



by [Evelyne Schmid](#)
January 14, 2020



On Saturday, the Iranian government admitted that its armed forces inadvertently targeted Ukraine International Airlines flight PS752. An unexamined question in this tragedy is whether Iran violated international humanitarian law (IHL) by targeting the plane, and could the downing of the aircraft even be considered a war crime? If the information we have so far is accurate and the plane was indeed shot down by mistake (which I will assume for the purpose of this analysis), Iran most likely violated the law of armed conflict but did not commit a war crime.

Was there an international armed conflict? If so, where?

[Sign Up for the Early Edition](#)

Featured Articles

[Recap of Recent Articles on Just Security \(Jan 13-17\)](#)
by Just Security

[15 Questions the Media Should Be Asking Lev Parnas](#)
by Viola Glieger and Laura Rozen

On Saturday, the Iranian government admitted that its armed forces inadvertently targeted Ukraine International Airlines flight PS752. An unexamined question in this tragedy is whether Iran violated international humanitarian law (IHL) by targeting the plane, and could the downing of the aircraft even be considered a war crime? If the information we have so far is accurate and the plane was indeed shot down by mistake (which I will assume for the purpose of this analysis), Iran most likely violated the law of armed conflict but did not commit a war crime.

Was there an international armed conflict? If so, where?

The legal classification of the plane downing depends on whether there was an armed conflict at the relevant time, a necessary condition for the application of IHL and the rules that legal regime applies to targeting. The attack on the plane occurred on early Wednesday, January 8, approximately four hours after Iran carried out missile strikes on two airbases housing United States forces in Iraq which was in response to the killing of Soleimani earlier that week. Shortly after takeoff in Teheran, an Iranian short-range missile hit the Ukrainian passenger jet, killing all 176 people on board. Did the preceding military engagements trigger application of IHL?

Common [article 2](#) to the Geneva Conventions is the starting point stating that IHL applies in “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.” It is reasonable to conclude that the downing of the plane took place in the context of an international armed conflict (IAC) involving Iran and the United States and, therefore, IHL applied on Iranian territory. This might seem trite, but it is not. According to Gabor Rona, it is a “[questionable assertion](#).”*

First, the counterstrike by Iran against the military bases in Iraq took place within the context of an IAC between Iran and the United States. The counterstrike was part of a situation in which one or more states had recourse to armed force against another state, a settled definition of an armed conflict. There are difficulties as to the applicability of IHL at the lower threshold of IAC, be it the “[border incursions problem](#)” or the “[first strike problem](#).” The ICRC Commentary affirms the applicability of IHL as soon as two or more states use any level of armed force against each other ([para 243](#)). Given the recent recourse of some states to targeted killings abroad, many have cautioned against affirming the applicability of IHL too quickly given the negative impact this can have on the protection of the right to life, as is outlined in an [article](#) by Agnes Callamard or as participants at a [2015 ICRC panel](#) discussed. Taking the applicability of IHL for granted can also lead to a further erosion of the prohibition of the use of force in interstate relations by entangling two separate enquiries – interstate use of force and targeted killings – from three distinct branches of international law into a single one, as [explained](#) by Anthony Dworkin. Yet, on January 8, IHL was, in my view, clearly applicable. Iran responded militarily to previous armed activity by another state against one of its high-ranking officials. The reasons why an intensity and organizational threshold exists in non-

international armed conflicts, when state authority is challenged internally, do not exist in international armed conflicts. For IHL to be effective on the ground, where the benefit of hindsight is not available, the applicability of IHL to situations such as the Iranian counterstrike must be affirmed.

What about the second issue concerning the territorial applicability of IHL? Contrary to non-international armed conflicts, the geographical applicability of IHL is relatively uncontroversial in IAC. IHL applies to the entire territory of the parties and to all activities linked to the armed conflict. In this IAC, Iran is undoubtedly a party to the conflict and the downing of the plane is linked to the conflict, therefore, IHL applied to the targeting of the aircraft even if the rest of the armed confrontation was deliberately aimed at facilities on Iraqi territory.

Was the downing of the aircraft a war crime?

Let us now consider the consequences of having established the applicability of IHL. The Ukrainian passenger jet is undoubtedly a civilian object. Deliberately targeting it would have been a war crime, but that is hopefully not what is at stake. What is at stake is the alleged error of fact by Iran, i.e. the information that Iran [misidentified](#) the plane as an enemy cruise missile. Even if we assign the mental state of recklessness to war crimes, the Iranian action appears not to cross the threshold.

In an article on NBC, Gabor Rona [asserted](#) that “if the attack was undertaken without sufficient precautions to make sure the target was a military object, that too could be a war crime.”** In an article on NBC, Gabor Rona [asserted](#) that “if the attack was undertaken without sufficient precautions to make sure the target was a military object, that too could be a war crime.”* But violation of the rules that require states to take precautions are not sufficient to establish criminal liability. To what extent war crimes can be committed recklessly has been discussed extensively before the ICTY (e.g. in the [Blaskic](#) case), as [Ralph Janik](#) has pointed out, but under the [Statute of the ICC](#), the relevant war crime explicitly requires proof that attacks were “intentionally directed” at a civilian object. Even under customary law, it would be necessary to show that the perpetrator at least knew that the plane was likely not a military object (awareness of the substantial risk). Unless significant new information is released, the downing of the Ukrainian aircraft did not meet the threshold for war crimes.

[Editor’s note: For more on this topic, see Ryan Goodman, [“Explainer: What Mental State is Required to Commit a War Crime?”](#)]

Precautions: Was Iran obliged to close the airspace? And what about the apparently lost transponder signal?

IHL is much more than a list of war crimes. Inadvertently shooting down a passenger jet can still be a violation of IHL. Acts of negligence in targeting can amount to IHL violations and state responsibility for the behavior of officials who carried out the strike. And a belligerent’s failure to take precautions to safeguard the lives of civilians—as outlined in article 57 of Additional Protocol I to the Geneva Conventions (which also applies as [customary law](#))—are IHL violations too.

Based on the information available today, it is most likely that Iran committed an IHL violation. Each party to the armed conflict has an obligation to take precautions to protect civilians before and during attacks. There are well-established and uncontroversial customary international law rules that required Iran to take constant care “to spare the civilian population, civilians and civilian objects” as well as to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects” (as codified in article 57 of Additional Protocol I).

What did these rules imply in the concrete situation? Tehran airport is near an Iranian military base. The authorities apparently [discussed](#) whether to close the airspace to civilian planes, but this was not done, probably in order to avoid giving the impression that Iran was expecting counterattacks. IHL does not explicitly require belligerent parties to close the airspace to civilian planes during or shortly after planned aerial attacks. But by taking a conscious decision against the closure of the airspace, the Iranian armed forces confirm that they were aware of the potential of civilian airplanes in the wrong place and time. Instead of closing the airspace, there might have been other (but admittedly more limited) ways to take precautions (e.g. by increasing the capacity and monitoring of the

communications channels between civilian air traffic control and the military forces or perhaps diverting civilian routes further away from the Iranian military sites). According to the [New York Times](#), the transponder signal of the aircraft disappeared *before* the missile hit the plane, for reasons that seem [yet unknown](#) but could well be unrelated to the political and military context. Even if the decision to target the object was taken after the loss of the signal, this does not necessarily mean that the object became immediately unidentifiable as a civilian plane. According to the ICRC's [customary IHL study](#), “[m]ilitary commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time,” thus including civilian air traffic information. A civilian airplane signal disappearing should hopefully not have gone unnoticed by civilian air traffic control and [intermittent or faulty transponder signals](#) are not unheard of. According to one [report](#), “the U.S. government has intelligence indicating that Iranians quickly learned they’d made a mistake by downing the plane That includes intercepts indicating that civil aviation officials in Iran knew the plane should not have been a military target.” In any event, in case of doubt, an object must always be presumed civilian (art. 52(3) AP I) and there were many reasons to be doubtful. Unless Iran can present evidence on the precautions that were taken, the mistake is a violation of humanitarian law. As with many other violations of IHL, one with terribly sad consequences for all the families and friends of those killed.

* Gabor Rona provided the following clarification following publication of this article: “The questionable assertion was whether Iran deemed itself at war. Iran has not, to my knowledge, asserted IHL as the basis of any of its uses of force, following the Suleimani drone strike. I was not expressing my own belief concerning application of IHL. I do believe that the US drone strike is a jus ad bellum violation and that, unfortunately, it triggers application of IHL. I agree with you that Iran’s position, like a declaration of war or its absence, is irrelevant to the determination of whether an armed conflict exists” (reproduced with Rona’s permission).

** *Editor’s note:* This *Just Security* article originally read, “In an article on NBC, Gabor Rona asserted incorrectly, that ‘if the attack was undertaken without sufficient precautions to make sure the target was a military object, that too would be a war crime.’” After publication, the NBC piece was changed from “would” to “could,” and this article by Schmid was accordingly revised.

Photo: An Iranian woman walks beneath a poster honoring the victims of a Ukrainian passenger jet accidentally shot down in the capital last week, in front of the Amirkabir University in the capital Tehran, on January 13, 2020 (Atta Kenare/AFP via Getty Images)