THE LAW ON MILITARY OCCUPATION: ANSWERING THE CHALLENGES OF DETENTION DURING CONTEMPORARY PEACE OPERATIONS?

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[Based on the author's personal experience, this think piece explores how the law on military occupation provides some answers to challenges faced by peacekeepers when they are involved in taking and handling detainees. The think piece recognises that the law on military occupation is context sensitive enough to provide a firm basis from which to ensure peacekeepers do not abuse some of the most fundamental rights detainees are entitled to. However, it also recognises that the law on military occupation is increasingly being critiqued from the perspective of its failure to meet some fundamental human rights standards relating to the treatment of detainees. The think piece concludes that there remains a need to give further thought as to whether the international community needs to develop a lex specialis *or special regime that focuses specifically on peacekeepers taking and handling detainees.]*

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I INTRODUCTION

Within a few hours of deploying to East Timor (now Timor-Leste), International Force East Timor ('INTERFET') troops found it necessary to detain a number of locals for interfering with its mission to restore peace and security in East Timor. Handing these detainees to Indonesian police proved unsatisfactory because of the collapse of the judiciary system. Commander INTERFET therefore wanted a practical short-term legal system for preventative detention. Our challenge, as legal officers working in the Australian Defence Force ('ADF') Legal Office[1] in Canberra, was to develop a policy that would permit INTERFET troops to achieve their mandate, and at the same time, ensure that the rights of individual detainees to justice and due process were protected.[2]

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1 My involvement in developing the detention policies stemmed from being posted to the serve with the INTERFET Detainee Management Unit ('DMU'). For a more detailed discussion about the DMU, see Bruce Oswald, 'The INTERFET Detainee Management Unit in East Timor' (2000) 3 *Yearbook of International Humanitarian Law* 347.

2 Ibid; Michael Kelly et al, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 83 *International Review of the Red Cross* 101; Hansjörg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46.

In those early days of INTERFET's deployment, some of the key legal and operational issues that we were particularly aware of included: the requirement to deal with continuing violence and large scale displacement of East Timorese civilians; the right of INTERFET troops to take and hold detainees; the applicability of Indonesian criminal law in East Timor; and the need to ensure that INTERFET was in the position to hand over any detainees to a competent institution, once established. Keeping these issues in mind, and seeking to remain consistent with ADF policy to use the principles of the laws of armed conflict as guidelines,[3] we drafted the INTERFET detention policy by relying upon the law on military occupation by analogy.[4] While it is true that military occupation law helped to found a firm basis for a policy which proved both effective and efficient,[5] I have subsequently been considering whether states and international institutions, such as the United Nations, should develop and use a *lex specialis*, or a special legal regime, that focuses specifically on taking and handling detainees during peace operations. My considerations arise from three primary concerns. First, there was some controversy as to our justification for using the law on military occupation de facto and our decision to use that law to deal with militia members taken as detainees. For example, the International Committee of the Red Cross ('ICRC') argued that any 'militia members detained for acts of violence against INTERFET members were entitled to prisoner-of-war status'.[6] Second, our reliance on using the law on military occupation meant that the Detainee Management Unit ('DMU') could only review the detention of detainees, and not try them.[7] While the power to review the status of detainees was adequate in the short-term, it could not continue

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3 The ADF has stated that 'all … [ADF] members need to adhere to the Law of Armed Conflict and the moral principles that underlie them, so that military operations are conducted in ways that ensure the … [ADF] retains its legitimacy as a fighting force': Commonwealth, Department of Defence, *The Australian Approach to Warfare* (June 2002) 27 <http://www.defence.gov.au/publications/taatw.pdf> at 18 October 2007.

4 Our reliance on the law on military occupation was based upon Australia's application of that law in southern Somalia when an ADF contingent was serving with the Unified Task Force ('UNIFAF'), which was a UN authorised but US led coalition force that served in Somalia from December 1992 to May 1993. For further details regarding the application of the law on military occupation to that deployment, see Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999).

5 See, eg, *Situation of Human Rights in East Timor: Note by the Secretary-General*, UN GAOR, 54th sess, Agenda Item 116(c), UN Doc A/54/660 (10 December 1999) [67]:

> As far as the question of treatment of detainees is concerned, the conduct of INTERFET has been exemplary. The delegation met with six detainees in conditions in which it could be confident that the detainees would have no fear of speaking frankly of any complaints as to their treatment. There were none. ICRC, which has full access, confirmed that it too had received no complaints from any of the detainees. The tone was set by the Force Commander who, especially in the beginning, established the pattern by personally visiting the detention area. The establishment of a detention-management team also acts as a safeguard against abuse.

6 Kelly et al, above n 2, 121.

7 This limitation was based upon art 70 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*'), which prohibits an occupying power from prosecuting and punishing protected persons for acts (other than breaches of the laws and customs of war) that they are alleged to have committed before the territory was occupied.

indefinitely because of the domestic legal requirement and international expectations to try detainees for alleged criminal offences. Third, there were times when we were developing the detainee policies that we wished for one body of law that could meet not only the needs of INTERFET, but also stand up to intense local and international scrutiny. We were all too aware of the fact that our policy would be closely scrutinised once it was applied on the ground by INTERFET troops.

Since my experience with assisting to develop the INTERFET detention policies and subsequently serving with the DMU, I have also been thinking about some more general issues relating to the application of the law on military occupation to detainees during peace operations. First, I remain concerned that there is no single legal framework applicable to UN peace operations establishing the definition of a detainee, circumstances in which peacekeepers may take detainees and the classification of detainees. Consequently, military operations lawyers have little choice but to stitch together a legal framework from a number of sources including: the *Hague Regulations*;[8] *Geneva Convention IV*; *Additional Protocol I*;[9] the *International Covenant on Civil and Political Rights* ('*ICCPR*');[10] and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.[11] None of these norms and standards were developed with peace operations in mind and, therefore, it is difficult to identify binding norms, how these norms should be interpreted to apply in particular contexts, and the appropriate accountability regimes if the norms are breached. Therefore, it is tempting to consider whether a more specialised, albeit fragmented, regime of international law should be developed to apply in the context of taking detainees during UN peace operations. Such a regime would hopefully focus not only on the needs of peacekeepers, but also provide benefits to detainees by reinforcing, amongst other things, context specific fundamental human rights provisions and appropriate accountability standards.

Second, I am concerned that the law of military occupation may not always be a suitable benchmark for achieving the appropriate balance between the rights of peacekeepers and those of the local civilian population. While it is true that we found the law of military occupation useful in East Timor during INTERFET's deployment, I continue to question its usefulness during other peace operations — particularly those where peacekeepers have more restrictive law and order mandates.

Third, I am fascinated by the tension that arises when peacekeepers are mandated to perform fundamental transformations to local laws, as well as the

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[8] *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

[9] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

[10] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[11] GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (9 December 1988) ('*Body of Principles*').

domestic society, economy and culture. This is admittedly a much larger question than the narrower issue of detention during peace operations, but it is nonetheless an important issue when considering the benefits that arise from peacekeepers transforming local criminal laws so as to meet the requirements of peacekeepers, rather than the requirements of the local population.[12]

My think piece attempts to identify some current developments in relation to how the law on military occupation is imagined and, more specifically, examine how that law answers some of the challenges that arise when peacekeepers take and handle detainees during peace operations.[13] This think piece combines both my personal experiences as a peacekeeper, my general research and academic concerns relating to developing a specialised 'detention' regime that is applicable to all or most peace operations; the role of military occupation law in developing such a regime; and the larger question of 'transforming' local laws. Therefore, I begin by examining the context in which detainees are taken and handled during peace operations and how the law on military occupation is relevant to such situations. In light of my experiences with the DMU and my ongoing concerns regarding applicable norms and standards in dealing with detainees, I conclude by briefly arguing whether the law on military occupation should be further developed into a specialised legal regime. I briefly explore whether such a regime would be more sensitive to addressing the challenges of contemporary peace operations by incorporating more appropriate norms for balancing what can sometimes be competing needs arising from maintaining security, protecting the rights of the local population and holding peacekeepers accountable for any abuse against that population.

II THE CONTEXT: TAKING AND HANDLING DETAINEES ON PEACE OPERATIONS

Peacekeepers find that they must detain civilians for a variety of reasons. These reasons include assisting local authorities to maintain law and order, exercising the right of self-defence, and acting as an executive arm of government in a host state or territory. In Cyprus, for example, UN military police were authorised to detain

> any Cypriot citizen committing an offence or causing a disturbance on [UN] premises … without subjecting them to the ordinary routine of arrest, in order to immediately hand him to the nearest appropriate Cypriot authorities for the purposes of dealing with such offences or disturbances.[14]

Meanwhile, in Rwanda, the role of the UN military peacekeepers in protecting civilians, as authorised by the Force Commander, was extended to searching,

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[12] See, eg, Bruce Oswald, 'Model Codes for Criminal Justice and Peace Operations: Some Legal Issues' (2004) 9 *Journal of Conflict & Security Law* 253.

[13] The term 'peace operations', as used in this think piece, refers to military operations that are conducted by military forces where such forces are operating outside their states. These operations include those created by the UN, those that have been created by regional institutions and those created by multi or bilateral agreements.

[14] *Exchange of Letters Constituting an Agreement concerning the Status of the United Nations Peacekeeping Force in Cyprus*, 492 UNTS 57, [14] (signed and entered into force 31 March 1964). See also *Report of the Secretary-General on the United Nations Operation in Cyprus*, UN SCOR, 33rd sess, UN Doc S/12946 (1 December 1978) [40]–[41].

disarming, and, where necessary, segregating suspected criminals.[15] They also held civilians accused of genocide in detention until they were handed over to the local district prosecutor, and conducted operations to disarm militias operating in the camps of internally displaced persons.[16] In the Bunia area of the Democratic Republic of Congo, UN peacekeepers have conducted 'routine patrols and held checkpoints in order to prevent common-law offences such as thefts'.[17] In January 2006, the UN Stabilisation Mission in Haiti ('MINUSTAH') repelled armed members of a gang who were attacking facilities in Port-au-Prince and subsequently arrested a number of people who were looting.[18] During operations in Kosovo, military personnel serving with the NATO-led Kosovo Force ('KFOR') undertook policing and detention management and, in the early days, local judges, prosecutors and defence counsel were flown into military premises to review and decide on detention.[19] The taking and handling of detainees is therefore a significant activity on peace operations and should be examined closely. It is only proper, both as a matter of law as well as military professionalism, that peacekeepers are held accountable for their actions, and sometimes their omissions, when taking and handling detainees.

Exercising the power to detain and handle detainees during peace operations is generally founded upon authorisation by a competent international organisation (such as the Security Council or increasingly the International Criminal Court ('ICC')). Host nation consent may also provide a justification for taking and handling detainees.[20] While it is true that there is no single normative framework that applies to such situations, it is also true that these detentions do not occur in a complete legal vacuum.

The most acceptable basis for taking and handling detainees by peacekeepers during peace operations is with the consent of the host nation and with the cooperation of the law and order authorities of that nation.[21] However, this

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15 Bruce Oswald, 'Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations' (2006) 6 *New Zealand Armed Forces Law Review* 1, 4–5.

16 Bruce Oswald, 'Peacekeeping in Rwanda — A Lawyer's Experience' (1996) 70 *Australian Law Journal* 69.

17 Kemal Saïki, Director of MONUC Public Information and Mission Spokesman, and Frederic Médard, Military Spokesman, 'Verbatim of the News Conference of Wednesday 19 April 2006' (Press Briefing, 19 April 2006), available from <http://www.monuc.org> at 18 October 2007.

18 See 'Deux opérations anti-gangs récentes accomplies par la MINUSTAH' (Press release PIO/PR/244/FRA/2006, UN Stabilization Mission in Haiti, 30 January 2006), available from <http://www.minustah.org> at 18 October 2007.

19 For an analysis of the role of KFOR in filling the rule of law vacuum in Kosovo, see Peter Jakobsen, 'Military Forces and Public Security Challenges', in Michael Pugh and Waheguru Sidhu (eds), *The United Nations and Regional Security: Europe and Beyond* (2003) 137.

20 For example, such consent was given to the members of the Regional Assistance Mission to Solomon Islands: see *Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security*, [2003] ATS 17 (signed and entered into force 24 July 2003). See also James Watson, 'A Model Pacific Solution? A Study of the Deployment of the Regional Assistance Mission to Solomon Islands' (Working Paper No 126, Land Warfare Studies Centre, 2005).

21 Oswald, 'Addressing the Institutional Law and Order Vacuum', above n 15, 7.

consent and cooperation may not always be possible. There may be situations, for example, where local law and order authorities are unwilling or unable to enforce the law. In such cases, peacekeepers may have to rely upon an authorisation from a competent international organisation such as the Security Council.[22] Regardless of the mechanism used to justify or legitimatise the detention powers exercised, peacekeepers will nonetheless have to carefully consider the boundaries of their powers both in political and legal terms. As explained by the UN Secretary-General in his report concerning the UN Emergency Force I ('UNEF'):

> authority granted to the United Nations group cannot be exercised within a given territory either in competition with representatives of the host Government or in cooperation with them on the basis of any joint operation. Thus, a United Nations operation must be separate and distinct from activities by national authorities … A right of detention which normally would be exercised only by local authorities is extended to UNEF units. However, this is so only within a limited area where the local authorities voluntarily abstain from exercising similar rights, whether alone of in collaboration with the United Nations. Were the underlying principle of this example not to be applied, United Nations units might run the risk of getting involved in differences with the local authorities or public or in internal conflicts which would be highly detrimental to the effectiveness of the operation and to the relations between the United Nations and the host Government.[23]

In circumstances where peacekeepers take and handle detainees, either with the consent of the local population or pursuant to an express or implied authorisation of a competent international organisation, the normative framework applied is a web of interconnected, yet fragmented legal, regimes. This fragmentation arises because peacekeepers may be required to detain three categories of detainees: criminal detainees, security detainees and detainees held for their own safety. As there is no single regime that applies to these three categories, peacekeepers seeking to meet local and international scrutiny have little choice but to search for and analyse relevant norms from international and domestic legal frameworks. For example, if a peacekeeper detains a local person for committing a serious criminal offence, such as genocide or crimes against humanity, then the legal regimes applicable will include: the domestic law of the host state; the international law relating to genocide or crimes against humanity; and the peacekeeper's own domestic law that is relevant to the use of force by the peacekeeper in carrying out the detention. Depending on the circumstances, other areas of international law are also likely to be applicable to the treatment and subsequent trial of the accused. These areas include: relevant resolutions authorising the mandate for that particular peace operation; any agreements creating and regulating the conduct of the peacekeeping force; international humanitarian law and international human rights law.

There may also be circumstances where peacekeepers detain a local person, not because the individual has committed a criminal offence, but because the local person poses a security threat to either the peacekeeping force or other

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22 See ibid.

23 UN Secretary-General, *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, UN GAOR, 13th sess, Agenda Item 65, UN Doc A/3943 (9 October 1958) [165]–[166].

locals. For example, peacekeepers may have to detain a local person who is taking photographs of a strategic bridge that has been designated as 'mission essential property'.[24] Assuming that there is sufficient information to suggest that this bridge may be subject to attack by local persons seeking to derail the peace operation, peacekeepers may decide to detain the photographer until his or her bona fides are established. In such circumstances, it may not be possible to justify detaining the individual pursuant to domestic laws and instead peacekeepers will need to rely upon international law. When faced with such situations, peacekeepers may need to turn to other normative frameworks to assist in balancing the need to establish and maintain a safe environment in which to carry out their mandate, whilst also ensuring that they do not breach fundamental protections owed to the local population. There may also be circumstances where an individual voluntarily demands to be detained because that individual fears for his or her safety.

One area of international law that has conceptualised and created a series of norms to apply when military forces are required to 'take such measures of control and security'[25] is the law on military occupation. The law on military occupation is anchored to international law generally, but more specifically in the *lex specialis* of international humanitarian law. It is 'an attempt to substitute for chaos some kind of order'[26] and, therefore, has traditionally applied to situations where a conquering army occupies the territory of another sovereign. The law on military occupation is located in the legal frameworks created by the *Hague Convention IV*;[27] *Geneva Convention IV*;[28] *Additional Protocol I*;[29] and the rules of customary international law.[30] Pursuant to reg 42 of the *Hague Convention IV*, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army'.[31] This is a question of fact which, once established, 'gives rise to certain legal rights and duties'.[32]

There are four key aspects of the law on military occupation as shaped by the *Hague Conventions*, *Geneva Conventions*, *Additional Protocol I* and customary

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24 'Mission essential property' is property that is given special protective status because the property is considered essential for the success of the mission.

25 *Geneva Convention IV*, above n 7, art 27.

26 Sir Arnold McNair, *Legal Effects of War* (first published 1920, 2nd ed, 1944) 322.

27 *International Convention concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277, arts 42–6 (entered into force 26 January 1910) ('*Hague Convention IV*').

28 *Geneva Convention IV*, above n 7, arts 13–26, 27–34, 47–78.

29 *Additional Protocol I*, above n 9, arts 68–77.

30 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 172 ('*Israeli Wall*').

31 Note there are other definitions: see Marten Zwanenburg, *Accountability of Peace Support Operations* (2005) 193–9.

32 McNair, above n 26, 320.

international law.[33] They may be summarised as follows. First, it is a specialised legal regime anchored in the *lex specialis* of the laws of war. Second, the scope of application of this law has evolved to take into account wider contexts — including non-belligerent and post-conquest occupation. Third, the focus of this law remains on temporary control over territory and protecting the inhabitants of the occupied territory from actual and potential abuses from the occupier. Fourth, the occupier is limited to only making those changes to the law that are necessary for the maintenance of order, safety of the forces and the realisation of the legitimate purposes of the occupation. The approach of this law is therefore to conserve the status quo within the occupied territory as much as possible by creating a normative framework where the occupying power is expected to respect the political, social, economic and legal structures within that territory. Therefore, the occupier by implication, should make as few changes to the social fabric as possible.[34]

As a general statement of law, it is true to say that where peacekeepers are 'belligerent occupiers', the law on military occupation will apply to them.[35] However, there is some controversy as to whether that law applies to UN peace operations. For example, Daphna Shraga has argued that

> [w]hile some of the most distinctive features of military occupation — an effective and exclusive control over a territory and its population independently of the existing or displaced sovereign — characterised also the peacekeeping operations in the Congo, Lebanon, Cyprus, and in Somalia, and the UN Administrations in Western Irian, Cambodia, Eastern Slovenia, and the twin-Administrations in Kosovo and East Timor, the laws of occupation have never been applicable to any of these operations de jure or by analogy.[36]

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33 For a more detained analysis of the law on military occupation, see Parts III and IV from Oscar Uhler and Henri Coursier (eds), *Commentary on the Geneva Conventions of 12 August 1949:* Geneva Convention relative to the Protection of Civilian Persons in Time of War (1958); McNair, above n 26; Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957); Doris A Graber, *The Development of the Law of Belligerent Occupation 1863–1914: A Historical Survey* (1949); Arthur Keith (ed), *Wheaton's International Law* (7th English ed) Vol 2 — War (1944); Eyal Benvenisti, *The International Law of Occupation* (1993); Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, above n 4.

34 See Uhler and Coursier, above n 33, 335, arguing that the 'idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory'.

35 See, eg, Derek Bowett, *United Nations Forces: A Legal Study* (1964); David Scheffer, 'Beyond Occupation Law' (2003) 97 *American Journal of International Law* 842; Steven R Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *European Journal of International Law* 695; Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Journal of International Law* 580; Daphna Shraga, 'Military Occupation and UN Transitional Administrations — The Analogy and its Limitations' in Marcelo Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (2007) 479; Michael Kelly, 'Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier' (2005) 29 *Fordham International Law Journal* 181; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *European Journal of International Law* 661; Aeyal Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1; Marten Zwanenburg, 'Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force' (2006) 45 *The Military Law and the Law of War Review* 239.

36 Shraga, above n 35, 481.

Australia however, has taken a broader approach regarding the application of military occupation law, stating that it regards *Geneva Convention IV* as applying to a wider range of circumstances than international armed conflicts:

> This means the Convention applies not only in international armed conflicts but also wherever foreign forces find themselves in control of the territory of another State where there is no consent from a State government apparatus for them to be there.[37]

The Australian approach is based on Colonel Michael Kelly's[38] thesis that *Geneva Convention IV* is intended to apply to the protection of civilian populations and their relationship to foreign armed forces in situations of belligerent occupation or occupation where no state of war exists (non-belligerent occupation), including operations by agreement (pacific occupation).[39] Kelly's argument is based upon a broad interpretation of *Geneva Convention IV* art 2(2), which states that *Geneva Convention IV* 'shall also apply to all cases of partial or total occupation of the territories of a High Contracting Party, even if the said occupation meets no armed resistance'. It must be said, however, that this broader approach has not been supported by other states, nor is it universally accepted by other commentators. At least one author has argued that the law on occupation should be

> used with caution, because it may narrow the options of the force commander. Moreover, the United States and most other governments are very reluctant to invoke and apply the Fourth Geneva Convention and the law of occupation … The political, economic and legal ramifications of taking over the functions of sovereignty and the administration of another state are enormous. The local conditions may be present for applying the Fourth Geneva Convention, but governments will still avoid doing so.[40]

Derek Bowett's summary relating to the application of the law of occupation to peacekeeping forces is probably closest to my own approach. He has argued that a peacekeeping force 'operating within a municipal law system is not in "belligerent occupation"'.[41] Nor is it an occupying force where its exercise of power is based on a peace agreement or status of force agreement. However, he

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[37] Commonwealth, 'Australia: Government for the Meeting of Contracting Parties to the Fourth Geneva Convention, Geneva, 27–29 October 1998', reprinted in (1999) 2 *Yearbook of International Humanitarian Law* 450, 451. In fact, this basis for implementation was used by Australian military forces serving in the Bay Province in Somalia during Operation Restore Hope in 1993. Australia determined that *Geneva Convention IV* applied to their military operation de jure and consequently, used the law of occupation to justify their efforts to rehabilitate the justice administration and to facilitate trials of warlords guilty of committing crimes against humanity.

[38] Kelly was an Australian Regular Army Legal Officer.

[39] Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, above n 4, 227. See also Adam Roberts, 'What is Military Occupation' (1984) *British Year Book of International Law* 249.

[40] Frederick Lorenz, 'The US Perspective of Operation *Restore Hope*' in Robert Oakley, Michael Dziedzic and Eliot Goldberg (eds), *Policing the New World Disorder* (1998) 433, 433.

[41] Bowett, above n 35, 490.

does acknowledge that there remains the possibility that peacekeepers

> may be in actual 'belligerent occupation' of territory, or may exercise a civil affairs administration subsequent to hostilities but before the relevant organ has determined that international peace and security is no longer threatened. Under these conditions, the customary and conventional laws of war (Articles 42–56 of the *Hague Regulations* and the *Geneva Convention of 1949 relating to the Protection of Civilian Persons in Time of War* being two of the primary sources) are relevant to United Nations [and other peacekeeping] Forces.[42]

Regardless of whether a broad or narrow approach is taken in relation to the application of the law on occupation to peace operations, there are a number of general and specific reasons why that law serves as an appropriate starting point for developing a normative framework for taking and handling detainees during peace operations. General reasons for using the law on military occupation during peace operations include the reality that as a specialised regime of law created to meet the requirements of military forces interacting with civilian populations, it is a more context sensitive legal regime to apply during peace operations than say human rights law. This is primarily because as a military focused legal regime, it constitutes a part of the general discourse of military forces and thus should form a common language when peacekeepers are functioning on a multinational peace operation. Furthermore, it sets a high standard threshold test which restricts occupying forces from interfering with local laws. This is a fundamental protection that peacekeepers must consider when seeking to identify the limitations of their powers to 'transform' the host government laws and institutions.[43] More specifically, there are at least two important reasons to consider applying that law to some peace operations in which peacekeepers may be responsible for taking and handling detainees:

1 It conceptualises a legal basis to hold detainees; and
2 It provides an adequate normative framework for the treatment of detainees.

A *A Legal Basis for Holding Detainees*

As mentioned above, there may be circumstances where peacekeepers are required to take detainees for a variety of reasons, including for security purposes. In such circumstances, if there is no host nation consent or mandate

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[42] Ibid. Cf Christopher Greenwood who argues that the law on belligerent occupation does not apply when UN peacekeepers are 'involved in administering territory but … [have] not been a party to an international armed conflict': 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3, 30.

[43] See James Dobbins et al, *The Beginner's Guide to Nation-Building* (2007) 81. The authors argue that the

> key areas in which to establish formal legislation include the following: public administration; civil procedural law; trafficking; organised crimes; and counternarcotics; corruption; corrections; property ownership; juvenile offenders and child protection; immigration and nationality; … commercial codes for partnerships, corporations, recognition of foreign entities, bankruptcy, contracts and anti-trust; and civil service.

No mention is made, however, of how introducing such fundamental changes may be legally justified or, for that matter, explained to the population affected by the 'transformed' laws.

from a competent international organisation to take detainees for security reasons, it seems to me that the only option available to peacekeepers is to exercise the right to detain the individual using two key principles in the law on military occupation — that of the obligation 'to restore, and ensure, as far as possible, public order and safety',[44] and, where *absolutely necessary*, to take measures to deprive individuals of their liberty 'for imperative reasons of security'.[45] In these cases, 'such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved'.[46]

Another provision of the law on military occupation that has been usefully applied during the INTERFET's deployment in East Timor is that of 'voluntary detention'.[47] In some circumstances, peacekeepers may be faced with situations where individuals seek to be detained because they are afraid for their safety. Such situations may arise where, for example, a person is a member of a local minority and is fearful of how the majority might deal with him if they found out his status. The power to hold voluntary detainees may be justified pursuant to art 42 of *Geneva Convention IV*.

In applying military occupation law by analogy to justify taking detainees, I am doing no more in practice than using the international legal system to build relationships between the established norms and applying those norms to the act of peacekeepers detaining individuals.[48] An added benefit of such an approach is that, if peacekeepers justify their detention on the basis of military occupation law they should be expected to apply the safeguards that are founded on that law relating to the treatment of detainees.

B *Treatment of Detainees*

If the law on military occupation is applied during peace operations, it will require peacekeepers, amongst other things, not to: discriminate against detainees on the basis of 'race, colour, religion or faith, sex, birth or wealth, or

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44 *Hague Regulations*, above n 8, art 43. This power is further reinforced by *Geneva Convention IV*, above n 7, art 64(3) which provides that:

> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

45 *Geneva Convention IV*, above n 7, art 78. See also art 42.

46 Uhler and Coursier, above n 33, 368.

47 INTERFET held one detainee in this category.

48 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) [35]–[36].

any other similar criteria';[49] torture or treat them cruelly;[50] commit 'outrages upon [detainees'] personal dignity';[51] and pass sentences and carry out executions 'without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable'.[52] The law on military occupation also requires peacekeepers to provide hygienic conditions and food, which will be sufficient to keep detainees in good health, and provide conditions 'at least equal to those obtain[ed] in prisons in the occupied country';[53] and to provide the right to medical attention and spiritual assistance.[54] *Additional Protocol I* also provides useful guidance for dealing with detainees taken by peacekeepers. For example, art 75 requires that any person arrested or detained 'shall be informed promptly, in a language he understands, of the reasons'[55] for their arrest or detention, and the release of those 'with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention … have ceased to exist'.[56] Article 75 also prohibits reprisals or collective punishments against detainees.[57]

More specifically, in circumstances where peacekeepers take and hold detainees for security reasons, other provisions in *Geneva Convention IV* should also apply, including: having their status considered as soon as possible by an appropriate tribunal;[58] dealing with and trying persons accused of breaching the penal provisions of the occupying power;[59] internment, arrest and detention[60] and trial, sentencing and appeals.[61] One such safeguard is the requirement to have the action of detaining the individual 'reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose'.[62]

Notwithstanding the relatively extensive nature of the above provisions, peacekeepers or legal advisers should consider whether further protections could be added from, for example, human rights regimes that deal with the administration of justice. For example, when drafting the regulations for the treatment of detainees held by INTERFET, we supplemented many of the above

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49 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention IV*, above n 7, Common Article 3(1).

50 Ibid Common Article 3(1)(a).

51 Ibid Common Article 3(1)(c).

52 Ibid Common Article 3(1)(d).

53 *Geneva Convention IV*, above n 7, art 76.

54 Ibid.

55 *Additional Protocol I*, above n 9, art 75(3).

56 Ibid.

57 Ibid art 75(2)(d).

58 *Geneva Convention IV*, above n 7, art 43.

59 Ibid arts 66–8.

60 Ibid arts 69–70.

61 Ibid arts 71–6.

62 Ibid art 43.

provisions with those contained in documents setting out internationally accepted principles and standards for the administration of justice. Some of the specific human rights provisions we had to use to supplement the protections afforded by the law of occupation included: the requirement to register detainees;[63] notifying the next of kin of the detention;[64] the conditional release of detainees;[65] an effective and efficient means of investigating any suspected ill-treatment;[66] and providing detainees with access to a defence lawyer.[67] These provisions ensured that detainees received standards which are now generally accepted as fundamental rights regardless of the reasons one is detained. On a more pragmatic level, providing detainees with these rights and standards also ensured that INTERFET avoided being accused of further abusing the East Timorese who had already been through considerable amounts of trauma since at least 1975 when Indonesia invaded East Timor. Other human rights provisions that should also be incorporated to a legal regime dealing with the treatment of detainees include the right of the detainee to know the identity of the person questioning them,[68] and the right to remedy if a fundamental right is abused, such as unlawful detention.[69] A useful accountability mechanism for investigating any suspected ill-treatment of detainees was the appointment of a DMU Visiting Officer. The tasks of the Visiting Officer included visiting and inspecting the detention centre, visiting all detainees, hearing any complaints or requests that detainees wished to make, furnishing a report to Commander INTERFET after each visit, and inspection of the detention centre. This Visiting Officer role was based on a similar appointment found in the Australian *Defence Force Discipline Regulations*[70] in force under the *Defence Force Discipline Act 1982* (Cth).

The importance of supplementing the law on military occupation with international human rights law has also been emphasised by the International Court of Justice. The Court has ruled that certain international human rights provisions continue to apply to occupied territories.[71] In the *Israeli Wall* advisory opinion, the Court stated that the *ICCPR*, *International Covenant on Economic, Social and Cultural Rights*,[72] and the *Convention on the Rights of the Child* ('*CRC*')[73] applied to Israel's occupation of Palestinian Territory.[74] Similarly, in relation to the *Armed Activities* decision[75] the Court found that the *ICCPR*,

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63 *Body of Principles*, above n 11, principle 10.
64 Ibid principle 16.
65 Ibid principle 38.
66 Ibid principle 7.
67 Oswald, 'The INTERFET Detainee Management Unit in East Timor', above n 1, 357.
68 *Body of Principles*, above n 11, principle 23.
69 Ibid principle 35; *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948) art 8.
70 *Defence Force Discipline Regulations 1985* (Cth) regs 14–15.
71 See, eg, *Israeli Wall* [2004] ICJ Rep 136.
72 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
73 Opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990).
74 *Israeli Wall* [2004] ICJ Rep 136, 180–1.
75 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ <http://www.icj-cij.org> at 18 October 2007 ('*Armed Activities*').

African Charter on Human and People's Rights,[76] *CRC* and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*[77] applied to the conduct of Ugandan troops in Congo.[78] It must be said, however, that the convergence of international humanitarian law and international human rights law has been subject to some robust criticism.[79] Notwithstanding these criticisms, peacekeepers and their legal advisers are well advised to take into account this convergence if they wish their forces to avoid the opprobrium of breaching fundamental human rights. The fact that, in *Armed Activities*, the ICJ found Uganda had committed violations in relation to its responsibilities to ensure that members of the Uganda People's Defence Force respected applicable provisions of international humanitarian law and international human rights law in the occupied territory adds further weight to the need to accept some convergence of these laws in the context of occupation.[80]

In my view, the law on military occupation is context sensitive enough to provide a firm basis from which to ensure that peacekeepers do not abuse some of the most fundamental rights to which detainees are entitled. However, it is also important to recognise that as a legal framework, the law on military occupation is increasingly being critiqued from the perspective of its failure to meet fundamental human rights standards.[81]

III ANSWERING THE CHALLENGE: A SPECIFIC LEGAL REGIME?

As I stated in the introduction to this think piece, the law on military occupation helped to provide a sound basis for INTERFET's dealings with detainees. However, I remain concerned over whether that law is adequate to deal with other peace operations; the developments in other areas of international law, particularly international human rights law; and the lack of transparency and inadequacies that exist in developing ad hoc legal regimes to deal with detainees.

While I believe that the law of military occupation provides a great deal of assistance to peacekeepers when dealing with detainees on peace operations, there is no doubt that its application as a matter of law remains controversial. The fact that apart from Australia, no other state has publicly acknowledged or advocated for a broad application of the law on military occupation to peace operations, suggests that not all states are willing to concede it should be applied to situations where peacekeepers deal with detainees. Perhaps one reason for this reluctance to use the law on military occupation is because most states imagine

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76 Opened for signature 27 June 1981, 1520 UNTS 217, art 16 (entered into force 21 October 1986).

77 Opened for signature 25 May 2000, 2173 UNTS 236 (entered into force 12 February 2002).

78 *Armed Activities (Judgment)* [2005] ICJ [167]–[221] <http://www.icj-cij.org> at 18 October 2007.

79 See, eg, Kelly, 'Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier', above n 35; Gross, above n 35. Note also Gross' comments regarding the Israeli Court's approach. See also Gerald Draper, 'Humanitarian Law and Human Rights' (1979) *Acta Juridica* 193, for a general discussion in relation to the distinction between the laws of war and human rights law.

80 *Armed Activities (Judgment)* [2005] ICJ [345(3)]–[345(5)] <http://www.icj-cij.org> at 18 October 2007.

81 See, eg, Ratner, above n 35; Roberts, 'Transformative Military Occupation', above n 35.

that it applies to situations of belligerent occupation and it is difficult to match that imagination with peace operations which usually do not involve the peacekeeping force acting as belligerents.

I am also uncertain as to whether the law on military occupation is a suitable legal regime to apply to the spectrum of peace operations. For example, is it a less suitable legal regime to apply in situations where peacekeepers are undertaking traditional peacekeeping functions and tasks, such as monitoring ceasefires and buffer zones, or providing humanitarian assistance? During such operations, peacekeepers may still need to handle detainees, but the standards expected of them might lean towards those found in international human rights law provisions that deal with the administration of justice rather than the law on military occupation. For example, it could be argued that where military peacekeepers are undertaking law and order tasks that are more akin to those undertaken by police, military peacekeepers must adhere to similar standards. In such cases it is arguable that the foundation law is the *lex specialis* of international human rights law and not the laws of armed conflict.

I also cannot imagine how the law on military occupation can be relied upon as the only legal basis for the taking and handling of detainees on contemporary peace operations. While it is true that INTERFET's detainee policies were based on the law on military occupation, the effectiveness and efficiency of those policies were enhanced because we relied upon a spectrum of international and municipal laws to fill the gaps and to deal with some of the limitations of the law on military occupation. The use of detainee registers, conditional releases, effective and efficient means of investigating any suspected ill-treatment and providing detainees with access to defence lawyers ensured that Commander INTERFET and his force were able to adequately deal with local and international scrutiny concerning the treatment of detainees. In this context, I echo Julius Stone's criticism that the law on military occupation remains in a 'legal paradise', in the sense that 'its propositions, as they stood in 1907, seem to be able to maintain themselves despite the unanswered challenge of the facts of contemporary international life'.[82] While Stone did not focus on detention issues when he was critiquing the law on military occupation, it is clear that there are aspects of military occupation law that would benefit from being redrafted to reflect, for example, recent developments in human rights law regarding the treatment of detainees.

In view of the above concerns, I am giving further thought to whether the international community should develop, and apply, a *lex specialis* or special regime that contains a set of rules and principles that cover taking and handling detainees on peace operations differently from the way it would be covered

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[82] Stone's criticisms regarding the law on military occupation focused on its failure to take into account the contemporary realities of international life, as it stood in 1954. This included the failure to recognise the combined impacts of:

1. the 'expansion of governmental functions and techniques';
2. temptations arising from the increased government functions and techniques to shift the burden of occupation from the occupier to the occupied;
3. the increase in resources that need to be devoted to armed conflict;
4. the requirement to provide minimum living standards for the occupied; and
5. 'shifting boundaries between public and private property'.

Julius Stone, *Legal Controls of International Conflict* (1954) 728–30.

under general principles of international law.[83] I imagine that such a regime will blend relevant legal principles from both international and municipal law while ensuring that these principles and standards meet the requirements of contemporary peace operations. These principles and standards may need to be quite general, thus permitting planners, commanders and legal officers to further fine tune detention policies to meet the exigencies of a particular mission. Developing general basic principles that provide a context benchmark will hopefully avoid the criticism of creating norms and standards that are so formal that they make little sense on the ground. Therefore, I imagine that the regime created will avoid both the uncertainties that arise when using ad hoc regimes and the limitations of using an overly narrow or restrictive 'one size fits all' approach.

I also imagine that such a regime will be more transparent by virtue of the fact that it is developed with relevant inputs from the international community. Furthermore, the planners and legal officers responsible for developing mission-specific policies for dealing with detainees will at least have a common starting point, which should make developing more detailed and mission-specific policies a more efficient process.

I accept, however, that there are a number of challenges that will need to be met by the international community if it is going to develop a *lex specialis* or a special regime that is more context specific to peacekeepers taking and handling detainees on peace operations. These challenges include achieving a consensus on which principles and standards are applicable to taking and handling detainees, the resources that are likely to be required in order to achieve and maintain such principles and standards, and the consequences if the agreed principles and standards are not met. However, these challenges are not insurmountable if states wish to effectively manage the needs of peacekeepers to accomplish their mandates, the rights of the local population to natural justice and due process, and the requirement for peacekeepers to be held accountable for their acts and, sometimes, their omissions.

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83 International Law Commission, above n 48, [128].