

Distinction, Proportionality and Precaution

The Law of Armed Conflict from a Small-State Perspective

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September 2026

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Abstract

This paper asks what the law of armed conflict is for, seen from a state that does not expect to fight. I argue that the three cardinal rules of the conduct of hostilities — distinction, proportionality and precaution — are for such a state a shield rather than a set of instructions to its own forces, and that this difference of position shows in what the state wants from the law. It shows in the sources the small state prefers: it ratifies universally and entire, and it reads the customary-law study as its library where the great power reads its own manual. It shows in the way the small state implements, thinly and through statutes applied from the colonial period, because implementation is priced against the expectation of use, so that the gap which results is one of capacity rather than of compliance. And it shows in the use the small state makes of the law adjacent to the law of armed conflict: the Charter's prohibition of force and the International Court's provisional-measures practice become, for the weaker party, a form of precaution before the attack. Guyana is the case study, through its implementation record, the Caribbean Community's practice under the Arms Trade Treaty, and the Court's Orders of 1 December 2023 and 1 May 2025 in *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, which I read as the peacetime analogue of the precautionary rule. The merits of that case are pending and nothing in the paper predicts them. It closes with what a modern Geneva Conventions Act should contain and the institutions that should go with it.

Keywords: law of armed conflict; international humanitarian law; distinction; proportionality; precaution; small states; Guyana; provisional measures; *Guyana v Venezuela*; Arms Trade Treaty; CARICOM

I. Introduction

The law of armed conflict is written in the imperative mood and addressed to a party that can attack. "Those who plan or decide upon an attack shall", the First Additional Protocol says, and then lists what they must do.¹ The International Court of Justice, asked in 1996 whether nuclear weapons could lawfully be used, described the two "cardinal principles" of the law — the distinction between combatants and non-combatants, and the prohibition of unnecessary suffering — as "the fabric of humanitarian law", and said of the fundamental rules of that law that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".² The Court was speaking to the states that possessed the weapons. The literature that has grown around the three rules of distinction, proportionality and precaution is, likewise, overwhelmingly a literature of the attacking party: how a target is verified, how incidental loss is weighed against military advantage, what precautions are "feasible" for the force that has the means to take them.³

This paper reads the same rules from the other end. Guyana has a Defence Force charged by statute "with the defence of and maintenance of order in Guyana",⁴ a Constitution that directs the state's defence policy to the preservation of "the country's sovereignty and integrity" and the security of citizens "against any armed aggression",⁵ and a land frontier the greater part of which is claimed by a neighbour whose Minister of Defence, in November 2023, "made an appeal to 'go to combat' with reference to the territory in question".⁶ It has not fought an international armed conflict in its sixty years of independence, and it does not expect to be the attacker in one. For such a state the three cardinal rules are not battlefield instructions. They are a shield: a set of rules whose addressee is the party with the capacity to attack and whose beneficiary is the party, and the population, that cannot.

The thesis is that this difference of position is structural, that it produces a small-state interest in the law of armed conflict which is distinct from the great-power interest, and that the difference can be seen in three places. It shows in the sources the small state prefers: universal treaty ratification, taken entire, and the customary-law study of the International Committee of the Red Cross used as a library, where the great power prefers its declarations and its manual. It shows in the way the small state implements: thinly, through statutes "applied" from the colonial period, because implementation is priced against the expectation of use, so that the implementation gap which results is a capacity gap and not a compliance choice. And it shows in the way the small state uses the law that lies adjacent to the law of armed conflict. A state that cannot deter has the Charter's prohibition of the threat or use of force and the International Court's power to indicate

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I) art 57(2)(a).

² *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, paras 78–79.

³ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) ch 5 (139–186); Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005) 51–67 (Rules 15–21).

⁴ Defence Act, Cap 15:01 (Guyana), s 5.

⁵ Constitution of the Co-operative Republic of Guyana, Cap 1:01, art 197A(1).

⁶ *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Provisional Measures)* [2023] ICJ Rep 655, para 36.

provisional measures, and these do for it the work that precautions do for the civilian: they oblige the stronger party to refrain, before the attack, from acts that would change the situation on the ground. I read the Court's Orders of 1 December 2023 and 1 May 2025 in *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* in that light, as a peacetime analogue of the precautionary rule.⁷

The framework is borrowed, and I should say so before going further. The observation that international law-making has drifted away from the consent of the states most affected by it, and that the resulting "hegemonic international law" presses hardest on the states least present in the rooms where it is made, is José Alvarez's.⁸ The account of why states, and small states above all, obey law they did not make — through repeated interaction, interpretation and the internalisation of the norm into domestic legal structures — is Harold Koh's.⁹ The doctrine of sources on which Section III relies is James Crawford's restatement.¹⁰ The exposition of the three rules in Section II follows Yoram Dinstein and Marco Sassòli, and the customary rules are stated in the form given to them by Jean-Marie Henckaerts and Louise Doswald-Beck.¹¹ What I claim as my own is the reading of those materials from the small state's chair: that the cardinal rules are a shield for the state that cannot fight, that Guyana's implementation gap is a capacity gap, and that provisional measures do for the weaker state what precaution does for the civilian.

The method is doctrinal. The rules are stated from the instruments and the judgments, with the paragraph and article numbers by which a reader can check them. Guyana's implementation record is taken from the Laws of Guyana and from the treaty depositaries. The regional practice is taken from the United Nations Treaty Collection and the resolutions of the Organization of American States. The Court's Orders are quoted from the Court's own text. Where a case is pending, and the merits of *Guyana v Venezuela* remain pending after the hearings of 4 to 11 May 2026, I describe the record and stop.¹²

II. The Three Rules Stated from the Instruments

A. The field of application

The rules apply in armed conflict, and the threshold is set by the Conventions and the Protocols. Common Article 2 of the four Geneva Conventions of 1949 applies them "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", and to occupation "even if the said occupation meets with no armed resistance". Common Article 3 applies "as a minimum" in "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". The Second Additional Protocol develops Common Article 3 for conflicts

⁷ *Ibid*; *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Request for the Modification of the Order Indicating Provisional Measures of 1 December 2023)* [2025] ICJ Rep 13.

⁸ José E Alvarez, *International Organizations as Law-Makers* (OUP 2005); José E Alvarez, 'Hegemonic International Law Revisited' (2003) 97 AJIL 873.

⁹ Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale LJ 2599, 2646.

¹⁰ James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) ch 2.

¹¹ Dinstein (n 3); Sassòli (n 3); Henckaerts and Doswald-Beck (n 3).

¹² ICJ, 'Arbitral Award of 3 October 1899 (Guyana v. Venezuela): Conclusion of the public hearings on the merits held from Monday 4 to Monday 11 May 2026' (Press Release No 2026/13, 11 May 2026).

between a state's armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".¹³ The most cited judicial definition is the Appeals Chamber's in *Tadić*: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State", and the law "applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached".¹⁴ The first limb of that definition — a resort to armed force between states — carries no requirement of intensity. It is the limb that matters to a state whose only plausible conflict is international.

In *Nicaragua* the Court held that the rules of Common Article 3 "constitute a minimum yardstick" in international armed conflicts also, reflecting "elementary considerations of humanity", and that the obligation in Common Article 1 "to respect" and "to ensure respect" for the Conventions "in all circumstances" derives "not only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression".¹⁵ The Court returned to the point in the *Nuclear Weapons* opinion, in the passage already quoted, and in the *Wall* opinion, where it said of the fundamental rules of humanitarian law that they "incorporate obligations which are essentially of an erga omnes character", and that "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with".¹⁶

B. Distinction

The basic rule is Article 48 of the First Additional Protocol: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Article 51(2) gives the rule its sharpest form: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Article 52(2) limits attacks "strictly to military objectives", which "are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a

¹³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I) arts 2–3; the same articles are common to Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II), Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III), and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II) art 1(1).

¹⁴ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72, Appeals Chamber (2 October 1995) para 70.

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, paras 218, 220.

¹⁶ *Nuclear Weapons* (n 2) para 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, paras 157–158.

definite military advantage". In case of doubt, a person is to be considered a civilian, and an object normally dedicated to civilian purposes is presumed not to be used for military action.¹⁷ The Second Additional Protocol repeats the core of the rule for non-international conflicts in Article 13(2), in the same words as Article 51(2).¹⁸

The customary-law study states the rule in two parts. Rule 1: "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." Rule 7 does the same for civilian objects and military objectives. Both are recorded as "a norm of customary international law applicable in both international and non-international armed conflicts", and the study notes that Articles 48 and 52(2) attracted no reservations.¹⁹ The Rome Statute makes the intentional direction of attacks against the civilian population or against civilian objects a war crime in international armed conflict, and the former a war crime in non-international armed conflict.²⁰

C. Proportionality

The Protocol does not use the word. It defines, among indiscriminate attacks, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated", and it requires those who plan or decide upon an attack to "refrain from deciding to launch" such an attack, and to cancel or suspend an attack "if it becomes apparent" that it would have that effect.²¹ The customary rule, Rule 14, restates Article 51(5)(b) as a prohibition applicable in both kinds of conflict.²²

The word "proportionality" hides two features of the rule. The comparison is between expected incidental harm and anticipated advantage; both are judged prospectively, by what "may be expected" and what is "anticipated", not by what occurred. And the standard is "excessive", not "disproportionate". The Trial Chamber in *Galić* observed that the provisions "do not make explicit reference to the term 'proportionality' but speak of 'excessive' incidental civilian losses", and held that "[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack".²³ The Rome Statute's war crime is narrower again: it requires knowledge that the attack "will cause" incidental loss "which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".²⁴ The words "clearly" and "overall" are not in the Protocol. The better view, respectfully, is that the two texts state two different things — a rule of conduct and the definition of an offence — and that a state which has ratified both instruments, as Guyana has, is bound by the Protocol's standard as a rule

¹⁷ AP I (n 1) arts 48, 51(2), 52(2); on the presumptions, arts 50(1) and 52(3).

¹⁸ AP II (n 13) art 13(2).

¹⁹ Henckaerts and Doswald-Beck (n 3) 3 (Rule 1), 25–26 (Rule 7).

²⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 8(2)(b)(i)–(ii), (e)(i).

²¹ AP I (n 1) arts 51(5)(b), 57(2)(a)(iii), 57(2)(b).

²² Henckaerts and Doswald-Beck (n 3) 46 (Rule 14).

²³ *Prosecutor v Galić* (Judgement and Opinion) IT-98-29-T, Trial Chamber I (5 December 2003) para 58 and n 104.

²⁴ Rome Statute (n 20) art 8(2)(b)(iv).

of conduct and by the Statute's standard only as the threshold of individual criminal responsibility.²⁵

D. Precautions

Article 57 opens with a rule of constant application: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." It then requires those who plan or decide upon an attack to "[d]o everything feasible to verify" that the objective is a military one, to "[t]ake all feasible precautions in the choice of means and methods of attack", and to refrain from launching an excessive attack; it requires cancellation or suspension where the objective turns out not to be military or the attack turns out to be excessive; it requires "[e]ffective advance warning" of attacks which may affect the civilian population "unless circumstances do not permit"; and, where a choice of objectives is possible, it requires the selection of the one expected "to cause the least danger to civilian lives and to civilian objects". Article 58 turns to the defending side, which "shall, to the maximum extent feasible" remove civilians from the vicinity of military objectives, "[a]void locating military objectives within or near densely populated areas", and take "the other necessary precautions to protect the civilian population".²⁶ The customary study restates these as Rules 15 to 21 (precautions in attack) and Rules 22 to 24 (precautions against the effects of attacks), and records all but two of them as applicable in non-international armed conflict as well.²⁷ "Feasible", the *Galić* Chamber noted, "means that which is practicable or practically possible", a reading several states declared upon ratification without objection.²⁸

The Second Additional Protocol contains no article on precautions at all. That silence is one reason the customary study matters to a state whose treaty law for internal conflict is this thin; Section III.C says why.

E. What the rules assume

Every one of these provisions assumes a party with the means to attack and the organisation to plan. "Those who plan or decide upon an attack" have staff, intelligence, a choice of weapons and a choice of targets. Precaution is priced in feasibility, and feasibility is a function of capacity. The rules are, in this sense, written for the strong. That is not a criticism of the rules; a rule of targeting has to be addressed to someone who targets. It does mean that a state which will never be that someone reads the same words differently, not as a duty it must discharge but as a duty owed to it.

III. Why the Small State's Interest Is Different

²⁵ Dinstein (n 3) ch 5 (139–186); for Guyana's ratifications see Section IV.A below.

²⁶ AP I (n 1) arts 57(1)–(3), 58.

²⁷ Henckaerts and Doswald-Beck (n 3) 51–76 (Rules 15–24); Rules 21 and 23 are recorded as applicable in international, "and arguably also in non-international", armed conflicts (65, 71).

²⁸ *Galić* (n 23) para 58, n 105.

A. Sovereign equality and the prohibition of force

The Charter "is based on the principle of the sovereign equality of all its Members". Members "shall settle their international disputes by peaceful means" and "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state". The one exception is "the inherent right of individual or collective self-defence if an armed attack occurs".²⁹ In *Nicaragua* the Court treated "the principle of non-use of force" as "a principle of customary international law, not as such conditioned by provisions relating to collective security".³⁰ For a state that cannot deter, these provisions are not background. They are the whole of its security law. The law of armed conflict answers the question what may be done in a war; the Charter answers the prior question whether there may be one, and the small state's interest lies overwhelmingly in the prior question.

Alvarez has described the way in which the collective processes of international law have been turned to hegemonic ends, and has asked who is accountable for law made in institutions in which most states do not sit.³¹ The point bites harder in the law of armed conflict than almost anywhere else, because its texts are drafted at diplomatic conferences in which the military powers negotiate from experience and the rest from principle, and its interpretation is settled, in practice, by the manuals and the targeting decisions of the states that fight. Koh's answer to the question why nations obey — that obedience arises from a cycle of interaction, interpretation and internalisation, rather than from coercion — is also the small state's answer, and it explains something about the pattern of Guyana's practice examined in Section IV: the treaties were ratified, and then internalised in the only form available, which was the statute already on the books.³²

B. Common Article 1 as the small state's provision

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The undertaking to *ensure* respect is the small state's provision. A state that will never be the attacking party has no use for a law that binds only the attacker; it needs a law that gives every other party an interest, and a duty, in compliance. *Nicaragua* read Article 1 as an obligation not to encourage violations by others; the *Wall* opinion read it as an obligation on every state party, "whether or not it is a party to a specific conflict", to ensure that the instruments are complied with.³³ The customary study records the obligation as Rule 139 and, in its external aspect, as Rule 144: states "may not encourage violations of international humanitarian law by parties to an armed conflict" and "must exert their influence, to the degree possible, to stop violations".³⁴ The provision converts the law of armed conflict from a bilateral code between belligerents into an obligation owed to all. That conversion is the legal foundation of the shield.

²⁹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 2(1), 2(3), 2(4), 51.

³⁰ *Nicaragua* (n 15) para 188.

³¹ Alvarez, 'Hegemonic International Law Revisited' (n 8) 873–888.

³² Koh (n 9) 2646.

³³ GC I (n 13) art 1; *Nicaragua* (n 15) para 220; *Wall* (n 16) para 158.

³⁴ Henckaerts and Doswald-Beck (n 3) 495 (Rule 139), 509 (Rule 144).

C. The customary-law study as a library

The study was mandated by the 26th International Conference of the Red Cross and Red Crescent in 1995, which asked the ICRC "to prepare, with the assistance of experts in international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts".³⁵ It was published in 2005 as 161 rules with commentary, and a second volume of practice; its authors did not claim for it the status of law, and the ICRC's own foreword records that the mandate was accepted "with gratitude and humility", the humility because the organisation "was fully aware of the difficulty involved in describing the present state of customary international law on the basis of all available sources".³⁶ The orthodox doctrine, in Crawford's restatement, is that custom requires a general practice and its acceptance as law, "opinio juris sive necessitatis", and that the Court "will often infer the existence of opinio juris" from the practice itself.³⁷

The study, I suggest, has a different value for a state with no manual, no operational practice and no targeting cell than it has for a state with all three. For the military power the study is one voice among its own; for the small state it is the library. Guyana has not published a military manual and has no body of targeting practice from which its own opinio juris could be inferred. What it has is a record of ratification. For such a state the study performs the function that the manual performs for the great power — it tells the state's forces, and the state's lawyers, what the law is — and it does so without asking the state to have done anything it has not done.

This is not a claim that the study is law. It is a claim about who needs it.

D. Universality and the treaty taken entire

The Court in 1996 explained the "broad accession" enjoyed by the Hague and Geneva Conventions by the fundamental character of their rules.³⁸ The explanation is right, but incomplete. States accede broadly because accession costs the non-belligerent nothing and gives it something: a share in the rules that bind the belligerent. The record of the states that fight tells the same story from the other side. The study records that France voted against Article 51 at the Diplomatic Conference because paragraphs 4 and 5 "would seriously hamper the conduct of defensive military operations against an invader", and then ratified without a reservation on the point; the states that entered understandings on the meaning of "feasible" — Italy, Belgium, the Netherlands, Spain, Canada, Germany, Australia and Egypt among them — are states with substantial forces and an expectation of using them.³⁹ Guyana ratified the Protocols on 18 January 1988 and the Third Protocol on 21 September 2009.⁴⁰ The small state's preferred source

³⁵ Henckaerts and Doswald-Beck (n 3) xvi (Foreword by Dr Jakob Kellenberger, quoting the mandate given by the 26th International Conference); see also xxxiii (Introduction).

³⁶ *Ibid* v–xii (contents, Rules 1–161), xvi.

³⁷ Crawford (n 10) 23–24.

³⁸ *Nuclear Weapons* (n 2) para 79.

³⁹ Henckaerts and Doswald-Beck (n 3) 37–38 (Rule 11), 46–47 (Rule 14); *Galić* (n 23) para 58, n 105 (statements of understanding on "feasible" by Italy, Belgium, the Netherlands, Spain, Canada, Germany, Australia and Egypt).

⁴⁰ ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 16 July 2026* (ICRC 2026), entry for Guyana.

is the treaty, ratified entire; the great power's is the treaty as read through its declarations and its manual. The difference is not a difference of virtue. It is a difference of position.

E. The Martens clause

The clause first appeared in the preamble to the Hague Convention of 1899 and is repeated in the 1907 Convention: in cases not included in the Regulations, "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".⁴¹ Its modern form is Article 1(2) of the First Additional Protocol, which the Court quoted in 1996, describing the clause as one "which has proved to be an effective means of addressing the rapid evolution of military technology" and adding that its "continuing existence and applicability is not to be doubted".⁴² Cassese, in the fullest study of its origins, concluded that the clause "was essentially conceived of, at the 1899 Hague Peace Conference, as a diplomatic gimmick intended to break a deadlock in the negotiations between the smaller and Great Powers", and traced the deadlock to the Belgian delegation's resistance to a code that would have left the population of an occupied territory without the right to resist; he nevertheless gave the clause a twofold legal significance, as a rule of interpretation and as a loosening, within humanitarian law, of the requirement of *usus in favour of opinio*.⁴³ Meron reads the clause more generously, as an affirmation that principles of humanity and the dictates of public conscience have normative weight of their own.⁴⁴ On either reading the clause is, by its history, the small state's clause: it was the small powers' price for accepting a code written by the large, and it remains the provision to which a state without practice can point when the practice of others runs out.

None of the materials in this section is a rule of targeting. Sovereign equality, the prohibition of force, Common Article 1, the customary study, the treaty ratified entire, the Martens clause: each is a rule about who is bound, and to whom, and a state that expects to be attacked rather than to attack has no use for any other kind. That has a consequence for its statute book.

IV. Guyana's Implementation Record

A. Treaty membership

The ICRC's table of states party records Guyana's accession to the four Geneva Conventions on 22 July 1968, two years after independence; its ratification of the First and Second Additional Protocols on 18 January 1988; and its ratification of the Third Additional Protocol on 21

⁴¹ Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907), preamble.

⁴² AP I (n 1) art 1(2); *Nuclear Weapons* (n 2) paras 78, 87.

⁴³ Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187, 187, 193–200.

⁴⁴ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 AJIL 78, 78–89.

September 2009.⁴⁵ Guyana ratified the Rome Statute on 24 September 2004, the ninety-seventh state to do so.⁴⁶ It has not made the declaration under Article 90(2)(a) of the First Protocol recognising the competence of the International Humanitarian Fact-Finding Commission; seventy-eight states have, among them Trinidad and Tobago (20 July 2001) and Brazil (23 November 1993).⁴⁷ It signed the Arms Trade Treaty on the day it opened for signature, 3 June 2013, and ratified it on 4 July 2013.⁴⁸

B. The constitutional setting

The Constitution is the supreme law, and any other law inconsistent with it is void to the extent of the inconsistency; the President is "Head of State, the supreme executive authority, and Commander-in-Chief of the armed forces of the Republic".⁴⁹ Title 6A provides that the state's "defence and security policy shall be to defend national independence, preserve the country's sovereignty and integrity, and guarantee the normal functioning of institutions and the security of citizens against any armed aggression", and that "[t]he Guyana Defence Force established under the Defence Act shall in the discharge of its constitutional responsibilities function in such a manner as to earn the respect and enjoy the confidence of citizens".⁵⁰ Article 154A entitles every person to the human rights enshrined in the international treaties set out in the Fourth Schedule "to which Guyana has acceded"; the Schedule lists the Convention on the Rights of the Child, the two Covenants, the Conventions on racial discrimination, discrimination against women and torture, and the Inter-American Convention on violence against women.⁵¹ The Geneva Conventions and the Protocols are not in the Schedule. Guyana's constitutional incorporation of treaty law reaches the law of peace and stops at the law of war.

C. The applied Act

The Geneva Conventions (Supplementary Provisions) Act, Chapter 15:04, is Act 4 of 1962, in force from 3 March 1962. Its long title is "An Act to supplement the applied Act entitled the Geneva Conventions Act, 1957, so as to enable full effect to be given in relation to Guyana to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine".⁵² It has four sections. Section 2 borrows its definitions — "protected internee", "protected prisoner of war", "the protecting power" — from "section 7 of the applied Act entitled the Geneva Conventions Act, 1957". Section 3 provides that where a protected prisoner of war or protected internee "has been convicted and sentenced to death or to

⁴⁵ ICRC (n 40), entry for Guyana.

⁴⁶ United Nations Treaty Collection, Chapter XVIII.10, Rome Statute of the International Criminal Court, status as at 4 September 2026 (Guyana: signature 28 December 2000, ratification 24 September 2004); International Criminal Court, Assembly of States Parties, 'Guyana ratified the Rome Statute' (Press Release ICC-CPI-20040927-76, 27 September 2004).

⁴⁷ International Humanitarian Fact-Finding Commission, 'States Parties — Recognition' <https://www.ihffc.org/recognition/states-parties.html> accessed 4 September 2026 (78 states listed; Guyana not among them); API I (n 1) art 90(2)(a).

⁴⁸ United Nations Treaty Collection, Chapter XXVI.8, Arms Trade Treaty, status as at 4 September 2026 (Guyana: signature 3 June 2013, ratification 4 July 2013).

⁴⁹ Constitution (n 5) arts 8, 89.

⁵⁰ *Ibid* art 197A(1), (3).

⁵¹ *Ibid* art 154A(1) and Fourth Schedule.

⁵² Geneva Conventions (Supplementary Provisions) Act, Cap 15:04 (Guyana), Act 4 of 1962, long title and date of commencement.

imprisonment for a term of two years or more, the time within which he must give notice of appeal shall notwithstanding anything in any enactment relating to such appeal be reckoned from the date on which he receives a notice" that the protecting power has been notified of his conviction and sentence; the notice is to be given, for a prisoner of war, "by an officer of the Guyana Defence Force". Section 4 adjusts the periods for the revesting and restitution of property accordingly. A note to the Act records that the 1957 Act was "[e]xtended to Guyana by applied law S.I. 1301/1959".⁵³

The substance, then, is not in Chapter 15:04 at all. It is in the United Kingdom's Geneva Conventions Act 1957 as extended to the colony of British Guiana by the Geneva Conventions Act (Colonial Territories) Order in Council 1959.⁵⁴ That Act, in section 1, makes it an offence for "[a]ny person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in" Article 50 of the First Convention, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth. Section 6 prohibits the use, "without the authority of the Army Council", of the red cross and red crescent emblems and designations. Section 8(2) authorised the extension of the Act by Order in Council to "any colony".⁵⁵

Three consequences follow. The grave-breaches jurisdiction that Guyana possesses is the jurisdiction of a 1957 statute over the four Conventions' grave breaches. It does not, and by its terms cannot, reach the grave breaches added by Article 85 of the First Protocol, which Guyana ratified twenty-nine years after the applied Act was extended to it; nor the war crimes of the Rome Statute, which Guyana ratified forty-five years after.⁵⁶ The emblem protection that Guyana possesses is the 1957 Act's, with its reference to the authority of the Army Council, and it does not extend to the red crystal of the Third Protocol, which Guyana ratified in 2009.⁵⁷ And the domestic law by which Guyana gives effect to the Conventions has not been revisited since 1962, although the Conventions oblige each party "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches", and to "search for persons alleged to have committed" them and bring them "regardless of their nationality, before its own courts".⁵⁸

D. The Defence Act and what is not there

The Defence Act, Chapter 15:01, originated as Ordinance 24 of 1966, passed and gazetted on 12 April 1966, six weeks before independence; it has been amended since, most recently by the

⁵³ *Ibid* ss 2–4 and note to s 3 ("Extended to Guyana by applied law S.I. 1301/1959").

⁵⁴ Geneva Conventions Act 1957 (5 & 6 Eliz 2 c 52) (UK); Geneva Conventions Act (Colonial Territories) Order in Council 1959, SI 1959/1301 (UK).

⁵⁵ Geneva Conventions Act 1957 (n 54) ss 1(1), 6(1), 8(2).

⁵⁶ AP I (n 1) art 85; Rome Statute (n 20) art 8; for the dates, ICRC (n 40) and UNTC Chapter XVIII.10 (n 46).

⁵⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 261; Geneva Conventions Act 1957 (n 54) s 6(1); ICRC (n 40).

⁵⁸ GC I (n 13) art 49; GC II (n 13) art 50; GC III (n 13) art 129; GC IV (n 13) art 146.

Defence (Amendment) Act 2024.⁵⁹ Section 4 establishes "a force to be called the GUYANA DEFENCE FORCE consisting of (a) a regular Force; and (b) a reserve Force"; section 5 charges the Force "with the defence of and maintenance of order in Guyana and with such other duties as may from time to time be defined by the Defence Board"; section 7 permits the Minister, "with the approval of the National Assembly signified by resolution thereof", to employ the Force outside Guyana.⁶⁰

The statute book is more telling for what it leaves out. The 2012 revised edition of the Laws of Guyana groups four chapters under "Defence, Security, Public Order": the Defence Act, the National Service Act, the Guyana Defence Force Uniforms Act and the Geneva Conventions (Supplementary Provisions) Act.⁶¹ No chapter implements the Rome Statute. I read the Parliament's published list of Acts on 4 September 2026; there is no Act after 1962 whose title refers to the Geneva Conventions, the Additional Protocols, the International Criminal Court or the distinctive emblems.⁶² The Conventions oblige each party, "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 programmes of military and, if possible, civil instruction"; the First Protocol adds an undertaking to include the study of the instruments in "programmes of military instruction and to encourage the study thereof by the civilian population", together with a duty to ensure that "legal advisers are available, when necessary, to advise military commanders at the appropriate level".⁶³ The customary study records the duty of legal advisers, the duty of instruction within armed forces and the encouragement of civilian teaching as Rules 141 to 143.⁶⁴ The OAS General Assembly recorded in 2011 that nineteen of its member states had national committees on international humanitarian law and that eleven had recognised the competence of the Fact-Finding Commission; I have not found a published record of a national committee in Guyana, and the Commission's list confirms that Guyana is not among the states that have recognised its competence.⁶⁵

E. A capacity gap, not a compliance choice

The record has a shape. Guyana ratifies promptly and entire: the Conventions within two years of independence, the Protocols together, the Third Protocol, the Rome Statute, the Arms Trade Treaty within thirty-one days of signature. It implements thinly and late: an applied colonial statute, supplemented in 1962 and not since. The temptation is to read the second half of the record as a choice — a state content to be seen to ratify and unwilling to be bound. That reading is wrong, and the reason it is wrong is the argument of this paper. Implementation is priced against

⁵⁹ Defence Act (n 4); Parliament of Guyana, 'Acts of Parliament' <https://www.parliament.gov.gy/publications/acts-of-parliament/> accessed 4 September 2026 (Defence Act/Ordinance 24 of 1966, gazetted 12 April 1966; Defence (Amendment) Act 4 of 1990, passed 23 March 1990; Defence (Amendment) Act 8 of 2024, passed 17 May 2024, gazetted 24 May 2024).

⁶⁰ Defence Act (n 4) ss 4, 5, 7.

⁶¹ Laws of Guyana, Revised Edition 2012 (L.R.O. 1/2012), Table of Contents, 'Defence, Security, Public Order' (Caps 15:01–15:04).

⁶² Parliament of Guyana (n 59): a review on 4 September 2026 of the 587 Acts listed, dating from 1950 to 2025, found none whose title refers to the Geneva Conventions, the Additional Protocols, the International Criminal Court or the distinctive emblems.

⁶³ GC I (n 13) art 47; GC II (n 13) art 48; GC III (n 13) art 127; GC IV (n 13) art 144; AP I (n 1) arts 82, 83.

⁶⁴ Henckaerts and Doswald-Beck (n 3) 500–508 (Rules 141–143).

⁶⁵ OAS General Assembly, AG/RES. 2650 (XLI-O/11) 'Promotion of and Respect for International Humanitarian Law' (7 June 2011), preamble; International Humanitarian Fact-Finding Commission (n 47).

the expectation of use. A state that expects to conduct attacks writes a manual because its officers will need one on Tuesday; a state that does not expect to conduct attacks has no Tuesday. Its legislative programme is consumed by the laws its institutions will apply, and the law of armed conflict is not among them. The gap is a gap of capacity and of priority, and in a small legislature the two are the same thing. Koh's cycle of interaction, interpretation and internalisation has, in Guyana's case, completed its first two stages and stalled at the third, not because the norm is contested but because nothing has yet required its internalisation beyond the form inherited in 1959.⁶⁶

The distinction matters because the two readings call for different remedies. A compliance choice is answered by pressure. A capacity gap is answered by a draft. Section VII offers the outline of one.

V. CARICOM Practice: The Arms Trade Treaty

A. *The instrument*

The Arms Trade Treaty was adopted by the General Assembly on 2 April 2013 by resolution 67/234 B, which "[a]dopts the Arms Trade Treaty as contained in the annex to document A/CONF.217/2013/L.3" and requests the Secretary-General to open it for signature on 3 June 2013.⁶⁷ The resolution was adopted by 154 votes to 3, with 23 abstentions.⁶⁸ The Treaty entered into force on 24 December 2014.⁶⁹ Its object is to "[e]stablish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms" and to "[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion"; its scope extends from battle tanks to "[s]mall arms and light weapons".⁷⁰

Two provisions carry the law of armed conflict into the law of the arms trade. Article 6(3) provides that a state party "shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party".⁷¹ Article 7(1) requires an exporting state, where the export is not prohibited, to "assess the potential that the conventional arms or items" could be used to "commit or facilitate a serious violation of international humanitarian law", and Article 7(3) provides that if, after that assessment and the consideration of mitigating measures, "there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall

⁶⁶ Koh (n 9) 2646.

⁶⁷ UNGA Res 67/234 B (2 April 2013) UN Doc A/RES/67/234 B, paras 1, 3.

⁶⁸ Peter Woolcott, 'The Arms Trade Treaty' (United Nations Audiovisual Library of International Law, 2014) 5 and n 14.

⁶⁹ UNTC Chapter XXVI.8 (n 48) (entry into force 24 December 2014, in accordance with art 22; registration No 52373; 3013 UNTS 269).

⁷⁰ Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269 (ATT) arts 1, 2(1).

⁷¹ *Ibid* art 6(3).

not authorize the export".⁷²

B. Why the small state ratified first

The Treaty is the only instrument of the law of armed conflict whose principal obligations fall on the exporter of arms rather than on their user. That is why the pattern of its ratification is the mirror image of the pattern examined in Section IV. The depositary's record shows the members of the Caribbean Community among the earliest parties.

CARICOM member state	Signature	Ratification, acceptance or accession
Antigua and Barbuda	3 June 2013	12 August 2013
Bahamas	3 June 2013	25 September 2014
Barbados	25 September 2013	20 May 2015
Belize	3 June 2013	19 March 2015
Dominica	1 October 2013	21 May 2015
Grenada	3 June 2013	21 October 2013
Guyana	3 June 2013	4 July 2013
Haiti	21 March 2014	—
Jamaica	3 June 2013	3 June 2014
Saint Kitts and Nevis	5 June 2013	15 December 2014
Saint Lucia	3 June 2013	25 September 2014
Saint Vincent and the Grenadines	3 June 2013	3 June 2014
Suriname	3 June 2013	19 October 2018
Trinidad and Tobago	3 June 2013	25 September 2013

Source: United Nations Treaty Collection, chapter XXVI.8, status as at 4 September 2026.⁷³

Guyana's ratification of 4 July 2013 followed Iceland's of 2 July 2013 and preceded every other state's.⁷⁴ The comparison with the exporting states makes the point. The United States signed on 25 September 2013 and has not ratified; China acceded on 6 July 2020; the Russian Federation and India do not appear on the depositary's list of signatories; Brazil ratified on 14 August 2018; Venezuela does not appear.⁷⁵ The states that ratified first were the states that import, and the Community had said as much through the delegation that spoke for it at the negotiating conference. [VERIFY: Trinidad and Tobago's statement on behalf of CARICOM at the Diplomatic Conference, reported in UN Meetings Coverage DC/3364 (July 2012) and DC/3420 (March 2013), describing small arms and ammunition as the region's weapons of mass destruction; press.un.org rendered only a script-blocked shell today and the quotation could not be read from

⁷² *Ibid* art 7(1)(b)(i), 7(3).

⁷³ UNTC Chapter XXVI.8 (n 48).

⁷⁴ *Ibid* (Iceland: signature 3 June 2013, ratification 2 July 2013).

⁷⁵ *Ibid* (United States of America: signature 25 September 2013; China: accession 6 July 2020; Brazil: ratification 14 August 2018; no entries for the Russian Federation, India or Venezuela).

the primary record — confirm wording and document symbol before print, or cut the sentence.]⁷⁶

I read the Arms Trade Treaty as the small state's law of armed conflict by other means. Distinction and proportionality govern the attack; Articles 6 and 7 govern the supply of the means of attack, and they do so by reference to the same rules — grave breaches, attacks on civilians, serious violations of humanitarian law. A state that will never plan an attack, but whose streets receive the small arms that leak from the trade, has every reason to want those rules enforced at the point of export, and every reason to ratify the instrument that puts them there. The regional practice is consistent. The General Assembly of the Organization of American States, of which Guyana is a member, has adopted resolutions on the promotion of and respect for international humanitarian law since 1994; the 2004 resolution recalled "the obligation of all states to respect and ensure respect, in all circumstances, the 1949 Geneva Conventions", and the 2011 resolution urged member states "to adopt such legislative or other measures as may be necessary to meet their legal obligations under the treaties on international humanitarian law to which they are party", including the classification "under criminal law" of "gross violations", laws "to regulate the use of and respect for" the emblems, and recourse "when appropriate" to the Fact-Finding Commission.⁷⁷ Guyana's own recent legislation runs in the same regional direction: the Regional Security System Act 2025 and the CARICOM Arrest Warrant Act 2025 were gazetted together on 5 June 2025.⁷⁸ A legislature that gazettes both on the same day is not indifferent to security law. It is legislating for the threat it expects.

VI. Precaution Before the Attack: *Guyana v Venezuela*

A. *The proceedings*

The controversy concerns the validity of the Arbitral Award of 3 October 1899, which fixed the boundary between British Guiana and Venezuela and was demarcated between November 1900 and June 1904.⁷⁹ Under Article IV(2) of the Geneva Agreement of 17 February 1966, to which Guyana became a party on independence, the Secretary-General of the United Nations was to choose the means of settlement; on 30 January 2018 he chose the Court, and Guyana filed its Application on 29 March 2018.⁸⁰ By its Judgment of 18 December 2020 the Court held, by twelve votes to four, that it had jurisdiction "in so far as it concerns the validity of the Arbitral Award of

⁷⁶ The Caribbean Community's position at the negotiating conference is recorded in United Nations press coverage of the July 2012 and March 2013 conferences; the primary record could not be read on 4 September 2026 and the statement is not relied on beyond the marker in the text.

⁷⁷ Organization of American States, 'Member States' https://www.oas.org/en/member_states/default.asp accessed 4 September 2026 (Guyana listed); OAS General Assembly, AG/RES. 2052 (XXXIV-O/04) 'Promotion of and Respect for International Humanitarian Law' (8 June 2004), preamble (recalling the resolutions of the General Assembly on the subject from AG/RES. 1270 (XXIV-O/94) onwards); AG/RES. 2650 (XLI-O/11) (n 65) operative paras 2–4.

⁷⁸ Regional Security System Act 2025 (Guyana), Act No 11 of 2025, and CARICOM Arrest Warrant Act 2025 (Guyana), Act No 12 of 2025, both published in the Official Gazette, Legal Supplement A, 5 June 2025.

⁷⁹ *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Jurisdiction of the Court)* [2020] ICJ Rep 455, paras 32–34; *Guyana v Venezuela (Provisional Measures)* (n 6) para 13.

⁸⁰ Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana (adopted 17 February 1966, entered into force 17 February 1966) 561 UNTS 322 (Geneva Agreement) art IV(2); *Guyana v Venezuela (Jurisdiction)* (n 79) paras 40–43, 59; *Guyana v Venezuela (Provisional Measures)* (n 6) paras 1–2, 14.

3 October 1899 and the related question of the definitive settlement of the land boundary dispute", and, unanimously, that it lacked jurisdiction over claims arising from events after the signature of the Geneva Agreement.⁸¹ By its Judgment of 6 April 2023 it rejected, by fourteen votes to one, Venezuela's preliminary objection.⁸² The Court fixed 11 August 2025 for Venezuela's Rejoinder, and the public hearings on the merits were held from 4 to 11 May 2026. The Court's press release of 11 May 2026 records that "[t]he Court will now begin its deliberation" and that "[t]he Court's decision will be delivered at a public sitting, the date of which will be announced in due course".⁸³ As at 4 September 2026 no judgment on the merits has been delivered and no date has been announced.

Nothing in this paper predicts the outcome.

B. The Order of 1 December 2023

On 20 October 2023 Venezuela's National Electoral Council published five questions for a "Consultative Referendum" on 3 December 2023. The fifth asked the Venezuelan people whether they agreed "with the creation of the Guayana Esequiba State and that an accelerated and comprehensive plan be developed for the present and future population of that territory, including, inter alia, the granting of Venezuelan citizenship and identity cards, in accordance with the Geneva Agreement and International Law, consequently incorporating that State into the map of Venezuelan territory". Guyana filed its request for provisional measures on 30 October 2023.⁸⁴

The Court's reasoning follows the settled sequence. Its power under Article 41 of the Statute "has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof", and is exercised only where the rights asserted are "at least plausible" and "a link must exist between the rights whose protection is sought and the provisional measures being requested".⁸⁵ The Court found Guyana's right to sovereignty over the territory plausible, because the territory "was awarded to British Guiana in the 1899 Award", and found the requested measure directed against acts "intended to prepare or allow the exercise of sovereignty or de facto control" to be linked to that right.⁸⁶ Irreparable prejudice and urgency require "a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision", a condition met where the acts susceptible of causing the prejudice "can 'occur at any moment'".⁸⁷ The Court noted Venezuela's statement that it "will not turn its back on what the people decide in the referendum", the Minister of Defence's appeal to "go to combat", and the announced construction of an airstrip described as "a logistical support point for the integral development of the Essequibo"; it concluded that the circumstances "present a serious risk of Venezuela acquiring and exercising control and administration of the territory in dispute".⁸⁸

⁸¹ *Guyana v Venezuela (Jurisdiction)* (n 79) para 138.

⁸² *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Preliminary Objection)* [2023] ICJ Rep 252, para 108.

⁸³ *Guyana v Venezuela (Modification)* (n 7) para 11; ICJ Press Release No 2026/13 (n 12).

⁸⁴ *Guyana v Venezuela (Provisional Measures)* (n 6) paras 7, 15–16.

⁸⁵ *Ibid* paras 19–20.

⁸⁶ *Ibid* paras 23, 25–26.

⁸⁷ *Ibid* paras 27–28.

⁸⁸ *Ibid* paras 36–37.

The Court then declined to order what Guyana had asked — the suspension or reframing of the referendum — and indicated a measure of its own framing. It observed "that the situation that currently prevails in the territory in dispute is that Guyana administers and exercises control over that area", and considered "that, pending the final decision in the case, Venezuela must refrain from taking any action which would modify that situation".⁸⁹ It added a non-aggravation measure addressed to both parties, and recalled that its orders under Article 41 "have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed".⁹⁰ The operative clause reads:

(1) Unanimously, Pending a final decision in the case, the Bolivarian Republic of Venezuela shall refrain from taking any action which would modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area; (2) Unanimously, Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.⁹¹

Judge ad hoc Couvereur, in a separate opinion, explained why the Court was right not to interfere with the referendum itself: its holding "could not, in and of itself, affect the Applicant's plausible rights to sovereignty over the disputed territory", so that the measures requested to that end would have lacked the necessary connection with those rights.⁹² The Court's measure was aimed at conduct on the ground, not at speech in Caracas.

C. The Order of 1 May 2025

Venezuela held the referendum on 3 December 2023. On 8 December 2023 its President signed six decrees which, as the Court later recorded, created a "Comprehensive Defense Zone" in the territory, designated a "Sole Authority of the Guayana Esequiba", authorised two state companies to grant oil and mineral concessions, ordered the territory's incorporation in official maps, declared protected areas within it and established a "High Commission for the Defense and Recovery of the Guayana Esequiba". On 21 March 2024 the National Assembly adopted an "Organic Law for the Defense of Guayana Esequiba", in force from 3 April 2024, which "creates the State of 'Guayana Esequiba' within the territorial and political organization of Venezuela". On 7 January 2025 the President announced elections for a "Governor of Guayana Esequiba State", fixed on 19 February 2025 for 25 May 2025.⁹³ The Security Council, in a statement of 15 April 2024, expressed concern "about the possible escalation of tensions between Venezuela and Guyana".⁹⁴

Guyana's request of 6 March 2025 was treated by the Court as a request for modification under Article 76(1) of the Rules, which permits revocation or modification of a decision on provisional measures "if, in its opinion, some change in the situation justifies such revocation or modification".⁹⁵ Venezuela, by letter, denied the Court's jurisdiction, characterised the request as

⁸⁹ *Ibid* paras 40–41.

⁹⁰ *Ibid* paras 43–44; *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466, para 109.

⁹¹ *Guyana v Venezuela (Provisional Measures)* (n 6) para 45.

⁹² Separate opinion of Judge ad hoc Couvereur, as summarised in ICJ, 'Arbitral Award of 3 October 1899 (Guyana v. Venezuela): Request for the indication of provisional measures' (Summary 2023/8, 1 December 2023), annex.

⁹³ *Guyana v Venezuela (Modification)* (n 7) paras 27–29.

⁹⁴ *Ibid* para 39.

⁹⁵ *Ibid* paras 12, 20; Rules of Court, art 76(1).

an abuse of process, and submitted that the holding of regional elections fell "within the *domaine réservé* (reserved domain)" of the state.⁹⁶ The Court held that the decrees, the Organic Law and the announced elections "represent grave developments which constitute a change in the situation within the meaning of Article 76", that "the serious risk of Venezuela acquiring and exercising control and administration over the territory in dispute has significantly increased", and that the change justified modifying its earlier decision "by further specifying its scope".⁹⁷ It considered that Venezuela "must, in conformity with its obligations under paragraph 45 of the Order of 1 December 2023, refrain from conducting elections, or preparing to conduct elections, in the territory in dispute", and it underlined that the Order was "without prejudice to any findings concerning the Respondent's compliance with the Order of 1 December 2023".⁹⁸ The operative clause reads:

(1) Unanimously, Reaffirms the provisional measures indicated in its Order of 1 December 2023, which should be immediately and effectively implemented; (2) By twelve votes to three, Indicates the following provisional measure: Pending a final decision in the case, the Bolivarian Republic of Venezuela shall refrain from conducting elections, or preparing to conduct elections, in the territory in dispute, which the Co-operative Republic of Guyana currently administers and over which it exercises control.⁹⁹

Judges Xue, Bhandari and Nolte appended a joint dissenting opinion.

D. Argyle

Between the two Orders the parties met. On 14 December 2023, at Argyle in Saint Vincent and the Grenadines, in discussions facilitated by the Prime Minister of Saint Vincent and the Grenadines and the Prime Minister of Dominica, with Brazil's envoy as an interlocutor and representatives of the Secretary-General attending as observers, the Presidents of Guyana and Venezuela issued a Joint Declaration. They "[a]greed that Guyana and Venezuela, directly or indirectly, will not threaten or use force against one another in any circumstances, including those consequential to any existing controversies between the two States"; "[a]greed that any controversies between the two States will be resolved in accordance with international law, including the Geneva Agreement dated February 17, 1966"; "[a]greed that both States will refrain, whether by words or deeds, from escalating any conflict or disagreement arising from any controversy between them"; and undertook to "cooperate to avoid incidents on the ground conducive to tension between them". The Declaration also "[n]oted Venezuela's assertion of its lack of consent and lack of recognition of the International Court of Justice and its jurisdiction in the border controversy".¹⁰⁰ The Declaration is not a treaty and I do not treat it as one. It is the regional institutions doing, by declaration, what the Court had done by Order a fortnight earlier: converting the general prohibition of force into a specific undertaking to refrain, addressed to the party with the capacity to act.

⁹⁶ *Guyana v Venezuela (Modification)* (n 7) paras 15, 19, 25.

⁹⁷ *Ibid* paras 30–31.

⁹⁸ *Ibid* paras 42, 45.

⁹⁹ *Ibid* para 46.

¹⁰⁰ Joint Declaration of Argyle for Dialogue and Peace between Guyana and Venezuela (Argyle, Saint Vincent and the Grenadines, 14 December 2023), text published by the Department of Public Information, Guyana <https://dpi.gov.gy/the-joint-declaration-of-argyle-for-dialogue-and-peace-between-guyana-and-venezuela/> accessed 4 September 2026.

E. The argument: provisional measures as precaution

The argument advanced here is that the provisional-measures Orders in *Guyana v Venezuela* stand to the weaker state as the rule of precautions stands to the civilian, and that the correspondence is structural rather than rhetorical. Five points of contact make it out.

Take the addressee first. Article 57 is addressed to "those who plan or decide upon an attack" — to the party with the capacity to act. The 2023 Order's first measure is addressed to Venezuela alone, because Venezuela alone had announced an intention to change the situation; only the non-aggravation measure is addressed to both. The 2025 measure is again addressed to one party.¹⁰¹ Precaution, in both regimes, is an obligation of the party that can do harm.

Next, what each rule protects. Article 41 of the Statute empowers the Court to indicate measures "which ought to be taken to preserve the respective rights of either party"; Article 57(1) requires "constant care" to be taken "to spare the civilian population, civilians and civilian objects".¹⁰² In each case the object is the preservation of a protected position pending an event — the judgment, the attack — which the protected party does not control.

The standard is prospective in both. Proportionality and precaution turn on what an attack "may be expected to cause" and on the advantage "anticipated"; the Court's test is "a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision".¹⁰³ Neither rule waits for harm. Each obliges the actor to assess risk before acting and to refrain where the risk is unacceptable — in the Protocol, where the harm would be "excessive"; in the Court's practice, where it would be "irreparable".

Fourth, the specification of conduct. Article 57(2) does not merely prohibit an outcome; it prescribes steps — verification, choice of means, cancellation, warning. The 2025 Order does the same: it takes the general obligation of 2023 not to modify the situation and specifies it, as the risk becomes concrete, as an obligation not to conduct, or prepare to conduct, elections.¹⁰⁴ The movement from general rule to specified precaution is the movement of Article 57 itself.

Last, the mode of enforcement. Precautions in attack are self-applied; no external authority stands over the commander at the moment of decision, and the rule works, when it works, through the commander's own acceptance of it, backed by the duty of commanders to prevent and suppress breaches and by the criminal law after the event.¹⁰⁵ Provisional measures are binding, as *LaGrand* settled and as both Orders recall, but the Court has no bailiff; compliance depends on the addressee, on the Security Council under Article 94(2) of the Charter, and on the obligation of all states to ensure respect for the law.¹⁰⁶ Both regimes are law without an enforcer at the point of application, and both rely for their effect on the same thing: the prior acceptance of the rule by the party bound.

¹⁰¹ *Guyana v Venezuela (Provisional Measures)* (n 6) para 45; *Guyana v Venezuela (Modification)* (n 7) para 46.

¹⁰² Statute of the International Court of Justice, art 41(1); AP I (n 1) art 57(1).

¹⁰³ *Guyana v Venezuela (Provisional Measures)* (n 6) para 28.

¹⁰⁴ *Guyana v Venezuela (Modification)* (n 7) paras 41–42.

¹⁰⁵ AP I (n 1) art 87.

¹⁰⁶ *LaGrand* (n 90) para 109; Charter (n 29) art 94; *Guyana v Venezuela (Provisional Measures)* (n 6) para 44; *Guyana v Venezuela (Modification)* (n 7) para 44; Henckaerts and Doswald-Beck (n 3) 509 (Rule 144).

The analogy has limits. Provisional measures protect the rights of a state, not the lives of persons; the Court's criterion is the plausibility of a right, not military necessity; and the Court is a court, not a commander. Venezuela's position, recorded in the 2025 Order, is that the Court lacks jurisdiction altogether and that elections within what it regards as its own territory fall within its reserved domain; the Court has not accepted that position, but I record it because the conflict of views is real and a reader is entitled to see it.¹⁰⁷ The claim is not that the two regimes are the same. It is that the small state's use of the one performs the function that the great power's compliance with the other performs for the civilian population, and that this is the natural consequence of the position described in Section III. A state that cannot deter an attack must prevent it by law, and the only law that operates before the attack is the law of peaceful settlement and the Court's power to preserve the situation while it decides.

The vocabulary is shared beyond these two regimes, which is some support for the reading. The Court in *Pulp Mills* accepted that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" of the River Uruguay, and the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea found that the incorporation of the precautionary approach in a growing number of instruments "has initiated a trend towards making this approach part of customary international law", locating the approach within "the general obligation of due diligence".¹⁰⁸ Precaution, as a legal method, is the obligation to act on risk before certainty, and it has migrated across environmental law, the law of the sea and the law of armed conflict because the structure of the problem — an actor, a protected interest and an irreversible harm — is the same in each. The Court's Orders belong to that family. There is also Miles's observation, in the leading study of provisional measures since *LaGrand*, that the content and enforcement of measures have expanded and that the Court has become willing to frame measures of its own which specify conduct rather than merely enjoin a result.¹⁰⁹ The 2023 and 2025 Orders are examples of that development, and for the state on the receiving end of a threat they are the most valuable one.

VII. Recommendations for a Small State

The recommendations that follow are addressed to the capacity gap identified in Section IV. None requires the state to expect to fight. Each is a measure the state can take because it does not.

A modern Geneva Conventions Act comes first, to replace the applied Act of 1957 and the four-section supplement of 1962. It should make grave breaches of the four Conventions and of Article 85 of the First Protocol offences under Guyanese law, with the jurisdiction "regardless of their nationality" that the Conventions require; it should give effect to the genocide, crimes against humanity and war crimes of the Rome Statute, by which Guyana has been bound since 2004; it should provide for the responsibility of commanders in the terms of Articles 86 and 87 of the First Protocol; and it should protect the red cross, red crescent and red crystal emblems by a

¹⁰⁷ *Guyana v Venezuela (Modification)* (n 7) paras 15, 19, 25.

¹⁰⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 164; *Responsibilities and Obligations of States with respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10, paras 131, 135.

¹⁰⁹ Cameron A Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017) ch 7.

provision that refers to a Guyanese authority rather than to the Army Council.¹¹⁰ The OAS General Assembly urged exactly these measures on its member states in 2011.¹¹¹

A national committee on international humanitarian law is the second. The 2004 and 2011 OAS resolutions recognise the "important advisory work" of such committees in ensuring that the instruments "are incorporated into the domestic law of states parties"; nineteen member states had one by 2011.¹¹² A committee drawn from the Attorney General's Chambers, the Ministry of Foreign Affairs, the Defence Force and the national Red Cross society costs almost nothing and supplies the one thing a capacity gap lacks: a standing body whose business it is to notice the gap.

The third is a short military manual, and the legal advisers to go with it. The Conventions require the study of the law to be included in "programmes of military ... instruction"; the First Protocol requires commanders to "ensure that members of the armed forces under their command are aware of their obligations", and requires legal advisers "at the appropriate level"; the customary study records each of these as a rule binding on states in peacetime.¹¹³ A manual for a force of Guyana's size need not be the multi-volume work of a military power. It needs to state the three rules, the definition of a military objective, the presumptions in case of doubt, the precautions in attack and against the effects of attack, and the duties of commanders, in the language of the Protocol, and it needs to be taught.

Fourth, the declaration under Article 90(2)(a) of the First Protocol. The declaration recognises "ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party" of grave breaches and other serious violations.¹¹⁴ It costs nothing, it binds only in relation to states that have accepted the same obligation, and it is the kind of commitment — an acceptance of fact-finding by a party that expects to be the object of violations rather than their author — which a small state should be among the first, not the seventy-ninth, to make. The 2011 OAS resolution invited member states to consider "making use of, when appropriate, the services of the International Humanitarian Fact-Finding Commission".¹¹⁵

Fifth, dissemination beyond the armed forces. The Fourth Convention requires the study of the Convention to be included "if possible" in programmes of "civil instruction"; the First Protocol requires states "to encourage the study thereof by the civilian population"; the customary study records the latter as Rule 143.¹¹⁶ In a state whose engagement with the law of armed conflict will be conducted by lawyers and diplomats rather than by soldiers, the law faculty, the Bar and the foreign service are the relevant population.

The sixth follows from Section V. The Arms Trade Treaty requires each state party to "establish and maintain a national control system, including a national control list".¹¹⁷ A state that ratified within thirty-one days should be able to show the control system that ratification promised; the

¹¹⁰ GC I (n 13) art 49 and the parallel provisions (n 58); AP I (n 1) arts 85–87; Rome Statute (n 20) arts 6–8; AP III (n 57).

¹¹¹ AG/RES. 2650 (XLI-O/11) (n 65) operative para 4.

¹¹² AG/RES. 2052 (XXXIV-O/04) (n 77) preamble; AG/RES. 2650 (XLI-O/11) (n 65) preamble.

¹¹³ GC I (n 13) art 47 and the parallel provisions (n 63); AP I (n 1) arts 82, 83, 87(2); Henckaerts and Doswald-Beck (n 3) 500–505 (Rules 141–142).

¹¹⁴ AP I (n 1) art 90(2)(a).

¹¹⁵ AG/RES. 2650 (XLI-O/11) (n 65) operative para 2.

¹¹⁶ GC IV (n 13) art 144; AP I (n 1) art 83(1); Henckaerts and Doswald-Beck (n 3) 505 (Rule 143).

¹¹⁷ ATT (n 70) art 5(2).

national committee proposed above is the body to audit whether it can.

VIII. Conclusion

The three cardinal rules were written for the party that attacks, and the literature has read them from that party's chair. I have read them from the other one, and the difference turns out to be one of structure, not of perspective. A state that cannot fight wants different things from this law. It wants the sources that bind everyone and that it can use without practice of its own: the treaty ratified entire, Common Article 1, the customary study, the Martens clause. It implements thinly, through statutes applied from before its independence, because implementation is priced against the expectation of use, and its implementation gap is therefore a gap of capacity and not a refusal to comply. And it turns to the law that operates before the attack, the Charter's prohibition of force and the Court's power to preserve the situation while it decides, because that is the only precaution it has.

Guyana's record bears each of those out. It ratified the Conventions, the Protocols, the Rome Statute and the Arms Trade Treaty, and in the last case faster than any state but one. Its domestic law of armed conflict consists of a 1957 statute extended to a colony in 1959 and supplemented by four sections in 1962. And when its territory was threatened it went to the Court, and obtained, unanimously in 2023 and by twelve votes to three in 2025, Orders that oblige the stronger party to refrain from acts that would change the situation on the ground pending judgment. The Orders are binding. Whether they have been complied with is a question the Court has expressly reserved, and the merits remain before it. I make no prediction. What can be said is that the Orders did for Guyana what Article 57 does for a civilian population: they required the party with the capacity to act to assess the risk of irreparable harm before acting, and to refrain.

The recommendations in Section VII are modest because the argument requires them to be. A capacity gap is closed by a statute, a committee, a manual, a declaration and a syllabus, and each of these is within the reach of a small legislature in a single session. What the small state cannot legislate is the conduct of others. For that it has the law it prefers, which is the law that binds everyone, and it has the Court. That is not a weakness in the small state's position. It is the whole of its strength, and it is why the law of armed conflict, read from where Guyana sits, has always been a shield.

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