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## Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework.

Michael J. Kelly

The Hague: Kluwer Law International, 1999, pp.311.

*Reviewed by* Oleksandra Baglay<sup>†</sup>

This book is an important contribution to the literature on the law of occupation and its role in regulation of international peace operations in collapsed states. *Restoring and Maintaining Order in Complex Peace Operations* provides a valuable insight into the practical side of peace operations. Written by Lieutenant Colonel Michael J. Kelly, who served as a military advisor to the Australian contingent in Somalia,<sup>1</sup> it is also remarkable for its detailed scholarly analysis of existing law of occupation, its historic development and implications for the future. Kelly argues that it is “both desirable and useful”<sup>2</sup> to apply laws of occupation in situations where an intervening force has occupied a foreign territory without the agreement of the sovereign authority of that territory.<sup>3</sup> While I cannot deny the rationale for using law of occupation as a guideline for action, its status as a “desirable” legal framework cannot be accepted without some reservations.

Kelly’s analysis of the law is primarily based on the Somalia case study, but is effectively complemented by the references to similar situations in the Balkans and in the Middle East. The book covers only a

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<sup>1</sup> Michael Kelly “Preface” in Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (The Hague: Kluwer Law International, 1999) at xiii.

<sup>2</sup> *Ibid.* at xxv.

<sup>3</sup> As a rule, an agreement between the Secretary-General and the host government specifically deals with the status of the intervening force and its relations with the local population. When no civil authority exists in the zone of conflict and, consequently, no agreement can be concluded, the international contingent may face the problem of establishing a legal framework for its actions. The book proposes some legal alternatives to deal with such situations.

short period of international presence in Somalia: from December 1992 to March 1995. During that period, the international contingent in Somalia was acting within the framework of two consecutive missions: the United Task Force (UNITAF)<sup>4</sup> and the United Nations Operations in Somalia II (UNOSOM II).<sup>5</sup>

Part I, “Problem,” introduces the reader to the case study of Somalia. It provides a detailed background of the conflict and an overview of the UNITAF and UNOSOM II operations. At the time of deployment, UNITAF was the only “organized entity capable of exercising authority in the areas it occupied.”<sup>6</sup> In fact, it assumed the powers of the sovereign in many spheres of public life,<sup>7</sup> including disarmament, air space and ports control, detainee handling, judiciary function, and regulation of the local media.<sup>8</sup> Significant problems, which UNITAF and later UNOSOM II faced in resolving these multiple tasks, were largely a consequence of the absence of a proper legal framework for action.<sup>9</sup> Kelly contends that had the laws of occupation been applied, UNOSOM II might have been more successful in completing its primary tasks.<sup>10</sup> To support his argument, the author cites the experience of the Australian contingent in Somalia,<sup>11</sup> which successfully used the laws of occupation as guidelines for managing a public security function in a collapsed state.

Part II, “Solution,” describes the historical development of the laws of occupation from the 1874 Brussels Code to the 1977 Additional Protocols to the Geneva Conventions. In considering that most peace operations are carried out under the auspices of the United Nations, Kelly analyzes in detail the application of the core documents of the laws of occupation – the 1907 Hague Regulations, the Fourth Geneva Convention and Additional Protocol I – to the UN-authorized<sup>12</sup> and UN-

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4 A UN authorized, but US led force deployed in the period of December 1992 – May 1993. See *supra* note 1 at 3.

5 A UN commanded or “blue helmet” force deployed from May 1993 until March 1995 (*ibid*).

6 *Supra* note 1 at 29.

7 *Ibid* at 16.

8 *Ibid* at 15.

9 Kelly, *supra* note 1 at 29, 83-87.

10 *Ibid.* at 90.

11 The Australian contingent has served within the structure of UNITAF in January – May 1993 and later for a short period within UNOSOM II. *Ibid.* at 33.

commanded (or “blue helmet”) missions.<sup>13</sup> The author concludes that many of the rules of the Fourth Geneva Convention and the Hague Regulations have acquired the status of customary international law<sup>14</sup> and, consequently, bind all the contingents involved in UN operations as well as the UN as an organization. Kelly emphasizes that, collectively, the laws of occupation should be applied in peace operations not only because they are formally binding but also because they are practical. In looking at some aspects of the exercise of civil authority, such as due process, arrest and detention, preventive security action, and regulation of the media, Kelly points out two main advantages of the laws of occupation. First, they guarantee basic humanitarian standards for the population in the occupied territory. Second, they provide a legal basis for the activities of an international force in the restoration of law and order in situations where the occupying force is the only effective authority in a collapsed state.<sup>15</sup>

Part III, “Conclusions,” discusses the criteria for the UN interventions and the challenges which international forces face in peace operations. Kelly sets out the main issues to be addressed in conflicts, namely: legitimacy, organization of the mission, support for the intervening force, intelligence, discipline, and capability of the force.<sup>16</sup> He suggests some reformative measures, which could increase the effectiveness of peace operations. In particular, he proposes some changes in the organization, command and control of peace operations at the UN level as well as at the level of separate military units.

For all its strengths in comprehensive analysis of the law and useful practical recommendations, the book has some weaknesses. My first

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12 In UN-authorized operations the forces of the member states conduct an operation under a Security Council mandate but remain under the national command. Each national contingent is bound by the conventions to which a sending state is a party and each state bears individual responsibility for the observation of those conventions. *Ibid.* at 167, 169.

13 The “blue helmet” forces are assigned to the UN command under an agreement between the UN and a member State. The national commander of the force becomes directly subordinated to the UN Secretary-General or his Special Representative. The forces under the UN command do not lose their status as national contingents and “bring to the UN operation all the applicable international conventions to which their respective governments have acceded.” The UN itself is not a party to either of the conventions constituting a body of the laws of occupation. *Ibid.* at 168, 175, 177, 178.

14 *Ibid.* at 181.

15 *Ibid.* at 216.

16 *Ibid.* at 241.

reservation concerns the author's argument regarding the extensive use of the 1907 Hague Regulations as guidelines for peacekeeping and peace enforcement forces. While I can agree with the rationale of applying the Fourth Geneva Convention to internal conflicts, I have doubts about the relevance of the Hague Regulations to current situations. As Kelly notes in Chapter VI, the Hague Regulations were "regarded as the codified expression of the laws and customs of war."<sup>17</sup> The law of the Hague was a product of a particular period of history in international law – the Peace conferences of 1899 and 1907.<sup>18</sup> Today, the majority of the conflicts in the world are internal. Thus the Hague Regulations are losing their significance because they were intended for application to international armed conflicts. Moreover, the provisions of the Hague Regulations survive only to the extent that the Fourth Geneva Convention does not supersede them.<sup>19</sup> Therefore, I cannot agree with the author's argument about practical usefulness of the Hague Regulations.

My second reservation regards the proposition that the laws of occupation are currently the best and only legal framework for international civil administrations. One of Kelly's arguments in favour of using the laws of occupation is that, at the moment, there is no appropriate framework to deal with the collapsed state scenario:<sup>20</sup> "the laws of occupation will be the only framework available, unless the issue is more adequately addressed in the mandate."<sup>21</sup> There are two problems with this statement. First, there are other international instruments besides the Fourth Geneva Convention that can be used to address issues of detention, due process, and freedom of media. For example, the International Covenant of Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms set out the standards for fair trials and may be effectively used as guidelines for action.<sup>22</sup> In Kosovo, which may be

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17 Kelly, *supra* note 1 at 147.

18 H. Kindred et al. *International Law Chiefly as Interpreted and Applied in Canada* 6th ed. (Toronto: Emond Montgomery, 2000) at 713.

19 Kelly, *supra* note 1 at 148.

20 *Ibid.* at 108.

21 *Ibid.*

22 The use of these instruments is, however, conditional on the collapsed state being a party to the relevant treaty or that the international force recognizes them as a part of applicable law.

considered a situation similar to Somalia, the UN Interim Administration in Kosovo (UNMIK) applied human rights standards enshrined in major human rights conventions such as the UN Declaration on Human Rights, the International Covenant on Civil and Political Rights and others. UNMIK also used the Security Council Resolution rather than the Fourth Geneva Convention as a source of guidelines for action.

Further, the Fourth Geneva Convention establishes only basic humanitarian standards of treatment and does not provide significantly more detailed regulations for civil administration. For example, it does not answer the question about the extent to which human rights regimes may be applied to peace operations, and the circumstances that would allow for derogation of some obligations.<sup>23</sup> Moreover, Kelly proposes amendments to the Fourth Geneva Convention, thus admitting that currently there are some problems with its application to internal conflicts.<sup>24</sup> Thus, it appears that application of the Fourth Geneva Convention will hardly introduce more clarity in legal regulation of peace operations and relations of the international contingent with the local community.

I do not reject some of the positive effects that the laws of occupation may have in a situation where no detailed framework for action exists. I would only emphasize that because of the aforementioned limitations, the laws of occupation are suitable as a supplementary, rather than primary, tool for regulation of peace operations.

Despite some of these shortcomings, Kelly's work is a valuable source of information and a detailed analysis of the application of laws of occupation in international peace operations. The book combines a unique blend of well-tailored questions, comprehensive discussion, and innovative approach to urgent issues of international administration in the areas of internal conflicts. These features make reading *Restoring and Maintaining Order in Complex Peace Operations* not only an exciting process, but also a good intellectual exercise.

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23 *Ibid.*

24 Kelly, *supra* note 1 at 94.