

Manual on International Law Applicable to Air and Missile Warfare: A Review

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In 2009, the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University published the *Manual on International Law Applicable to Air and Missile Warfare (Manual)*.¹ Also available is the *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare (Commentary)*.² The *Manual* is made up of 24 sections.³ Most sections commence with rules that apply generally to armed conflict, followed by rules that focus on the specifics of air and missile warfare. In total, there are 175 rules (a number of which have sub-rules). The *Commentary* repeats each rule (or sub-rule) and then “clarifies the prominent legal interpretations and indicates differing perspectives”.⁴

* This paper was written in a personal capacity and does not necessarily represent the views of the Australian Department of Defence or the Australian Defence Force.

¹ Program on Humanitarian Policy and Conflict Research at Harvard University, ‘Manual on International Law Applicable to Air and Missile Warfare’, 15 May 2009, *International Humanitarian Law Research Initiative*, <http://ihlresearch.org/amw/HPCR%20Manual.pdf>. Unless indicated otherwise, all urls were last accessed on 12 January 2011.

² Program on Humanitarian Policy and Conflict Research at Harvard University, ‘Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare’, March 2010 (version 2.1), *International Humanitarian Law Research Initiative*, <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>.

³ The sections are: Definitions, General Framework, Weapons, Attacks, Military Objectives, Direct Participation in Hostilities, Precautions in Attacks, Precautions by the Belligerent Party Subject to Attack, Protection of Civilian Aircraft, Protection of Particular Types of Aircraft, Specific Protection of Medical and Religious Personnel, Medical Units and Transports, Specific Protection of Medical Aircraft, Specific Protection of the Natural Environment, Specific Protection of Other Persons and Objects, Humanitarian Aid, “Exclusion Zones” and No-Fly Zones, Deception, Ruses of War and Perfidy, Espionage, Surrender, Parachutists from an Aircraft in Distress, Contraband, Interception, Inspection and Capture, Aerial Blockade, Combined Operations, and Neutrality.

⁴ *Commentary*, *supra* note 2, iii.

The *Manual's* publication adds to the growing number of significant works being published concerning the content of the law of armed conflict. For example, in recent times we have had the comprehensive work on customary international humanitarian law by Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005) and the very specific work published by the International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009). The *Manual* usefully complements and does not duplicate other works in the field.

The purpose of the *Manual* is to restate the current customary international law governing air and missile warfare. It purports to be neither a draft treaty nor an attempt to develop the law. The *Manual* does not deal with outer space⁵ and also limits itself to international armed conflict; however, the *Commentary* does indicate whether a rule is also applicable to non-international armed conflict.⁶ The intended audience for the *Manual* is broad: legal advisors, military officers (including military commanders in the field and individual members of aircrews), and humanitarian practitioners. The expectation is that the *Manual* will be used during the development of rules of engagement, the writing of domestic military manuals, the preparation of training courses and during the conduct of combat operations.

Why was the *Manual* considered necessary? There is very little treaty law dealing specifically with air and missile warfare. The well-known 1923 *Hague Rules of Air Warfare* were never adopted as a treaty.⁷ The earlier Hague law on the launching of projectiles and explosives from balloons expired in 1905, and in any event only ever had limited acceptance and applicability.⁸ The subsequent 1907 Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons,⁹ while technically still in force, is generally considered to no longer

⁵ For the rationale behind this, see *id.*, p. 6.

⁶ See Rule 2.(a). For the rationale behind this decision, see *id.*, p. 6.

⁷ As to whether the 1923 Hague Rules of Air Warfare reflect customary international law see ICTY, Trial Chamber I, *Prosecutor v. Galić*, IT-98-29-T, Judgement, 5 December 2003, § 57, footnote 103.

⁸ Declaration (IV,1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, The Hague, 29 July 1899, 26 *Martens Nouveau Recueil* (ser. 2) 994.

⁹ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, 3 *Martens Nouveau Recueil* (ser. 3) 745.

have legal effect.¹⁰ The most codified area concerns military medical aircraft.¹¹ The one other specific article concerns airmen parachuting from disabled aircraft.¹² Consequently, the *Manual's* publication is likely to be well received by those who work in this area.

Knowledge of how the *Manual* came to be is important in understanding its usefulness and what 'weight' to give to its text. The process is explained in some detail on the website of the International Humanitarian Law Research Initiative.¹³ In summary, a key recommendation arising out of a January 2003 Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law (which was co-organized by the HPCR and the Swiss Federal Department of Foreign Affairs)¹⁴ was the importance of addressing potential gaps in the present law of armed conflict applicable to high-tech warfare. In particular, air and missile warfare was identified as a key area for further research. It was believed that significant developments in air and missile technology in recent years might present a challenge to conventional understandings and interpretations of how the law affects the means and methods of warfare. Contemporary issues included remotely piloted aircraft,¹⁵ precision-guided weapons, direct participation in hostilities by civilians, computer network attack, exclusion zones, and coalition air operations. As a minimum, it was unclear how the developments at the tactical and strategic levels of air and missile warfare were to be addressed in the prevailing legal framework.

The HPCR proposed a research study to undertake a contemporary codification of international humanitarian law applicable to air and missile warfare. Subsequently, the HPCR became the facilitator of this new project with Professor Yoram Dinstein as Program Advisor. In January 2004, an expert group compiled a comprehensive research portfolio on this area of the law. The group went on to produce, based on a series of in-depth analysis and discussion papers, a first draft of

¹⁰ The Declaration prohibited "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature ... for a period extending to the close of the Third Peace Conference". The Third Peace Conference was never convened. Subsequent State practice is inconsistent with the Declaration.

¹¹ See Chapter VI 1949 GC I and Articles 24–30 AP I.

¹² Article 42 AP I.

¹³ See *supra* note 1.

¹⁴ See Program on Humanitarian Policy and Conflict Research at Harvard University, 'Alabama Process', *International Humanitarian Law Research Initiative*, <http://ihl.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=481>.

¹⁵ Also known as unmanned aerial vehicles or drones.

what was to become the *Manual* in March 2006. Along the way, it was decided that the *Manual* should be modelled on the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.¹⁶ This decision recognised the success of the *San Remo Manual*, which has become a *de facto* ‘standard’ on what is the law of armed conflict at sea.

The Group of Experts ultimately grew to approximately 30 qualified international scholars and practitioners. It included experts from Government circles (military and civilian) and from the International Committee of the Red Cross. All of the experts officially participated in their personal capacity and were not considered to be expressing a national position.¹⁷ To what extent each expert, particularly those drawn from Government/military positions, chose to consult internally among their respective Governments and organisations no doubt varied from expert to expert.

This first draft of the *Manual* was edited and submitted for comment to the representatives from approximately 25 States at the Third Informal High-level Expert Meeting on Current Challenges to International Humanitarian Law, held in Montreux, Switzerland, in May 2006. Based on feedback,¹⁸ the *Manual* underwent further revision. The next main step, and a significant feature of how the *Manual* was produced, was a series of regional consultations. The first of the regional consultations was a workshop in Sydney in November 2007. The workshop was attended by participants from China, Indonesia, Japan, Malaysia, New Zealand, Pakistan, Singapore, the Philippines, the Republic of Korea, Thailand, the United States of America, and Australia. The participants were a mixture of military (both lawyers and non-lawyers), civilian lawyers from departments of defence and other Government departments, and academic institutions. Further regional consultations during 2007–08 occurred in Poland, South Africa, Brazil, China and Canada.¹⁹ The final text of the rules of the *Manual* was adopted by the

¹⁶ L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea: Prepared by a Group of International Lawyers and Naval Experts convened by the International Institute of Humanitarian Law* (Cambridge, Cambridge University Press, 1995).

¹⁷ The names of all the experts and their professional affiliation appear at Program on Humanitarian Policy and Conflict Research at Harvard University, ‘Expert Participants’, *International Humanitarian Law Research Initiative*, <http://www.ihlresearch.org/amw/participants>.

¹⁸ A summary is available at HPRC, *supra* note 14.

¹⁹ For a complete list of the meetings and the States who took part, see Program on Humanitarian Policy and Conflict Research at Harvard University, ‘Appendix

Group of Experts in Bern on 15 May 2009.²⁰

The *Commentary* on the rules was drafted by selected experts from the original Group of Experts, under the supervision of Professor Dinstein and Bruno Demeyere (the HPCR Project Coordinator).²¹ Notwithstanding the smaller group responsible for the *Commentary*, the entire Group of Experts was generally involved in the *Commentary* and did have an opportunity to see an early draft version of the *Commentary*. However, it remains the case that the rules in the *Manual* reflect the views of the members of the Group of Experts, whereas the *Commentary* is regarded as the sole responsibility of HPCR. In this regard, it is particularly noteworthy that:

Consensus for the purposes of the drafting of the ... *Manual* [meant] ... no more than two participants in the Group of Experts had reservations about the language in which the Black-letter Rules are couched (caveats were then inserted in the *Commentary*). Whenever three or more participants in the Group of Experts objected to a given text, it was changed to meet such objections or bridge over conflicting views. In the rare instances in which compromise formulas proved beyond the reach of the Group of Experts, it was agreed to follow in the text the majority view but to give in the *Commentary* full exposure to the dissenting opinions.²²

The specific goals of the *Commentary* are to:

- (a) Expound underlying premises in the black-letter rules and shed light on points that may require greater clarity.
- (b) Elaborate ideas mentioned 'en passant' in the text, and explain decisions taken by the Group of Experts.
- (c) Cite treaties ... and other official instruments (such as recent military manuals), as well as relevant case law, in support of the text. There are no references to academic writings in the *Commentary*, it being understood that the views of scholars will be presented in full in the published research papers

III: List of Information Meetings with State Representatives', *International Humanitarian Law Research Initiative*, <http://www.ihlresearch.org/amw/manual/appendices/appendix-iii-list-of-information-meetings-with-state-representatives>.

²⁰ For a complete list of the meetings of the Group of Experts, see Program on Humanitarian Policy and Conflict Research at Harvard University, 'Appendix II: Sessions of the Group of Experts', *International Humanitarian Law Research Initiative*, <http://www.ihlresearch.org/amw/manual/appendices/appendix-ii-sessions-of-the-group-of-experts>.

²¹ For a list of the Drafting Committee, see Program on Humanitarian Policy and Conflict Research at Harvard University, 'Appendix IV: Drafting Committee: Members & Meetings', *International Humanitarian Law Research Initiative*, <http://www.ihlresearch.org/amw/manual/appendices/appendix-iv-drafting-committee-members-meetings>.

²² *Commentary*, *supra* note 2, p. 4.

underpinning the HPCR Manual.

(d) Address controversial issues not covered by the Black-letter Rules themselves.

(e) Give full expression to differing positions that emerged in the deliberations of the Group of Experts about the substance of the law. The Commentary points out where compromise solutions have been worked out in order to reconcile divergent approaches.

(f) Add to some Black-letter Rules an extrapolation that had originally been included in the black-letter language but was later relegated by the Group of Experts to the Commentary, as a mode of building a consensus for the black-letter phraseology (objections to the wording were often withdrawn on the understanding that a sentence or paragraph - the text of which was agreed upon - will appear in the Commentary rather than in the Black-letter Rule).

(g) Indicate whether the Black-letter Rule is also applicable in non-international armed conflicts.²³

As a general comment, the *Manual* does a commendable job of bringing together the various strands of law applicable to air and missile warfare. The breadth of coverage is extensive. In that respect alone, the *Manual* acts as an excellent primer for the issues that need to be considered when planning an operation, drafting rules of engagement or constructing a comprehensive exercise. The stated aim of restating the law is also laudable. Whether that aim was actually achieved, however, is another matter. I will comment later in this review on where I believe some mistakes were made.²⁴ Importantly, the addition of a *Commentary* allows for clarification, further explanation and reference to authority. While the project's website states that the *Commentary* is "tailor-made to the requirements of the 'ops' officer",²⁵ I commend the *Commentary* to all legal officers when considering the 'black-letter' rules in the *Manual*.

Various parts of the *Manual* and *Commentary* warrant particular mention. A useful section of the *Manual* is the definition section. There are, though, some puzzling omissions. For example, *combatant* is not defined, notwithstanding its frequent use in the rules. As a word with an important legal meaning that is not identical to its dictionary definition, it warranted defining. While the *Commentary* on Rule 10.(b)

²³ *Id.*, p. 5.

²⁴ To the extent that I am critical of some parts of the *Manual* or *Commentary*, that needs to be viewed in the context of a *Manual* with 175 rules and many sub-rules, and a *Commentary* of 300 substantive pages.

²⁵ Program on Humanitarian Policy and Conflict Research at Harvard University, 'About the Manual', *International Humanitarian Law Research Initiative*, <http://www.ihlresearch.org/amw/aboutmanual>.

(i) does provide a definition for *combatant*;²⁶ this is not sufficient. The term ‘combatant’ is used so frequently in the *Manual*, a definition of the term should not be left to the *Commentary* on one specific sub-rule — particularly as the *Manual* may be used without reference to the *Commentary*.

The definition of ‘collateral damage’ in Rule 1.(l) is concerning. The rule states:

‘Collateral damage’ means incidental loss of civilian life, injury to civilians and damage to civilian objects *or other protected objects* or a combination thereof, caused by an attack on a lawful target. (emphasis added)

I am not aware of any legal support for the addition of the italicized words. The *Commentary* states that the definition is drawn from the principle as set forth in Articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of *Additional Protocol I*. None of those articles refer to other than civilians and civilian objects. The issue is important from a military perspective, as can be shown by one straightforward example. Military medical hospitals are protected objects. However, they are not civilian objects. Where a military medical hospital is collocated with a military objective, while the hospital is protected from direct attack, the hospital is not protected from the incidental effects of attack on the nearby military objective.²⁷ Accordingly, collateral damage to military medical units need not be considered when determining the proportionality of an attack on a nearby military objective.

One issue that occurs in a number of spots is the confusion between ‘rules’ and ‘commentary’. Rule 29 provides: “Subject to the circumstances ruling at the time, the following activities are *examples of what may constitute* taking a direct part in hostilities: ...” (emphasis added). The very wording of the ‘rule’ is not in rule-like language. That said, the examples are a very helpful contribution to the debate and warrant close attention. Rule 8 provides: “There is no specific obligation on Belligerent Parties to use precision guided weapons. There may however be situations in which the prohibition of indiscriminate attacks, or the obligation to avoid — or, in any event, minimize — collateral damage, cannot be fulfilled without using precision guided weapons”. The first sentence correctly states the law. The second sentence is clearly better

²⁶ *Commentary*, *supra* note 2, p. 84.

²⁷ For a detailed argument supporting this conclusion, see I. Henderson, *The Contemporary Law of Targeting. Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Leiden, Nijhoff, 2009), pp. 195-196.

suit to being in the *Commentary*. One is left to wonder whether the need to achieve consensus might have led to some compromises as to what was and was not a ‘rule’.

Another example of mixing commentary with rules is provided by Rule 40, which states:

Before an aircraft is attacked in the air, all *feasible* precautions must be taken to verify that it constitutes a military objective. Verification ought to use the best means available under the prevailing circumstances, having regard to the immediacy of any potential threat. Factors relevant to verification may include:

- (a) Visual identification.
- (b) Responses to oral warnings over radio.
- (c) Infrared signature.
- (d) Radar signature.
- (e) Electronic signature.
- (f) Identification modes and codes.
- (g) Number and formation of aircraft.
- (h) Altitude, speed, track, profile and other flight characteristics.
- (i) Pre-flight and in-flight air traffic control information regarding possible flights. (emphasis added)

Everything after the first sentence is commentary. This is particularly so as Rule 1.(q) has already defined *feasible* as meaning: “that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations” – a useful and accurate statement of the law.

As a final example, on the critical issue of what is a ‘military objective’, the *Manual* falls into a common error. Rule 1.(y) states, correctly, that:

‘Military objectives’, as far as objects are concerned, are 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 definite military advantage.

Equally correctly, Rule 10 provides that:

- 10.(a) In accordance with the basic principle of distinction, attacks must be confined to lawful targets.
- (b) Lawful targets are: ... (ii) Military objectives (as defined in Rules 1 (y) and 22);²⁸

²⁸ Rule 22 provides an expanded definition of ‘nature’, ‘location’, ‘purpose’ and ‘use’ as used in Rule 1.(y).

Somewhat redundantly, but understandably in light of the stated desire for the *Manual* to be used by non-lawyers, Rule 25 provides: “Aircraft may be the object of attack only if they constitute military objectives”. The problem arises with Rule 26, which provides: “All enemy military aircraft constitute military objectives, unless protected under Section L of this *Manual*, or as otherwise agreed by the Belligerent Parties under Section N (V)”. There are two problems with Rule 26 being a rule.

First, as matter of international law, no objects are ‘deemed’ military objectives. Both the drafting history to Article 52(2) of *Additional Protocol I* and learned commentary support the view that no objects are *ipso facto* military objectives.²⁹ Second, Rule 26 contradicts Rule 1.(y). Rule 1.(y) requires a ‘test’ to be applied to determine whether an object is a military objective, whereas Rule 26 purports to categorically state that a particular type of object is, in all circumstances, a military objective. Alert to the proceeding points, the drafters of the *Commentary* wrote:

4. Because military aircraft can travel great distances in a short period of time, they are generally available for use throughout a theatre of operations. As a result, their destruction, damage or neutralization will always offer a military advantage to an attacker because it deprives the enemy of their subsequent use, and they will therefore constitute military objectives by nature at all times (see Rule 22 (a)).³⁰

Unfortunately, this just compounds the error. Instead of requiring the test set out in Rule 1.(y) to be applied faithfully, the *Commentary* purports to state categorically that in no circumstances can it ever be possible that an attack on military aircraft would not offer a military advantage. That approach is inconsistent with both the plain reading of Rule 1.(y) and the drafting history of Article 52(2) of *Additional Protocol I*.³¹ Rule 26 would have been better placed as commentary to either Rule 25 or Rule 27, albeit with more qualified language.

²⁹ See the discussion of the drafting history and citations at Henderson, *supra* note 27, pp. 47-49.

³⁰ Commentary, *supra* note 2, p. 111.

³¹ The drafting history for Article 52(2) AP I is set out in Henderson, *supra* note 27, pp. 48-49. In particular, the 1972 conference was presented with a draft in the following terms: “Only those objectives which, by their nature or use, contribute effectively and directly to the military effort of the adversary, *or which are of a generally recognized military interest*, are considered as military objectives” (emphasis added). See ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, ICRC, 1971-1972), Vol. 1, p. 146. If that were the wording of the test for when an object is a military objective, then certain targets would be able to be deemed as military objectives.

A good example of where the *Manual* and *Commentary* get the balance right is the definition of ‘air or airspace’. Rule 1(a) provides the standard definition that “‘Air’ or ‘airspace’ means the air up to the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit”. It is left to the *Commentary* to provide the explanation that this equates to an altitude of approximately 100 km, but that 100 km is not in itself legally accepted in international law.

Rule 105.(b) and the associated commentary are interesting, mainly for what the *Commentary* does not cover. The rule states: “Zones designated for unrestricted air or missile attacks are prohibited”. Paragraph 1 of the commentary to rule provides: “Rule 105 (b) clearly prohibits any form of unrestricted air and missile attacks, i.e. attacks on sight against all objects and persons encountered within the zone without prior target identification or pre-cautionary measures”. When considered from the perspective of a belligerent party, Rule 105.(b) is clearly correct. A party cannot declare all persons or objects inside a geographic zone ‘hostile’ based merely on their presence in that zone. For a person or object to be a lawful target, a person must either be a combatant or take a direct part in hostilities, and an object must satisfy the test for being a military objective. However, at the tactical level, the rule and particularly its commentary are not complete. What the *Commentary* might have made clear is that the ‘prior target identification or pre-cautionary measures’ may have been undertaken outside the cockpit and the aircrew might then be authorised (cleared to engage) *any targets* inside the geographic area without the aircrew having to determine for themselves that a person is a combatant or an unidentified aircraft is an enemy military aircraft.³² For example, the *Commentary* might have distinguished between:

- (a) declaring that any aircraft found inside a zone may be fired upon; and
- (b) advising that all aircraft in a zone have been verified as enemy military aircraft and may be fired upon without further verification.

The first example is an unlawful type of ‘free fire’ zone, whereas the latter is a lawful type. This type of distinction is particularly important where the attacking weapon-system may have the ability to acquire a

³² Subject to cancelling or suspending an attack if, among other things, it *becomes apparent* that the target is not a lawful target (see Rule 35.(a)).

target but cannot verify the nature of the target.³³

The addition of rules and commentary on computer network attack is very welcomed. While not unique to air and missile warfare, this branch of military operations is often practised in air forces. A contemporary statement on this conceptually difficult area will prove of great assistance to lawyers and practitioners.

Section W (Rules 160–4) is particularly noteworthy. Modern campaigns often involve coalitions. When it comes to air and missile warfare, it is not at all unusual for various coalition partners to be involved in one particular operation. For example, various States might contribute to the surveillance and reconnaissance (perhaps through a remotely piloted aircraft), tactical command and control (e.g., through an airborne early warning and control aircraft), air-to-air refuelling, target identification and/or approval (e.g., through a forward air controller or perhaps through a Air Task Order issued out of a Combined Air Operations Centre), and the strike aircraft. Determining the division of legal responsibility in such situations is important, particularly where the States may have different treaty law obligations, be operating under different rules of engagement and, of course, have their own national interests.

The importance of section W is that it “focuses on how legal rights and obligations of a State are affected by the activities of the armed forces of its co-belligerent”.³⁴ Section W can be summarised as stating that where a State may participate in a combined operation with a State that has different international law obligations; and regardless of the multinational command and control arrangements or the territory from which operations are being conducted, a State retains and must meet its own international law obligations. This section brings some much needed clarity to this area of the law.

Ideally, section W will also stimulate further debate and learned commentary. Issues that are touched upon in the *Commentary* but not pursued to resolution include the extent to which one party may cooperate in an attack (e.g., by providing fighter escort to a bomber) where the target of that attack is lawful under one State’s legal obligations but is not lawful under the other State’s. Similarly, what legal obligations, if any, are incurred by State A sharing intelligence with State B where State B then acts in compliance with State B’s

³³ See, in particular, the list of factors relevant to verification as a military objective listed in Rule 40.

³⁴ *Commentary*, *supra* note 2, p. 301.

legal obligations but those same actions would have been contrary to State A's legal obligations. While Rules 161 and 162 make it clear that a State retains responsibility for its own legal obligations, the *Rules* and *Commentary* do not clearly address whether a State can rely on the actions of others in discharging those obligations. For example, a typical strike mission might involve a forward air controller laser-designating a target and an aircraft releasing a laser-guided bomb on to the target. In this scenario, it is legally permissible for the aircrew to rely upon the forward air controller to have determined whether the target is a lawful target. If the target was not a lawful target, then where the forward air controller and the aircrew are from the same State, there is no issue in determining State responsibility. However, if the forward air controller is from State A and the aircrew are from State B, what are the various legal responsibilities where it turns out that the target was not a lawful target and this was ascertainable through the taking of feasible precautions? This comment is not meant as a criticism of the *Rules* or the *Commentary*. Rather, in this area the *Rules* and the *Commentary* have probably gone as far as possible within the declared aim of restating the current customary international law and it is now for States, courts and tribunals, and learned commentators to address the uncertain areas.

As a contemporary and extensive statement of the law applicable to air and missile warfare, both the *Rules* and *Commentary* are a very valuable contribution to the available literature. The breadth of contributors, the time and process taken for the development, and the wise decision to differentiate between *Rules* and *Commentary* all add to the quality of the final product. It is not going too far to assign the *Rules* in particular the status of having 'authority' — i.e., a work that is to be taken seriously. While the *Rules* cannot, and do not claim to be, authoritative, the depth and breadth of scholarship is arguably sufficient to in effect set up a rebuttable presumption. It may not be the law merely because it is in the *Manual*, but there would have to be a cogent argument as to why something that the *Manual* claims to be a rule should not be treated as such. Notwithstanding the issues raised above, the quality of the work, its rigour, the significant effort undertaken to consult broadly and the very useful *Commentary* result in a highly recommended contribution to the field that will no doubt gain the status desired by the project's organisers.

Summary – Résumé – Samenvatting – Zusammenfassung – Riassunto – Resumen

Summary – Manual on International Law Applicable to Air and Missile Warfare: A Review

In 2009, the Program on Humanitarian Policy and Conflict Research at Harvard University published the *Manual on International Law Applicable to Air and Missile Warfare* and an associated *Commentary*. The stated purpose of the *Manual* is to restate the current customary international law governing air and missile warfare. It purports to be neither a draft treaty nor an attempt to develop the law. There is no equivalent publication available, with the nearest similar document being the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. This article summarises the development of the *Manual* and provides a critique of its content. While some doubt is expressed about some aspects of the *Manual*, the article concludes that the *Manual* does an excellent job of achieving its purpose, and that both the *Manual* and *Commentary* are a valuable contribution to the available literature.

Résumé – Manuel sur le droit international applicable à la guerre aérienne et à la guerre des missiles: une critique

En 2009, le Programme sur la politique humanitaire et la recherche sur les conflits de l'université de Harvard a publié le *Manuel sur le droit international applicable à la guerre aérienne et à la guerre des missiles* et un *Commentaire* y afférent. Le *Manuel* vise expressément à compiler le droit international coutumier qui régit la guerre aérienne et la guerre des missiles. Ce document ne se veut pas un projet de traité, ni une tentative de faire évoluer le droit en la matière. Aucune publication équivalente n'est disponible, le document le plus comparable étant le *Manuel de San Remo sur le droit international applicable aux conflits armés sur mer*. Cet article décrit l'élaboration du *Manuel* et propose une analyse critique de son contenu. Même s'il émet quelques réserves sur certains aspects du *Manuel*, l'auteur conclut que l'ouvrage a brillamment atteint son objectif et que le *Manuel* tout comme le *Commentaire* apportent une contribution substantielle à la littérature spécialisée disponible.

Samenvatting – Manual on International Law Applicable to Air and Missile Warfare: een bespreking

In 2009 publiceerde het Program on Humanitarian Policy and Conflict Research van de Universiteit van Harvard de *Manual on International*

Law Applicable to Air and Missile Warfare samen met een daarbij behorende *Commentary*. Het verklaarde doel van dit Handboek is om het huidige internationaal gewoonterecht inzake lucht- en raketoorlog weer te geven. Het wil nadrukkelijk geen ontwerp van verdrag zijn en evenmin trachten het recht te ontwikkelen. Er is geen gelijkwaardige publicatie voorhanden en het meest gelijkaardige document is de *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Dit artikel beschrijft kort de ontwikkeling van het Handboek en omvat een kritische lectuur van zijn inhoud. Hoewel het enkele twijfels uit met betrekking tot bepaalde aspecten van het Handboek, besluit het artikel dat het Handboek zijn doel uitstekend heeft bereikt en dat zowel het Handboek als de Commentaren een waardevolle bijdrage leveren tot de beschikbare vakliteratuur.

Zusammenfassung – *Manual on International Law Applicable to Air and Missile Warfare*: eine Rezension

Im Jahre 2009 veröffentlichte das *Program on Humanitarian Policy and Conflict Research* der Harvard Universität das *Manual on International Law Applicable to Air and Missile Warfare* samt einem dazugehörigen Kommentar. Das erklärte Ziel des Handbuchs ist es, das in Bezug auf den Luftkrieg derzeit geltende Völkergewohnheitsrecht darzulegen. Das Handbuch soll ausdrücklich weder einen Vertragsentwurf noch einen Versuch der Fortentwicklung des Völkerrechts darstellen. Eine äquivalente Publikation ist derzeit nicht verfügbar. Vergleichbar ist das Handbuch allenfalls mit dem *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Der vorliegende Artikel beschreibt die Entstehung des Handbuchs und setzt sich kritisch mit seinem Inhalt auseinander. Obwohl einige Zweifel in Bezug auf einzelne Aspekte des Handbuchs verlautbart werden, wird dargelegt, dass das Handbuch auf eine exzellente Weise seine Bestimmung erfüllt und, in Verbindung mit dem Kommentar, einen wertvollen Beitrag zur Fachliteratur leistet.

Riassunto – Recensione: Il Manuale di diritto internazionale applicabile alla guerra aerea e missilistica

Nel 2009, il Programma di ricerca su ‘Politiche umanitarie e conflitto’ dell’Università di Harvard ha pubblicato il *Manuale di diritto internazionale applicabile alla guerra aerea e missilistica*, con relativo *Commentario*. L’obiettivo segnalato del *Manuale* è quello di ribadire il diritto internazionale consuetudinario che regola attualmente la guerra aerea e missilistica. Il documento non vuole difatti costituire una bozza di convenzione, né un tentativo di sviluppo del diritto

esistente. Da notarsi che non vi è alcuna pubblicazione equivalente, attualmente disponibile. Il documento che gli si avvicina di più è il *Manuale di San Remo sul diritto internazionale applicabile ai conflitti armati in mare*. In tale quadro, questo articolo riassume lo sviluppo del *Manuale*, evidenziando talune criticità. Sebbene possano comunque avanzarsi alcuni dubbi su specifici aspetti del documento, esso finisce per centrare in maniera eccellente i propri obiettivi. In conclusione, può senza dubbio dirsi che sia il *Manuale* che il *Commentario* costituiscano un valido contributo alla letteratura di settore.

Resumen – Manual de derecho internacional aplicable a la guerra aérea y la guerra de misiles: análisis crítica

En 2009, el Programa sobre Políticas Humanitarias e Investigación de Conflictos de la Universidad de Harvard publicó el *Manual de derecho internacional aplicable a la guerra aérea y la guerra de misiles* con un *Comentario* correspondiente. El *Manual* pretende explícitamente compilar el derecho internacional consuetudinario que rige la guerra aérea y de misiles. Este documento no quiere ser un borrador de tratado ni tampoco intenta desarrollar el derecho actual. No existe ninguna publicación equivalente, el documento más comparable es el *Manual de San Remo sobre el derecho internacional aplicable a los conflictos armados en el mar*. Este artículo describe la elaboración del *Manual* y analiza su contenido de manera crítica. Aunque el autor manifiesta algunas reservas acerca de ciertos aspectos del *Manual*, concluye que consigue brillantemente sus objetivos y tanto el *Manual* como el *Comentario* constituyen una contribución sustancial a la literatura disponible.

