これまでに見てきたように、国際機構は様々な権限を有し、実際に行使する。その過程で自らが損害を被った場合に何ができるかについては、国連賠償勧告的意見を分析した際に学んだ。では、逆に、国際機構が他者に害を与える場合には、その責任は誰が負うのだろうか。

典型的な場合を考えてみよう。キプロス紛争[1]に際し、安全保障理事会は、決議 186 (1964)を採択し、キプロスに平和維持部隊(UNFICYP)を派遣することを決定した[2]。イギリス軍は、UNFICYP が実際に派遣される 1964 年 3 月 27 日以前からキプロス政府の同意に基づいて現地で活動しており、UNFICYP 派遣後はその一部として活動を続けた。この間、UNFICYP 派遣以前から、イギリス軍は現地のホテルを接収し、UNFICYP の一部となった後も使用を続けた。そこで、ホテルの経営者が、損害賠償を求めてイギリス政府を相手にイギリス裁判所に訴えた（Nissan 事件）。この場合、イギリス軍がイギリス軍として活動していた時期（UNFICYP 派遣以前）につき、イギリスが責任を負うことは言うまでもない。問題は、イギリス軍が UNFICYP の一部となった後に生じた損害について責任を負うのは国連かイギリスか、である。イギリスの裁判所は以下のように回答した[3]。どの見解が最も適切か、考えてみよう。

第一審判決　Nissan v. Attorney-General, [1968] 1 Q.B. 286, 294 (Stephenson, J.).

The Secretary-General issued directives, including instructions from the principal organs of the United Nations, to the Commander of the Force appointed by the Secretary-General to exercise in the field full command of the Force, and the Commander is operationally responsible for the performance of all functions assigned to the Force by the United Nations and may delegate his authority to the commanders of national contingents […] [T]he Force [is] a subsidiary organ of the United Nations, and its members, although remaining in their national service, are temporarily international personnel under the authority of the United Nations and subject to the instructions of the Commander, through the chain of command. […]

I cannot think that the authority of the United Nations over their Force can differ from the authority of an independent sovereign state over its armed forces […] That may raise, or depress, the status of the United Nations, an organisation in which a number of independent sovereign states are for some purposes united, to the level of an independent sovereign state and may require that "acts of state" be extended or altered to "acts of the United Nations." But as the United Nations can make agreements with such states and by such agreements establish an armed force in their territories, I find nothing surprising in that.

控訴審判決　Nissan v. Attorney-General, [1968] 1 Q.B. 286, 327 (Lord Denning).

On March 27, 1964, the British troops became part of the United Nations Force. They were under the command of the United Nations Commander. They flew the United Nations flag. They wore

[1] 角田勝彦『サイプラス問題と国際法』（世界の動き社、1993 年）。外務省「キプロス基礎データ」。

[2] 香西茂『国連の平和維持活動』（有斐閣、1991 年）147 頁以下。

[3] ニッサン事件につき、参照、松田幹夫「国連軍の地位についての覚書」大沼保昭（編）『国際法、国際連合と日本〔高野雄一先生古稀記念論文集〕』（弘文堂、1987 年）169 頁。

the berets and arm flashes to denote they were no longer the soldiers of the Queen, but the soldiers of the United Nations. They were acting as agents for the United Nations, which is a sovereign body corporate. Their actions thenceforward were not to be justified by virtue of the royal prerogative of the Crown of England. They were to be justified only by virtue of the United Nations. I do not think the Crown can be expected to pay compensation thereafter. It must be paid by the United Nations themselves or perhaps by the Cyprus Government who agreed to provide all necessary premises. At any rate, it is not payable by the British Crown.

［Danckwerts L.J. および Winn L.J. も同意見］

上告審判決　Attorney-General v. Nissan, [1970] AC 179 (Lord Morris of Borth-y-Gest).

The United Nations is not a state or a sovereign: it is an international organisation formed (inter alia) to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to peace […]

From the documents it appears further that, though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences committed by them in Cyprus.

［他の 4 人の裁判官も同意見］

ところが、今世紀に入り、ヨーロッパ人権裁判所[4]は Nissan 事件上告審判決とは別の判断を下した。

ユーゴスラヴィア解体プロセスでのコソヴォにおける混乱に際し、安全保障理事会は、決議 1244 (1999)により、コソヴォ暫定統治部隊(UNMIK)およびコソヴォ安全保障軍(KFOR)を派遣することを決定した[5]。UNMIK の任務は、基本的行政機能の遂行、自治確立の促進、法と秩序の維持など（上記決議パラ 10-11）であり、KFOR の任務は、敵対行為再発の防止、ユーゴスラヴィア軍撤退確保、コソヴォ内武装勢力の武装解除など（上記決議パラ 9）である。UNMIK が安保理補助機関であるのに対し、KFOR はそうではなく、いわゆる有志国が自発的に軍隊を出す「多国籍軍」である。パラ 9 の冒頭とパラ 10 の冒頭および上記 UNMIK/KFOR のリンク先をそれぞれ比較されたい。

KFOR は、コソヴォを 4 つの区画に分け、それぞれ一つの国が担当していた。そのフランス担当区域において、クラスター爆弾の被害を受けた子供の親が、当該地域の管理を担当していたフランスを相手どってヨーロッパ人権裁判所に訴えを提起した。また、KFOR 指揮官（ノルウェー軍人）の命により UNMIK 警察官に不当逮捕されたと主張する者が、ノルウェーを相手取って同裁判所に訴えた（拘留係属中に指揮官はフランス軍人に

[4] 欧州評議会(Council of Europe)の下で作成されたヨーロッパ人権条約により設置された裁判所。加盟国管轄下にある者が同条約の定める人権について侵害を被ったと考える場合、一定の手続を経て同裁判所に訴えることができる。裁判所の概要については、裁判所サイトの広報動画を見ると良い。

[5] KFOR および UNMIK につき詳しくは、酒井啓亘「国連憲章第七章に基づく暫定統治機構の展開」神戸法学雑誌 50 巻 2 号（2000 年）81 頁。

交代)。この 2 つの事件（ヨーロッパ人権条約 2 条・5 条・6 条などの違反が主張された）を扱った Behrami/Saramati 事件判決（2007 年）において、ヨーロッパ人権裁判所は、次のように述べた（パラ 134 はやや難しいので、ざっと見ておくだけで良い）[6]。

133. The Court considers that the key question is whether the UNSC [United Nations Security Council] retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the [UN Charter] Article 43 agreements never concluded.

134. That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

In the first place, and as noted above, Chapter VII [of the UN Charter] allowed the UNSC to delegate to "Member States and relevant international organisations". Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions […] could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution).

したがって、KFOR の行為は国連に帰属するため、フランスやノルウェーは個別に責任を負うことはない、と判示された。つまり、この場合に責任を負うのは国連となる。

その後、別の事件でイギリス貴族院上訴委員会（現・最高裁判所）がかなり異なる判断を下した。Al-Jedda 事件である。イラク・イギリスの重国籍者 Al-Jedda は、バグダッドにおいて、テロ集団の一員であると疑われ、イラク戦争（2003 年）後にイラクに展開していたイギリス軍に逮捕・拘禁された。Al-Jedda は、この逮捕・拘禁がヨーロッパ人権条約 5 条に違反するとしてイギリス国内裁判所に不法行為訴訟を提起した。イギリス政府は、イギリス軍による本件逮捕・拘禁の根拠を安全保障理事会決議 1511 (2003)の 13 項・14 項および決議 1546 (2004)の 10 項("the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq")に求めた。すなわち、本件におけるイギリスは「多国籍軍」への部隊派遣をしており、Behrami/Saramati 事件におけるフランス・ノルウェーと類似の立場にあった。

[6] この判決および次に言及する Al-Jedda 事件につき詳しくは、薬師寺公夫「国連の平和執行活動に従事する派遣国軍隊の行為の帰属」立命館法学 2010 年 5・6 号下巻 1573 頁、薬師寺公夫「国連憲章第 103 条の憲章義務の優先と人権条約上の義務の遵守に関する覚え書き」芹田健太郎ほか（編集代表）『講座国際人権法 4　国際人権法の国際的実施』（信山社、2011 年）5 頁、薬師寺公夫「国際機関の利用に供された国家機関の行為の帰属問題と派遣国の責任」松田竹男ほか(編集代表)『現代国際法の思想と構造　I. 歴史、国家、機構、条約、人権』(東信堂、2012 年)183 頁。

貴族院は 2007 年 12 月 12 日の判決により訴えを退けた。多数意見に属する Bingham 判事は以下のように述べる。

23. […] It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.

24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. […]

30. […] [Article 103 of the United Nations Charter] lies at the heart of the controversy between the parties. […] [T]he appellant insists that the UNSCRs [United Nations Security Council Resolutions] referred to, read in the light of the Charter, at most authorise the UK to take action to detain him but do not oblige it to do so, with the result that no conflict arises and article 103 is not engaged.

31. […] I am, however, persuaded that the appellant's argument is not sound […].

[…]

34. […] It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

[…]

39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention.

この判決の後、Al-Jedda はヨーロッパ人権裁判所に訴えを提起した（ヨーロッパ人権条約 5 条違反を主張）。同事件係属中の 2011 年 2 月 14 日、国連事務局は、国際機構の責任問題を扱っていた国連国際法委員会[7]に対して見解を送付し、その中で Behrami/Saramati 判決に対して強烈な批判を行った(A/CN.4/637/Add.1, pp. 10-12)。

[7] 本講義では、国際法委員会における国際機構の責任に関する議論は扱わない。関心があれば、本文に示したリンク先のほか、次を参照されたい。植木俊哉「国際組織の責任」村瀬信也・鶴岡公二（編）『変革期の国際法委員会』（信山社、2011 年）215 頁、植木俊哉「国際責任法の新たな展開」植木俊哉（編）『グローバル化時代の国際法』（信山社、2012 年）299 頁。

2. In the practice of the United Nations a clear distinction is made between two kinds of military operations: (a) United Nations operations conducted under United Nations command and control, and (b) United Nations-authorized operations conducted under national or regional command and control. *United Nations operations* conducted under United Nations command and control are subsidiary organs of the United Nations. They are accountable to the Secretary-General under the political direction of the Security Council. *United Nations-authorized operations* are conducted under national or regional command and control, and while authorized by the Security Council they are independent of the United Nations or the Security Council in the conduct and funding of the operation.

[…]

9. The recent jurisprudence of the European Court of Human Rights, beginning with the Behrami and Saramati case disregarded this fundamental distinction between the two kinds of operation for purposes of attribution. In attributing to the United Nations acts of a United Nations-authorized operation International Security Force in Kosovo (KFOR) conducted under regional command and control, solely on the grounds that the Security Council had "delegated" its powers to the said operation and had "ultimate authority and control" over it, the Court disregarded the test of "effective command and control" which for over six decades has guided the United Nations and Member States in matters of attribution.

10. Consistent with the long-standing principle that responsibility lies where command and control is vested, the responsibility of the United Nations cannot be entailed by acts or omissions of those not subject to its command and control.[…]

そして、ヨーロッパ人権裁判所は、2011 年 7 月 7 日に Al-Jedda 事件判決を下した[8]。

80. The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multi-National Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of Member States to contribute personnel. The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise the powers of government in Iraq.

[…]

84. […] [T]he Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.

[…]

105. The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge

[8] この判決につき、参照、和仁健太郎「[判例研究] アル・ジェッダ対英国事件――欧州人権裁判所（大法廷）判決、2011 年 7 月 7 日」阪大法学 63 巻 2 号（2013 年）。

> and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention [= the European Convention on Human Rights].[…] In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force.[…]

[…]

109. […] In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention [= the European Convention on Human Rights].

110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1.

さらに、スレブレニツァの虐殺（1995 年 7 月）[9]に関してまた異なる判断が示されている。同虐殺の遺族が、オランダの裁判所に国連とオランダとのそれぞれを別々に相手取って損害賠償等を求めて提訴したところ、国連を被告とする事件について、オランダ最高裁は、国連は本件に関してオランダ裁判所において免除を享有するとの判決（2012 年 4 月 13 日）。国連の免除に関するこの判決は後日扱うとして、ここではオランダを被告とする訴訟を検討する。

ユーゴスラヴィア内戦に際し、安保理は決議 743(1992)・758(1992)により UNPROFOR を安保理補助機関として設立した [10]。その任務は、一定地区の非武装化と非武装地帯の監視、紛争当事者軍隊撤退の監視などである。スレブレニツァの虐殺に際しては、UNPROFOR に派遣されていたオランダ部隊 Dutchbat が、同部隊管理下にある施設からあふれたムスリム系住民を保護しなかったが故に結果的にジェノサイド [11]の被害者にしてしまったことにつき、国連の責任に加えてオランダの責任も問われた。オランダに対する訴えに関する 2013 年 9 月 6 日の最高裁の二つの判決(Case No. 12/03324; Case No. 12/03329)は、2011 年 7 月 5 日ハーグ高等裁判所判決に対する上告審判決である。同高裁は、同事件における同部隊の行為が国連に帰属することを排除せずに、オランダに帰属すると判断していた [12]。国側の上告を受けて、最高裁は以下のように判断した（引用

---

9 とりあえず、知恵蔵の「スレブレニツァ虐殺」を参照されたい。学内ネットワークからアクセスできる聞蔵に入って「知恵蔵」タブをクリックすれば検索できる。詳細には、長有紀枝『スレブレニツァ』（東信堂、2009 年）。

10 UNPROFOR については、酒井啓亘「国連平和維持活動における自衛原則の再検討――国連保護軍(UNPROFOR)への武力行使容認決議を手がかりとして」国際協力論集 3 巻 2 号（1995 年）61 頁。

11 国際司法裁判所によりジェノサイドと認定されている。*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, *I.C.J. Reports 2007*, p. 43, pp. 155-166, paras. 278-297. 湯山智之「判例研究 国際司法裁判所・ジェノサイド条約適用事件（ボスニア・ヘルツェゴビナ対セルビア・モンテネグロ）（判決 2007 年 2 月 26 日）（1）～（3・完）」立命館法学 2011 年 1 号 436 頁、2011 年 4 号 398 頁、2012 年 2 号 494 頁。

12 同判決の詳細につき、参照、岡田陽平「国連平和維持活動に従事する部隊構成員の行為の帰属（4・

部分は両判決に共通）。

3.11.2 In so far as these grounds of appeal are based on the submission that international law excludes the possibility that conduct can be attributed both to an international organization and to a State and that the Court of Appeal therefore wrongly proceeded on the assumption that there was a possibility that both the United Nations and the State had effective control over Dutchbat's disputed conduct, they are based on an incorrect interpretation of the law. As held above at 3.9.4[13], international law […] does not exclude the possibility of dual attribution of given conduct. It follows that the Court of Appeal was able to leave open whether the United Nations had effective control over Dutchbat' s conduct in the early evening of 13 July 1995. […]

3.11.3 In so far as it is submitted in these grounds of the cassation appeal that the Court of Appeal has applied an incorrect criterion in assessing whether the State had effective control over Dutchbat at the moment of the disputed conduct, they too are based on an incorrect interpretation of the law. For the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently. It is apparent […] that the attribution of conduct to the seconding State or the international organization is based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account. In the disputed findings of law the Court of Appeal has examined, in the light of all circumstances and the special context of the case, whether the State had factual control over Dutchbat's disputed conduct. The Court of Appeal has not therefore interpreted or applied the law incorrectly.

この判決を受けた差戻審ハーグ高等裁判所判決（2017 年 6 月 27 日）では、オランダの損害賠償義務が認定された。

このように、Behrami/Saramati 事件ヨーロッパ人権裁判所判決、Al-Jedda 事件イギリス貴族院判決、Al-Jedda 事件ヨーロッパ人権裁判所判決、スレブレニツァの母事件（対オランダ）オランダ最高裁判決はそれぞれ異なる理由付けで異なる結論に達した。それは、（多国籍軍か安保理補助機関たる平和維持部隊かの差異を含む）事実関係の違いのみにより説明可能だろうか。また、これら 4 つの判決のいずれが最も適切な判断を下したと考えられるか。あるいは、さらに別のよりよい（よりましな）解決策があるのか[14]。

完）」法学論叢 175 巻 6 号（2014 年）116 頁。

[13] 最高裁判決のパラ 3.9.4 では、国連国際法委員会の国際機構の国際責任に関する条文案へのコメンタリーを参照し、ある行為は国際機構か国家かのいずれかに帰属すると限られることはなく、その両者に帰属することもあり得る、と述べていた。これに対する批判として、Ömer Faruk Direk, “Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the ‘Effective Control’ Standard”, *Netherlands International Law Review*, vol. 61, 2014, p. 1, pp. 19-21.

[14] 詳しくは、参照、岡田陽平「国連平和維持活動に従事する部隊構成員の行為の帰属（１）～（４・完）」法学論叢 174 巻 6 号（2014 年）107 頁、175 巻（2014 年）2 号 98 頁、4 号 93 頁、6 号 116 頁、岡田陽平「国連安保理の授権に基づいて活動する多国籍軍の行為の帰属（１）・（２・完）」法学論叢 177 巻（2015 年）1 号 141 頁、2 号 94 頁。