para 5, for the debate if it is sufficient for the occupant to be regarded as such if he is merely in a position to establish military authority or if he must actually replace the local authority with his own structures.

94 See Adam Roberts, 'Termination of Military Occupation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 9.

95 Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 147.

96 Art 2(2) 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 (GCIV).

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find itself under a situation of coercion.[97] Lack of consent to the foreign armed presence is sufficient.[98] Military authority has been established from the moment a foreign army exercises sufficient control to enforce their rights and duties under the law of occupation.[99] It therefore does not matter if the foreign army invaded the territory or if it had been invited onto it.[100] When the forces of a State turn to coercion on foreign territory to protect its interests there, or, if they lack consent by the host State for their presence, they exercise military authority and become occupying forces.[101] When a territory has chosen independence in a legally valid fashion, military authority applies if the former parent State or a third State remains on or enters the territory without consent.[102]

The presence of UN forces, absent consent, equally amounts to coercion and therefore military authority applies.[103] This is true, regardless

97 Dinstein, *The International Law of Belligerent Occupation* (n 36) 38-39. Various kinds of pressure qualify as coercion, including threats and intimidation (Christopher C Joyner, 'Coercion' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 1). Accordingly, 'It is generally accepted that it is sufficient that the occupying force can, within reasonable time, send detachments of troops to make its authority felt within the occupied area' (Benvenisti, 'Occupation, Belligerent' (n 1) para 8).

98 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 53. See Georg Nolte, 'Intervention by Invitation' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 26, regarding the fragility of consent with respect to transitional governments.

99 cf International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report of the 32nd International Conference of the Red Cross and Red Crescent (International Committee of the Red Cross 10 December 2015) 11.

100 See *Armed Activities Case* (n 3) paras 173-78; Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 32; Dinstein, *The International Law of Belligerent Occupation* (n 36) 42.

101 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 230. See also 1.3 'Hostile Army', 41f, for the threshold to qualify as a hostile army of the foreign State.

102 n 98. See Crawford, *The Creation of States in International Law* (n 15) 147-48; 1.2.4 Self-Determination and Related Claims to Territory, 37ff; 6.5.2 Historic Colonies, 116ff.

103 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 54. See also 1.3 'Hostile Army', 41f.

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if the UN forces are led by States or by the UN itself.[104] The UN Charter provides no cause to assume that an intervention by UN forces under a mandate of the Security Council of the United Nations (The Security Council) be its own type of authority and military occupation therefore not applicable.[105]

Military authority, and therefore occupation, applies only in those areas 'where such authority has been established and can be exercised'.[106] There is no prescribed spacial threshold and therefore occupation applies also when military authority is exercised on very confined land, such as a facility.[107] Similarly, there is no threshold of duration and therefore occupation applies immediately, even in case of only a momentary instance of military authority, such as during a raid.[108]

Since occupation is a consequence of the fact of military authority, the status of military occupation ends when the foreign military authority has ceased.[109]

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104 cf Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 185ff; Marten Zwanenburg, 'United Nations and International Humanitarian Law' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 6, 27.

105 See Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 385. See also Roberts, 'Termination of Military Occupation' (n 94) paras 50-51; Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 79; Dinstein, *The International Law of Belligerent Occupation* (n 36) 41, who however requires that the UN itself become a belligerent party – either under a Chapter VII enforcement action or in the course of a peacekeeping operation gone awry.

106 Art 42(2) Hague Regulations (n 2). Similarly, Article 2(2) GCIV (n 96) provides that the Convention applies to both 'partial or total occupation of the territory of a High Contracting Party'.

107 See ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 105) 39; Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 21.

108 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 20. See however Dinstein, *The International Law of Belligerent Occupation* (n 36) 46.

109 A withdrawal of troops is the most common case, but the conclusion of a valid treaty without the threat or use of force may transform the former military occupation into a consensual presence (Eyal Benvenisti, 'Occupation, Pacific' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn,

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1.4.2 The Relationship to Peace

While occupation lasts, peace is precluded.

One instance in which peace is breached is at the start of hostilities.[110] During hostilities, a hostile army may be able to establish military authority on the territory of the foreign State. This in turn is when military occupation starts.[111]

Peace is also breached when a State that had been invited onto foreign territory transforms its presence there into military authority without the conduct of hostilities.[112] The moment the foreign forces lack consent, they turn to coercion and the military occupation begins.[113] In this case, the start of military occupation coincides with the breach of peace.

Peace can only be restored when military occupation has ended.[114] The formal conclusion of peace alone does not end occupation and therefore does not restore actual peace.[115] Only the cessation of military authority ends occupation and thus enables peace.[116]

1.4.3 The Relationship to Sovereign Equality

The sovereign equality of a State is suspended from the moment a foreign army exercises military authority on the territory. Although its equality is suspended, an occupied State does not lose the claim to its territory.

A State is equal as a territorial unit opposite other territorial units.[117] The UN Charter employs the term 'sovereign equality' to describe the relationship of co-existence among its Member States.[118] To complement

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Oxford University Press 2017) para 6; Roberts, 'Termination of Military Occupation' (n 94) paras 20, 27).

110 See Michael Wood, 'Peace, Breach of' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 11, 14, with reference to the pertinent SC practice.

111 n 93.

112 Kolb and Hyde (n 101) 230.

113 1.4.1 Instances of Authority, 43ff; 1.3 'Hostile Army', 41ff.

114 cf Kolb and Hyde (n 101) 230.

115 See Roberts, 'Termination of Military Occupation' (n 94) para 9.

116 See n 93.

117 1.2.2 Equal States as a Territorial Order, 30f.

118 Abi-Saab (n 7), 257. Art 2(1) UN Charter (n 8).

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the term 'equality' with the word 'sovereign' emphasises the idea that an equal State is the only governing authority within its own territorial unit, subject only to international law.[119] Strictly speaking, the meaning of 'sovereign' is already contained in the term 'equality', since two territorial units are only equal precisely because the one cannot decide over the territory of the other, without consent.[120] The analogy can be made to the idea of equality of human beings, which means not just their plain co-existence as bodies, but their freedom to command their bodies with the same rights and obligations as all other human beings.[121]

Among equal States, rights and obligations cannot be presumed, but have to be consented to by the States concerned, through agreement or customary law.[122] With each agreement, States stipulate their right to exclusive government on their own territory without entirely forfeiting their sovereign equality.[123]

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119 This is as close as it gets to the meaning of the term 'sovereign' in an international law context (*Oxford Dictionary of Law* (9th edn 2018) 469; Hans Kelsen, 'The Pinciple of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) Yale Law Journal 207, 208; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Legal Aspects of International Organizations, Vol 51, Brill | Nijhoff 2009) 111).
Perhaps naturally, the term 'sovereign' or 'sovereignty' is still subject to much discourse, even after adoption of the UN Charter (See Bardo Fassbender and Albert Bleckmann, 'Article 2(1)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 paras 71-73).

120 See Crawford, 'State' (n 12) paras 5-7. See also 1.2.2 Equal States as a Territorial Order, 30f.

121 n 30. See also n 573.

122 'Between independent persons there can be no imposition of law; otherwise these persons would not be independent, but rather subjected to the sway of some higher subject. Conversely, these persons may agree among themselves as to what the law should be. The agreement is the vehicle *par excellence* of some law-creation in a decentralized society'; with customary law itself being a form of tacit agreement (Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' (2012) 23(1) European Journal of International Law 233, 233f). PCIJ, *The Case of the SS "Lotus" (France v Turkey)* (Judgement) Serie A, No 10 (1927) 18; Kokott (n 26) para 30. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement, Merits) (1986) para 269.

123 Thus, while sovereignty is still 'the point of departure in settling most questions that concern international relations' (*Island of Palmas Award* (n 38) 8) it may '(no longer) serve as a reliable starting point for deductions about the law',

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Per the Hague Regulations, the Geneva Conventions and customary international law, equal States are suspending their own equality by ceding their exclusive right to govern on their own territory in the event of military occupation.[124] But although the sovereign equality of an occupied State is suspended by the foreign military authority, the occupied State does not lose the claim to its own territorial unit.[125] An equal State has merely ceded its right to govern exclusively for as long as the foreign military authority lasts.[126] How far the foreign government reaches in terms of its material legal scope is determined by the law applicable to the status of military occupation.[127] Because the status of occupation

(Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 51) 303) in the sense that sovereignty is 'not a synonym for limitless, absolute power' (Jost Delbrück, 'International Protection of Human Rights and State Sovereignty' (1982) 57(4) Indiana Law Journal 567, 570).
'Entering into international engagements is an attribute of State sovereignty' and not an abandonment thereof (PCIJ, *Case of the SS "Wimbledon" (Britain et al v Germany* (Judgement) Serie A, No 1 (1923) 25).

124 Article 6(3) GCIV (n 96) provides that '(The Occupying Power) exercises the functions of government in such territory, by the provisions (of the Convention)'. See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59f.

125 See Zimmermann, 'Continuity of States' (n 22) para 10; Roberts, 'Termination of Military Occupation' (n 94) paras 38-40; Eric De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff 2009) 120. See however Kelsen, *Principles of International Law* (n 13) 75-76, arguing that a State goes out of existence if its own government disintegrates completely during occupation.
While most writers seem to agree that the claim to territory is not lost during occupation, they do use differing terminology to describe the relationship between the temporary suspension of sovereign equality and the permanent claim to the territorial unit – such as possession and ownership; concrete ownership and abstract ownership; sovereignty to prescribe and title; or *de facto* sovereignty and *de iure* sovereignty (See Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 4-6; Brownlie (n 14) 106-07; Dinstein, *The International Law of Belligerent Occupation* (n 36) 58).

126 See Marcelo Kohen, 'Conquest' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) para 3; Brownlie (n 14) 107. See also 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

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

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does not affect claims to territory, an entity can develop into a State on that territory, even while it is being occupied.[128]

128 n 13; n 20. See however Crawford, *The Creation of States in International Law* (n 15) 148.

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2 The Use of Force and Military Occupation

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2.1 The Legality of Occupation

The question if military occupation came about by legal or illegal use of force does not affect the application of occupation law.

The prohibition of the use of force relevant to the exercise of military authority is contained in the UN Charter and starts out at its Article 2(4):

> **Article 2 UN Charter**
>
> (...)
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or *in any other manner inconsistent with the Purposes of the United Nations*.
>
> (...)[129]

Article 2(4) is informed by Article 1(1) of the Charter, containing the purposes of the United Nations:

> **Article 1 UN Charter**
>
> *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

129 Emphasis added.

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> international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> (...)[130]

In turn, both Articles 1 and 2 are restrained by Article 51 of the Charter:

> **Article 51 UN Charter**
>
> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[131]

The prohibition of the use of force is directed against attacks, not against self-defence.[132] This follows from the fact that the UN Charter prohibits 'acts of aggression or other breaches of the peace'[133], but lets nothing impair the 'inherent right of individual or collective self-defence if an armed attack occurs'.[134] Additionally, use of force which has been autho-

130 Emphasis added.
131 Emphasis added.
132 Georg Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' [1976] Year Book of World Affairs 307, 317, 333; Christopher Greenwood, 'Self-Defence' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 9, 52.
133 Art 2(4) in connection with Art 1(1) Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945).
134 Art 51 UN Charter (n 133); See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement, Merits) (1986) para 195; Yoram Dinstein, 'Aggression' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 7, 19, 27, 33.
Note at this point that while the prohibition of the use of force is 'probably the single most important obligation' imposed upon the Member States its exact

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rised by the Security Council as 'necessary to maintain or restore international peace and security' is not considered an act of aggression.[135] The Security Council has authorized action also in case of humanitarian situations that concerned only national and not international peace and security and it may be argued that a pertinent duty exists.[136] An overriding responsibility to protect, which would allow States to use force unilaterally against another State that violates *ius cogens* norms on its own territory has not yet been established.[137]

---

scope is highly disputed and it is therefore also 'probably the most controversial obligation' (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 33).

135 Art 51 in connection with Art 42 UN Charter (n 133). Dinstein, 'Aggression' (n 134) para 19.

136 See 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) 29-30; Gareth Evans, 'The Evolution of the Responsibility to Protect: From Concept and Principle to Actionable Norm' in Ramesh Thakur and William Maley (eds), *Theorising the Responsibility to Protect* (Cambridge University Press 2015) 34-37.
Some also call for a duty to intervene, if necessary by force, to support independence movements (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 1766).

137 Andreas Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 637; Nigel Rodley, "Humanitarian Intervention" in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 793-94; André De Hoogh, 'Jus Cogens and the Use of Armed Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1185-86. See also Christian Henderson, *The Use of Force and International Law* (Cambridge University Press 2018) 401-06, for the uncertainties surrounding the responsibility to protect in its evolution as a legal norm.
Some at least concede that 'In the rare event where there is a humanitarian emergency, and where most States agree that intervention is needed but the UN is unable to act (...), States may be willing to accept humanitarian considerations in mitigation of the occasional violation of the prohibition of the use of force and limit their response accordingly' (Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max*

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The question arises, if an occupant has breached the peace illegally or exercised legal self-defence.[138] The Security Council has the competence to determine if an act of aggression indeed occurred.[139] No other legal authority has compulsory jurisdiction to do so.[140] It thus remains unanswered if the use of force was illegal when the Security Council stalls due to a veto.[141]

Even if it is established that peace was breached by an illegal attack, this has no bearing upon the right of either party to establish military authority and thus become the occupant.[142] During war, the same rights

Planck Encyclopedia of Public International Law (Oxford University Press 2017) para 47).

138 See also 1.4.2 The Relationship to Peace, 46f.

139 Art 39 UN Charter (n 133). See Michael Wood, 'Peace, Breach of' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 11.

140 Even when vested with jurisdiction, the ICJ referred to the Security Council with respect to the finding that the occupation of Namibia by South Africa was illegal (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) (1971) paras 115, 119 with reference to Security Council Resolution on The Situation in Namibia, SC Res 276 (30 January 1970) UN Doc S/RES/276 (1970) paras 2, 5).

141 'This is the gap in the Charter' (Philip C Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company 1950) 203. See also Dinstein, 'Aggression' (n 134) paras 10, 32; Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 121-22).

'It must always be borne in mind that the veto may be exercised not only when one of the permanent members of the Security Council is a party to a dispute, but also in any case in which such a member desires to block action, perhaps because of sympathy with one of the parties' (Jessup (n 141) 203; See also Ian Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the 'Unreasonable Veto'' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 227ff.

In practice, it therefore still remains true that each State is its own judge on the question of who started (See Immanuel Kant, *Zum Ewigen Frieden* (first published 1795, Philipp Reclam jun Stuttgart 1984) 18).

142 Eyal Benvenisti, 'Occupation, Belligerent' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 20. See also Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 551, 553, 559, 608, who consider an occupation

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and obligations attach to an original attacker as to a defender.[143] The definition of military authority does not distinguish between attacker and defender.[144] Consequently, the rights and obligations that follow from the establishment of military authority apply to all parties equally.[145] The question of legality of the breach of peace thus has no influence upon the rights and obligations from occupation law, which apply to an occupant during military occupation.[146]

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illegal only if it is maintained in a manner that defeats the prospect of its termination.

143 This non-differentiation between attacker and defender in the course of war, including during occupation, is a result of the exclusionary distinction between the realms of *ius in bello* and *ius ad bellum* (See Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 4; Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 14ff; Keiichiro Okimoto, 'The Relationship Between *Jus ad Bellum* and *Jus in Bello*' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1214, 1215).

144 1.4.1 Instances of Authority, 43f.

145 See Security Council Resolution 1483, SC Res 1483 (22 May 2003) UN Doc S/RES/1483 (2003) point 5. See Allan Gerson, 'War, Conquered Territory, and Military Occupation in the Contemporary International Legal System' (1977) 18(3) Harvard International Law Journal 525, 541-42, for the rationale behind the equal application of the law of occupation to attacker and defender.
Note that a breach of the rights and obligations under occupation law that is found to be illegal does not render the occupation illegal *per se* (See ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004)). See however Ben-Naftali, Gross, and Michaeli (n 142), 552-53, for a critique of the strict separation of the two spheres.

146 'International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject' (United States Military Tribunal, Nuemberg, *The Hostages Trial (Trial of Wilhelm List and Others: Case No 47)* (1948) 8 Law Reports of Trials of War Criminals: Selected and prepared by the United Nations War Crimes Commission 369, 59); Benvenisti, 'Occupation, Belligerent' (n 142) para 20; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 2. See however Resolution on Situation in Namibia resulting from the illegal occupation of the Territory

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2.2 The Prohibition to Acquire Territory by Force

The prohibition of the use of force precludes that territory can be acquired during military occupation.

To acquire foreign territory, a State would have to be able to establish a valid new boundary, by altering an existing one or drawing a new one.[147] When foreign territory belongs to an equal State,[148] a boundary cannot be established unilaterally,[149] even though equality has been suspended during occupation.[150] This is due to the prohibition of the use of force which not only bans illegal breaches of the peace, but also the use of force against the 'territorial integrity' or the 'political independence' of 'any State'.[151] 'Territorial integrity' means that the boundaries of the territory of a State are to be preserved and the territorial unit of a State to remain unaltered.[152] 'Political independence' means that the same territorial unit shall remain in existence as an equal State.[153] 'Political independence' thus protects States also from the re-allocation, by force, of their entire territory, or of an island or overseas territory to a new State entity whereby no alteration of boundaries occurs. This protection of the permanent existence of a State within its own territorial unit expresses the nature of equality as a right which can only be suspended but not permanently lost.[154]

While the breach of peace through the use of force may be justified by self-defence,[155] the acquisition of territory by force lacks this justification

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by South Africa, GA Res 41/39A (20 November 1986) UN Doc A/RES/41/39A (1986).

147 1.2.3.1 Delimitation in General, 32ff.

148 See 1.2.1 The Scope of the Term 'Hostile State', 26ff for the question when a State and therefore a claim to territory in fact exists.

149 1.2.3.1 Delimitation in General, 32ff.

150 See Ben-Naftali, Gross, and Michaeli (n 142), 570ff; See also 1.4.3 The Relationship to Sovereign Equality, 46f.

151 Art 2(4) UN Charter (n 133) (reprinted in 2.1 The Legality of Occupation, 51).

152 See Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 54. See also 1.2.2 Equal States as a Territorial Order, 30f; 1.2.3.1 Delimitation in General, 32ff.

153 See John Westlake, *International Law: Part I – Peace* (Cambridge University Press 1910) 321. See also 1.4.3 The Relationship to Sovereign Equality, 46f.

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

155 2.1 The Legality of Occupation, 51ff.

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under the Charter.[156] The Charter allows self-defence when an armed attack occurs.[157] Yet self-defence is also limited to countering that armed attack.[158] To counter an armed attack, it may be necessary to establish military authority on a foreign territory, but to alter that territory is going much further.[159] Also, per the Charter, the exercise of self-defence 'shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take *at any time* such action as it deems necessary in order to maintain or restore international peace and security'.[160] To alter a territory unilaterally certainly affects international peace and security – for better or worse – and thereby interferes with the authority of the Security Council, even if the Security Council may be stalling.[161] Unilateral acquisition of occupied territory is therefore not covered by self-defence.[162]

Without the legally valid establishment of a new boundary, territory remains foreign and therefore occupied.[163] Although claims to foreign territory can be developed over time,[164] the use of force still bars such

156 Gray (n 141) 164; Ben-Naftali, Gross, and Michaeli (n 142) 571-72. See also Dinstein, *The International Law of Belligerent Occupation* (n 146) 59.

157 Art 51 UN Charter (n 133) (reprinted in 2.1 The Legality of Occupation, 51).

158 Johanna Friman, *Revisiting the Concept of Defence in the Jus ad Bellum* (Hart 2017) 93.

159 Jennings (n 152) 55; Stephen M Schwebel, 'What Weight to Conquest? (Editorial Comment)' (1970) 64(2) American Journal of International Law 344, 344. The general statement thus seems accurate that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal' (Declaration on Principles of International Law concerning Friendly Relations and Cooperation 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). See also Security Council Resolution 242, SC Res 242 (22 November 1967) UN Doc S/RES/242 (1967)).

160 Art 51 UN Charter (n 133) (emphasis added) (reprinted in 2.1 The Legality of Occupation, 51).

161 The wording 'at any time' in Article 51 UN Charter (n 133) should be taken to imply that a hanging veto does not cancel the authority or responsibility of the SC.

162 n 156. Neither can the Security Council take measures to alter a boundary (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 19).

163 1.2.3.1 Delimitation in General, 32ff.

164 n 44.

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acquisition.[165] In any case, acquisition via the passage of time would not take effect unilaterally but would have to be decided upon by a competent legal forum.[166]

165 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) 1082; Marcelo Kohen, 'Conquest' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 5, 12 – the latter author makes an exception for the case of *debellatio*, while the former does not.
An analogy with Roman law would suggest that acquisition be barred under the institute of *usucapio* as a consequence of the use of force – regardless of its legality, and therefore not dependent upon the application of yet another ancient principle, that of *ex iniuria ius non oritur* (See Nicholas Barry, *An Introduction to Roman Law* (Oxford University Press 1962) 122. See however Rudolf L Bindschedler, 'Die Anerkennung im Völkerrecht' (1961-1962) 9 Archiv des Völkerrechts 377, 388, 392).

166 1.2.3.1 Delimitation in General, 32ff. See also Victor Prescott and Gillian D Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Martinus Nijhoff 2008) 188.

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3 The Applicable Law Pertinent to the Economy

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3.1 The General Scope of Authority

3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations)

Article 43 of the Hague Regulations outlines the material legal scope of occupation. It grants the occupant far-reaching authority to take measures for public order and safety.

Article 43 of the Hague Regulations is part of customary international law.[167] It contains the general clause for the applicable law under the status of military occupation.[168]

167 ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 89.

168 See Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004) 9; David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94(885) International Review of the Red Cross 207, 218.

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Hague Regulations

Article 43

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

To take measures for 'public order and safety' is at the same time a right and an obligation.[169] The occupant must not leave the territory in a desolate or hazardous state that endangers the inhabitants.[170] In turn, the occupant enjoys expansive regulatory leeway regarding economic transactions in the territory.[171] The wording that the 'legitimate power' has 'passed into the hands of the occupant' expresses this regulatory leeway.[172] The occupant is now the governing authority in the territory.[173]

169 See Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 232.

170 See Timothy Mccormack and Bruce M Oswald, 'The Maintenance of Law and Order in Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (1st edn, Oxford University Press 2010) 457-59; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 104.

171 The authentic French words are 'l'ordre et la vie public'. The provision thus entails 'the entire social and commercial life of the community'; or, in other words, 'every transaction that makes daily life possible in a country' (Coleman Phillipson, *International Law and the Great War* (T Fisher Unwin, Ltd 1915) 219; Lindsey Cameron, 'Does the Law of Occupation Preclude Transformational Developments by the Occupying Power?' [2005] (34) Collegium: Special Edition – Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation 60, 63). See also Benvenisti, *The International Law of Occupation* (n 168) 9-11.

172 See Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill | Nijhoff 2018) 127.

173 'The occupier does not derive public authority from the people it governs but from the fact of effective control' (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). See also 1.4.3 The Relationship to Sovereign Equality, 46f.

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The basic right an occupant has under occupation law is to maintain the occupation.[174] This results from the fact that all warring parties are equally entitled to establish military authority and that no specific end to military authority is prescribed.[175] To maintain military authority may require the regulation of economic transactions.[176] For instance, military authority could be jeopardized if a third State or the inhabitants gained economic control in the territory.[177] Measures to maintain military authority must, however, never go as far as to diminish the rights which the inhabitants enjoy under occupation law.[178] The general right to main-

174 '(The occupying power's) legitimate interest is to control the territory for the duration of the occupation' (Marco Sassòli, Antoine A Bouvier, and Anne Quintin, *How Does Law Protect in War? : Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, vol 1, International Committee of the Red Cross 2011) pt 1, ch 8, 21). 'The occupying power is entitled to take all measures rendered necessary by military operations, or for the safety of the occupying forces' (Wolff Heintschel von Heinegg, 'Factors in War to Peace Transitions' (2004) 27(3) Harvard Journal of Law & Public Policy 843, 860). See also Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 382-83.

175 n 142. According to the definition of occupation in the Oxford Manual, '(...) the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation' (Art 41 The Laws of War on Land (Oxford Manual) (Institute of International Law 9 September 1880)). See however Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 551, 612, who argue that the right to maintain military authority is forfeited if the occupation itself becomes illegal.

176 'The *de facto* authority, which is the characteristic of occupation, implies that the Occupying Power has at least the ultimate control of that administration' (Michael Bothe, 'The Administration of Occupied Territory' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 42).

177 'In any event, if the rules refer to the security interests involved, the occupying power will have a considerable margin of discretion when it comes to the determination of the necessary measures' (Heintschel von Heinegg (n 174), 860).

178 Article 47 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 provides that 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by

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tain the occupation is complemented by specific rights of the occupier to have his military efforts supported and to administer property in the territory.[179]

Taking measures for public order and safety, the occupant must respect the laws in force in the country 'unless absolutely prevented'.[180] At the outset it should be noted that this limitation concerns the measures for public order and safety and not those measures taken in the exercise of more specific rights and obligations under occupation law.[181] With respect to the measures for public order and safety, an occupant is 'absolutely prevented' from respecting the laws in force in the country, if this would mean a threat to his security or an obstacle to the application of the international law of occupation.[182] With respect to the security of the occupant, there exists a priority over the laws in force in the country, if military necessity demands it.[183] The occupant is thus free to take measures that serve the maintenance of his military authority and to exercise

any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'. Bothe (n 176) para 18.

179 3.2 Administration of Property (Usufruct), 66ff; 3.3 Rights and Duties to Support the Military Authority, 71ff.

180 In the original French text of the Hague Regulations, the relevant term reads '*sauf empechement absolu*' (Art 43 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)).

181 n 179. See however 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) 75, and the references to the negotiating history of Article 43 there.

182 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, 670, 675; Occupation and International Humanitarian Law: Questions and Answers: A series of questions and answers by the ICRC's legal team on what defines occupation, the laws that apply, how people are protected, and the ICRC's role (International Committee of the Red Cross 4 August 2004) 57.

183 See Benvenisti, *The International Law of Occupation* (n 168) 14.

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his rights under occupation law.[184] This leaves ample room to regulate economic transactions irrespective of contrary laws in force.[185]

The term 'laws in force in the country' in Article 43 of the Hague Regulations encompasses rights and obligations of international law that apply in the occupied territory.[186] The priority of occupation law thus applies also opposite international law which binds the occupied country, such as an international investment treaty.[187] This can be taken to follow from the wording of the Hague Regulations as well as the Hague Convention to which the Regulations are annexed: The titles of the Hague Convention and the annexed Regulations read 'laws' ('*lois*') and customs of war on land.[188] Since the Convention and its Regulations concern matters of international law, the word 'laws' ('*lois*') in Article 43 of the Regulations should also include international law and not only national law.[189] Further, Article 10 of the Hague Regulations – which concerns national laws – speaks of 'the laws of their country.'[190] Article 43, however, employs the broader term 'laws in force in the country' and thus should encompass not only the proper laws of the country but all rights and obligations that apply in the country, including by virtue of international law.

If no other rights and obligations from occupation law, nor laws in force in the country apply, the authority of the occupant again falls back to his competence to regulate the economy by measures for public or-

184 Some even allow deviation from the laws in force under 'a case-specific assessment (which) will evolve depending on the situation concerned' (Cuyckens (n 172) 145. See also Benvenisti, *The International Law of Occupation* (n 168) 16).

185 Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' (n 173) para 57. See n 171. See also 3.1.2 New Legislation and Existing Laws, 64ff; 3.2 Administration of Property (Usufruct), 66ff.

186 Bothe (n 176) 97. In the authentic French text the relevant term reads *'les lois en vigueur dans le pays'* (Art 43 Hague Regulations (n 180)).

187 cf 184.

188 Hague Regulations (n 180).

189 Today, the body of international law is to a large part – such as through custom – in force in a State regardless if that State maintains a monist or a dualist tradition (See Ackermann (n 181) 73-74).

190 Or *'les lois de leur pays'* in the authentic French text (Art 10 Hague Regulations (n 180)).

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der and safety.[191] The term 'public order and safety' invites considerable discretion.[192] The regulation of previously unregulated economic activity inevitably falls under that discretion.[193] This discretion may even include the capacity to enter into treaties concerning the territory.[194]

3.1.2 New Legislation and Existing Laws

An occupant enjoys considerable leeway to enact new legislation.

Article 43 of the Hague Regulations authorizes the occupant to 'take all the measures in his power' to restore and ensure public order and safety.[195] These measures encompass also the modification of existing laws and the enactment of new laws for the duration of occupation.[196]

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191 Public order and safety gives the occupant 'a wider scope for change in its administration of the occupied territory than "military necessity"' Cameron (n 171), 64).

192 'It includes all aspects of public or civil life' (Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (n 168), 219. 'Whether and to what extent the occupying power may interfere with the political and social structures in an occupied territory will (...) depend upon the circumstances of the individual situation, and is, thus, a question of fact' (Heintschel von Heinegg (n 174), 860).

193 To ensure public order expresses concern 'for providing a future system of public order, regardless of whether one existed before the conflict' (Davis P Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1985) 37(6) Stanford Law Review 1573, 1578).

194 It may be inferred from the judgment of the ICJ concerning the Timor Gap Treaty that only *unlawful* occupants are precluded from entering into treaties that dispose over the natural resources of a territory (ICJ, *Case Concerning East Timor (Portugal v Australia)* (Judgement) (1995) paras 13-15, 34-35. See n 143 and n 145, for the question if occupation is lawful). For the ongoing debate, see Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 59ff.

195 Art 43 Hague Regulations (n 180) reprinted in 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59.

196 Corn and others (n 174) 378. Note that it has even been argued that the legislative power of the occupant is not limited to restoring and ensuring public order and safety (See Cuyckens (n 172) 140-41). And some finally want to allow the transformation of the laws and institutions of an occupied territory if the intervention had been justified for humanitarian reasons (See Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and

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Article 43 of the Hague Regulations is complemented by Article 64(3) of the Fourth Geneva Convention (GCIV).[197] Article 64(3) GCIV contains an explicit right to legislate:

> **GCIV**
>
> **Article 64**
>
> (...)
> (3) The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration
> (...)

The right to legislate per Article 64(3) GCIV pertains to all fields of law.[198] Support is found in the fact that Article 64(3) GCIV speaks of 'provisions' only, while in all other relevant instances the Convention employs the term 'provisions' always in connection with notions of penal law.[199] The term 'provisions' is more comprehensive than the term 'penal laws.'[200] An occupant may even enter into treaties regarding the territory.[201]

Similar to his competence to legislate per Article 43 of the Hague Regulations to restore and ensure public order and safety, the occupant can legislate under Article 64(3) GCIV 'To fulfil (his) obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power (...)'. But in contrast

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Jus in Bello in the Contemporary Law of War' (2009) 34 The Yale Journal of International Law 47, 108. See also n 136).

197 Art 154 GCIV (n 178); Cuyckens (n 172) 145-47.

198 Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 150; Cuyckens (n 172) 147-48. See also Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 337.

199 See Art 64ff GCIV (n 178).

200 See also Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182), 669-70; Dinstein, *The International Law of Belligerent Occupation* (n 170) 111.

201 See Bothe (n 176) 98.

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to Article 43 of the Hague Regulations, the occupant is not bound by the laws in force in the country under Article 64(3) GCIV.[202] Unlike Article 43 of the Hague Regulations, Article 64(3) GCIV does not mention the laws in force.[203] An occupant thus enjoys greater legislative leeway under the Geneva Convention than under the Hague Regulations.[204] His right to legislate is only limited by the rights which the inhabitants enjoy under occupation law.[205] Where no rights and obligations from occupation law are concerned, the occupant can legislate not only for his military interests, but for the orderly government of the territory.[206] This includes legislating with respect to economic policy.[207]

3.2 Administration of Property (Usufruct)

Administration of property grants the occupant broad benefits from the use of land and infrastructure.

Customary international law according to Rule 51 as identified by the ICRC,[208] as well as Article 55 of the Hague Regulations prescribe that

202 Dinstein, *The International Law of Belligerent Occupation* (n 170) 112.

203 cf Art 43 Hague Regulations (n 180) reprinted in 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59.

204 See Cuyckens (n 172) 150.

205 Art 47 GCIV (n 178) reprinted in n 178.

206 See Cuyckens (n 172) 150; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182), 673.

207 An occupant can thus largely transform the economy of an occupied territory, as long as the changes are temporary (n 171).
Recall that 'Belligerent occupiers are either fighting to change the government and the fundamental structure of the occupied territory's society, or the occupiers find substandard structures or no structures at all (Goodman (n 193), 1591).
It has been argued that changes to legislation should be allowed if the same situation is regulated similarly in the metropolitan territory (Dinstein, *The International Law of Belligerent Occupation* (n 170) 133). But this test still allows for economic transformation (Benvenisti, *The International Law of Occupation* (n 168) 15-16). It was also argued that legislative change needs to stay close to local economic traditions, but it is hard to invoke a sound legal basis for this other than the transitory nature of occupation (See Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182) 678-79).

208 Jean Marie Henckaerts and others, *Customary International Humanitarian Law* (vol 1, Cambridge University Press 2005) (ICRC Rules).

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the occupier functions as administrator of public property in accordance with the rule of usufruct:

> **ICRC Rule 51**
>
> **Public and Private Property in Occupied Territory**
>
> In occupied territory:
> (a) movable public property that can be used for military operations may be confiscated;
> *(b) immovable public property must be administered according to the rule of usufruct*; and
> (c) private property must be respected and may not be confiscated;
> except where destruction or seizure of such property is required by imperative military necessity.[209]

> **Hague Regulations**
>
> **Article 55**
>
> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Administration under the rule of usufruct vests the occupant with rights and duties.[210] As administrator, the occupant enjoys the right to use public property according to his needs.[211] The most direct benefit to the occupant lies in the use of the proceeds from public real estate – such as natural resources and the produce of the land.[212] Among the proceeds from public infrastructure are products or rent payments, including li-

209 Emphasis added.
210 See Bothe (n 176) para 86.
211 See Cuyckens (n 172) 135; Corn and others (n 174) 403, 405.
212 See Anicée Van Engeland, 'Protection of Public Property' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 27; Hans-Georg Dederer, 'Enemy Property' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 33; Corn and others (n 174) 405.

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censing fees.[213] The rule of usufruct does not prescribe the specific use of these proceeds.[214] The occupant can sell the proceeds.[215] He may keep the profits or reinvest them.[216] The occupant benefits not only from the direct proceeds of existing economic operations on public real estate, but also from free use of the land.[217]

If the status of ownership of a property is unclear, a property is likely presumed to be public during occupation.[218] Property of strategic value

213 See 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, 647; Dinstein, *The International Law of Belligerent Occupation* (n 170) 232.

214 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 232-33. Some however want to limit the use of the proceeds to the needs of the army and administration of occupation (Bothe (n 176) para 86) or to the defraying of the costs of occupation (Corn and others (n 174) 405) or to finance the expenses *connected with* the occupation (Vité (n 213), 648, conceding also that 'treaty-based law does not state it explicitly').

215 Corn and others (n 174) 405.

216 See Vité (n 213) 647; Dinstein, *The International Law of Belligerent Occupation* (n 170) 232-33.

217 Article 55 of the Hague Regulations speaks of 'real estate' and ICRC Rule 51 speaks of 'immovable public property'. See Dinstein, *The International Law of Belligerent Occupation* (n 170) 229, 232. Public land also includes indigenous lands and common lands (See Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) 261). See however Van Engeland (n 212) para 15, who regards State ownership of common and indigenous lands to be an issue for discussion.

218 Pro: Van Engeland (n 212) para 9; Dinstein, *The International Law of Belligerent Occupation* (n 170) 230-32; UK Joint Service Manual of the Law of Armed Conflict (2004) (UK Ministry of Defence 2004) 304-05; US Department of Defense Law of War Manual (2015, updated 2016) (Office of General Counsel of the Department of Defense 2016) 792.
Contra: Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip: The proceedings of a conference organized by al-Haq in Jerusalem in January 1988* (Clarendon Press 1992) 437-38, arguing that the only sound reason for such a presumption would be to avoid the effect of last-minute privatizations by States on the brink of being occupied.
See also Bothe (n 176) para 83, who argues that the public nature of property should be determined by the laws in force in the country – noting that according to the law in many countries, minerals in the ground are public property.

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is probably at least partly owned by the State and therefore subject to administration by the occupant.[219] Similarly, a State might nationalize key properties and facilities in the course of war, when the threat of occupation is still perceived unlikely.[220] In addition to public property, administration could also apply to some privately owned real estate.[221] The wording of the Hague Regulations lends itself to this conclusion. Article 55 enumerates 'public buildings, real estate, forests, and agricultural estates belonging to the hostile State'. The term 'real estate' already encompasses agricultural estates. The fact that agricultural estates are mentioned separately can be taken to mean that they alone receive the qualification of 'belonging to the hostile State', while 'real estate' refers to all land regardless of its owner. Excluded from administration would thus be only private agricultural estates. This seems also in line with Article 46(1) of the Hague Regulations which urges to respect 'family honour and rights, the lives of persons, and private property, as well as religious convictions and practice'. This wording indicates that what is concerned is the right to privacy of the inhabitants.[222] Private real estate which does not fall within the sphere of privacy – such as land on which nobody lives – would therefore not be covered by Article 46(1) of the Hague Regulations. Such property is only barred from confiscation.[223] Administration is however not confiscation,[224] and thus private real estate arguably also

219 '[H]eavy concentration of national wealth in state or socialized enterprises perhaps subjected to enemy administration much that would otherwise have been protected by the "private property" clause' (Jacob Robinson, 'Transfer of Property in Enemy Occupied Territory' (1945) 39(2) The American Journal of International Law 216, 218).

220 'Thus the shift from private to public ownership presents another of the problems which will harass those who continue to think within the Hague framework' (Robinson (n 219), 218).

221 See however Loukis G Loucaides, 'The Protection of the Right to Property in Occupied Territories' (2004) 53(3) The International and Comparative Law Quarterly 677, 685.

222 cf Art 17(1) International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171; Art 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (entered into force 3 September 1953) 213 UNTS 221; Art 11 American Convention on Human Rights 'Pact of San José, Costa Rica' (22 January 1969) (entered into force 18 July 1978) 1144 UNTS 123.

223 Art 46(2) Hague Regulations (n 180); ICRC Rule 51(b).

224 Avril McDonald and Hanna Brollowski, 'Requisitions' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The*

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falls under the rule of usufruct of Article 55 of the Hague Regulations and ICRC Rule 51(b).

Under the rule of usufruct the occupant must safeguard the capital of the properties.[225] Harvesting is thus generally only allowed if the stock of the resource can recover to the same level.[226] For instance, fishing and timber harvesting are allowed, but over-fishing and deforestation are not.[227] But to safeguard the capital of properties also means to retain their value. The occupant must therefore maintain the usability of real estate and infrastructure.[228] In the case of a mine or an oil field, for example, this can require the maintenance of production at existing levels.[229] In such cases, the occupant can continue extraction of non-renewable natural resources, even despite the depletion of their stock.[230] Finally, an occupant can assign his rights and duties as administrator to third parties, such as through licenses.[231]

Max Planck Encyclopedia of Public International Law (1st edn, Oxford University Press 2017) para 19.

225 Corn and others (n 174) 405.

226 See Vité (n 213), 647.

227 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 233. See however Bothe (n 176) para 83, who excludes living resources from public property.

228 Van Engeland (n 212) 1541-42; Dinstein, *The International Law of Belligerent Occupation* (n 170) 233.

229 Bothe (n 176) para 85. But probably not the opening of new extraction fields or areas (Bothe (n 176) para 85). See however Dederer (n 212) para 33, who calls this issue debatable.

230 See Bothe (n 176) para 85; Dederer (n 212) para 33. See also Van Engeland (n 212) 21, noting the uncertainty surrounding the precise meaning of the principle of usufruct – with respect to natural resources – as transported from Roman law into civil law and international law.

231 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 232.

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3.3 Rights and Duties to Support the Military Authority

3.3.1 Taxes

The occupant can maintain the existing taxation systems in place in the occupied territory and use the revenues towards the costs of his administration.[232] He can also raise existing taxes or introduce new ones.[233]

3.3.2 Contributions for the Needs of the Army

The inhabitants of an occupied territory are under several obligations to support the needs of the occupying army.

Article 49 of the Hague Regulations grants a direct way to fund the occupation by allowing the occupant to levy 'other money contributions in the occupied territory (...) for the needs of the army or of the administration of the territory in question.'[234]

During war, all parties are legally entitled to establish and maintain military authority.[235] To maintain military authority is therefore a legitimate need of the army. The term 'needs of the army' – as employed by the provisions discussed here – thus entails requisitioning to maintain military authority over the territory.[236]

232 Article 48 Hague Regulations (n 180) says 'If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.' Crawford and Pert (n 198) 150; Corn and others (n 174) 409.

233 Raising taxes may be warranted due to changing needs, such as in instances of prolonged occupation (See Dinstein, *The International Law of Belligerent Occupation* (n 170) 137; Bothe (n 176) para 94. See also n 3.4.2). New taxes may be subject to Article 49 Hague Regulations (n 180) and therefore to the requirement of the needs of the army or administration (See Vité (n 213), 649; Cuyckens (n 172) 136. See also 3.3.2 Contributions for the Needs of the Army, 71f.

234 Art 49 Hague Regulations (n 180). Vité (n 213), 649; Corn and others (n 174) 409-10.

235 n 175.

236 '[T]he needs of the army of occupation (...) may include the needs of the occupation administration' (Bothe (n 176) 105. See also Ingo Venzke, 'Contribu-

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Under Article 52(1) of the Hague Regulations, the occupant can request requisitions in kind from the inhabitants to support his military authority.[237] These requisitions must be in proportion to the resources of the country.[238] Article 52(3) of the Hague Regulations cautions that 'Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.'[239] However, the amount of compensation due is not specified.[240] Requisitions in kind include movable as well as immovable private property.[241] While the occupant has at least possessory use rights over private *immovable* property, he acquires ownership of the requisitioned private *movable* property.[242] Finally, confiscation of private property may be allowed if the local law provides for such confiscation by the State and if the occupant adheres to the same conditions that the State was bound by.[243]

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tions' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 1, 6). Some also seem to suggest that requisitions are guided by economic necessity (McDonald and Brollowski (n 224) para 1). But requisitions may not be used to cover the needs of the inhabitants and the economy in the home territory of the occupant (United States Military Tribunal, Nuemberg, *The Krupp Trial (Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others: Case No 58)* (1948) 10 Law Reports of Trials of War Criminals: Selected and prepared by the United Nations War Crimes Commission 69, 135-37; McDonald and Brollowski (n 224) para 7). Note also that any seizure of property beyond the necessities of war constitutes a war crime per Article 8(2)(b)(xiii) of the Rome Statute of the International Criminal Court (17 July 1998) (entered into force 1 July 2002) 2187 UNTS 3.

237 ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 103. The right to requisition is part of customary law (McDonald and Brollowski (n 224) para 1).

238 Art 52(1) Hague Regulations (n 180).

239 Art 52(3) Hague Regulations (n 180).

240 See also Dinstein, *The International Law of Belligerent Occupation* (n 170) 249.

241 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 246-47; Yutaka Arai-Takahashi, 'Protection of Private Property' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) 25-27.

242 Arai-Takahashi (n 241) para 24; Dinstein, *The International Law of Belligerent Occupation* (n 170) 249.

243 Dinstein, *The International Law of Belligerent Occupation* (n 170) 244. Further, 'The occupying power may, of course, avail itself of the occupied State's exist-

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Finally, the occupant can request services from the inhabitants. Under Article 52(1) of the Hague Regulations, such work must be for the 'needs of the army'. Under Article 52(2) GCIV, however, the occupier may compel persons to work not only for the needs of the army of occupation but also for the maintenance of public operations.[244] Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities.[245] The occupant may also recruit workers who actively seek employment.[246] In result, workers may be protected from outright exploitation, but the occupant enjoys leeway in administering the public utilities and land – from which he owns the profits.[247]

3.3.3 Confiscation of Munitions of War

The occupant can confiscate or destroy munitions of war in the occupied territory.

Under Article 53(1) of the Hague Regulations and ICRC Rule 51(a), the occupant may confiscate movable public property that can be used for military operations.[248] The collective term is 'munitions of war' or '*munitions de guerre*' in the original French text of the Hague Regula-

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ing expropriation laws from which it may deviate for reasons of necessity (...) (Dederer (n 212) para 37. See also n 267).

244 Art 51(2) GCIV (n 178). Work that may be requested includes that for 'ensuring the continuous functioning of public utility services such as postal, telegraphic, and telephone services; industrial and agricultural production; and mining' (McDonald and Brollowski (n 224) 15). See Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' (n 173) para 42; Corn and others (n 174) 407-08.

245 Art 51(3) GCIV (n 178).

246 Corn and others (n 174) 409. The occupant must however not create conditions of unemployment to induce the population to work for him (McDonald and Brollowski (n 224) para 16).

247 See Corn and others (n 174) 406. See also 3.2 Administration of Property (Usufruct), 66ff.

248 'An army of occupation can only take possession of (...) depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.' (Art 53(1) Hague Regulations (n 180)).
'Movable public property that can be used for military operations may be confiscated' (ICRC Rule 51(a), reprinted in 3.2 Administration of Property (Usufruct), 66).

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tions.[249] The confiscation of public munitions of war results in ownership.[250] Article 53(2) of the Hague Regulations allows confiscation of munitions of war even if they belong to private individuals.[251] However, they must be 'restored and compensation fixed when peace is made'.[252] Under ICRC Rule 51 confiscation of privately owned munitions of war is allowed even without compensation, but only in case of military necessity.[253]

The term 'munitions of war' encompasses all movable property that can be used for military operations.[254] The definition is broad and the distinction between civil and military purposes is difficult to make.[255] Minerals like crude oil are arguably not munitions of war before they have been extracted or produced, but are instead part of immovable property.[256] If they are considered immovable, they fall under the rule of usufruct as applicable to the administration of property.[257]

3.3.4 Spoils of War

The occupant can confiscate cash, funds, and realizable securities under Article 53(1) of the Hague Regulations, if they are public property.[258] Article 53(1) is silent with respect to the disposition of these properties.

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249 See Arai-Takahashi (n 241) para 28.
250 Van Engeland (n 212) para 33.
251 'Depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made' (Art 53(2) Hague Regulations (n 180)).
252 n 251.
253 ICRC Rule 51, reprinted in 3.2 Administration of Property (Usufruct), 66. See Corn and others (n 174) 406-07. See also 3.4.1 'Imperative Military Necessity', 75f.
254 n 248; n 251.
255 '[M]ost movables may be directly or indirectly used for military purposes' (Dederer (n 212) para 34. See also Dinstein, *The International Law of Belligerent Occupation* (n 170) 238). 'The list of movable property is non-exhaustive, and there is indeed the possibility of an extended understanding as to what falls under 'military purpose' (Van Engeland (n 212) para 31).
256 The debate is ongoing (See Arai-Takahashi (n 241) para 28; Van Engeland (n 212) para 28; Dinstein, *The International Law of Belligerent Occupation* (n 170) 252-53.
257 3.2 Administration of Property (Usufruct), 66ff.
258 n 248.

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This contrasts with money contributions by the inhabitants, which must be for the needs of the army.[259] Under Article 53(1), the occupant can thus use the confiscated public funds at his discretion.[260]

3.4 Exceptions

3.4.1 'Imperative Military Necessity'

To save his military authority, the occupant can confiscate or destroy all property – public or private, movable or immovable.

'Imperative military necessity' presents the occupant with an exception that allows for the destruction or seizure of property per ICRC Rule 51.[261] A similar exception can be found in Article 23(g) of the Hague Regulations, which forbids to 'destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.' It should be noted, however, that the exception of 'necessities of war' per the Hague Regulations pertain to the conduct of hostilities and not to occupation *per se*.[262] Article 23 appears in Section II of the Hague Regulations, which concerns hostilities, while the rules on military occupation are contained in Section III. The exception of 'military necessity' per ICRC Rule 51, on the other hand, applies explicitly to occupation as indicated by the title of Rule 51 which reads 'Public and Private Property in Occupied Territory.'[263] Seizure of immovable public property is the exception to the rule of administration contained in paragraph (b) of ICRC Rule 51.[264] In case of 'imperative military necessity', the occupant can seize immovable public property and is not bound to administer it

259 n 234; Arai-Takahashi (n 241) para 29.

260 Dinstein, *The International Law of Belligerent Occupation* (n 170) 238. 'It seems that Article 53 of the Hague Regulations indeed transfers ownership of title to the occupying authorities' (Van Engeland (n 212) para 33). See however Corn and others (n 174) 405, who argue that these funds can only be used towards military operations or the costs of administering the occupied territory.

261 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66.

262 *Wall Opinion* (n 167) para 124. Cf however Arai-Takahashi (n 241) paras 11-13.

263 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66.

264 See also Yoram Dinstein, 'Military Necessity' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 8, 14.

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according to the rule of usufruct.[265] He can thus dispose of the property at will.[266] The same is true of private property, since the exception of 'imperative military necessity' also overrides the prohibition to seize movable and immovable private property as contained in paragraph (c) of ICRC Rule 51.[267]

The occupant is legally entitled to maintain his military authority.[268] An 'imperative military necessity' thus certainly exists when the military authority of the occupant is immediately threatened.[269] But to maintain "military authority" can also require the control of economic transactions.[270] Ultimately, considerations of security are notorious for discretionary interpretations, absent an arbiter.[271]

265 See Sigrid Redse Johansen, *The Military Commander's Necessity: The Law of Armed Conflict and its Limits* (Cambridge University Press 2019) 360. cf 3.2 Administration of Property (Usufruct), 66ff.

266 n 214.

267 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66. See also Dinstein, 'Military Necessity' (n 264) paras 8, 14.

268 n 142; n 175.

269 'As war by itself is a venture of allocating and applying certain means to achieve certain ends, the notion of necessity connotes to a 'for what" (Johansen (n 265) 401).
Already the Lieber Code stated that 'Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war' (Art 14 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). Note that the provision was 'motivated by considerations of humanity (...) to limit the use of violence' (Dietrich Schindler, 'J.C. Bluntschli's Contribution to the Law of War' in Marcelo G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Brill 2007) 445)).

270 See n 177. 'In the modern age of total war, an occupier can change or destroy the entire infrastructure of the occupied territory without violating the limits established by "military necessity"' (Goodman (n 193) 1592). The call for a principle of proportionality to apply to security measures is accompanied by the caveat that 'proportionality is a difficult principle' and 'The balancing process it implies involves uncertainties' (Bothe (n 176) para 102). Note also that only the 'Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' constitutes a war crime per Article 8(2)(a)(iv) of the Rome Statute (n 236).

271 See n 282. 'It is left to the Occupying Power to decide when military necessity is 'absolute" and 'The occupier becomes the judge and the party' (Van Enge-

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3.4.2 Prolonged Occupation

When occupation persists over a certain period of time, the occupant can take economic measures that go beyond the strict rights and obligations from occupation law.

The theory of prolonged occupation assumes that the longer occupation lasts, the more the economic needs of the inhabitants increase and that the obligations of the occupant under occupation law no longer serve the welfare of the population.[272] A couple of years may suffice to call an occupation prolonged.[273] In the name of the welfare of the population, an occupant can take economic measures that would not otherwise have been allowed under occupation law or considerably stretch the latter.[274] This includes the enacting of legislation.[275] It also includes the possibility to increase taxes.[276] Finally, a long-term occupant can exploit

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land (n 212) paras 38-39, with reference also to the failure of the ICJ to define absolute military necessity).

'The discretionary power authorized by the law of occupation in defense of the occupant's security becomes, in the hands of a prolonged occupying power with territorial ambitions, the door through which an entire cart and horses of colonial apparatus can be driven' (Dirk A Moses, 'Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine' (2017) 8(2) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 379, 382).

272 See Edmund H Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54 Yale Law Journal 393, 400-01; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 72.

273 Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84(1) American Journal of International Law 44, 47, 95 calls for a requisite duration of 5 years.

274 See Cuyckens (n 172) 155; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 73-74.

275 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 128-32 with reference to the case law of Israel.

276 Recall that taxes can be used to cover the administration (n 232). Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182) 680; Bothe (n 176) para 94; Corn and others (n 174) 409, 410. '[I]f the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with "public order and safety" as understood in Article

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the capital or stock of a resource to increase the proceeds contrary to the rule of usufruct.[277]

The catch is that the needs of the population might have been raised precisely because the occupant inhibited their free choice of economic transactions in the first place.[278] Under the theory of prolonged occupation an occupant is thus allowed to solve a problem without remedying what created it.[279] Generally, notions of welfare grant room for subjectivity.[280] Under the notion of welfare, an occupant may apply his own standard of economic prosperity, regardless of the subjective needs of the population.[281] There is namely no arbiter with regard to the necessity of measures to be taken.[282] An occupant is thus free to transform the local economy to eg more economically productive activities.[283] Any eco-

43 (Ernst H Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942) 49).

277 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 233-34. cf also 3.2 Administration of Property (Usufruct), 66ff.

278 See Benvenisti, *The International Law of Occupation* (n 168) 11-12. See also 3.1 The General Scope of Authority, 59ff; 3.2 Administration of Property (Usufruct), 66ff.

279 'To achieve (welfare), the scope of authority vested in the Occupying Power must be commensurate with the objective need – accelerating the longer the occupation lasts – to enact new legislation, to introduce new development projects, and to consider new schemes of socio-economic reform' (Dinstein, *The International Law of Belligerent Occupation* (n 170) 310).

280 See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 55-57. '[T]his criterion is not without risk of being abused since some very wide-ranging transformations can be adopted under the disguise of the preoccupation for the welfare of the population' (Cuyckens (n 172) 155).

281 See Benvenisti, *The International Law of Occupation* (n 168) 15; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 75.

282 Rotem Giladi, 'The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation' (2008) 41(1-2) Israel Law Review 246, 291-92; Cuyckens (n 172) 159. See also ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 75-76.

283 'Even if the economy of the occupied territory had not been growing prior to occupation, it should be the duty of any government, even a temporary one, to facilitate the betterment of the populace' (Goodman (n 193), 1603). '[A]n occupying State may choose to implement changes to the economic structure of the occupied territory – to include infrastructure – in order to enhance the economic situation of the local population' (Corn and others (n 174) 385-86).

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nomic transformation of an occupied territory could serve the agenda of an occupant just as much as it does the welfare of the population.[284]

'The authority of a military administration applies to taking all measures necessary to ensure growth, change and development. Consequently, a military administration is entitled to develop industry, commerce, agriculture, education, health, welfare, and like matters which usually concern a regular government, and which are required to ensure the changing needs of a population in a territory under belligerent occupation' (Justice Barak, cited in Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (n 273), 93).

284 'A professed humanitarian concern may camouflage a hidden political agenda, and it may be prudent to guard the inhabitants from the bear's hug of the Occupying Power' (Dinstein, *The International Law of Belligerent Occupation* (n 170) 132).

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4 The Relationship of Occupation Law to Other International Law Pertinent to the Economy

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4.1 Human Rights

Human rights lack the clear capacity to curb the economic control that an occupant exerts under occupation law.

Two sets of human rights come into question in times of occupation: those that apply to the occupied territory directly as laws in force there,[285] and those to which an occupant is bound by his own accord or customary law.

The application of human rights to which an occupant is bound by his own accord faces two initial hurdles. The first one is that of extraterritorial application. The ICCPR, for instance indicates that it applies only in the territory of the signatory State.[286] Despite affirmative recent case law

285 See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

286 Article 2(1) International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171 says that a State is bound by these human rights opposite all individuals 'within its territory and subject to its jurisdiction'. The word 'and' indicates that the two criteria are cumulative (Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) The American Journal of International Law 119, 122). The extraterritorial application of International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) (entered into force 3 January 1976) 993 UNTS 3 (ICESCR) is similarly disputed (See Dennis (n 286) 127-29).

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it is therefore still debated if, in occupied territory, an occupant is bound by the same human rights that bind him in his own territory.[287] The second hurdle is presented by the derogations allowed under human rights instruments.[288] In case of a derogation from human rights obligations, the law applicable falls back to occupation law.[289]

Those human rights which apply as 'laws in force in the country' step back behind the rights of the occupant under occupation law.[290]

Both the above sets of human rights face the obstacle that if they are in fact capable of conflicting with occupation law, the latter enjoys priority as *lex specialis*.[291] Note that the application of the principle of *lex specialis* does not suspend human rights law *in toto* but only gives way to the

287 Contra: US Department of Defense Law of War Manual (2015, updated 2016) (Office of General Counsel of the Department of Defense 2016) 24-25; Dennis (n 286), 122.
Pro: ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 111, with respect to the ICCPR; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) (2005) paras 178-80, with respect to the general corpus of human rights law; European Court of Human Rights, *Case of Loizidou v Turkey* (Judgement (Merits)) (1996) VI ECHR 2227 para 52, with respect to the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (entered into force 3 September 1953) 213 UNTS 221; Loukis G Loucaides, 'The Protection of the Right to Property in Occupied Territories' (2004) 53(3) The International and Comparative Law Quarterly 677, 694; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 112-13, with respect to treaties in general, if the territory is under effective control. See also Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 61-63, for an excerpt of the ongoing debate.

288 See Art 27(1) American Convention on Human Rights 'Pact of San José, Costa Rica' (22 January 1969) (entered into force 18 July 1978) 1144 UNTS 123; Art 15(1) European Convention on Human Rights (n 287) – both explicitly allowing derogations in times of war. See ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) para 25; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 81-82 – regarding derogations under the ICCPR in times of war. See *Wall Opinion* (n 287) para 106, regarding derogations from human rights conventions in general in times of war.

289 Loucaides (n 287), 682.

290 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

291 *Nuclear Weapons Opinion* (n 288) para 25; *Wall Opinion* (n 287) para 106; Wolff Heintschel von Heinegg, 'Factors in War to Peace Transitions' (2004) 27(3) Har-

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law of occupation when and where the two prescribe opposing rights or obligations.[292] For example, the obligation to respect property is ousted in those instances where the occupant enjoys a right to expropriate under occupation law.[293] Human rights would only prevail against conflicting rules of occupation law, if they possessed the quality of *ius cogens* norms, and that is not the case with economic rights, apart from the most basic ones that are already covered by the obligation to provide for public order and safety under occupation law.[294]

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vard Journal of Law & Public Policy 843, 868; Dinstein, *The International Law of Belligerent Occupation* (n 288) 95, 97, 309. See Jochen A Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation' (1998) 28 The International and Comparative Law Quarterly 1, 11.

292 This relationship has been described as one of complementarity (Dorota Marianna Banaszewska, 'Lex Specialis' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 12). See Silvia Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law - The Role of the Judiciary* (Springer International Publishing 2015) 3; Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97(900) International Review of the Red Cross 1295, 1307; 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, 660-62.

293 'With regard to property (...) International humanitarian law proves to be more complete and more detailed than the law of human rights. There is no complementarity, as the latter is superseded by the former by virtue of the principle of speciality. Irrespective of whether it applies to the short term or to the long term, the prevailing legal regime is the law of occupation' (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).
'[N]otions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law' (International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgement) (2001) para 471). See n 241; n 267 – for the expropriations allowed under occupation law. See also 3.2 Administration of Property (Usufruct), 66ff, with regard to the administration of private real estate.

294 n 170. See Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 261.

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4.2 Measures of UN Administration

If measures decided by the UN Security Council were to prevail over occupation law, they would be a tool that cuts both ways.

It is assumed that military authority always triggers occupation law, even when covered by a Security Council or General Assembly Resolution and exercised by UN troops or third States.[295] A conflict can thus occur between the measures prescribed by the Security Council and occupation law.[296] In conflict with occupation law, the Security Council measures face the obstacle that occupation law has its source in treaties and customary international law.[297] It is still debated if measures prescribed by Security Council resolution should enjoy the priority awarded

295 n 91; n 105. '[T]he question of the applicability of the law of occupation to UN Territorial Administration is a question of fact. In other words, if the definition of occupation is in fact met, then the law of occupation will apply to UN Territorial Administration' (Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill | Nijhoff 2018) 95). 'Relevant principles of international humanitarian law will apply to an occupied territory regardless of Security Council action' (David J Scheffer, 'Beyond Occupation Law' (2003) 97(4) American Journal of International Law 842, 851). See Jaume Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2006-2007) 58(3) Hastings Law Journal 479, 480. See however Lindsey Cameron, 'Does the Law of Occupation Preclude Transformational Developments by the Occupying Power?' [2005] (34) Collegium: Special Edition – Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation 60, saying 'if the Security Council does derogate from the law of occupation, it must do so explicitly.'

296 Note that the General Assembly granted itself the capacity to act within the sphere of competence of the Security Council when the latter stalls (Resolution on Uniting for Peace, GA Res 377(V) (3 November 1950) UN Doc A/RES/377(V)A (1950)). Resolutions of the General Assembly are however not binding (n 517; DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1957) 32 British Year Book of International Law (1955-1956) 97, 121-22).

297 Or even *ius cogens* (See Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43(1) The International and Comparative Law Quarterly 55, 93; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661 681).

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by Article 103 to substantive UN Charter obligations over obligations from occupation law.[298]

If it were assumed however that Security Council Resolutions can govern the administration of territories instead of occupation law, those territories would be at the mercy of the Security Council.[299] Generally, measures prescribed by the Security Council could expand the rights of the inhabitants opposite the administering power but they could also vest the administration with even more economic control than occupation law does.

298 '[T]he Security Council is not entitled to free the belligerents from their obligations (...) under the law of armed conflict (Heintschel von Heinegg (n 291), 873). See Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 125-29. See however ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures, Order of 14 April 1992) (1992) paras 37, 39; Philip Spoerri, 'The Law of Occupation' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 197; Michael Bothe, 'The Administration of Occupied Territory' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 117. See also Robert Kolb, *An Introduction to the Law of the United Nations* (Hart Publishing 2010) 162, suggesting that 'Article 103 should not apply to those actions that are not undertaken in the collective interest, but only for the particular interests of one State' and that Article 103 should be barred from overriding *ius cogens* (Kolb, *An Introduction to the Law of the United Nations* (n 298) 163).

299 It may be noted in this instance that 'legitimacy on behalf of international organizations cannot be assumed' and 'international administration will never be fully legitimate or supportable on a normative level due to the tensions that are inherent in using outside rule to bring about internal change' (Hollin K Dickerson, 'Assumptions of Legitimacy and the Foundations of International Territorial Administration' (2006) 100 Proceedings of the ASIL Annual Meeting 144, 194).

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4.3 International Investment Law

4.3.1 Foreign Direct Investment

Occupation law takes precedence over the rights and obligations from investments in foreign territory and grants the occupant sweeping benefits from these properties.

Two categories of investments in foreign territory should be distinguished according to the origin of their ownership: Those from the occupant and his nationals and those from third States and their nationals.

The occupant can take over the administration of his own investments and those of his nationals in accordance with occupation law, if these investments concern immovable public property or real estate.[300] As administrator, the occupant benefits from the proceeds of his own investments, and from those of his nationals.[301] The occupant can even confiscate his own investments under the conditions of occupation law and in this event is no longer bound by the rules of administration – such as the obligation to preserve the stock of a natural resource.[302] International investment agreements yield to occupation law, because the former are 'laws in force in the country'[303] and because occupation law is *lex specialis*.[304] Within the ambit of occupation law, the investments of the occupant are now free from the rights which the occupied territory had enjoyed in them as the host State.[305] The economic interest of the occupant in his own investments and those of his nationals can thus improve during military occupation.

The situation is similarly beneficial to the occupant with respect to investments from third States and their nationals. Public properties with partial foreign investments and real estate come under administration by the occupant or can be confiscated under the conditions prescribed by occupation law.[306] The occupant is not bound by investment agree-

300 3.2 Administration of Property (Usufruct), 66ff.
301 See n 212; n 218.
302 n 265; n 277.
303 n 187.
304 n 291.
305 How an occupant proceeds with the property from direct investments of his own nationals is a matter of his domestic laws, including his human rights obligations (See n 287).
306 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4 Exceptions, 75ff.

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ments in force between the occupied territory and third States,[307] and, as 'laws in force in the country', these agreements yield to occupation law.[308] But the question arises, if the occupant is bound in occupied territory by the investment treaties he concluded himself with third States. Generally, treaties apply only on the proper territory of the respective contracting party, either explicitly or by way of Article 29 VCLT.[309] There may however be a tendency to regard occupied territory as territory of the occupant for matters of compensation under investment treaties.[310]

Since investment agreements yield to occupation law,[311] the occupant may preclude new investment activity by third States, within his rights and obligations from occupation law.[312]

4.3.2 Permanent Sovereignty over Natural Resources (PSNR)

PSNR grants peoples and nations the claim to their resources. This claim is however suspended during occupation.

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307 Art 34 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331.

308 cf n 303. See however 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) 76ff, for a more detailed approach. For the question of liability of the occupied territory itself opposite third States see eg Suzanne Spears and Maria Fogdestam Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties' in Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2013).

309 cf n 287.

310 See Swiss Federal Tribunal, *4A_396/2017* (Judgement of 16 October 2018) (2018) para 4.3.2; Ackermann (n 308) 80ff. See also Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33(3) Journal of International Arbitration 245). This approach is not in line with the prohibition to acquire territory by force and may run the risk of turning occupation into a *fait accompli* (See n 125; n 165; Ackermann (n 308) 89).

311 n 291; n 187.

312 n 171; n 207; n 177.

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The General Assembly in 1962 adopted a resolution called 'Permanent Sovereignty over Natural Resources' (Resolution 1803).[313] Per Resolution 1803, PSNR means that every State is free to enter into agreements that concern the disposition of its natural resources.[314] A State is equally entitled to withdraw from such agreements via nationalization, expropriation or requisitioning, under certain conditions.[315] The addition of the word 'permanent' to the term 'sovereignty' should be read to indicate that the claim of a State to its natural resources persists despite its temporary disposition – just like the claim of a State to its territory does.[316] In the same vein, PSNR grants a *people or nation* a claim to their natural resources.[317] Like the claim to territory, the claim to natural resources is

313 Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803/(XVII) (1962) With Resolution 1803 the General Assembly declares that:
'1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources (...) should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. (...)
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest (...) In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.
(...)':

314 GA Res 1803 (n 313) nos 2-3. See also DE Vielleville and BS Vasani, 'Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?' (2008) 5(2) Transnational Dispute Management, 7.

315 GA Res 1803 (n 313) no 4. See M Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017) 102-03, for the emergence of this entitlement in the context of decolonization.

316 n 125; Peter Orakhelashvili and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (8th edn, Routledge 2019) 381.

317 See Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law, Cambridge University Press 1997) 311. See also Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38

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temporarily suspended within the ambit of occupation law but is fully revived when occupation ends.[318] This permanent claim to natural resources may be seen as a corollary to the right to self-determination.[319]

PSNR further contains the obligation that the right of the peoples of a State to its natural wealth and resources be exercised in their interest.[320] The wording of this function of PSNR is that of a human right, or collective human right, against contrary State interference.[321] As a human right, it steps back behind occupation law.[322] The rights of a people or nation to freely dispose of their natural resources thus yields to the rights which the occupant enjoys by way of administration, requisition and confiscation.[323]

George Washington International Law Review 33, 43-51, who agrees and provides an extensive review of the debate if PSNR applies to States or to peoples. This debate may raise questions as to the exact quality of PSNR as a legal norm (Dinstein, *The International Law of Belligerent Occupation* (n 288), 236.

318 cf n 126.

319 cf n 69; Orakhelashvili and Akehurst (n 316) 380-81. Where a people enjoys the right to self-determination, the ensuing claim to their natural resources under PSNR may be counted as *ius cogens* (See Brownlie (n 287) 511; Martin Dawidowicz, 'Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC–Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013), 273. cf n 66).

320 GA Res 1803 (n 313), no 1.

321 See Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence, and International Law Symposium Issue: Oil and International Law: The Geopolitical Significance of Petroleum Corporations' (2003-2004) 36 New York University Journal of International Law and Politics 331, 356-57; ICCPR General Comment No 12: Article 1, The Right to Self-Determination of Peoples (13 March 1984) (UN Human Rights Committee 1984) para 5.
cf also Articles 26 and 27 of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (2007), which contain essentially the same rights as PSNR and are worded like human rights opposite State behavior.

322 n 287; n 291. See also *Armed Activities Case* (n 287) para 244, holding generally that PSNR does not apply in occupied territory. This may be an indication that the Court followed the *lex specialis* approach between the laws of war and human rights of peacetime (Phoebe N Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' (2007) 9 International Community Law Review 237, 256. See n 291).

323 See 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4.1 'Imperative Military Necessity', 75ff; 3.4.2 Prolonged Occupation, 77ff.

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4.4 International Trade Law

The rights of an occupied territory to trade freely are largely eliminated during occupation.

Two sets of rights should be distinguished: The rights which an occupant must grant on occupied territory to third States; and those which an occupant must grant on his own territory to the occupied State. The first set of rights can further be distinguished into those flowing from trade agreements concluded by the occupant for his own territory and those in force in the occupied territory.

In occupied territory, the first obstacle to free trade is the priority which occupation law enjoys over trade law, because the former is *lex specialis*.[324] The rights and obligations from occupation law thus take precedence where they collide with rights and obligations from trade agreements.[325] The second obstacle is the issue of extraterritoriality which comes into play on foreign territory. Those international trade agreements that were entered into by the occupant for his own territory may also bind the occupant only on his own territory and not on occupied territory.[326]

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324 n 291.

325 n 292.

326 cf n 287. Some trade agreements refer to the territory of the contracting parties, others, like the agreements relevant to the World Trade Organization (WTO) do not. In both cases, Article 29 VCLT applies (cf n 309). Note that the VCLT does not provide a definite answer but merely lays down a residual rule: a treaty is binding upon each party in respect of its entire territory, 'unless a different intention appears from the treaty or is otherwise established' (Art 29 VCLT (n 307); Anthony Aust, 'Treaties, Territorial Application' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 3).

Recall however that the extension of agreements to occupied territory may imply recognition of title over that territory on behalf of the occupant and should therefore be treated cautiously (n 310; Dawidowicz, 'Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC–Morocco Fisheries Agreement' (n 319) 273-74, with reference to State practice of Switzerland). The European Court of Justice denied application of a trade agreement between the European Community and Israel to 'locations which have been placed under Israeli administration since 1967', arguing that agreements do not confer rights and obligations upon third parties (European Court of Justice, *C-386/08 Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*

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If rights from trade agreements apply in the occupied territory, the occupant still does not have to grant them to full effect. This is true for trade agreements concluded by the occupant for his own territory as well as for trade agreements concluded by the occupied territory. The former yield to the *lex specialis* of occupation law.[327] The latter are laws in force in the country and therefore yield to occupation law.[328] Under occupation law, an occupant can take measures or enact legislation which limit economic activity in the territory.[329] Free trade could strengthen the economic presence of third States in the territory and empower them or the territory itself to challenge the authority of the occupant. An occupant can therefore curb trade in the occupied territory to maintain his military authority.[330] Only beyond this lawful purpose do additional security measures need to meet the standards prescribed by the international trade instruments that apply as laws in force in the country.[331] The rights that a territory would normally enjoy from free trade agreements are also inhibited by the exercise of the specific rights of an occupant under occupation law. Under occupation law, an occupant enjoys wide discretion to make use of business operations and real estate that he administers or confiscates.[332] Accordingly, the occupant controls which goods or services these enterprises consume and produce, import and export. As administrator, he is not obliged to obtain the products or services of the territory or of third States, even if they are more competitive than his own.[333]

In his own territory, the occupant is bound by the rights and obligations from the mutual bilateral or multilateral trade agreements in force with the occupied territory. Here, the occupant cannot invoke occupa-

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(Judgment of the Court (Fourth Chamber)) (2010) I ECR 1289 paras 52, 53, 64).

327 n 325.

328 n 187.

329 n 171; n 207.

330 See n 177.

331 Eg Article XXI of the General Agreement on Tariffs and Trade 1994 (April 15, 1994): Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (entered into force 1 January 1995) 1867 UNTS 187.

332 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4.1 'Imperative Military Necessity', 75ff; 3.4.2 Prolonged Occupation, 77ff.

333 Occupation law contains no rules regarding, for example, the public procurement pertaining to the public utilities under administration by the occupant.

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tion law to curb international trade, since occupation law applies only on foreign territory.[334] An occupant therefore must treat imports from the occupied territory into his own territory in accordance with his obligations under the applicable trade agreements. To invoke an exception for reasons of his own security, he would need to abide by the rules of the respective trade agreements.[335] Factually, however, an occupant can drastically reduce the benefit of the rights which the occupied State enjoys in the territory of the occupant. By his own administration, an occupant can largely control the exports from the occupied territory into his own territory.[336]

334 1.2.1 The Scope of the Term 'Hostile State', 26ff.
335 n 331.
336 See n 332.

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5 Concluding Summary of Part I

As soon as the forces of a State use coercion on foreign territory, that State becomes the occupant. It does not matter if coercion was preceded by hostilities or if the foreign State came onto the territory peacefully – such as to look after its economic interests there.[337] Coercion applies as soon as forces attributable to a State establish military authority in all or parts of foreign territory.[338] Territory is foreign for the intervening forces wherever they are not within the legally valid boundaries of their own State.[339]

Existing boundaries cannot be altered unilaterally.[340] An exception applies only to some peoples who can separate their territory from the parent State and thus become foreign to it.[341] Undelimited territory remains foreign to all forces, so long as more than one State has a potential claim to it.[342] Which entities do count as equal States and therefore have a valid claim does not lie in the discretion of the beholding State.[343] To settle the opposing claims to a particular territory, there needs to be a consensus between all entitled States or else, adjudication.[344]

During occupation, the occupied territory is governed by the foreign State whose forces have established military authority on it.[345] The occupied State therefore no longer enjoys equality of its territory opposite the occupant or third States. Equality is suspended for the period of occupation but only to the extent of the scope of occupation law.[346] At the same time, a State does not lose the claim to its own territory because of an occupation.[347]

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337 1.4.1 Instances of Authority, 43ff.
338 1.3 'Hostile Army', 41f; 1.4.1 Instances of Authority, 43ff.
339 1.2.3.1 Delimitation in General, 32ff. See also 1.2.2 Equal States as a Territorial Order, 30f.
340 1.2.3.1 Delimitation in General, 32ff.
341 1.2.4 Self-Determination and Related Claims to Territory, 37ff.
342 1.2.3.1 Delimitation in General, 32ff.
343 1.2.1 The Scope of the Term 'Hostile State', 26ff.
344 1.2.3.1 Delimitation in General, 32ff.
345 See 3.1 The General Scope of Authority, 59ff.
346 1.4.3 The Relationship to Sovereign Equality, 46f.
347 1.4.3 The Relationship to Sovereign Equality, 46f; 2.2 The Prohibition to Acquire Territory by Force, 56ff.

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The question if the occupation came about legally or not, regularly remains unanswered but regardless has no effect upon the legal conduct of the occupation. The occupant enjoys his rights from occupation law irrespective of whether his military authority was the result of an act of legal self-defence or illegal aggression.[348]

Under occupation law the occupant can request the inhabitants to support his military authority through the provision of funds, property and manpower.[349] He can confiscate or destroy munitions of war;[350] he can freely dispose of the public funds of the occupied State;[351] and he can confiscate or destroy property, if his military authority is threatened.[352]

Part I has presented the wide reading available to the occupant, under traditional occupation law, with respect to his economic rights. In Part II, this will be contrasted with the regime of UN Charter Chapter XI, which benefits the inhabitants and not the occupant.[353] Generally, under traditional occupation law, the occupant can take economic measures to maintain his military authority in the occupied territory.[354] He can therefore assert control over the local economy against the influence of rivalling third States or the inhabitants.[355] Occupation law prevails over other instruments of international law.[356] The economic freedom which the inhabitants enjoyed during peacetime are largely nullified.[357] The occupant can sever the economic ties of a territory and isolate it from foreign commercial influence.[358] His own investments in the territory remain intact and the benefits from them may even increase under occupation law.[359]

Occupation law also enjoys priority over the laws in force in the territory.[360] The occupant can legislate within the ambit of his rights under

348 2.1 The Legality of Occupation, 51ff.
349 3.3 Rights and Duties to Support the Military Authority, 71ff.
350 3.3.3 Confiscation of Munitions of War, 73f.
351 3.3.4 Spoils of War, 74.
352 3.4.1 'Imperative Military Necessity', 75f.
353 10 Concluding Summary of Part II, 173ff.
354 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.
355 See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.
356 3.1 The General Scope of Authority, 59ff.
357 See 4 The Relationship of Occupation Law to Other International Law, 81ff.
358 See 4.4 International Trade Law, 90ff; 4.3.1 Foreign Direct Investment, 86ff.
359 4.3.1 Foreign Direct Investment, 86ff.
360 3.1 The General Scope of Authority, 59ff.

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occupation law. He can raise taxes.[361] Where no obligations from occupation law exist and the laws in force have not regulated, the occupant is free to apply his own economic measures and legislation in the name of public order.[362] In case of a prolonged occupation, the occupant can disregard even occupation law itself and expedite economic activity in the territory as he deems necessary for the general welfare.[363]

An occupant can gain extensive economic benefits through the administration of immovable public property and real estate. He can keep the proceeds, reinvest the profits or use them at his discretion.[364] Besides the direct profits, an occupant enjoys free use of public property and land.[365]

In sum, occupation law enables the occupant to form an economy of his own vision in the occupied territory and to cement ties with his own economy. Occupation law thus presents an incentive for States to stay in foreign territory. A State that invested in foreign territory can turn to coercion to enforce expectations from its investments, such as to avoid nationalization.[366] A warring party is incentivized to remain in the territory after hostilities or even to invade it in the first place.[367] The longer an occupant remains, the more he can get invested in the territory and the stronger the incentive becomes to stay. This legal situation would change, if Chapter XI were applied to military occupations.[368]

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361 3.3.1 Taxes, 71.

362 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

363 3.4.2 Prolonged Occupation, 77ff.

364 3.2 Administration of Property (Usufruct), 66ff.

365 3.2 Administration of Property (Usufruct), 66ff.

366 Such nationalization could, for example, be based on a resurgent claim of 'unequal treaty' (See Yaël Ronen, 'Territory, Lease' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 3, 18-20; Anne Peters, 'Unequal Treaties' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 4-7, 34ff).

367 Recall that 'Disputes arise because resources are scarce'; and the right to 'indulge in rapacious resource exploitation was left unhampered by (the Hague and Geneva Conventions)' (Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 302; 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 para 22).

368 10 Concluding Summary of Part II, 173ff.

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

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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

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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

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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).

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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).

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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).

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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).

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– 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)).

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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.

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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).

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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.

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'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).

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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)).

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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.

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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).

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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.

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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).

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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.

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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,

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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-

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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.

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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.

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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).

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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

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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.

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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).

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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,

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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*

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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

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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).

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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

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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

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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

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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.

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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.

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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.

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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-

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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.

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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).

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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.

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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,

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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

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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-

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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

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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.

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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.

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7 The Economic Regime of Chapter XI, Article 73

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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.

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> 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.

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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

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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

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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.

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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.

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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.

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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.

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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).

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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

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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

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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).

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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.

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

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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).

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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.

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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).

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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

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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

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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).

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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).

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> **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).

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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.

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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.

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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).

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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).

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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.

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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).

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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]

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.

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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).

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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.

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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.

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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.

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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.

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Synopsis

Contrasting the conclusions of Part I and Part II, it becomes clear that Chapter XI can shift the legal paradigm for military occupations. This paradigm shift away from traditional occupation law is warranted.[787] The economic leeway that the occupant enjoyed under occupation law is removed by Chapter XI and replaced with the interests of the inhabitants.[788] While occupation law created an economic incentive to stay in foreign territory by force, Chapter XI not only eliminates this incentive, but deters occupation. Under Chapter XI, States are still allowed to defend themselves militarily, but they must not use foreign territory economically.[789] Chapter XI could thus end not only historic colonialism, but all forcible stay in foreign territory.

787 'Various conflicting interpretations have arisen, hindering the quest for a coherent approach to occupation law. Citing these central provisions, occupying powers have often justified a very large scope of authority over occupied territories. In other cases, foreign administrators have invoked the obligation to respect local laws in order to minimize their authority and evade their responsibilities under occupation law. This situation is unsatisfactory and work has to be done in this regard to avoid discrepancies in the interpretation and implementation of the law in contemporary contexts of occupation' (Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 54).

788 8.1.1 Priority over Occupation Law, 157ff.

789 8.4 Reconciliation with the Munitions of War Rule, 166ff.

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