UNIVERSITÉ DE GENÈVE

Archive ouverte UNIGE
https://archive-ouverte.unige.ch

Contribution à un dictionnaire / une encyclopédie | 2012

Published version | Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

Non Self-Governing Territories

Mbengue, Makane Moïse

How to cite

MBENGUE, Makane Moïse. Non Self-Governing Territories. In: The Max Planck Encyclopedia of Public International Law (Online Edition). Wolfrum, R. (Ed.). Oxford : Oxford University Press, 2012. doi: 10.1093/law:epil/9780199231690/e1074

This publication URL: https://archive-ouverte.unige.ch/unige:56193
Publication DOI: 10.1093/law:epil/9780199231690/e1074

© This document is protected by copyright. Please refer to copyright holder(s) for terms of use.

OXFORD PUBLIC INTERNATIONAL LAW

Max Planck Encyclopedia of Public International Law

Non-Self-Governing Territories

Makane Moïse Mbengue

Content type:
Encyclopedia Entries
Article last updated:
February 2013

Product: Max Planck Encyclopedia of Public International Law [MPEPIL]

Subject(s):

Territory, non-self-governing — United Nations (UN) — Colonization / Decolonization

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

A. The Birth of Chapter XI: A Non-Self-Made Provision

1 Trusteeship territories were those territories or colonies placed under the administration of one or more States so commissioned by the UN. As such, the administering authority or authorities of a trusteeship territory were acting under the strict supervision of the Trusteeship Council which was established as one of the principal organs of the UN (United Nations Trusteeship System). Non-self-governing territories, by contrast, are not per se subject to a system of strict and direct supervision by the UN. Indeed, under the terms of Art. 73 (e) United Nations Charter, members of the UN that have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government undertake to transmit regularly to the UN Secretary-General 'information' relating to the economic, social, and educational conditions in the territories for which they are respectively responsible. Today, there are sixteen remaining non-self-governing territories in the list of the UN: in Africa: Western Sahara (see also Western Sahara [Advisory Opinion]); in the Atlantic and Caribbean: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands/Islas Malvinas, Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands; in Europe: Gibraltar; in Asia and Pacific: American Samoa, Guam, New Caledonia, Pitcairn, Tokelau.

2 Chapter XI UN Charter offers the constitutional background upon which non-self-governing territories are dealt with. At the time of its inception, Chapter XI represented—and still represents—the most fully realized treaty provision relating to non-self-governing territories in the international legal order. Yet, Chapter XI has not appeared *ex nihilo* within the system of the UN Charter. Its origin stems prima facie from Art. 23 (b) Covenant of the League of Nations, which required members of the League to 'undertake to secure just treatment of the native inhabitants of territories under their control'. Albeit general in its content and merely focusing on educational, social, and economic conditions of the colonies and other dependencies, Art. 23 (b) League Covenant—together with Art. 22 League Covenant—marked a change in the perception of the functions and duties of colonial powers (hereinafter, also referred to as administering powers or States). The idea of 'just treatment' was not strictly limited to the welfare of the people in all dependencies. It also encompassed by necessary implication 'the idea of—if not full and immediate at least eventual or gradual—self-determination of societies and decolonization of dependent territories' (Matz 52–53; Self-Determination). Indeed, *par analogie* of what the International Court of Justice ('ICJ') said about Art. 22 League Covenant in the *Namibia* case, the concept of 'just treatment' embodied in Art. 23 (b) League Covenant was 'not static, but … by definition evolutionary' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] notwithstanding Security Council Resolution 276 [1970] [Advisory Opinion]* para. 53; South West Africa/Namibia [Advisory Opinions and Judgments]) and its interpretation 'must take into consideration the changes which have occurred in the supervening half-century, and … cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law' (ibid). It was self-evident that the obligation to 'secure just treatment' of colonial dependencies and other dependent territories 'had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development' (ibid para. 46).

3 It was then not surprising that during World War II, the Allies strengthened the new wave that consisted of internationalizing the 'supervision and control' (*International Status of South-West Africa* 132) of colonialism. The *raison d'être* for such a concern lay in an assumption that prevailed within Allied circles, according to which, 'millions of non-self-governing peoples would constitute a threat' (Sud 7) to international peace and security, unless formally addressed. The Atlantic Charter (1941), signed on 11 August 1941 by President Roosevelt and Prime Minister Churchill, and to which the British Dominions, the European governments in exile and the Soviet Union adhered in September 1941, echoed those concerns of the Allies with respect to non-self-governing territories. Yet, shortly after the signature of the Atlantic Charter, strong differences of view between the United States and Great Britain arose in relation to the scope and meaning of the Atlantic Charter. In

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

particular, both countries disagreed over the need to address specifically and expressly the question of non-self-governing territories in the future UN Charter. The United States' position was mainly reflected in the Hull Memorandum of November 1942 (Russell 86). It was on the basis of the Hull memorandum, together with its annexed draft declaration entitled 'The Atlantic Charter and National Independence', that in March 1943 the US State Department propounded to President Roosevelt a document which was to serve as a basis for the negotiations of the UN Charter. The document was titled 'Declaration by the United Nations on National Independence' (Sud 10, citing US Department of State *Post War Foreign Policy Preparation, 1939–1945* [US Department of State Publication No 3580 Washington DC 1950] 470–72). The text was submitted to Great Britain, to be considered for inclusion as a separate chapter of the UN Charter. However, the British government rejected the draft declaration as being a threat to British control and jurisdiction over its possessions, colonies, and protectorates (see also Protectorates and Protected States).

4 During the Dumbarton Oaks Conference (1944) and the Yalta Conference (1945), discussions over the status of non-self-governing territories were relatively broken-off. No progress was made towards the inclusion of provisions on non-self-governing territories in the draft UN Charter. The San Francisco Conference of 1945 was a decisive step in dealing with the issue. Surprisingly, nations that were opposed to any reference to non-self-governing territories—and more specifically, Great Britain—produced proposals regarding these territories. This wind of change was facilitated by a new apperception of the 'good colonial policy' which could be summarized as follows: 'overseas dependencies were not a matter of sole concern to the metropolitan powers but were objects of legitimate interest to the international community' (Goodwin 346). Nevertheless, the nurturing idea behind such acceptance for addressing non-self-governing territories within the UN Charter was that provisions regarding those dependencies would form part of a non-binding annex to the UN Charter. After major disagreements in the Five-Power Consultative Group and in the technical committee with respect to the use of terms such as 'self-government', a compromise was sealed. A chapter of the UN Charter—ie Chapter XI—was to be dedicated to the status of non-self-governing territories.

5 Chapter XI is entitled 'Declaration regarding Non-Self-Governing Territories'. The name itself sounds inaccurate. Chapter XI is the only part of the UN Charter which is designated as a declaration. The terminology chosen reflects the intent of the drafters of the UN Charter to set down soft law principles, or a declaration of principles, rather than clear-cut obligations concerning non-self-governing territories. Chapter XI consists of two articles, ie Arts 73 and 74 UN Charter. Both articles remain general and quite vague in their content. It is therefore understandable why Chapter XI has roused so much controversy in practice. Arts 73 and 74 UN Charter read as follows:

> 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;

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

(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 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-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

6 What is striking is the resemblance *in se* between Art. 22 (1) League Covenant and the *chapeau* of Art. 73 UN Charter. Decrypting the relationship between Art. 73 UN Charter and Art. 22 League Covenant, the *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice)* stressed that:

> [i]t must be evident to anyone who reads Article 73 of the United Nations Charter, in conjunction with Article 22 of the League Covenant, that the provisions of the one were fashioned to a major extent upon those of the other. The similarity not only of concept but of language is striking ([1962] ICJ Rep 465, 541).

The 'virtual reproduction' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] notwithstanding Security Council Resolution 276 [1970] [Advisory Opinion] [Dissenting Opinion of Judge Sir Gerald Fitzmaurice]* [1971] ICJ Rep 220 para. 43) in the principal provision of Art. 73 UN Charter of the language of Art. 22 League Covenant confirms that Chapter XI UN Charter has its roots deeply anchored in the League Covenant via a joint combination of Arts 23 (b) and 22 (1) League Covenant. The affinities between Art. 73 UN Charter and Art. 22 League Covenant are of such nature that Chapter XI has even been perceived as codification (see eg Engers 85).

7 Due to its inner aspects of both codification and progressive development of international law, Chapter XI symbolizes a definitive legal step in the 'idea of subjecting the colonial powers to some measure of international accountability' (ibid) and ensures that the 'whole field of dependent peoples living in dependent territories is now covered' by the UN Charter (UNCIO 'Statement of the President of Commission II' in UNCIO *Documents of the United Nations Conference on International Organization* vol 8 *Commission II, General Assembly* [UN Information Organizations New York 1945] 127). Yet, Chapter XI, as it stands, appears more as a symbol than a legal panacea for the process of decolonization that was taking place in the world post–1945. Mainly criticized for its softness (not to say vagueness and fuzziness), Chapter XI is somewhat profiled as a weak mechanism among the provisions of the UN Charter relating to colonialism, the two others being Chapters XII and XIII. Chapter XI has, therefore, been described as a 'snapshot, a record of the existing status of international law, outdated shortly after its codification' (Engers 85–86). Although legitimate, the cavilling comments on Chapter XI tend to ignore that at the time of the drafting of the UN Charter, this was a landmark achievement. Chapter XI was the utmost compromise that could be

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

reached among the 'States whose interests were specially affected' (North Sea Continental Shelf Cases [Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands] para. 73). Despite its inherent limits, Chapter XI has succeeded in laying the legal foundations for specific supervision by the UN over the administration of non-self-governing territories. Chapter XI is simply not to be read as a self-contained provision. Its operation is governed by 'the practice followed by the Organization' (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict [Advisory Opinion]* [1996] ICJ Rep 66 para. 21) and not solely by the ordinary meaning of the rules therein, namely Arts 73 and 74 UN Charter (see also United Nations Charter, Interpretation of).

B. The Development and Implementation of Chapter XI: A Non-Self-Governing Provision

8 How could a provision like Chapter XI—without any institutional or substantively binding machinery—be legally viable and effective in promoting the rights and interests of non-self-governing territories? The development and implementation of Chapter XI have benefited from both the norm-defining resolutions of the UN organs and their norm-interpretative practice. In the domain of non-self-governing territories, 'the *corpus iuris gentium* has been considerably enriched' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia* para. 53) by the UN General Assembly. This latter principal organ has transmuted Chapter XI from a declaration, not containing an assumption of fresh obligations under the UN Charter, to a real system of close supervision over the administration of non-self-governing territories. Such achievement was not instantaneous, and the UN General Assembly has somewhat navigated political and legal troubled waters.

9 A high tide occurred with the opening session of the UN General Assembly, where strong concerns were raised with respect to the establishment of Chapter XI–implementing machinery. Two antagonistic groups opposed each other. The 'anti'-implementing machinery group considered that the endowment of a special organ or committee in charge of supervising Chapter XI would, at the very least, constitute an *ultra vires* act. Some members later went so far as to qualify such a move as being illegal and transformative, changing the provisions of Chapter XI into a kind of trusteeship regime, which the San Francisco Conference had purposely ruled out. On the other hand, the 'pro'-implementing machinery group advocated that there was no difference between Chapters XI, XII, and XIII UN Charter, and that the creation of a specialized committee would fall within the explicit and implied powers of the General Assembly (International Organizations or Institutions, Implied Powers) to establish such subsidiary organs as it deems necessary for the performance of its functions (Art. 22 UN Charter). As for its birth (and maybe even more), the institutional crystallization of Chapter XI has also been the product of compromise through different paths. The first path was to use the device of Art. 73 (e) UN Charter (the 'principle' of regular transmission by UN members to the UN Secretary-General of statistical and other technical information relating to economic, social, and educational conditions in the territories for which they are respectively responsible). From thereon, after a proposal submitted by China to the Fourth Committee—the Special Decolonization and Political Committee—the UN General Assembly adopted unanimously, Resolution 9 (I) of 9 February 1946 on 'Non-Self-Governing Peoples'. Resolution 9 (I) requested the UN Secretary-General to include in his annual report on the work of the Organization, 'a statement summarizing such information as may have been transmitted to him by Members of the United Nations under Article 73 (e) of the Charter' (at para. 2). The historical importance of Resolution 9 (I) lies in the fact that it acknowledged *expressis verbis* that 'certain specific obligations' derived from Chapter XI, ie the 'obligation to develop self-government and to assist the inhabitants in the progressive development of their free political institutions' (at Pmbl.). But apart from that, Resolution 9 (I) conjured déjà vu. Indeed, Chapter XI had already bestowed on the UN Secretary-General the power to receive information relating to non-self-governing territories under Art. 73 (e) UN Charter. The lack of added value of Resolution 9 (I) was emphasized by the UN Secretary-General himself, who called the attention of the General Assembly to the need to set up

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

an expert body in charge of examining the information submitted and the summaries prepared by the Secretary-General. With the suggestion of the Secretary-General and the impulse coming from the Fourth Committee, the General Assembly adopted during the second part of its first session, Resolution 66 (I) of 14 December 1946 on 'Transmission of Information under Article 73e of the Charter'.

10 Resolution 66 (I) paved the way for a second path: the quasi-institutionalization of Chapter XI. This was done through the establishment of an '*ad hoc* Committee on the Transmission of Information under Article 73 (e)', which was mandated to:

> examine the Secretary-General's summary and analysis of the information transmitted under Article 73 (e) of the Charter with a view to aiding the General Assembly in its consideration of this information, and with a view to making recommendations to the General Assembly regarding the procedures to be followed in the future' (at para. 6).

Resolution 66 (I) insisted on an equal number of representatives of administering States and non-administering States to compose the Committee. All the administering powers except New Zealand cast a negative vote on Resolution 66 (I), considering that the creation of the ad hoc Committee was a sort of 'backdoor compulsory trusteeship organization'. The rest of the story is known: a love and hate relationship between administering members and non-administering members, as to whether to mould the ad hoc Committee into a permanent institutional machinery exclusively in charge of the supervision of the implementation of Chapter XI. Against winds and tides, compromises were found both at the levels of the Fourth Committee and the General Assembly, to extend each time the mandate of the ad hoc Committee for further periods of two or three years (see, eg, UNGA Res 1332 [XIII] 'Question on the Renewal of the Committee on Information from Non-Self-Governing Territories' [12 December 1958] GAOR 13th Session Supp 18 vol 1, 36). In 1947, the ad hoc Committee even became the 'Special Committee' and was entrusted with a larger mandate (UNGA Res 146 (II) 'Creation of a Special Committee on Information transmitted under Article 73 (e) of the Charter'[0] [3 November 1947] GAOR 2nd Session Resolutions 57). By the early 1950s, these institutional developments allowed for paradigm shifts within the UN in relation to non-self-governing territories. Coinciding in 1950 with the important *International Status of South-West Africa (Advisory Opinion)*, in which the ICJ declared that 'no such rights of the peoples could be effectively safeguarded without international supervision and a duty to render reports to a supervisory organ' (at 137). Although it concerned 'peoples of mandated territories' (Chapter XII UN Charter; Mandates), the position of the Court, as the UN principal judicial organ, could only ring out within the UN and influence the mechanism of Chapter XI. Consequently, a third path was cleared away by the General Assembly in 1952: converting the Special Committee into a semi-permanent body.

11 UN General Assembly Resolution 646 (VII) of 10 December 1952 on the 'Renewal of the Committee on Information from Non-Self-Governing Territories' (GAOR 7th Session Supp 20, 32) changed the name of the Special Committee to 'Committee on Information from Non-Self-Governing Territories' (commonly known as the 'Committee on Information'). Throughout the years, the extension of the mandate of the Committee on Information became rather automatic with almost no opposition being raised against such an extension. The main obstacle was the withdrawal of Belgium (an administering power) from the Committee on Information in 1952, due to its strong opposition to a semi-permanent body. France, the United Kingdom, and the United States had, from 1947 to 1948, ceased to transmit information with regard to some of the territories they were administering (see also Overseas Territories, Australia, France, Netherlands, New Zealand, United Kingdom, United States of America). The strengthening of the Committee on Information went along with the progressive integration of indigenous inhabitants of non-self-governing territories in the work of the Committee. UN General Assembly Resolution 566 (VI) of 18 January 1952 on the 'Participation of Non-Self-Governing Territories in the Work of the Committee on Information from Non-Self-Governing Territories' (GAOR 6th Session Supp 20, 60), exhorted the Committee on

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

Information to examine 'the possibility of associating' non-self-governing territories 'more closely to its work' (at para. 3). Noteworthy is the acknowledgement for one of the very first time that 'the direct association of the Non-Self-Governing Territories in the work of the United Nations and of the specialized agencies is an effective means of promoting the progress of the peoples of those Territories towards a position of equality with Members States of the United Nations' (at Pmbl.). From a mere exhortation, the General Assembly took a further step and began to request full association of non-self-governing territories not only in the Committee on Information, but also throughout the entire UN system. UN General Assembly Resolutions 744 (VIII) of 27 November 1953 on the 'Association of Representatives from Non-Self-Governing Territories in the Work on the Committee on Information from Non-Self-Governing Territories' (GAOR 8th Session Supp 17, 24) and 1466 (XIV) of 12 December 1959 on the 'Participation of the Non-Self-Governing Territories in the Work of the United Nations and of the Specialized Agencies' (GAOR 14th Session Supp 16, 35) were determinant in that sense. The General Assembly was not alone in its quest. The UN Economic and Social Council, through its Resolution 671 (XXV) of 29 April 1958 on the 'Terms of Reference of the Economic Commission for Africa' (ESCOR 25th Session Supp 1, 1), also provided for non-self-governing territories to become associate members of the Economic Commission for Africa. The aforementioned developments show that Chapter XI served as one of the primary bases upon which non-State actors could participate fully in the activities of the UN system and were recognized rights and duties. It can even be said that the aforementioned resolutions favoured the emergence of practice aimed at providing associate membership to non-self-governing territories within regional organizations (see, eg, the Caribbean Community [CARICOM] which gave associate membership to the following non-self-governing territories: Anguilla, Bermuda, British Virgin Islands, Cayman Islands and, Turks and Caicos Islands; Art. 3 (2) Revised Treaty of Chaguaramas establishing the Caribbean Community Including the CARICOM Single Market and Economy [signed 5 July 2001, entered into force 4 February 2002] 2259 UNTS 293). What was the next step to consolidate the Chapter XI institutional *acquis*? The answer came again from the General Assembly, through the construction of a fourth path: setting forth a permanent supervisory body responsible for the supervision of the implementation of Chapter XI.

12 The 'institutional locus' (Crawford 610) designed by the General Assembly took the form of a new Committee named the 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (commonly referred to as the 'Committee of Twenty-Four' since 1962 or 'Special Committee on Decolonization'). What prompted the terminological, semantic and functional change was the evolutionary perception of the object and purpose of Chapter XI (see also Treaties, Object and Purpose). As clearly explained,

> Chapter XI … provided for a gradual development of Non-Self-Governing Territories towards self-government …. But in the early 1950s, this policy of progressive and gradual development towards increased self-government was put under pressure more and more by the General Assembly. Eventually the Assembly set aside the policy of gradual development and replaced it with a policy which asserted that subject and dependent or colonial territories should immediately be granted independence (Raič 202–3).

UN General Assembly Resolution 1654 (XVI) of 27 November 1961 set up the Committee of Twenty-Four to 'examine the application of the Declaration, to make suggestions and recommendations on the progress and extent of the implementation of the Declaration' (at para. 4). Interestingly enough, Resolution 1654 (XVI) did not make any mention of Chapter XI, and therefore, the Committee of Twenty-Four did not appear *ex facie* as a supervisory body in charge of the implementation of Chapter XI.

13 Is this 'eyes wide shut' on Chapter XI? Not really. To gauge the link between the Committee of Twenty-Four and Chapter XI, it is essential to pause again on the very nature of Chapter XI, as a non-self-governing provision. Chapter XI UN Charter, as pointed out above, does not only lack

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

supervisory machinery. It also lacks what was alluded to as 'substantive machinery': clear and autonomous substantive rules and principles, with respect to non-self-governing territories. Thus, the General Assembly also had to fill the legal substantive gap and interregnum that characterizes Chapter XI. It did so first and foremost by clarifying the meaning of non-self-governing territories. Art. 73 UN Charter defines—in a rather tautological manner—the said territories as 'territories whose peoples have not yet attained a full measure of self-government'. UN General Assembly Resolution 742 (VIII) of 27 November 1953 on the 'Factors which Should Be Taken into Account in Deciding whether a Territory Is or Is Not a Territory whose People Not Yet Attained a Full Measure of Self-Government' (GAOR 8th Session Supp 17, 21) dressed up a list 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'. Three categories of factors can be taken into account: (i) 'factors indicative of the attainment of independence' (eg international responsibility, eligibility for membership in the United Nations, etc); (ii) 'factors indicative of the attainment of other separate systems of self-government' (eg freedom of choice, voluntary limitation of sovereignty, etc); and, (iii) 'factors indicative of the free association of a territory on equal basis with the Metropolitan or other country as an integral part of that country or in any other form'. This list was confirmed in 1960 in UN General Assembly Resolution 1542 (XV) of 15 December 1960 on the 'Transmission of Information under Article 73 e of the Charter' (GAOR 15th Session Supp 16 vol 1, 30). The list of factors assisted the General Assembly to decide unilaterally whether a territory is or is not a non-self-governing territory. For instance, in 1962, it affirmed that the 'Territory of Southern Rhodesia was a Non-Self-Governing Territory within the meaning of Chapter XI of the Charter' (UNGA Res 1747 [XVI] 'The Question of Southern Rhodesia' [28 June 1962] GAOR 16th Session Supp 17, 3 para. 1) despite the United Kingdom's protest. Prior to that, and in spite of Portugal's refusal to submit information, in 1960 the General Assembly qualified the following territories as non-self-governing territories: The Cape Verde Archipelago, Portuguese Guinea, Sao Tomé and Principe, Sao Joao Batista De Ajuda, Angola, Mozambique, Goa and dependencies, Macau and dependencies, Timor and dependencies.

14 The very same year, the General Assembly embodied in Resolution 1541 (XV) of 15 December 1960 a set of 'Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter' (GAOR 15th Session Supp 16 vol 1, 29). The Principles delineate and substantiate the content as well as the scope of Chapter XI. Principle I affirms in an unprecedented way that 'the authors of the Charter had in mind that Chapter XI should be applicable to territories which were then known to be of colonial type'. Principle VI emphasizes that a non-self-governing territory can be said to have reached a 'full measure of self-government' by 'a) Emergence as a sovereign independent State; b) Free association with an independent State; or c) Integration with an independent State'. Principle III states that 'the obligation to transmit information under Article 73 (e) of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law'. Yet, these were not the last elements of development of Chapter XI. Besides being a productive year for the General Assembly, 1960 was also a pioneer year for the international process of decolonization. Indeed, this is when Resolution 1514 (XV) of 14 December 1960 entitled 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (also known as the 'Colonial Declaration') was adopted. The Colonial Declaration—without explicitly bringing up Chapter XI—stressed the 'important role of the United Nations in assisting the movement for independence' (at Pmbl.) in non-self-governing territories. From here, the link between the Committee of Twenty-Four and Chapter XI is more palpable. Indeed, since Resolution 1654 (XVI) of 27 November 1961 creating the Committee of Twenty-Four purported to establish a 'super-UN supervisory mechanism' dealing with all issues and forms of colonization and independence, non-self-governing territories were necessarily going to be scrutinized mainly by the Committee of Twenty-Four. In fact, Resolution 1654 (XVI) requested the Committee on Information 'to assist' the Committee of Twenty-Four in its work. The obligation of administering States to transmit information under Art. 73 (e) UN Charter was also going to be supervised *à titre principal* by the Committee of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

Twenty-Four. UN General Assembly Resolution 2621 (XXV) of 12 October 1970 entitled 'Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (GAOR 25th Session Supp 28, 1) even went a step further and entrusted the Committee of Twenty-Four with the power to 'send visiting missions to the colonial territories' and 'to assist the General Assembly in making arrangements, in co-operation with the administering Powers, for securing a United Nations presence in the colonial Territories' (at para. 9).

15 Therefore, Chapter XI was no longer the orphan provision it had appeared to be, and non-self-governing territories were granted maximum rights at the international level. As such, Chapter XI is a good illustration of how subsequent practice of a principal organ of an international organization can interplay with the development of primary rules. The ICJ itself in the Kosovo (Advisory Opinion) recognized that aspect of the legal evolution of Chapter XI: 'During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation' (at para. 79; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa]* paras 52–54; *East Timor [Portugal v Australia]* [1995] ICJ Rep 90 para. 28; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion]* [2004] ICJ Rep 136 para. 88). The development and implementation of Chapter XI through the grace of the subsequent practice of the General Assembly has surely helped to shape the Friendly Relations Declaration (1970), which relates in part to non-self-governing territories. It is thus doubtful that Chapter XI has only become 'the bottom layer of a palimpsest of which the upper layers are formed by the Declarations of 1960 and 1970' (Engers 87). However, when assessing the effect of Chapter XI—and notwithstanding the achievements—it must be at least admitted that after more than sixty years, some non-self-governing territories are still territories of discord within the international community.

C. An Assessment of the Effect of Chapter XI: The Territories of Discord

16 UN General Assembly Resolution 65/119 of 10 December 2010 proclaimed the 'Third International Decade for the Eradication of Colonialism'. Resolution 65/119 still urges:

> the administering Powers to cooperate fully with the Special Committee to develop a constructive programme of work on a case-by-case basis for the Non-Self-Governing Territories to facilitate the implementation of the mandate of the Special Committee and the relevant resolutions of the United Nations on decolonization, including resolutions on specific Territories (at para. 3).

Does this imply that Chapter XI did not succeed in fostering self-determination for non-self-governing territories and ineffectively supervising the situation within those territories? The answer is not self-evident. Indeed, it is important to recall that at its very first session, the General Assembly listed 72 territories as being non-self-governing territories (UNGA Res 66 (I)). Today, there are sixteen remaining non-self-governing territories in the list of the UN, the majority of which are administered by the United Kingdom and the United States.

17 As long as there are remnants of colonialism, it cannot be said that the object and purpose behind Chapter XI have been fulfilled. Nevertheless, the great achievements in terms of decolonization cannot be ignored. Today, most of the non-self-governing territories are small islands. The challenge for Chapter XI—and with it, the UN system and other international organizations (universal, regional, sub-regional)—is not only to ensure self-determination for those territories, but also to protect them because of their vulnerability. The UN General Assembly is conscious of the specific features of today's non-self-governing territories and, within the last few years, has regularly requested specialized agencies and other organizations of the UN system to promote sustainable development and to provide information on:

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

(a) Environmental problems facing the Non-Self-Governing Territories;

(b) The impact of natural disasters, such as hurricanes and volcanic eruptions, and other environmental problems, such as beach and coastal erosion and droughts, on those Territories;

(c) Ways and means to assist the Territories to fight drug trafficking, money-laundering and other illegal and criminal activities;

(d) Illegal exploitation of the marine and other natural resources of the Territories and the need to utilize those resources for the benefit of the peoples of the Territories (UNGA Res 65/110 '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' [10 December 2010] UN Doc A/RES/65/110 para. 10).

Some resolutions dealing with individual non-self-governing territories even embody an obligation for the administering power 'to cooperate in establishing programmes for the sustainable development of the economic activities and enterprises of the Territory' (as in, eg, UNGA Res 64/104 'Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, St Helena, the Turks and Caicos Islands and the United States Virgin Islands' [10 December 2009] GAOR 64th Session Supp 49 vol 1, 226 Sec. B VI).

18 As regards the specific issue of self-determination, there is also a need to revisit certain methods, means and concepts appertaining to the international supervision of non-self-governing territories. Some efforts have also been made in that sense. Several resolutions of the General Assembly on 'Dissemination of Information on Decolonization' (see, eg, UNGA Res 65/116 'Dissemination of Information on Decolonization' [10 December 2010] UN Doc A/RES/65/116) recognize 'the need for flexible, practical and innovative approaches towards reviewing the options of self-determination for the peoples of Non-Self-Governing Territories with a view to implementing the plan of action for the Second International Decade for the Eradication of Colonialism' (at Pmbl.). The said resolutions stress, furthermore, the need for the Department of Public Information and the Department of Political Affairs of the UN Secretariat:

> to ensure the widest possible dissemination of information on decolonization, with particular emphasis on the options for self-determination available to the peoples of Non-Self-Governing Territories, and … to actively engage and seek new and innovative ways to disseminate material to the Non-Self-Governing Territories (at para. 2).

19 Besides the need for revisiting methods, is there a pressing demand for reconsidering the definition of what constitutes a non-self-governing territory? Some UN Member States see the de-listing and decolonization criteria as 'anachronistic' (see, eg, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 'Gibraltar: Working Paper prepared by the Secretariat' [18 March 2010] UN Doc A/AC.109/2010/16 para. 52). There is a list of territories that needs to be addressed by the UN through the mechanism of Chapter XI. The ultimate goals of decolonization and self-determination commend a case-by-case adjustment of the notion of non-self-governing territories. For example, how to qualify the situation of Puerto Rico? In a recent report of the Committee of Twenty-Four, it was stated:

> Since 1953, the United States has maintained a consistent position regarding the status of Puerto Rico and the competence of United Nations organs to examine that status, based on resolution 748 (VIII), by which the General Assembly released the United States from its obligations under Chapter XI of the Charter of the United Nations. It has maintained that Puerto Rico has exercised its right to self-determination, has attained a full measure of self-government, has decided freely and democratically to enter into a free association with the

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

United States and is therefore beyond the purview of United Nations consideration. The Puerto Rican forces in favour of decolonization and independence have contested this affirmation. In paragraph 9 of resolution 748 (VIII), the General Assembly expressed its assurance that due regard would be paid in the eventuality that either of the parties to the mutually agreed association might desire any change in the terms of that association (Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 'Report prepared by the Rapporteur of the Special Committee, Bashar Ja'afari (Syrian Arab Republic)' [19 March 2012] UN Doc A/AC.109/2012/L.13 para. 73).

20 What about the case of Mayotte? Should it be kept off the list of non-self-governing territories under Chapter XI? The status of Mayotte as a French overseas territory has led throughout the years to a number of condemnations from the international community (see also Decolonization: French Territories). The fact that Mayotte has become a French department by Loi 2010-1487 relative au Département de Mayotte of 7 December 2010, ie an integral part of the French Republic, does not end the controversy over its status. The UN General Assembly has continually adopted resolutions criticizing the French conduct. UN General Assembly Resolution 49/18 on the 'Question of the Comorian Island of Mayotte' of 28 November 1994 (GAOR 49th Session Supp 49 vol 1, 17) reaffirms 'the sovereignty of the Islamic Federal Republic of the Comoros over the island of Mayotte' (at para. 1). In the same vein, the Assembly of Heads of State and Government of the Organization of African Unity adopted Resolution 241 (OAU Doc AHG/Res.241 [XXXI] [1995]), by virtue of which the Organization of African Unity reaffirmed the sovereignty of the Federal Islamic Republic of the Comoros over the Comorian Island of Mayotte. The same queries apply to the situation of the Falkland Islands. Although listed as a non-self-governing territory, the UN organs take great care to always specify that 'a dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas)'. Does this imply that as long as there is standing dispute, the Falkland Islands will remain a non-self-governing territory under British administration? What should be the role of the UN in solving both the sovereignty dispute and ensuring that self-determination is truly exercised in the Falkland Islands? Unless adequate answers and solutions are found and determined, the 'universal realization of the right of peoples to self-determination' (Report of the Secretary-General: Universal Realization of the Right of Peoples to Self-Determination) will continue to pace up and down a long and winding road.

Select Bibliography

GL Goodwin *Britain and the United Nations* (Manhattan Publishing Company New York 1957).

RB Russell *A History of the United Nations Charter: The Role of the United States 1940-45* (Brookings Institution Washington 1958).

U Sud *United Nations and the Non-Self-Governing Territories* (University Publishers Jullunder 1965).

A Rigo Sureda *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Sijthoff Leiden 1973).

JF Engers 'From Sacred Trust to Self-Determination' in H Meijers (ed) *Essays on International Law and Relations in Honour of AJP Tammes* (Sijthoff Leyden 1977) 85–91.

MA Ajomo 'International Law, the United Nations, and Decolonization' in EG Bello and B Ajibola (eds) *Essays in Honour of Judge Taslim Olawale Elias* (Nijhoff Dordrecht 1992) 77–92.

T Christakis *Le droit à l'autodétermination en dehors des situations de décolonisation* (La Documentation française Paris 1999).

D Raič *Statehood and the Law of Self-Determination* (Kluwer The Hague 2002).

N Matz 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' (2005) 9 Max Planck UNYB 47–96.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015

J Crawford *The Creation of States in International Law* (2nd edn OUP Oxford 2006) 603–47 and 746–56.
A Oraison 'Nouvelles réflexions sur la conception française du droit des peuples à disposer d'eux-mêmes à la lumière du "cas Mahorais"' (2009) 87 RDI 1–112.

Select Documents

Atlantic Charter (United Kingdom–United States of America) (14 August 1941) 204 LNTS 381.
Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195.
East Timor (Portugal v Australia) [1995] ICJ Rep 90.
International Status of South-West Africa (Advisory Opinion) [1950] ICJ Rep 128.
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16.
Loi 2010-1487 relative au Département de Mayotte (7 December 2010) <http://www.legifrance.gouv.fr> (26 October 2012).
North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3.
South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) [1962] ICJ Rep 319.
UNGA 'Report of the Secretary-General: Universal Realization of the Right of Peoples to Self-Determination' (12 September 2006) UN Doc A/61/333.
UNGA Res 9 (I) 'Non-Self-Governing Peoples' (9 February 1946) GAOR 1st Session Part I Resolutions 13.
UNGA Res 66 (I) 'Transmission of Information under Article 73e of the Charter' (14 December 1946) GAOR 1st Session Part II Resolutions 124.
UNGA Res 1466 (XIV) 'Participation of the Non-Self-Governing Territories in the Work of the United Nations and of the Specialized Agencies' (12 December 1959) GAOR 14th Session Supp 16, 35.
UNGA Res 1514 (XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960) GAOR 15th Session Supp 16 vol 1, 66.
UNGA Res 1654 (XVI) 'The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (27 November 1961) GAOR 16th Session Supp 17 vol 1, 65.
UNGA Res 65/119 'Third International Decade for the Eradication of Colonialism' (10 December 2010) UN Doc A/RES/65/119.
United Nations (ed) 'What the UN Can Do to Assist Non-Self-Governing Territories' (2009) <http://www.un.org/> (26 October 2012).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2013. All Rights Reserved. Subscriber: Universite de Geneve; date: 11 May 2015