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Matthew Saul
University of Oslo

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The Practice of Shared Responsibility in relation to Internationally Administered Territories

Matthew Saul [*]

1. Introduction

The concept of 'international territorial administration' can be defined in different ways. This chapter adopts the inclusive approach of Stahn, who refers to international administration as 'the exercise of administering authority (executive, legislative, or judicial authority) by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose'.[1]

This definition covers a wide range of examples both contemporary and more historical, stretching back over the last two hundred years, which have been categorised in various ways.[2] A first category consists of the early *ad hoc* situations of internationalisation of free cities and free territories, including the role of the League of Nations in the Free City of Danzig (1919-1939) following the First World War. A second and more systematic approach includes the administration of former colonial territories under the League's mandate system and the subsequent United Nations (UN)'s system of trusteeship. A third category covers the more recent instances in which the UN and, at times, other international organisations have undertaken plenary (Kosovo, East Timor) or partial (Cambodia, Bosnia and Herzegovina) administrative roles as part of a response to a threat to international peace and security.[3]

Situations of international territorial administration have the potential to give rise to issues of shared responsibility – 'responsibility is shared, when multiple actors are responsible for their

[*] Post-Doctoral Research Fellow, Department of Public and International Law, University of Oslo. The research leading to this chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007–2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam. All websites were last accessed in December 2014.

[1] C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, 2008), p. 44; for an alternative approach see, e.g., J. Chopra, *Peace Maintenance: The Evolution of International Political Authority* (London: Routledge, 1999), p. 37.

[2] Stahn, ibid., p. 46.

[3] For an overview of some of the studies that have assessed this phenomenon from an international legal perspective, see S. Chesterman, 'Review Essay: International Territorial Administration and the Limits of Law', (2010) 23 LJIL 437.

contribution to a single harmful outcome'.[4] The fact that a collective of international actors could administer the territory in question, raises the question of whether all or just some of the administering parties could be held responsible for wrongful acts committed under the auspices of the administration. The situation has additional complexity when the administered territory might possess its own international legal personality. In that case there is an additional entity that could be implicated in the commission of a wrongful act, either on the basis of its own free standing acts or through a connection to the acts of the international administration.

This chapter focuses on three instances of international administration – in Nauru, Bosnia, and Kosovo – that have given rise to claims that can be construed as relevant for the debate on shared responsibility. These examples (discussed respectively in section 2, 3 and 4) represent a situation of trusteeship, a situation of partial territorial administration, and a situation of plenary territorial administration. By examining three different forms of administration, this chapter helps to demonstrate the variety in the responsibility issues that can arise when international actors (third states and/or international organisations) undertake the administration of a territory.

The applicable principles that are relevant to shared responsibility differ between the three instances. There is no general international legal framework specifically for the regulation of the practice of international territorial administration. In each instance general international law will be applicable, but the elements that are relevant and in what manner will depend on the circumstances at hand. In addition, the nature and content of the international legal framework can be adapted on the basis of specific treaties or Security Council Resolutions. For each example, consideration is given to the applicable primary and secondary rules of international law, as well as the available judicial processes, to the extent that these are relevant for questions of shared responsibility.

[4] See for this definition the Introduction to this volume, P.A. Nollkaemper and I. Plakokefalos, 'Introduction', ___, at__. To date, there is no study which deals in a general manner with the framework for, and practice of, shared responsibility during international administration. Although there are studies which address particular elements of responsibility in relation to certain situations, see e.g. E. de Brabandere, 'Human Rights Accountability of International Administrations: Theory and Practice in East Timor', in J. Wouters, E. Brems, S. Smis and P. Smitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), p. 331.

2. Nauru

2.1 Background

Nauru, an island in the South Pacific, was internationally administered under both the League's mandate system and the UN's trusteeship system (Chapter XII UN Charter).[5] It is the latter that is more interesting, as here Nauru was administered by three states.[6] The Trusteeship Agreement for Nauru was approved by the UN General Assembly in 1947.[7] The General Assembly established an Administering Authority consisting of the governments of Australia, New Zealand, and the United Kingdom (UK).

A prominent issue that brought the question of responsibility to the fore is the way in which the Administering Authority dealt with resources of phosphate on the territory. The Authority allowed for, and benefited from, the mining of phosphate. This mining left the phosphate lands in need of extensive rehabilitation, if they were to be used to the benefit of Nauru on its acceding to independence in 1967.[8]

In practice, Australia undertook the administrative role. This arguably made Australia a more obvious respondent for actors seeking compensation. However, given that the Authority was constituted with two other states, and these two other states had agreed to Australia undertaking the administrative role (Article 4 of the Trusteeship Agreement), this did not necessarily entail that Australia alone would be responsible for any wrongful acts committed by the Administering Authority.

2.2 Applicable primary rules

The relationship between a trust territory and the administering authority is regulated, in the first instance, by a territory specific trusteeship agreement. The Agreement for Nauru specified a number of general obligations for the Administering Authority. For instance, by Article 5(2)(a) of the Trusteeship Agreement, the Authority was required to 'respect the rights

[5] Charter of the United Nations, San Francisco, 26 June 1954, in force 24 October 1945, 1 UNTS 16 (UN Charter).
[6] As a target of trusteeship, the territory of Nauru did not have its own international legal personality.
[7] Trusteeship Agreement for the Territory of Nauru (Australia, UK, and New Zealand), approved by the General Assembly, 1 November 1947, 10 UNTS 3.
[8] See I. Anderson, 'Can Nauru clean up after the colonialists? (rehabilitation of environmental damage caused by phosphate mining)' (1992) 135 *New Scientist* 12, at 12–13.

and safeguard the interests, both present and future, of the indigenous inhabitants of the Territory'.

Additional rules for assessing the conduct of an Administering Authority are found in Chapter XII of the UN Charter through which the trusteeship system was established. Article 76 of the UN Charter, for example, identifies the trusteeship system as intended 'to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'.

Moreover, customary international law, such as the right of all peoples to self-determination, which encompasses the right of a people not to be deprived of natural resources,[9] is applicable.

The noted primary rules are underspecified, but still provide a basis for the conduct of the Administering Authority with regard to the mineral phosphates to be assessed from an international legal perspective. Each of the noted rules arguably requires that any usage of natural resources on a trust territory be undertaken in a sustainable manner. To the extent that this was not the case, the Authority for Nauru can be argued to have been in breach of international law.

As this was a situation in which three states were appointed as the Administering Authority, but only one state, Australia, actually undertook the administration, it might be contemplated that the obligations, especially those created through the Trusteeship Agreement, would differentiate between the three states. This was not the case, however. The relevant rules, such as Article 5 of the Trusteeship Agreement, do not differentiate between the three states. Rather the reference throughout the Agreement, following an initial reference to the 'joint Administering Authority', is to 'the Administering Authority'.

Given that the Administering Authority was not a legal person, this in effect meant that each of the three states was subject to the obligations contained in the Trustreeship Agreement. It might be contemplated that the Administering Authority was created as an international legal person separate from the three states. However, there is little to support such an argument on

[9] See e.g. Article 1(2) International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).

the basis of the most common indicators for the existence of an international organisation; the Administering Authority did not have its own organs, for instance. Rather, the approach taken in the Agreement is more readily accepted as an indication that it was the intention of the three states to create the Administering Authority as a common organ of the states, with each state subject to the same obligations vis-à-vis the territory and people of Nauru.[10]

This, though, does not preclude the fuller role of Australia in the actual administration serving as a factor in the application of the secondary rules on responsibility, including the nature of reparations.

2.3 Secondary rules

With regard to the trusteeship system, the standard practice was to have one state constituting the Administering Authority, rather than three. This might help to explain why there was no specific provision made in the UN Charter for allocation of responsibility during a situation of joint administration. In this situation, any specific provisions on responsibility would have to be included in the Trusteeship Agreement.

Although the Trusteeship Agreement for Nauru does not contain any rules on responsibility, still, the Agreement might be turned to for evidence of the intention of the parties in relation to the allocation of responsibility. In this respect, a significant component of the Agreement is the reference to the obligations of the joint Administering Authority without any differentiation between the three constituting states (Australia, United Kingdom, and New Zealand). The reference to joint Administering Authority in this Agreement provides, as noted above, an indication that it was the intention of the three states to create a common organ of the three states, with each state equally obligated.

The idea that all three states could incur the same level of responsibility as a result of the actions of the common organ, the Authority, finds support in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) as set out by the ILC.[11] These rules anticipate that there can be a plurality of responsible states for the same wrongful act (Article

[10] See S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for the Acts of the CPA', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart, 2008), p. 185, at p. 201; also J. Crawford, *State Responsibility – The General Part* (Cambridge University Press, 2013), p. 340.
[11] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

47 ARSIWA). Situations where states act through a common organ and that common organ commits a wrongful act, provide one example of the situation envisaged by Article 47. Neither the ARSIWA nor the Commentary[12] provides a clear basis for evaluation of the existence of such a situation. Still, the fact that the ILC made reference to the Nauru phosphates situation in the Commentary to Article 47 ARSIWA, suggests that it had it in mind that this sort of arrangement would be covered.[13]

Locating a situation within Article 47 ARSIWA provides some guidance on how responsibility can be approached. For instance, Article 47 permits the injured state to 'hold each responsible State to account for the wrongful conduct as a whole'.[14] But Article 47 ARSIWA also leaves open a number of issues pertinent to the Nauru situation. For instance, it leaves open the issue of whether, when one state is held responsible for the wrongful conduct as whole, it has an entitlement to a contribution from the other states, and also how any such entitlement is to be worked out.[15] For instance, while the UK and New Zealand could have argued for a differentiated level of responsibility, as a result of the arguably more remote connection to the injury suffered by Nauru, Article 47 would not have provided a basis for evaluating such an argument.

In the event, the case was brought to the International Court of Justice (Court or ICJ) by Nauru only against Australia. The ICJ dismissed the preliminary objections of Australia on grounds returned to below.[16] The case did not proceed to the merits, as Australia agreed to settle.[17] However, the approach taken to settlement shines light on some of the issues noted above. Support for the idea that the Authority was a common organ of the three states is found in the fact that Australia requested money from the other two states and the two other states agreed to pay.[18] Still, the fact that the United Kingdom and New Zealand agreed to pay a

[12] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).
[13] Ibid., Commentary to Article 47 ARSIWA, para. 4.
[14] ARSIWA Commentary, ibid., Commentary to Article 47 ARSIWA, para. 2.
[15] On the difficulty surrounding use of domestic terms of responsibility such as 'joint', 'joint and several' and 'solidary', see ARSIWA Commentary, ibid., Commentary to Article 47 ARSIWA, para. 3; see also P.A. Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', SHARES Research Paper 01 (2011), ACIL 2011-01, pp. 8–10; Crawford, *State Responsibility*, n. 10, p. 330.
[16] *Nauru*, n. 21, at 262, para. 56.
[17] See Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru, Nauru, 10 August 1993, in force 20 August 1993, 1770 UNTS 379.
[18] Ibid., the idea that the Court would have treated the Administering Authority as a common organ at the merits is supported by explicit use of this term in the separate opinion of Judge Shahabuddeen, in *Nauru*, n. 21, Separate Opinion of Judge Shahabuddeen, p. 270, at p. 284.

significantly lesser amount than Australia indicates scope for differentiation of responsibility, where one state undertakes a more active role in the administration.[19]

2.4 Judicial process

As the territory of Nauru lacked independent international legal personality during its trusteeship, the possibility of the complaint being brought before an international judicial body was precluded. The trusteeship system did make provision for the inhabitants to petition to the UN Trusteeship Council.[20] However, the Council did not have the ability to take binding decisions in relation to administering authorities. Accordingly, it is understandable that it was not until after the independence of Nauru that the issue of the treatment of the mineral phosphates came before an international judicial body, the ICJ. The Court passed judgment on preliminary objections in 1992.[21]

Australia objected to the admissibility of the case on a number of grounds. In particular, it objected that the case could not be decided without pronouncing on the responsibility of the United Kingdom and New Zealand, because the claim was essentially against the Administering Authority which all three states participated in.[22] In response, the Court stressed that although the outcome might potentially affect the responsibility of the other states, as long as the responsibility issue did not form the very subject of the case, this would not stop it from proceeding.[23] Although the Court noted that the Administering Authority was not to be treated as an international organisation,[24] it otherwise left open the question of the relevance of the nature of the Administering Authority in terms of allocation of responsibility (an issue that the Court noted could be addressed at the merits).[25]

Ultimately, then, this scenario can be taken to indicate that where states agree to jointly

[19] See BBC, 'Nauru Profile', 13 June 2013, at http://www.bbc.co.uk/news/world-asia-pacific-15433901: 'Australia agrees to pay out-of-court settlement of $73m over 20 years. New Zealand and the UK agree to pay a one-time settlement of $8.2m each.'
[20] UN Charter, n. 5, Chapter XIII, Article 87.
[21] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Preliminary Objections, ICJ Reports 1992, 240 (*Nauru*).
[22] Ibid., Preliminary Objections of the Government of Australia, Written Proceedings Vol. I, December 1990, para. 321.
[23] For critique see M. Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4(2) JIDS 295, at 311; also Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', n. 15, at 22.
[24] *Nauru*, n. 21, at 258.
[25] Ibid., at 262, para. 56.

administer territory, the Authority that is created is likely be treated as a common organ with each state equally obligated towards the territory and its people, provided no specific, alternative provision is made. Nonetheless, where one state undertakes a more substantial role in the administration, this latter element has the potential to be taken into account in determining how the burden of reparations should be allocated. However, the practice in the case of Nauru does not provide building blocks for an answer to the question how reparations are to be allocated, and what criteria would be relevant to differentiation of reparation.

3. Bosnia

3.1 Background

In contrast to Nauru, Bosnia and Herzegovina was already a sovereign state at the time of the initiation of international involvement in the administration of the territory. It was admitted as a member of the United Nations in 1992. However, the acceptance by the international community of Bosnia as a state was followed by a period of armed conflict in which different groups, both internal and external, disputed the future of the territory. The conflict ended with the Dayton Agreement of November 1995,[26] which set out the terms for peace in a series of Annexes. The Dayton Agreement was agreed to by Bosnia and Herzegovina, Croatia and the then Federal Republic of Yugoslavia. Annex 4 set out the Constitution for Bosnia, which included the details of a consociational arrangement for domestic governance.[27] In light of the complexities of the governance task ahead, the parties to the Dayton Agreement, by Annex 10, requested the UN Security Council (UNSC) to designate a High Representative to oversee the implementation of the civil elements of the Agreement. Following the acceptance of the Dayton Agreement, a Peace Implementation Conference of interested states and international organisations was held. At the conference, a Peace Implementation Council (PIC) was established, including a steering board to be chaired by the High Representative and consisting of nine states and the European Union (with Turkey representing the Organisation of the Islamic Conference). The PIC took responsibility for identification of the High

[26] The General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), initialled at Dayton on 21 November 1995, signed in Paris on 14 December 1995, (in force on signature) (1996) 35 ILM 75 (Dayton Agreement).

[27] Annex 4 to the Dayton Agreement, ibid., Constitution of Bosnia, Article V. This was key to the warring parties reaching agreement on peace, and is typified by the arrangements for the presidency, which consists of one Bosniac, and one Croat directly elected from the Federation, and one Serb directly elected from the Republica Srpska.

Representative, and invited the UNSC to endorse its approach. The UNSC did so in 1995 through Resolution 1031 issued under Chapter VII of the Charter.[28]

While the Office of the High Representative (OHR) initially interpreted the powers that it had been afforded in a narrow manner,[29] decision-making impasses amongst the domestic actors were hindering the reconstruction process. This led to a meeting of the PIC in Bonn at which the approach of the OHR was reconsidered.[30] It was agreed that under the terms of the Dayton Agreement the High Representative could take binding decisions, including 'measures … against persons holding public office or officials' in the interests of the implementation of the Peace Agreement.[31] This development was endorsed by the UNSC in Resolution 1144 in 1997.[32]

The increased powers of the OHR raised the question who was to be held responsible in situations where the exercise of its powers would result in the infringement of (individual) rights. An example is found in the decision of the OHR to remove certain public officials from their positions (between 29 June 2004 and 16 December 2004), which was reasoned on a purported link between the officials and the failure of certain individuals to be surrendered to the International Criminal Tribunal for the former Yugoslavia.[33] In such cases, it is not immediately apparent where any responsibility should lie in international law. Is the OHR a separate international legal person? Does responsibility lie with the PIC members? Is the UN in some way responsible? Or is it Bosnia that is responsible? Or is responsibility to be shared between two or more of these entities?

3.2 Applicable primary rules

The decision of the OHR to remove and ban certain individuals from public office and party political positions touched upon the human rights of the individuals concerned, particularly the right to a fair trial and freedom of association and the right to be elected. These rights (in any case the first two) can be argued to form part of customary international law and are also

[28] UN Doc. S/RES/1031 (15 December 1995).
[29] Stahn, *The Law and Practice of International Territorial Administration*, n. 1, pp. 296–297.
[30] Ibid.
[31] Ibid., p. 297 (footnote 176) citing the 'Conclusions of the Peace Implementing Conference held in Bonn' (1997).
[32] UN Doc. S/RES/1144 (19 December 1997).
[33] *Berić*, n. 52, para. 2.

found in international instruments, such as the European Convention on Human Rights (ECHR),[34] that Bosnia became a party to in 2002.[35]

To determine whether the noted rights were applicable to the acts of the OHR requires consideration of the nature of its international legal personality. In an extensive study of the concept of international territorial administration, Wilde recognises 'the obscure nature of and lack of commentary on the legal status of the [OHR]',[36] but concludes that on the basis of the nature of its creation and authorisation that 'it is a *sui generis* international organisation connected to, but operating separately from, the Dayton parties, the UN Security Council, and the PIC states'.[37] On this approach, the OHR is a separate international legal person and therefore not bound directly by international human rights instruments, such as the ECHR, as it is not a party.[38] It is, though, still bound by customary international human rights law.[39]

It should be noted that the operation of the OHR is not completely independent of other international legal persons that also have human rights obligations. The OHR is supervised by the PIC, which includes states that are parties to international human rights instruments, and it also operates within the legal system of the Bosnian state, which also is bound by international human rights obligations. In addition, it can be connected to the UN, as the Office of the High Representative has been authorised by the UNSC under its Chapter VII powers and reports are sent to the UNSC.[40] There is now good authority for the proposition that the UN also is bound by (customary) human rights law.[41]

To determine whether the relevant actors indeed were bound by relevant human rights obligations, some assistance can be found in the doctrine on jurisdiction in international

[34] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR). See respectively Articles 6, 11 and Article 3 to Protocol I.
[35] Bosnia became a party to the ECHR in 2002; the rights were also applicable in Bosnia as a result of the ICCPR, to which Bosnia became a party to in 1993.
[36] R. Wilde, *International Territorial Administration* (Oxford University Press, 2008), p. 32 (see footnote 88).
[37] Ibid., p. 67; see also the website of the Office of the High Representative: 'The Office of the High Representative (OHR) is an *ad hoc* international institution responsible for overseeing implementation of civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina.', 16 February 2012, see http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519.
[38] For the argument that when the OHR acts in a national role it is bound by international legal obligations as if it was the state of Bosnia, see R. Wilde, 'International Territorial Administration and Human Rights', in N.D. White and D. Klaasen (eds.), *The UN, Human Rights, and Post-Conflict Situations* (Manchester University Press, 2005), p. 149.
[39] See N.D. White, *The Law of International Organisations* (Manchester University Press, 2005), p. 217.
[40] See UN Doc. S/RES/1031 (1995), n. 28, para. 32.
[41] See White, *The Law of International Organisations*, n. 39; also C. Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 JCSL 451, at 455, 458.

human rights law. The applicability of international human rights law is dependent on jurisdiction.[42] As Milanović has noted, 'textually, the jurisdiction clauses of most human rights treaties are "primarily territorial" in nature – but not necessarily exclusively so'.[43] The broader jurisdiction clauses, such as those found in the ECHR and the International Covenant on Civil and Political Rights (ICCPR), inform the view that 'human rights treaties should apply not (only) when a state exercises control over a *territory*, but (also) when it exercises authority and control over a *person*'.[44] Uncertainty continues to surround the threshold level of control to establish jurisdiction, but it is arguable that, at least for the negative obligations in the context of the personal approach, it is sufficient that an actor is in a position to violate a human right.[45] This is on the basis that there should always be scope for the actor to exercise restraint so as not to act in a way that infringes the right.[46] It is also arguable that the personal approach pertains in customary international human rights law.[47] This summation of the general position provides a basis to determine which actors involved in the factual scenario had human rights obligations vis-à-vis the public officials.

As the OHR was in a position to violate the human rights of the public officials, it is possible to argue that the OHR had jurisdiction in relation to customary international human rights law. The state of Bosnia can also be argued to have had jurisdiction. This is on the basis that the acts occurred on its territory, and there is precedent to support the view that a state cannot escape its human rights obligations through delegation of its activities to other actors (Bosnia consented through the Dayton Agreement to the presence of the OHR).[48] However, the Chapter VII authorisation for the OHR entails that Bosnia is not in a position to definitively influence or end the activity of the OHR. This could support an argument for not treating acts committed by the OHR as within the jurisdiction of Bosnia. An alternative approach, one that would not excuse Bosnia of all responsibility, would be to interpret Bosnia's human right obligations in light of the Chapter VII authorisation of the OHR; perhaps reading the right to a fair trial as the source of an obligation to petition the OHR on behalf of the individuals

[42] This is jurisdiction in the sense of 'a certain kind of power that a state exercises over a territory and its inhabitants', see M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, Policy* (Oxford University Press, 2011), p. 33 and p. 41.
[43] Ibid., p. 33.
[44] Ibid. (emphasis added).
[45] Ibid., p. 119.
[46] Ibid.
[47] See N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, 2010), pp. 232–235.
[48] See *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi* v. *Ireland*, App. No. 45036/98 (ECtHR, 30 June 2005).

concerned.[49]

It is more difficult to argue that the states constituting the PIC exercised jurisdiction over the dismissed officials. Although the PIC had a key role in enabling the OHR to act in the way it did – through, for instance, approving its authority to remove from office public officials considered to be violating the legal commitments of the Peace Agreement[50] – there is little basis to suggest that the PIC had control of the officials, either territorially or on a personal basis. Similarly, it is far from obvious that the officials were in the jurisdiction of the UN. The authorisation of the OHR by the UNSC provided an additional legal basis for the activity of the OHR, but it did not make the OHR an organ of the UN, and therefore did not place the public officials in the control of the UN in either a territorial or personal sense.

It follows that even though, in particular through the involvement of the PIC and the UN, a great number of actors were involved in the conduct of the OHR, the concept of jurisdiction significantly may hamper the possibility to construe the relevant rules as being binding on each of these actors.

3.3 Secondary rules

The secondary rules on responsibility make it possible, through the provisions on attribution, for an entity to be held responsible for a wrongful act even where that act at least prima facie was conducted by another actor (here the OHR).

If indeed it is accepted, as suggested above, that the OHR is an international legal person, under the law of responsibility the OHR would be internationally responsible for its own conduct. However, that does not exclude the possibility of a (shared) responsibility of other actors.

One option is to consider the principles on attribution as a basis for treating the acts of the OHR as acts of the state of Bosnia. This argument might be grounded on Article 5 of the ARSIWA. This provision refers to the attribution of the activity of entities exercising

[49] Such an approach could find support in the arguments which have been raised in relation to the duties of a state vis-à-vis a national that is being ill-treated in a foreign country, see e.g. *R* v. *Secretary of State for Foreign and Commonwealth Affairs ex p Abbasi* [2002] EWCA Civ 1598, paras. 57, 64, 92, 93, 98 (where the Court found that there was an emerging rule in custom, which required that at least a request for assistance by the person alleging torture be considered fully by the state of nationally).
[50] Conclusions of the Bonn Peace Implementation Conference, UN Doc. S/1997/979 (Annex).

elements of governmental authority (such as that exercised by the OHR). For attribution there is no requirement of direct control by the state. However, the activity of the OHR is unlikely to be attributed to the state of Bosnia on this basis, because of the requirement that the authority exercised be provided for in the internal law of the state. The powers of the OHR stem from Annex 10 of the Dayton Agreement, rather than from law promulgated explicitly by the government as internal law. Moreover, the Chapter VII basis for the OHR implies that its authority cannot be affected in the same way as other entities would be by a change in the internal law. That is, internal legislative action cannot prevent the exercise of authority by the OHR.

Still, even though it appears difficult to attribute the activity of the OHR in its entirety to the state of Bosnia (especially given that the Chapter VII basis blocks the government of Bosnia from ending the activities of the OHR), it may be possible that part of the conduct of the OHR is attributed to Bosnia.[51] The fact that the state had accepted the operation of the OHR through the Dayton Agreement, combined with the argument that a state cannot escape its obligations through delegation of its activities, could substantiate an argument for attribution of conduct to Bosnia. This point was highlighted but not discussed by the European Court of Human Rights (ECtHR) when it addressed the case of the public officials (see further below).[52]

A separate question is whether there are there grounds for attributing the activity of the OHR to the members of the PIC and/or the UN Security Council. For states included in the PIC, guidance can be sought from Article 6 and Article 8 of the ARSIWA which deal, respectively, with the attribution of acts of the organs of other states and of other groups. For international organisations, it is Article 7 of the Articles on the Responsibility of International Organizations (ARIO) – 'Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization' – that appears most relevant. However, the emphasis in the Commentaries on all three of the noted Articles is on

[51] Indeed, the Commentary of the ILC on Chapter II of the ARIO makes explicit reference to the fact that '[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded.' Articles on the Responsibility of International Organizations, ILC Report of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), at 16, para. 4.

[52] Dušan *Berić and others* v. *Bosnia and Herzegovina*, Admissibility Decision, App. No. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (ECtHR, 16 October 2007), paras. 29–30 (*Berić*).

direction and control over the acts in question as forming the basis for attribution. The PIC and the UNSC have an institutional link to the activity of the OHR (through their role in the creation, continuation, and monitoring, for instance), but it is hardly plausible to argue that the OHR was directed by either set of actors to dismiss the public officials. As such, the ILC Articles do not provide a clear basis for attributing the particular act of dismissing the officials to either the PIC or the UN.

However, with regard to attribution to the UN, it is important to draw attention to the reasoning of the ECtHR when the case of the public officials appeared before it.[53] The analysis of the Court concentrated on the application of (what was then) Article 5 (now Article 7) of the ARIO. The Court found there was effective control of the UN over the OHR. This was on the basis that there was an explicit delegation of authority, it was done with sufficiently defined limits, and there was a requirement to report.[54] Such reasoning is problematic, not the least because it overlooks the extent of the autonomy enjoyed by the OHR, and the argument for it to be seen as a separate international legal person. The approach was, though, in accordance with earlier case law of the Court in *Behrami* and *Saramati*. In that instance, the Chapter VII authorisation for the Kosovo Force (KFOR) multinational force in Kosovo was also essentially treated as a basis for attributing the conduct in question to the UN, with little regard for the level of control exercised by the states parties to the ECtHR that constituted the force.[55]

With the *Al Jedda*[56] decision on detention acts of the United Kingdom forces in Iraq, the ECtHR has signalled that it will not always be persuaded that the activity of actors operating under a Chapter VII authorisation should be attributed to the UN. In explaining why acts of the multinational force in Iraq should not be attributed to the UN, the Court pointed to the fact that the force had already been constituted before the authorisation, and it also indicated that periodic reporting to the Council does not represent control.[57] This has implications for future assessment by the ECtHR of the link between the OHR and the UN in the Bosnia context. As such, it is reasonable to think that if the issue of the public officials dismissed by the OHR were to have arisen before the ECtHR now, the ECtHR would take a more careful approach to the assessment of attribution; including consideration of the scope for the OHR to be seen as

[53] Ibid.
[54] Ibid., para. 28.
[55] See Agim *Behrami and Bekir Behrami* v. *France* and *Ruzhdi Saramati* v. *France, Germany and Norway*, App. No. 71412/01 and 78166/01 (ECtHR, 2 May 2007).
[56] *Al-Jedda* v. *the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011).
[57] Ibid., para. 80.

separate international legal person to which the acts could be attributed.

In conclusion, the rules of attribution as contained in the law of responsibility seem to make it difficult to construe a (shared) responsibility for the states involved in the PIC. For Bosnia, the argument in favour of a shared responsibility rests on safer grounds. For the UN, the situation is unclear, given that the fact that the approach in recent judgments on UN authorisation appears to differ from the approach that the Court took in the *Berić* case in relation to the OHR. If the latter approach would stand, it could be argued that there could be a shared responsibility between the OHR and the UN (and possibly Bosnia).

3.4 Judicial process

The international mandate of the OHR has been accepted by the Bosnian courts as placing it above their jurisdiction without specific consent from the OHR.[58] Nonetheless, the Constitutional Court addressed the claim of the dismissed public officials in 2006, ordering the domestic authorities to secure an effective remedy in respect of removals from office by the High Representative.[59] This led to a response from the OHR,[60] which essentially removed practical effect from the Constitutional Court's decision, by determining that it should be left to the Presidency of Bosnia and Herzegovina to bring to its attention 'all matters raised in said Decision that ought to be considered by the international authorities referenced in the said Decision', and blocking the review of the OHR's Order by any existing or to be established Bosnian institution.

In response, the applicants brought the case to the ECtHR, arguing that the acts of the OHR breached Article 6 and Article 11 ECHR, and that the absence of an effective remedy breached Article 13. As the OHR is not a party to the ECHR, the case was brought against Bosnia.[61] This led the Court to address the issue of whether the acts could be attributed to Bosnia. An issue it approached through a focus on the connection between the OHR and the UNSC.

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[58] Bosnian Constitutional Court, Decision No. U 9/00 of 3 November 2000.
[59] Bosnian Constitutional Court, Decision No. AP 953/05, 8 July 2006. See also B. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge University Press, 2008), pp. 309–318.
[60] OHR, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija *et al*, No. AP-953/05,Order of 23 March 2007 (available at www.ohr.int).
[61] *Berić*, n. 52.

As has been noted in section 3.3, the Court found that the acts of the OHR could be attributed to the UN (albeit on questionable grounds). Interestingly, the Court did not rule out that Bosnia could be in violation of its obligations under the ECHR in relation to the acts of the OHR, as a result of its acceptance of the OHR through the Dayton Agreement (connected to idea that a state cannot escape it obligations through delegation of its activities). But the Court found it could not proceed to examine this issue, because to do so would require it to assess a Chapter VII based activity of the UN (the activity of the OHR in the Court's view), for which it did not have jurisdiction.[62]

In conclusion, the case of Bosnia shows significant limitations in terms of available processes to litigate a case of (shared) responsibility of OHR, both in the domestic courts and in the ECtHR, though in both situations the grounds and scope of these limitations appears controversial.

Apparently, no judicial processes where initiated against the other actors that (arguably) could share responsibility – Bosnia, the states participating in the PIC, and the UN.

4. Kosovo

4.1 Background

Following the bombing campaign against the Federal Republic of Yugoslavia (FRY) by the North Atlantic Treaty Organization (NATO) in 1999, the FRY withdrew from the territory of Kosovo, leaving no functioning administration. By Resolution 1244 of 1999, the UNSC authorised the creation of an international civil presence to perform all basic administrative functions. On this basis, the UN Secretary-General constituted the United Nations Interim Administration in Kosovo (UNMIK) as a plenary international territorial administration, exercising 'all executive and legislative powers, including the administration of the judiciary'. [63] It was based on a four-pillar structure, including, alongside the civil administration role of the UN (pillar II), roles for the United Nations High Commissioner for Refugees (humanitarian assistance – pillar I), the Organization for Security and Co-operation in Europe (Institution-building pillar III), and the European Union (reconstruction-pillar IV).

[62] Ibid., paras. 29–30.
[63] Report of the Secretary-General on the United Nations Interim Mission in Kosovo, UN Doc. S/1999/779 (12 July 1999), paras. 35-9.

The Special Representative of the Secretary General (SRSG) was to be the single head of the mission, and each pillar was to be headed by a Deputy SRSG. In addition, a NATO commanded KFOR security force was established under Resolution 1244 to operate alongside UNMIK.[64] Despite the emergence of parallel Kosovar structures of governance, there was initially no formal role for the Kosovars in governance.[65] This changed over time, with more and more authority being transferred to Kosovar institutions of governance in the form of the Provisional Institutions for Self-Government (PISG), which consisted of an assembly, a president, and government.[66] The PISG was created through a regulation of the SRSG in May 2001, and operated in some areas with a considerable degree of autonomy.[67]

In this situation, the allocation of responsibility became complex as result of the range of actors that operated with a degree of autonomy within a framework established and overseen by the UN. In cases where the exercise of authority interfered with (individual) rights, the question could arise whether responsibility was to be shared between multiple actors. An example of such an interference with individual rights was the banning by certain municipalities of the wearing of head scarves in schools in Kosovo. This activity has the potential to violate the human rights of the individuals affected. As the bans occurred throughout the period of UNMIK administration with considerable PSIG autonomy, this scenario raises the following question. To what extent is an international administration (co-)responsible under international law when it is a domestic institution with a degree of autonomy that undertakes a wrongful activity?

4.2 Primary rules

In terms of applicable primary rules, obviously the territorial state (formerly FRY, then the Union of Serbia and Montenegro, and now Serbia) had international human rights obligations in relation to the territory of Kosovo, having become a party to the ICCPR in 2001, and the

[64] Ibid., paras. 43-108.
[65] See R. Caplan, *International Governance of War-Torn Territories – Rule and Reconstruction* (Oxford University Press, 2005), p. 93.
[66] See D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford University Press, 2007), p. 138.
[67] Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK Regulation No. 2001/9 (15 May 2001); see also UNMIK, Report to the Human Rights Committee on the Human Rights Situation in Kosovo since 1999, 13 March 2006, CCPR/C/UNK/1.

ECHR in 2004.[68] However, it is difficult to argue that Serbia was in a position to fulfill these obligations, given that it had been displaced from the territory by UNMIK.[69] As a subsidiary organ of the UN, UNMIK was not a party to the relevant international human rights treaties. Still, international human rights treaty law was brought into the UNMIK framework through regulations promulgated by the SRSG.[70] This meant that UNMIK was obligated to adhere to this human rights law as part of its dual nature domestic/international legal framework, rather than as a result of membership of the treaty regime. In addition, the UN, and thus UNMIK, was bound by customary international human rights law.[71]

The banning of students from wearing head scarves to school by certain municipalities in Kosovo can be assessed in the light of provisions on religious freedoms in human rights treaties that UNMIK incorporated into its legal framework. For instance, Article 18 ICCPR, which refers to the right to manifest religion, including through the observance of customs such as distinctive clothing or head coverings.[72] This provision can also be argued to be part of customary international law.[73] The law on religious freedoms does not prevent the banning of wearing religious symbols for certain purposes. Article 18 ICCPR specifies 'public safety, order, health, or morals or the fundamental rights and freedoms of others' as grounds that can justify limitation. But '[l]imitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.'[74] A key issue with the bans in question was the lack of a clear domestic legal basis,[75] which contravened the principle of legality, necessary for a valid limitation.[76]

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[68] Concluding Observations of the Human Rights Committee: Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO, para. 3.

[69] See J. Cerone, 'Legal Responsibility Framework for Human Rights Violations Post-Conflict', in N.D. White and D. Klaasen (eds.), *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press, 2005), p. 42, at p. 67.

[70] UNMIK Regulation No. 1999/1, 25, at section 2; UNMIK Regulation No. 1999/24, section 1.3; UNMIK Regulation No. 2001/9 (Constitutional Framework), n. 67, Chapter 3.

[71] See White, *The Law of International Organisations*, n. 39, p. 217.

[72] Human Rights Committee, General Comment 22: The right to freedom of thought, conscience and religion (Article 18), UN Doc. HRI/GEN/1/Rev.1 at 35 (1994), para. 4.

[73] See Human Rights Committee, General Comment 24 (52): General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8; see also discussion in B. Lepard, *Customary International Law. A New Theory with Practical Applications* (Cambridge University Press, 2010), p. 349.

[74] UN Human Rights Committee, General Comment No. 22, n. 72, para. 8.

[75] Ombudsperson Institution in Kosovo, Special Report No. 8 On The Legality Of Actions Of Public Authorities Aimed At Banning The Wearing Of Religious Symbols By Pupils In Public Schools Throughout Kosovo (4 June 2004), available at http://www.ombudspersonkosovo.org/en/reports, at 4-5.

[76] Although even with a domestic legal basis, it should not be assumed that it would be considered a valid limitation, see *Bikramjit Singh* v. *France*, Communication No. 1852/2008, HRC, UN Doc.

With regard to whether the banning of head scarves represented a breach of international law by UNMIK, it is important to highlight that international human rights law creates obligations for all branches of a state,[77] but it is the state as a whole in the form of the central government that must answer any claim of wrongdoing. This implies that regardless of the fact that the bans on head scarves in certain schools were enacted by domestic municipalities under the auspices of the PISG, the claim of a wrongful act should be made against UNMIK, as it was the ultimate embodiment of political authority on the territory. A closer look at the nature of the governing arrangement can shed light on the appropriateness of this approach.

The PISG was created by UNMIK on the basis of its mandate to organise and oversee 'the development of provisional institutions for democratic and autonomous self-government'.[78] Through the Constitutional Framework regulation, UNMIK granted the PISG direct legislative, executive, and judicial powers, and following the election of the PISG in 2001, the Kosovo Assembly became the prominent site of lawmaking for Kosovo.[79] However, UNMIK still maintained ultimate authority for the implementation of UNSC Resolution 1244,[80] including the power to take 'appropriate measures' when the PISG acts in a manner that is inconsistent with Resolution 1244 or the Constitutional Framework;[81] a power exercised, for instance, when a resolution of the Kosovo Assembly on the territorial integrity of Kosovo was vetoed.[82] Moreover, the resolutions of the Kosovo Assembly needed to be promulgated by the SRSG to take effect,[83] and the Constitutional Framework could be adapted (or removed) by the SRSG.[84] However, it was apparent that UNMIK was not simply imposing its own will. For instance, UNMIK has reported how it was urging the Kosovo Assembly to pass new legislation on religious freedoms (one that could potentially respond to some of the difficulties related to the bans of symbols), but it did not present itself as in a position to impose this legislation.[85] This mix of autonomy and control that defined the relationship between the PISG and UNMIK means that it is not immediately apparent whether the acts of

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CCPR/C/106/D/1852/2008 (2013), although also see at the ECtHR the case of *Dogru* v. *France*, App. No. 27058/05, (ECtHR, 4 December 2008).

[77] See Human Rights Committee, General Comment : Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4.

[78] UN Doc. S/RES/1244 (1999), para. 11c.

[79] Stahn, *The Law and Practice of International Territorial Administration*, n. 1, p. 322.

[80] Constitutional Framework, n. 67, preamble, para. 9.

[81] Ibid., chapter 12.

[82] Stahn, *The Law and Practice of International Territorial Administration*, n. 1, p. 322.

[83] See Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999 CCPR/C/UNK/1,13 March 2006, paras. 61–65.

[84] Stahn, *The Law and Practice of International Territorial Administration*, n. 1, p. 322 (see footnote 337).

[85] UNMIK, Report to the Human Rights Committee (2006), n. 67, para. 179.

the Kosovar institutions should simply be treated as those of UNMIK under international law, in the same way as acts of different branches of a state are attributed to the central government. It is to the secondary rules on the responsibility of international organisations, and the scope they provide for the complexity of the governance arrangement to be taken into account, that attention is now turned.

4.3 Secondary rules

The ILC's ARIO can be utilised as a framework for assessing the nature of the relationship between the PISG and UNMIK. The general principle is that international responsibility of an international organisation follows from conduct that is attributable to the organisation and is in breach of an international obligation of the organisation. In determining attribution of any wrongful conduct occasioned by the banning of head scarves, two of the ARIOArticles appear relevant.

One of these is Article 7 ARIO, which bases attribution on direction and control of the acts in question. Yet, as UNMIK did not exercise its powers in a manner that directed the bans, Article 7 would not support treating the activity as attributable to UNMIK.

More relevant is Article 6 ARIO, which refers to organs and agents exercising functions of the organisation. It was the function of UNMIK to govern the territory of Kosovo, and the PISG were endowed by UNMIK with aspects of governance of the territory of Kosovo. The Commentary on Article 6 ARIO specifies that 'conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event is not attributable when the organ or agent acts in a private capacity'.[86] This provides a basis for the governance activity that potentially included a violation of the right to religious freedom to be attributed to UNMIK and ultimately the UN.

This latter approach connects with that of the Ombudsperson for Kosovo which assessed the consistency of the practice of banning head scarves in certain schools with the ECHR in a Special Report in 2004.[87] On finding the practice to be inconsistent with the law, the recommendation was that the SRSG should 'ensure that, in the absence of any adequate legal

[86] ARIO Commentary, n. 51, Commentary to Article 6 ARIO, para. 7.
[87] Ombudsperson Special Report No. 8, n. 75.

provision, public authorities refrain from any action which could interfere with pupils' freedom of manifesting their religion in schools by wearing religious symbols'.[88] It is important to keep in mind that the role of the Ombudsperson was to determine simply whether there had been a breach of the rights by any of the public authorities of Kosovo. As such, it did not need to give any attention to the extent to which, by delegating authority,the nature of the international legal responsibility of UNMIK might be affected. Still, in focusing the call for action at the SRSG rather than at one of the institutions of the PSIG, the Ombudsperson's approach could be seen as one that viewed the UN as retaining full legal responsibility for all actions taken within its framework, regardless of the level or nature of delegation to the PSIG. In effect, that would mean that all responsibility would reside with the UN, and none with the PSIG.

It is striking that there appears to be little scope in the work of the ILC for a middle ground approach, one that would not necessarily allocate full responsibility to UNMIK for acts of the PSIG in relation to the human rights violations, given the level of independence that was enjoyed; but one that would still recognise in some way the role of UNMIK in creating and facilitating a situation where the violation was able to take place. This omission is significant, given the importance, in the context of UN based international administrations, in having a transfer in authority to domestic actors, to help develop domestic infrastructure and to foster a sense of ownership of reconstruction initiatives. If the international actors remain responsible to the same extent under international law when a degree of authority has been transferred to domestic actors, this might deter the transferring of authority.

4.4 Judicial process

The issue of international legal accountability for human rights violations in Kosovo has received considerable attention. An important reason for this is that UNMIK enacted a regulation on 'the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo', according legal immunity to the mission from domestic judicial process.[89] As such, the main site for the local population to address human rights violations related to

[88] Ibid.
[89] United Nations, Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK/REG/2000/47, 18 August 2000.

UNMIK has been with the Ombudsperson. Established by an UNMIK Regulation,[90] the Ombudsperson was given the capacity to receive and investigate human rights complaints in relation to any public body in Kosovo (excluding KFOR), and to make recommendations for action.

In relation to the banning of religious symbols in schools by certain municipalities, a prominent action of the Ombudsperson was the issuance of a Special Report in 2004.[91] This report was based on the compilation of a number of complaints that had been received from affected individuals. The Ombudsperson found that the practice was in breach of the ECHR provision on religious freedom (Article 9), as there was no clear legal basis for the bans that had been implemented. The action of the Ombudsperson, as noted above, was to make a recommendation that the SRSG should ensure that the domestic authorities did not act in a way that contravened the law. Subsequently, following further reports of municipality based bans without a clear domestic legal basis, the Ombudsperson found it necessary in September 2007 to send an open letter to the prime minister of Kosovo on the topic.[92] This development brings into question the usefulness of directing the initial call at the SRSG, and, in turn, provides a basis for querying the sense in focusing all the international legal responsibility on the actor with ultimate political authority in a situation of international territorial administration where considerable authority has been delegated to domestic actors.

5. Conclusion

This chapter has sought to contribute towards a clearer understanding of the nature of the shared responsibility issues that can arise during international territorial administration. It has done so through concentrating on three particular factual scenarios that have arisen during three separate instances of international administration.

Through consideration of the Nauru example, it has been shown that international law

[90] United Nations, Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38, 30 June 2000.
[91] Ombudsperson Special Report No. 8, n. 75.
[92] Republic of Kosovo Ombudsperson, 'Acting Ombudsperson: Students must not be banned from wearing head scarves in schools', 26 September 2007, available at http://www.ombudspersonkosovo.org/en/archive_test/Acting-Ombudsperson-Students-must-not-be-banned-from-wearing-head-scarves-in-schools-1071; the issue continued to persist throughout the main period of UNMIK and beyond, see e.g. Ombudsperson Annual Report 2011, available at http://www.ombudspersonkosovo.org/en/reports, p. 56.

recognises the shared responsibility of states constituting an international administration where that acts as a common organ, but provides no clear answer as to how responsibility should be allocated when a collection of states agree to administer a territory and a potentially wrongful act is committed. There were, though, signs from the relevant judicial process and subsequent agreement on compensation that there is scope for calibration in the amount of reparations due based on the level of direct contribution to the administration.

The Bosnia example has shown that it is possible for several international actors in addition to an international administration to be implicated to some extent in the commission of an wrongful act. It has also been shown, though, that existing international law struggles to reflect this plurality of involvement in the way in which it allocates responsibility. In particular, it has been shown that applying international human rights law and the secondary rules of attribution is likely to lead to a finding of responsibility only for the actor most directly implicated in the wrongful act. The relevant decision of the ECtHR (*Berić*) has shown that there is scope for matters to be further complicated (and responsibility to be channelled to one actor – the UN – only) through the way in which the application of the law on attribution is approached.

The Kosovo example has brought into focus the difficulties that surround allocating responsibility when domestic actors with a degree of autonomy are created by an international administration. The autonomous element is a reason to query how much responsibility should be allocated to the international administration for the acts of the domestic actors. The relevant accountability process was not required to deal with the issue, as it simply had to determine whether there had been a breach of rights as a result of the acts of the public authorities. Analysis of the situation in the light of the law on responsibility suggests that if a judicial body had been required to address secondary rules on responsibility, it would have allocated full responsibility to UNMIK, in spite of the level of authority that had been delegated, and the importance of fostering local ownership of decision making in a transitional context. On that ground, it would seem that shared responsibility would be precluded.

Even though in each of these situations multiple actors were involved, in none of them an actual finding of shared responsibility was made. The Nauru example comes closest, at least on the basis of the negotiated settlement. In the other two examples, due to reasons of applicable law (Bosnia example), principles of attribution (both the Bosnia and the Kosovo

example) and limitations of the judicial process (in particular the Bosnia example), findings of shared responsibility were precluded.

The difficulties that can arise in trying to work out responsibility during international territorial administrations where there are several actors implicated is a reason to contemplate the development of a more comprehensive set of provisions on responsibility specifically for international territorial administration. However, the prospects of these being an actual aid is limited by the diversity in the contexts within which international territorial administrations operate, as well as in the role of and way in which international administrations are constituted. Accordingly, a more useful suggestion would be for the actors that constitute the administrations to take more care to explain the approach to responsibility in the constitutive instruments. In all three of the examples examined, the uncertainty that has arisen with regard to allocation of responsibility could have been much reduced if the relevant international agreement or resolution had dealt in a more specific manner with matters of responsibility.