

# 美國陸軍戰場手冊 (Field Manual) 彙編

## FM 27-10 第一章 基本規則與原則

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### CHAPTER 1 BASIC RULES AND PRINCIPLES

### 第一章 基本規則與原則

#### Section I. GENERAL

##### 1. Purpose and Scope

The purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States. Although certain of the legal principles set forth herein have application to warfare at sea and in the air as well as to hostilities on land, this Manual otherwise concerns itself with the rules peculiar to naval and aerial warfare only to the extent that such rules have some direct bearing on the activities of land forces.

This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

##### 2. Purposes of the Law of War

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace.

##### 3. Basic Principles

a. *Prohibitory Effect.* The law of war places limits on the exercise of a belligerent's power in the interests mentioned in [paragraph 2](#) and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.

The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and

#### 第一節 通則

##### 1. 目的與範圍

本手冊之目的在提供交戰雙方與中立國軍事人員基於慣例法與條約，適用於海戰與空戰之戰爭行為威權性之指引。雖然，此處除陸戰之外的許多原則也同樣適用於海戰與空戰，但本手冊並不特別處理海戰與空戰，只處理陸戰所涉及的相關議題。

本手冊為美國陸軍所正式出版的文件。但，本手冊的條款中若非美國法律或美國所參與簽署條約的條款內容，應不視為對法庭在適用戰時國際法時具有絕對的拘束力。但是，此條款具有習慣與實務上無上的價值。

##### 2. 戰時國際法之目的

陸上戰鬥行為是包含明文及不明文部份的陸戰法所約制，其目的係透過下述手段以消弭戰爭的罪惡：

- a. 保護雙方戰鬥或非戰鬥人員，以免受到不必要的侵害；
- b. 保障落入敵軍手中人士的部分基本人權，特別是戰俘、傷病和平民；以及
- c. 促進恢復和平。

##### 3. 基本原則

a. *禁止效果。* 戰時國際法因[第二段](#)之目的對交戰國設限，同時要求交戰國克制非軍事必需之各種類程度之暴力，以及施行敵意行為時，應考慮人道原則與騎士精神。

戰時國際法的禁止效力並非妥協於「軍事必要性」。前述「軍事必要性」之原則已經被定義為國際法所不禁止的行為，為盡快拘禁歸順的敵方所不可或缺者。傳統戰時國際法在考慮「軍事必要性」後，已經發展與架構完成，對

conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

b. *Binding on States and Individuals.* The law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed forces.

#### 4. Sources

The law of war is derived from two principal sources:

a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.

b. *Custom.* Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.

Lawmaking treaties may be compared with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law.

#### 5. Lawmaking Treaties

a. *Treaties to Which the United States Is a Party.* The United States is a party to the following conventions pertinent to warfare on land:

(1) [Hague Convention No. III of 18 October 1907, Relative to the Opening of Hostilities](#) (36 Stat. <sup>1</sup> 2259, Treaty Series 538), cited herein as H. III.

(2) [Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land](#) (36 Stat. 2277; Treaty Series 539), cited herein as H. IV, and the Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295; Treaty Series 539), cited herein as HR.

(3) [Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.](#) (36 Stat. 2310; Treaty Series 540), cited herein as H. V.

(4) [Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces in Time of War](#) (36 Stat. 2351; Treaty Series 542), cited herein as H. IX.

(5) [Hague Convention No. X of 18 October 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention](#) (36 Stat. 2371; Treaty Series No. 543), cited herein as H. X.

(6) [Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929](#) (47 Stat. 2021; Treaty Series 846), cited herein as GPW 1929.

(7) [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 27 July 1929](#) (47 Stat. 2074; Treaty Series 847), cited herein as GWS 1929.

(8) [Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 15 April 1985](#) (49 Stat. 3267; Treaty Series 899), cited herein as the Roerich Pact. Only the United States and a number of the American Republics are parties to this treaty.

以「軍事必要性」防禦或攻擊的行為均不得違反戰爭慣例法與傳統戰時國際法的行為規範。

b. *國家與個人應遵守。* 戰時國際法並非僅國家要遵守，其效力亦及於個人，特別是軍隊成員。

#### 4. 法源

戰時國際法源於以下兩種主要來源：

a. *具有法律效力之條約或公約*，諸如海牙公約和日內瓦各項公約。

b. *習慣。* 雖然美國所參與簽署之條約或公約，並不包括戰時國際法之全部內容，但此未成文或慣例法乃為眾多國家習慣所建立，同時也具有國際法所認可之權威。

對美國而言，具有法律效力之條約可與經過立法的國內法具有相同效力，且戰爭慣例法可與盎格魯 - 美國不成文普通法具有相同效力。

#### 5. 具法律效力之條約

a. *美國所參與簽署的條約。* 美國參與下述戰時國際法公約之簽訂：[\(註 1\)](#)

(1) [海牙第三公約](#) · 1907.10.18 · 有關開戰部分 (36 Stat. <sup>1</sup> 2259, Treaty Series 538) · 摘為 H. III 。

(2) [海牙第四公約](#) · 1907.10.18 · 有關陸戰法律與習慣 (36 Stat. 2277; Treaty Series 539) · 摘為 H. IV · 以及附則，收錄陸戰法律與習慣之條款 (36 Stat. 2295; Treaty Series 539) · 摘為 HR 。

(3) [海牙第五公約](#) · 1907.10.18 · 有關中立國與陸戰中人員之權利與義務 (36 Stat. 2310; Treaty Series 540) · 摘為 H. V 。

(4) [海牙第九公約](#) · 1907.10.18 · 有關戰時海軍砲擊 · (36 Stat. 2351; Treaty Series 542) · 摘為 H. IX 。

(5) [海牙第十公約](#) · 1907.10.18 · 有關改自日內瓦海戰公約 · (36 Stat. 2371; Treaty Series No. 543) · 摘為 H. X 。

(6) [日內瓦戰俘公約](#) · 1929.07.27 · 有關改善戰俘待遇 · (47 Stat. 2021; Treaty Series 846) · 摘為 GPW 1929 。

(7) [日內瓦戰場改善傷病兵狀況公約](#) · 1929.07.27 · (47 Stat. 2074; Treaty Series 847) · 摘為 GWS 1929 。

(8) [保障藝術與科學機構與歷史博物館條約](#) · 1985.04.15 (49 Stat. 3267; Treaty Series 899) · 摘為僅美國與部分美洲共和國為簽約國之婁立赫協定 (the Roerich Pact) 。

(9) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (T. I. A. S. <sup>2</sup> 3362), cited herein as GWS.

(10) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (T. I. A. S. 3363), cited herein as GWS Sea.

(11) Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (T. I. A. S. 3364), cited herein as GPW.

(12) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (T. I. A. S. 3365), cited herein as GC.

\* (13) Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (T.I.A.S.\_\_), cited herein as Geneva Protocol of 1925.

*b. Effect of the Geneva Convention of 1949.* GWS replaces the previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 in relations between parties to GWS (see GWS, art. 59). GWS Sea replaces Hague Convention No. X of 18 October 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906 in relations between parties to GWS Sea (see GWS Sea, art. 58). GPW replaces GPW 1929 in relations between parties to GPW (see GPW, art. 134); in relations between parties to H. IV and the corresponding convention of 1899 and which are also parties to GPW, it is complementary to Chapter II of the HR (see GPW, art. 135). GC, in relations between parties to H. IV and the corresponding convention of 1899, is supplementary to Sections II and III of the HR (see GC, art. 154).

## 6. Custom

Evidence of the customary law of war, arising from the general consent of States, may be found in judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States. Even though individual States may not be parties to or otherwise strictly bound by H. IV and GPW 1929, the former convention and the general principles of the latter have been held to be declaratory of the customary law of war, to which all States are subject.

The Preamble to the HR specifically provides:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Similarly, a common article of the Geneva Conventions of 1949 (GWS, art. 63; GWS Sea, art. 62; GPW, art. 142; GC, art. 158) provides that the denunciation of (withdrawal from) any of the Geneva Conventions of 1949, \* \* \* shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

(9) 日內瓦改善陸戰傷病兵狀況公約 · 1949.08.12 · (T. I. A. S. <sup>2</sup> 3362) · 摘為 GWS 。

(10) 日內瓦改善海戰傷病兵狀況公約 · 1949.08.12 · (T. I. A. S. 3363) · 摘為 GWS Sea 。

(11) 日內瓦戰俘待遇公約 · 1949.08.12 · (T. I. A. S. 3364) · 摘為 GPW 。

(12) 日內瓦戰時保護平民公約 · 1949.08.12 · (T. I. A. S. 3365) · 摘為 GC 。

\* (13) 日內瓦禁止戰時使用窒息、毒瓦斯或其他氣體及細菌武器議定書 · 1925.06.17 · (T.I.A.S.\_\_) · 摘為 1925 日內瓦議定書 。

*b. 1949 年日內瓦公約效力。* 日內瓦陸戰傷病兵狀況公約取代先前 1864 年 8 月 22 日、1906 年 7 月 6 日、1929 年 7 月 22 日各國簽署之公約 (參照日內瓦陸戰傷病兵狀況公約第 59 條)。日內瓦改善海戰傷病兵狀況公約取代 1907 年 10 月 18 日海牙第 10 公約，改編自 1906 年各國簽署之日內瓦海戰公約原則 (參照日內瓦改善海戰傷病兵狀況公約第 58 條)。日內瓦戰俘待遇公約取代 1929 年各國所簽署之日內瓦戰俘待遇公約 (參照日內瓦戰俘待遇公約第 134 條)，及取代 1899 年各國所簽署之海牙第 4 公約公約。此為海牙公約第 2 章之補充 (參照日內瓦戰俘待遇公約第 135 條)。日內瓦保護平民公約取代 1899 年海牙第 4 公約，並補充其第 2 節與第 3 節 (參照日內瓦戰時保護平民公約第 154 條)。

## 6. 習慣

為各國所承認戰時國際法的習慣散諸判決、法學者著作、外交文件，和其他有關國家實務的檔案文件。即使個別國家並非條約簽署國，或負有 1929 年海牙第四公約以及戰俘待遇公約的義務，前項公約以及後項公約所包含之一般性原則已經成為戰爭慣例法，且為各國所遵守。

海牙公約前言特別聲明：

在更明確的戰時國際法條款尚未被制訂之前，簽署國得權宜的聲明在無條款規定的場合，交戰雙方與平民仍舊需受到一般國際法原則、文明人的慣例、人道與公義原則的保障。(註 2)

同樣的，1949 年日內瓦公約的共同條款 (GWS 第 63 條、GWS Sea 第 62 條、GPW 第 142 條、GC 第 158 條) 規定 1949 年各項日內瓦公約的撤簽，亦不得免除衝突雙方的遵守由文明人所建立的人道和公義之國際法原則的義務。

## 7. Force of the Law of War

*a. Technical Force of Treaties and Position of the United States.* Technically, each of the lawmaking treaties regarding the conduct of warfare is, to the extent established by its terms, binding only between the States that have ratified or acceded to, and have not thereafter denounced (withdrawn from), the treaty or convention and is binding only to the extent permitted by the reservations, if any, that have accompanied such ratification or accession on either side. The treaty provisions quoted in this manual in bold-face type are contained in treaties which have been ratified without reservation, except as otherwise noted, by the United States.

These treaty provisions are in large part but formal and specific applications of general principles of the unwritten law. While solemnly obligatory only as between the parties thereto, they may be said also to represent modern international public opinion as to how belligerents and neutrals should conduct themselves in the particulars indicated.

For these reasons, the treaty provisions quoted herein will be strictly observed and enforced by United States forces without regard to whether they are legally binding upon this country. Military commanders will be instructed which, if any, of the written rules herein quoted are not legally binding as between the United States and each of the States immediately concerned, and which, if any, for that reason are not for the time being to be observed or enforced.

*b. Force of Treaties Under the Constitution.* Under the Constitution of the United States, treaties constitute part of the "supreme Law of the Land" (art. VI, clause 2). In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.

*c. Force of Customary Law.* The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy (see [par. 497](#)). The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country.

## 8. Situations to Which Law of War Applicable

*a. Types of Hostilities.* War may be defined as a legal condition of armed hostility between States. While it is usually accompanied by the commission of acts of violence, a state of war may exist prior to or subsequent to the use of force. The outbreak of war is usually accompanied by a declaration of war (see [par. 20](#)).

Instances of armed conflict without declaration of war may include, but are not necessarily limited to, the exercise of armed force pursuant to a recommendation, decision, or call by the United Nations, in the exercise of the inherent right of individual or collective self-defense against armed attack, or in the performance of enforcement measures through a regional arrangement, or otherwise, in conformity with appropriate provisions of the United Nations Charter.

*b. Customary Law.* The customary law of war applies to all cases of declared war or any other armed conflict which may arise between the United States and other nations, even if the state of war is not recognized by one of them. The customary law is also applicable to all cases of occupation of foreign territory by the exercise of armed force, even if the occupation meets with no armed resistance.

## 7. 戰時國際法的效力

*a. 條約技術效力與美國的立場。* 技術上說，每部規範戰爭行為而具法律效力之條約，與條件規範之範圍，僅對批准國或加入國，且未撤銷或廢止國有效。必要時，也僅對在提出保留意見範圍內而批准或加入條約的國家有效。除特別說明者外，本手冊以黑體字印刷之條文為引自美國已無條件批准之條約的款。

戰時國際法條約之條款乃為不成文法一般原則中正式與個別適用的部份。條約成員國間應嚴正承擔的義務，亦應被視為代表現代輿論對國際法中交戰國與中立國應確切遵守的意見。

基於上述理由，引用的條約條款應被美國嚴格遵守和實施，而不考慮是否為此國家之義務。必要時，應明令軍事部隊長美國與任一相關國家不受此處所引用的明文規則之約束，不可暫時性的不遵守或不實施。

*b. 憲法下的條約效力。* 在美國憲法下，條約屬於國家的最高法律(憲法第4條第2款)。因此，戰時國際法相關條約的效力與國會透過的法律相等。其條款必須被軍事與文職人員給予憲法與法規法律的文字與精神同等嚴密程度的遵守。

*c. 慣例法的效力。* 戰時國際法的不成文法或慣例法約束所有國家。除對因敵方當局之不合法行動而實施正當的報復之外，美國軍隊亦應遵守(參照本彙編第497段)。戰爭慣例法亦為美國法律的一部份，且在不得觸美國所簽署的條約或對行政或立法部門有約束力的法案協議等範圍內，美國、美國公民，以及其他服務於國家的人員均應遵守之。

## 8. 戰時國際法適用狀況

*a. 交戰類型。* 戰爭得定義為武裝衝突國家間的法律狀態。此通常伴隨著暴力行為，戰爭狀態得先於使用武力或為使用武力的結果。戰爭的爆發通常伴隨著宣戰(參照本彙編第20段)。

未宣戰的武裝衝突狀態得包含但不限於依據聯合國所勸告、決議、召集的武裝力量，對抗武裝攻擊的個人天賦權利或集體自衛權利，實施局部性安排或與符合聯合國憲章適切條款的強制性手段。

*b. 慣例法。* 戰時國際法的慣例法適用所有宣戰的場合，或美國與其他國家發生任何武裝衝突的場合，即使此戰爭狀態並未被某一方所承認亦然。戰時國際法的慣例法同樣適用於使用軍事力量佔領外國領土，即使此佔領並未遭遇武裝抵抗。

c. *Treaties*. Treaties governing land warfare are applicable to various forms of war and armed conflict as provided by their terms. The Hague Conventions apply to "war." Common Article 2 of the Geneva Conventions of 1949 states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. (GWS, GWS Sea, GPW, GC, art. 2.)

d. *Special Case of Civil Wars*. See [paragraph 11](#).

## 9. Applicability of Law of Land Warfare in Absence of a Declaration of War

As the customary law of war applies to cases of international armed conflict and to the forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law. Similarly, treaties relating to "war" may become operative notwithstanding the absence of a formal declaration of war.

## 10. When Law of Land Warfare Ceases To Be Applicable

The law of land warfare generally ceases to be applicable upon:

- a. The termination of a war by agreement, normally in the form of a treaty of peace; or
- b. The termination of a war by unilateral declaration of one of the parties, provided the other party does not continue hostilities or otherwise decline to recognize the act of its enemy; or
- c. The complete subjugation of an enemy State and its allies, if prior to a or b; or
- d. The termination of a declared war or armed conflict by simple cessation of hostilities.

However, certain designated provisions of the Geneva Conventions of 1949 (see GC, art. 6; [par 249](#) herein) continue to be operative, notwithstanding the termination of any antecedent hostilities, during the continuance of a military occupation. Insofar as the unwritten law of war and the Hague Regulations extend certain fundamental safeguards to the persons and property of the populations of occupied territory, their protection continues until the termination of any occupation having its origin in the military supremacy of the occupant, notwithstanding the fact the Geneva Convention relative to the Protection of Civilian Persons may have ceased to be applicable.

## 11. Civil War

- a. *Customary Law*. The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.
- b. *Geneva Conventions of 1949*.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

c. *條約*。涉及陸戰的條約適用多種戰爭與武裝衝突型態。海牙公約適用於戰爭。1949年日內瓦公約一般條文第2條規定：

於平時應予實施之各項規定之外，本公約適用於兩個或兩個以上締約國間所產生之一切經過宣戰的戰爭或任何其他武裝衝突，即使其中一國不承認有戰爭狀態。

凡在一締約國的領土一部或全部被佔領之場合，即使此項佔領未遇武裝抵抗，亦適用本公約。

衝突之一方雖非締約國，其他曾簽訂本公約之國家於其相互關係上，仍應受本公約之拘束。設若上述非締約國接受並援用本公約之規定時，則締約各國對該國之關係，亦應受本公約之拘束。(GWS, GWS Sea, GPW, GC 第2條)

d. *內戰的特殊狀態*。參見[第11段](#)。

## 9. 未正式宣戰時之戰時國際法適用

戰時國際法之慣例法適用於國際武裝衝突，及強制性佔領敵方領土和已經宣戰之情況，但公告宣戰並非適用戰時國際法的主要條件。同樣的，儘管並公告宣戰，有關戰爭的條約得屬有效。

## 10. 戰時國際法停止適用時間

陸戰法在下述狀況下停止適用：

- a. 經由通常是和平條約的協定終止戰爭。
- b. 任一方單方面宣示終止戰爭，設若另一方並未持續交戰或拒絕承認其敵方的行為，或
- c. 若在 a. 或 b. 之前，完全平定敵方國家及其聯盟
- d. 以單純停止戰鬥行為之模式終止宣戰之戰爭，或武裝衝突。

無論如何，儘管在軍事佔領期間宣佈終止之前的武裝衝突，1949年日內瓦公約中部份特定條文(GC 第6條、本彙編第249段)仍持續有效。在戰爭的不成文法與海牙公約之附屬規則對個人與佔領區財產的基本保證條款範圍內，其保護持續有效至最高軍事佔領者宣告終止佔領為止，但日內瓦有關保護平民公約得停止適用。

## 11. 內戰

- a. *慣例法*。在承認叛亂者為交戰團體後，戰爭慣例法便適用至內戰。
- b. *1949年日內瓦公約*

在一締約國之領土內發生非國際性的武裝衝突之場合，衝突之各方最低限度應遵守下列規定：

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. (GWS, GPW, GWS, Sea, GC, art. 3.)

## 12. Military Government and Martial Law Distinguished

In the practice of the United States, military government is the form of administration which may be established and maintained for the government of areas of the following types that have been subjected to military occupation:

- a. Enemy territory.
- b. Allied territory recovered from enemy occupation, when that territory has not been made the subject of a civil affairs agreement (see [par. 354](#)).
- c. Other territory liberated from the enemy, such as neutral territory and areas unlawfully incorporated by the enemy into its own territory, when that territory has not been made the subject of a civil affairs agreement.
- d. Domestic territory recovered from rebels treated as belligerents.

Although military government is an accepted concept in the law of the United States, the limits placed upon its exercise are prescribed by the international law of belligerent occupation. Other countries exercise jurisdiction in occupied areas through types of administration analogous to military government even though they may be designated by other names.

In the United States, martial law is the temporary government of the civil population of domestic territory through the military forces, without the authority of written law, as necessity may require. The most prominent distinction between military government, as that term is used herein, and

(1) 不實際參加戰事之人員，包括放下武器之武裝部隊人員及因病、傷、拘留、或其他原因而失去戰鬥力之人員在內，在一切情況下應予以人道待遇，不得基於種族、膚色、宗教或信仰、性別、出身或財力或其他類似標準而有所歧視。

為此，對於上述人員，不論何時何地，不得有下列行為：

- (a) 對生命與人身施以暴力，特別如各種謀殺、殘傷肢體、虐待及酷刑；
- (b) 押為人質；
- (c) 損害個人尊嚴，特別如侮辱與降低身分的待遇；
- (d) 未經具有衣冠文物人類所認為必需之司法保障的正規組織之法庭之宣判而遽行判罪及執行死刑。

(2) 傷者、病者應予集中與照顧。

公正的人道主義團體，如紅十字國際委員會，得向衝突之各方提供服務。

衝突之各方應進而努力，以特別協定之模式，使本公約之其他規定得全部或部分發生效力。

上述規定之適用不影響衝突各方之法律地位。(GWS, GPW, GWS, Sea, GC, 第 3 條)

## 12. 軍事政府與戒嚴法

美國的實務是，軍事政府乃為在下述軍事佔領區域所建立與維持政府職權的管理型態：

- a. 敵方領土。
- b. 盟軍自敵方佔領所解放出來的領土，當此領土尚未簽訂民政治理協議 (參照本彙編第 354 段)。
- c. 其他自敵方解放之領土，諸如非法被敵方併入其領土之中立領土和區域，而有關此領土的處置尚未定訂民政治理協議。
- d. 自交戰團體之叛亂方光復之國內領土。

儘管軍事政府之概念為美國法律所接受，其實施之範圍與條件限於國際法中之交戰國佔領法。其他國家經由對佔領地執行類似軍事政府的管理型態來實施管轄權，無論其名稱為何。

在美國，戒嚴法是一種經由必要的軍事手段在國內領土所建立暫時性的民政政府，而無須法律明文規定。在本法中，戒嚴法與軍事政府最大的不同是，

martial law is that the former is generally exercised in the territory of, or territory formerly occupied by, a hostile belligerent and is subject to restraints imposed by the international law of belligerent occupation, while the latter is invoked only in domestic territory, the local government and inhabitants of which are not treated or recognized as belligerents, and is governed solely by the domestic law of the United States.

So far as the United States forces are concerned, military government and martial law are exercised by the military commander under the direction of the President, as Commander in Chief of the Armed Forces.

### 13. Military Jurisdiction

Military jurisdiction is of two kinds: first, that which is conferred by that branch of a country's municipal law which regulates its military establishment; second, that which is derived from international law, including the law of war.

In the Army of the United States, military jurisdiction is exercised through the following military tribunals:

- a. Courts-martial.
- b. Military commissions.
- c. Provost courts.
- d. Other military tribunals.

While general courts-martial have concurrent jurisdiction with military commissions, provost courts, and other types of military tribunals to try any offender who by the law of war is subject to trial by military tribunals (UCMJ, art. 18), it has generally been held that military commissions and similar tribunals have no jurisdiction of such purely military offenses specified in the Uniform Code of Military Justice as are expressly made punishable by sentence of court-martial (except where the military commission is also given express statutory authority over the offense (UCMJ, arts. 104, 106)). In practice, offenders who are not subject to the Uniform Code of Military Justice but who by the law of war are subject to trial by military tribunals, are tried by military commissions, provost courts, or other forms of military tribunals.

In areas occupied by United States forces, military jurisdiction over individuals, other than members of the Armed Forces, who are charged with violating legislation or orders of the occupant is usually exercised by military government courts. Although sometimes designated by other names, these tribunals are actually military commissions. They sit in and for the occupied area and thus exercise their jurisdiction on a territorial basis.

### 14. Dissemination of the 1949 Geneva Conventions

- a. *Wounded and Sick Convention; Wounded and Sick at Sea Convention.*

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmed of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains. (GWS, art. 47, GWS Sea, art. 48.)

- b. *Prisoners of War Convention.*

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to

軍事政府通常在交戰團體的領土或被正式佔領的領土上實施，同時受制於國際法上交戰國佔領法的約制。而戒嚴法則行使於國內領土，其地方政府和住民並不視為或承認為交戰團體，且受制於美國國內法管轄。

對美國而言，軍事政府與戒嚴法權力都由接受三軍最高統帥美國總統命令的軍事指揮官所行使。

### 13. 軍事管轄權

軍事管轄權有兩種型態，首先是國內法規中有關軍事當局條款所授權，其次是衍生自包括戰時國際法的國際法。

在美國陸軍中，軍事管轄權由以下的軍事法庭所行使：

- a. 軍法審判庭。
- b. 軍事法庭。
- c. 軍事簡易庭。
- d. 其他軍事性法庭。

當一般軍法審判庭執行軍事法庭、軍事簡易庭，及其他型態之軍事性法庭審判應由軍事性法庭所行使審判權之違反戰時國際法者 (UCMJ 第 18 條) 時，通常軍事法庭或類似法庭對此單純違反軍事司法統一法典 UCMJ 特定條款 (除軍事法庭亦明定對此違法者享有法定權力之外) 並無管轄權 (UCMJ 第 104 與 106 條)，並明定應由軍事審判庭審判之。實務上，非違反軍事司法統一法典 UCMJ 所定罪刑，但依據戰時國際法卻應受軍事性法庭審判者，應受軍事委員會、非重大案件之軍事法庭，或其他軍事性法庭之管轄。

在美國軍隊所佔領之地區，對非屬於軍隊之個人，但被以違反佔領者法律或命令而起訴時，其軍事管轄權通常由軍事政府法院所行使。雖然偶而此軍事法庭得以他種名義指派。此等機構座落且為佔領地而存在，故其管轄權具屬地性質。

### 14. 1949 年日內瓦公約之傳布

- a. *傷病公約、海上傷病公約。*

各締約國在平時及戰時應在各該國盡量廣泛傳播本公約之約文，尤應在其軍事，並如可能時在公民教育計畫中，包括本公約之學習，俾本公約之原則為全體民眾，尤其武裝戰鬥部隊、醫務人員及隨軍牧師所周知。(GWS 第 47 條、GWS Sea 第 48 條)。

- a. *戰俘公約。*

include the study thereof in their programmed of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions. (GPW, art. 127.)

*c. Civilians Convention.*

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof in their programmed of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions. (GC, art. 144.)

## Section II. PROTECTING POWERS

### 15. Protecting Powers

The Geneva Conventions of 1949 contain certain common provisions regarding the safeguarding of the interests of the belligerents by nations designated as "Protecting Powers." These provisions are set forth in the following paragraphs.

### 16. Functions of Protecting Powers

*a. Treaty Provision.*

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. (GWS, art. 8; GWS Sea, art. 8; GPW, art 8; GC, art. 9.)

*b. Article 8, GWS and GWS Sea, contains the following additional provision:*

Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

Except as specifically provided otherwise by GPW and GC, the activities of representatives or delegates of the Protecting Powers under these conventions may not be restricted even in case of imperative military necessity.

### 17. Activities of the International Committee of the Red Cross

各締約國在平時及戰時應在各該國盡量廣泛傳播本公約之約文，尤應在軍事教育計畫，並如可能時在公民教育計畫中，包括本公約之學習，俾本公約之原則為全體居民所周知。

任何在戰時應負責處理戰俘之軍事或其他當局，應保有公約之內容，且需遵守其條款 (GPW 第 127 條)。

*c. 保護平民公約。*

各締約國在平時及戰時應在各該國盡量廣泛傳播本公約之約文，尤應在軍事教育計畫，並如可能時在公民教育計畫中，包括本公約之學習，俾本公約之原則為全體居民所周知。

凡在戰時擔任有關被保護人之責任之任何民政、軍事、警察或其他當局必須備有本公約之約文，並須對其各項規定受有特別之教導。(GC 第 144 條)。

## 第二節 保護國 (註 3)

### 15. 保護國

1949 年的各項日內瓦公約，包含一系列有關交戰國利益被所謂保障的共同條款。此條款如下所述。

### 16. 保護國的功能

*a. 條約條款。*

本公約之適用應與保護國合作並受其監察。保護國之責任為維護衝突各方之利益。為此目的，保護國在其外交或領事人員之外，得自其本國國民或其他中立國國民中指派代表。上述代表應經其執行任務所在國之認可。

衝突各方對於保護國之代表之工作應盡最大可能予以便利。

保護國之代表，在任何情況下，不得逾越本公約所賦予之任務，彼等尤須顧及其執行任務所在國之安全上迫切的必要。僅遇有迫切的軍事需要時，始能作為一種例外及暫時的措施而限制其活動。(GWS 第 8 條、GWS Sea 第 8 條、GPW 第 8 條、GC 第 9 條)

*b. GWS 與 GWS Sea 第 8 條，包含以下附加條款：*

當此為軍事之必要行動時，其行動應僅限定於例外與臨時手段。

除特別由日內瓦戰俘待遇公約與日內瓦公約明文規定外，在此公約下，即使軍事上有必要，保護國代表或代表團之行為亦不得受限。

### 17. 國際紅十字會活動

The provisions of the present Convention [s] constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of [persons protected by the convention] and for their relief. (GWS art. 9; GWS Sea, art. 9; GPW, art. 9; GC, art. 10.)

## 18. Substitutes for Protecting Powers

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When \* \* \* [persons protected by the convention] do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such, an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever, in the present Convention, mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article. (GWS, art. 10; GWS Sea, art. 10; GPW, art. 10; GC, art. 11.)

## 19. Conciliation Procedure

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for \* \* \* [persons protected by the convention] possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting. (GWS, art. 11; GWS Sea, art. 11; GPW, art. 11; GC, art. 12.)

<sup>1</sup> United States Statutes at Large.

本公約之規定並不妨礙紅十字國際委員會或其他公正的人道主義組織，在有關於衝突各方之同意之條件下，從事保護與救濟平民之人道主義活動。(GWS 第 9 條、GWS Sea 第 9 條、GPW 第 9 條、GC 第 10 條)

## 18. 保護國之替代

各締約國得隨時同意將根據本公約應由保護國負擔之任務，委託於具有公允與效能之一切保證之組織。

當受本公約保護之人，不拘為何原因，不能享受或已停止享受保護國或本條第一款所規定之組織的活動之利益時，則拘留國應請一中立國或此種組織擔任依照本公約應由衝突各方指定之保護國所執行之任務。

若保護不能依此佈置，則拘留國應在本條之規定之約束下，請求或接受一人道組織，如紅十字國際委員會，提供服務，以擔任依本公約由保護國執行之人道的任務。

任何中立國或任何組織經有關國家邀請或自願提供服務而執行任務時，在行為上須對本公約所保護之人員所依附之衝突一方具有責任感，並須充分保證能執行其所負之任務，且能公允執行之。凡中立國民眾處於佔領地或交戰國領土內而其本國並無通常外交代表駐在該國時，本條各項規定應對彼等適用。

各國間訂立特別協定，如其中一國因軍事關係，特別是因其領土之大部或全部被佔領，以致該國與其他一國或其盟國談判之自由受限制，即是暫時的，本公約上列規定不得因該項特別協定而有所減損。

凡本公約中提及保護國，亦適用於本條所指之代替組織。(GWS 第 10 條、GWS Sea 第 10 條、GPW 第 10 條、GC 第 11 條)

## 19. 調解程式

保護國認為於被保護人之利益適宜時，尤其遇衝突各方對於本公約之適用與解釋意見有分歧時，應從事斡旋以期解決分歧。

為此目的，各保護國得應一方之請求，或主動向衝突各方建議，可能在適當選擇之中立領土召開代表會議，被保護人之負責當局代表尤須參加。衝突各方對於為此目的而提出之建議負有實行之義務。各保護國得於必要時，提請衝突各方同意，特邀一中立國人員或紅十字國際委員會委派之人員參加此項會議。(GWS 第 11 條、GWS Sea 第 11 條、GPW 第 11 條、GC 第 12 條)

<sup>1</sup> 全部美國法規

- 資料來源 <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch1.htm>

註：

1. 略語 (本彙編第 5 段)

H. III	海牙第三公約，1907.10.18，有關開戰部分。
HR.	海牙第四公約，1907.10.18，有關陸戰法律與習慣。
H. V.	海牙第五公約，1907.10.18，有關中立國與陸戰中人員之權利與義務。
H. IX.	海牙第九公約，1907.10.18，有關戰時海軍砲擊。
H. X.	海牙第十公約，1907.10.18，有關改自日內瓦海戰公約。
GPW 1929.	日內瓦戰俘公約，1929.7.27，有關改善戰俘待遇。
GWS 1929.	日內瓦戰場改善傷病兵狀況公約，1929.7.27。
the Roerich Pact	保障藝術與科學機構與歷史博物館條約，1985.4.15。
GWS.	日內瓦改善陸戰傷病兵狀況公約，1949.8.12。
GWS Sea	日內瓦改善海戰傷病兵狀況公約，1949.8.12。
GPW	日內瓦戰俘待遇公約，1949.8.12。
GC	日內瓦戰時保護平民公約，1949.8.12。

occupant	佔領者或佔領權 (國)
principal occupying power	主要佔領權 (國)
subordinate occupying power	次要佔領權 (國)
occupied territory	佔領地或佔領區域
belligerent occupant	交戰國佔領者
occupying forces	佔領軍
highest military authority	最高軍事當局
belligerent	交戰國之一方
belligerents	交戰國雙方
co-belligerent	戰爭中之同盟國

UCMJ

軍事統一法典

military commissions

軍事法庭

military government courts

軍事政府法院

military tribunals

軍事裁判所

provost courts

軍事簡易庭

(general) courts martial

(一般) 軍人受軍法審判或軍法審判庭

## 2. St. Martens clause

此慣例法標準常被視作「一般人道標準」或「Martens clause」。Martens clause 首先於 1907 年海牙公約上被提及，且有意維持某些人道原則和善惡準則。

[http://www.reliefweb.int/ocha\\_ol/pub/Easy Referencs to IHL and HR.htm](http://www.reliefweb.int/ocha_ol/pub/Easy%20References%20to%20IHL%20and%20HR.htm)

約 2,500 年前，希臘哲學家提出如何建構「戰爭的正當目的」，認為根據眾所承認的現行習慣法，為「與敵國軍隊作戰」。在 1868 年，此項古代的規則被再度重申為「唯一正當目的是，國家應鼓勵在戰爭中弱化敵方軍隊」。同樣的原則亦載明於 1907 年海牙公約中第 22 條，即交戰雙方之打擊敵方並非毫無限制。

3. 在國際人道法中，被保護人 (Protected persons) 指的是某項人道條約所適用的人民。意即被某項條約所載明涵蓋應受保護統治的人民，以及因此若此人在敵對國家中仍享有某些權利。廣義來說，被保護人是在戰爭中因為條約或人道慣例法而受益的人。特別是，被保護人指的是傷、病、海難受難者、戰俘、平民，以及其他未參加或已脫離戰鬥行為的人、醫護人員、宗教人員，救濟行動成員，民間保衛組織成員及調解人員。

[http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian\\_law:Protected\\_persons\\_and\\_property?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Protected_persons_and_property?OpenDocument)

在此一般條款之外，根據日內瓦公約在第 12 條所描述有關戰俘在擄獲國 (detaining power) 與拘留國 (protecting power) 間的交換。戰俘是在敵國的手中，但並非在擄獲者的個人或軍事機構手中。拘留國則對俘虜待遇負有責任。重要的是，此顯示最終的法律責任是源自於簽約國對條約的遵守，意即法律責任是在相關國家的政府，而非其武裝個人。

日內瓦第三公約第 12 條載明擄獲國與拘留國之法律責任，意即首先擄獲 (戰俘) 者以及其後拘留 (戰俘) 者。

<http://www.archbevis.com/9380.html>