

**EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS**



**The Attack on the
Mariupol Drama Theater**
A Legal Assessment

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The Attack on the Mariupol Drama Theater – A Legal Assessment

Executive Summary

This report concerning the attack of 16 March 2022 on the Donetsk Academic Regional Drama Theater in Mariupol, Ukraine, [hereinafter: Mariupol Drama Theater] has been compiled in response to a call by the Center for Spatial Technologies [hereinafter: CST] to the European Center for Constitutional and Human Rights [hereinafter: ECCHR].

On 15 March 2023, one year after the attack, the CST published the video titled [“A CITY WITHIN A BUILDING: The russian airstrike on the Mariupol Drama Theater”](#). Based on a 3D model of the theater and situated testimonies of survivors of the attack undertaken jointly with Forensis and Forensic Architecture, the video tells the story of the self-organized community of persons who sought shelter in the Mariupol Drama Theater after the beginning of the Russian full-scale invasion in Ukraine. As a second part of the study, CST has published an [online archive](#) dedicated to the study of the attack itself.

The present report is aiming to support this project by giving a legal analysis of the attack on the Mariupol Drama Theater. The assessment is concerned with the question whether this attack constitutes an international crime according to the provisions foreseen in the [Rome Statute of the International Criminal Court](#) and thus leads to individual criminal responsibility of those who were involved in the commission.

The report comes to the conclusion that based on the currently available information on the attack, it is overwhelmingly likely that it constituted a war crime by Russian forces. The perpetrators likely intentionally targeted the civilians sheltering in the theater and the theater as a civilian object protected under international humanitarian law. But even in the unlikely event that they were erroneously intending to target a military objective, the foreseeable harm to civilians was clearly excessive compared to any conceivable concrete military advantage, and the attack thus disproportionate.

Furthermore, there are strong indications that the attack on the Mariupol Drama Theater also constituted a crime against humanity. In light of reports on the dramatic extent of air strikes harming civilians and civilian infrastructure and the siege of the city from early March on, there are grounds to believe that the attack on the Mariupol Drama Theater formed part of a widespread and systematic attack on the civilian population of Mariupol. A final assessment would, however, call for more evidence, which is currently difficult to obtain due to the ongoing occupation of Mariupol. This question should thus be part of ongoing and future investigations.

The findings in this report are based on information gathered by CST, particularly summaries of 12 situated testimonies from people who took shelter in the theater as well as an expert opinion on the explosion. Moreover, open-source information, particularly a report by Amnesty International as well as newspaper articles by Associated Press, BBC and the New York Times, but also beyond have been consulted.



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A. International Criminal Law and Airstrikes

The legal framework governing permissible conduct during armed conflicts is provided by international humanitarian law.¹ These norms – slowly and successively adopted in reaction to experiences of grave suffering of both soldiers fighting in armed conflict and civilians affected by it² – have come to enshrine certain fundamental principles in an attempt to ‘humanize’ warfare³, leading the International Criminal Tribunal for the Former Yugoslavia to hold that “[t]he protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law.”⁴

This is most notably reflected in the so-called principle of distinction. According to this basic rule, “[i]n 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 objects and accordingly shall direct their operations only against military objects.”⁵ The International Court of Justice has recognized this obligation to distinguish between combatants and non-combatants as one of the “cardinal principles” of international law and an “intransgressible principle [...] of international customary law”.⁶ It ties in with the prohibition of indiscriminate attacks, which do not clearly distinguish between military objectives and civilian objects.⁷

However, these attempts at ‘humanization’ all work within a logic of legal prioritization of military tactic. The consideration underlying international humanitarian law was from the outset the “desire to diminish the evils of war, as far as military requirements permit”⁸ – and thus always taking into consideration the interest in weakening the military capacity of the other parties to the conflict as a legitimate purpose.⁹ “As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death. [...] To speak of the humanization of humanitarian law or the law of war is thus in many ways a contradiction in terms.”¹⁰

This fundamental tension between this so-called principle of military necessity¹¹ and the effective protection of human life is particularly visible when it comes to air warfare. In line with technological advances, (particularly powerful) states have continuously aimed at employing their air forces instead of leading war on land, thus waging wars in which – despite the euphemistic labeling as “zero-casualty”

¹ In the case of the Russian war of aggression against Ukraine, an international armed conflict, the fundamental provisions are the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18.10.1907 [Hague Regulation 1907], the Geneva Conventions of 12 August 1949 and, crucially, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 08.06.1977 [Additional Protocol I].

² T. Meron, *The Humanization of Humanitarian Law*, AJIL, Vol. 94, 2000, p. 243.

³ C. Stahn, *Between ‘Constructive Engagement’, ‘Collusion’ and ‘Critical Distance’: The International Committee of the Red Cross and the Development of International Criminal Law*, in Robin Geiß et al., *Humanizing the Laws of War*, 2017, p. 186.

⁴ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v Kupreskic et al*, Judgment, Trial Chamber, IT-95-16-T, 14.01.2000, para 521.

⁵ Art. 48 Additional Protocol I.

⁶ International Court of Justice, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 26, 1996, para 434.

⁷ Art. 51(4) Additional Protocol I; ICRC, *Indiscriminate attacks*, available at: https://casebook.icrc.org/a_to_z/glossary/indiscriminate-attacks (last accessed: 19.01.2024).

⁸ Hague Regulation 1907, preamble, para 5.

⁹ ICRC, *Military necessity*, available at: https://casebook.icrc.org/a_to_z/glossary/military-necessity (last accessed: 19.01.2024).

¹⁰ T. Meron, *The Humanization of Humanitarian Law*, AJIL, Vol. 94, 2000, p. 240.

¹¹ ICRC, *Military necessity*, available at: https://casebook.icrc.org/a_to_z/glossary/military-necessity (last accessed: 19.01.2024).

wars¹² due to the lower number of combatants killed – “the civilian casualties far outweighed the casualties taken by the armed forces of those carrying out the attacks.”¹³ Such airstrikes killing civilians are, however, not necessarily prohibited. While intentionally targeting civilians, for example to thereby break the adversary’s morale, as well as indiscriminate area attacks on a large scale are outlawed, strikes on perceived military targets leading to civilian deaths are prohibited only if the strike can be expected to cause harm to civilians or civilian objects which is excessive in relation to the military advantage anticipated. It is thus considered legitimate to kill civilians for military gains, which raises the questions of how humanitarian so-called international humanitarian law actually is.

Moreover, the relevant provisions in international criminal law are even narrower: Not all violations of international humanitarian law trigger individual criminal responsibility but only grave breaches.¹⁴ The legal framework, as it stands, largely privileges commanders and war efforts to the detriment of civilian life and accountability for taking it. First, the Rome Statute of the International Criminal Court foresees that the civilian harm must be ‘clearly’ excessive in comparison to the military advantage, which presupposes that the disproportionality was obvious.¹⁵ Second, the commander’s perspective and knowledge are principally decisive for the assessment of whether an attack could be considered proportionate. This makes the perpetrator “the judge in his own cause”.¹⁶ A prosecution is thus effectively only conceivable in very clear-cut cases, in which it can be deduced from the evidence available that those ordering or executing the attack intentionally targeted civilians or knew that a large number of civilians would die in a strategically insignificant attack on perceived military targets. Hence, there have so far hardly been any convictions for air strikes whatsoever, leading to considerable lacunae in accountability.

To remedy these shortcomings, the legal framework around airstrike decisions needs to be reformed. At the very least, the rules of engagement and targeting policies should respect human rights obligations in a stronger fashion. When civilians are likely to be affected by a strike, their rights to life and physical and mental integrity warrant for a more principled, rigid definition of the preconditions for lawfully ordering these strikes. While a complete ban on killing civilians for military gain would be desirable, at least the requirements of proportionality should be better defined.

The Russian war of aggression, characterized by relentless airstrikes on cities all over Ukraine, illustrates the urgent need for a legal framework adequately capturing air warfare and thus contributing more effectively to the protection of civilians and to holding those accountable who harm them. Whether prosecutorial authorities will set precedents in prosecuting Russian air attacks remains to be seen. This report comes to the conclusion that the airstrike by Russian forces against the Mariupol Drama Theater constitutes one of the exceptionally clear-cut cases which are already covered by the framework of international criminal law as it currently stands – and will thus hopefully lead to accountability.

¹² ICRC, Air warfare, available at: <https://casebook.icrc.org/law/air-warfare> (last accessed: 19.01.2024).

¹³ Pointing to the conflicts in the Gulf, Afghanistan and Kosovo is C. Byron, *International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage*, Yearbook of International Humanitarian Law, vol. 13, 2010, p. 208.

¹⁴ Art. 85 Additional Protocol I; concerning airstrikes see first and foremost Art. 8(2)(b)(i), (ii), (iv) Rome Statute.

¹⁵ Art. 8(2)(b)(iv) Rome Statute; ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13.06.2000, para 21; not considering such an obvious excessiveness necessary are W. Schabas, *The International Criminal Court*, Commentary, 2010, p 230 f; ICRC, Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1/L.53, A/CONF.183/INF/10.

¹⁶ M. Bothe, War Crimes, in: A. Cassese/P. Gaeta/J. Jones (eds), *The Rome statute of the international criminal court: a commentary*, vol I., 2002, p. 400.



B. Legal Assessment of the Attack on the Mariupol Drama Theater

After the beginning of the full-scale invasion of Russian troops in Ukraine, Mariupol very quickly came under massive attack, siege and ultimately occupation [I.]. In this situation, the Mariupol Drama Theater served as a humanitarian hub and shelter for thousands of civilians awaiting evacuation from the city. On 16 March 2022, the theater was destroyed in an airstrike. Russia denies any involvement in the attack. [II.] The information available does, however, strongly suggest that the airstrike was in fact undertaken by Russian troops and constitutes a war crime [III.]. While it is at present difficult to say with certainty whether it can also be prosecuted as crime against humanity, there are strong indications into this direction which should form part of any ongoing or future investigation of the attack [IV.].

I. Context of the Attack

Already since 2014, an increasingly escalating armed conflict with Russian-controlled armed groups has been taking place on the territory of Ukraine.¹⁷ On 24 February 2022, this reached the stage of a now open war of aggression by Russia against Ukraine¹⁸ with an incursion of Russian troops across various Ukrainian border crossings as well as attacks from the already occupied territories, from the air and from the Black Sea.¹⁹ Ground forces advanced from the north from the Belarusian border to Kyiv and Chernihiv, in the north-east to Kharkiv and Sumy, and in the south to Kherson, Mykolaiv, the Zaporizhzhya region and Mariupol.²⁰ This was accompanied by massive armed clashes in the Donetsk and Luhansk regions of eastern Ukraine that continue to this day. Attacks by Russian ground, air and naval forces targeted all parts of Ukraine, with the majority of hostilities occurring in or near densely populated areas including large cities such as Chernihiv, Kharkiv, Kherson, Mykolaiv, as well as Mariupol.²¹

The fighting concerning the strategically important city of Mariupol started immediately after the onset of the invasion. Part of the warfare were frequent attacks by the Russian air force. All of the twelve witnesses who gave situated testimonies to CST described the constant bombing of the city by airplanes. These accounts are corroborated by video footage of 15²² and 16 March 2022²³ taken in the immediate vicinity of the Mariupol Drama Theater which is showing the overflight of planes accompanied by

¹⁷ European Court of Human Rights, *Ukraine and the Netherlands v. Russia*, Appl. Nos. 8019/16, 43800/14, 28525/20, 25.01.2023, para. 695; Council of Europe Commissioner for Human Rights, *Memorandum on the human rights consequences of the war in Ukraine*, 08.07.2022, CommDH(2022)18, para. 1.

¹⁸ UN General Assembly, *Resolution ES-11/1. Aggression against Ukraine*, 02.03.2022, A/RES/EX-11/1, para. 3 f.

¹⁹ UN Human Rights Council (UNHRC), *Report of the Independent International Commission of Inquiry on Ukraine*, 18.10.2022, A/77/533, available at: <https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf> (last accessed: 19.01.2024), para. 24.

²⁰ UNHRC, *ibid*, paras. 27 f., 29, 30.

²¹ Office of the High Commissioner for Human Rights (OHCHR), *Report on the Human Rights Situation in Ukraine, 1 February to 31 July 2022*, 27.09.2022, available at: <https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-february-31-july-2022> (last accessed: 19.01.2024). p. 10, para. 19.

²² CST, Video titled 'telegram-cloud-document'.

²³ CST, Video titled 'just after the attack'.



audible shelling as well as by reports of downed Russian airplanes in Mariupol.²⁴ The Russian airstrikes also hit civilian infrastructure such as a maternity hospital on 9 March.²⁵

The city was encircled from 2 March 2022 onwards²⁶ with Russian forces blocking the streets²⁷ and Ukrainian forces trying to defend the city. The supply of water, gas, heat and electricity stopped in the beginning of March²⁸ and Mariupol was effectively cut off communication with the outside world. The civilian population stuck in the city was hoping for evacuation corridors and sought shelter in their own homes or – with Russian troops advancing and airstrikes destroying many buildings – often had to resort to public shelters.²⁹

On 16 March 2022, Mariupol was still besieged and fighting ongoing. The frontline closest to the Mariupol Drama Theater was reportedly approximately 3 kilometers away.³⁰ On 18 March, Russian forces claimed to have entered the center of Mariupol³¹, by 30 March, the city was completely occupied except for the Azovstal steel factory.³² The Ukrainian forces still fighting from the latter surrendered on 20 May 2022. Mariupol has been under Russian occupation since.

In the aftermath of the siege and the relentless airstrikes on the city, there have been reports about satellite images of mass burial sites near Mariupol.³³ Ukrainian authorities estimate that at least 25.000 people were killed in the fighting, with 5.000 to 7.000 dying under the rubble of collapsed houses after airstrikes.³⁴ According to the UN High Commissioner for Human Rights, the death of 1,348 civilian persons had been verified by June 2022, with the death toll “likely thousands higher”.³⁵ Moreover, 90 percent of residential buildings and up to 60 percent of private houses had been destroyed.³⁶

²⁴ Mariupol City Council, Plane of Russian invaders was shot down near Mariupol, 28.02.2022, available at: <https://mariupolrada.gov.ua/en/news/pid-mariupolem-zbili-litak-rosijskih-okupantiv> (last accessed: 19.01.2024).

²⁵ Mariupol: Key moments in the siege of the city, BBC News, 17.05.2022, available at: bbc.com/news/world-europe-61179093 (last accessed: 19.01.2024); K. Polglase/G. Mezzofiore/L. Doherty, Anatomy of the Mariupol hospital attack, CNN, 17.03.2022, available at: <https://edition.cnn.com/interactive/2022/03/europe/mariupol-maternity-hospital-attack/index.html> (last accessed: 19.01.2024).

²⁶ Mariupol: Key moments in the siege of the city, BBC News, 17.05.2022, available at: bbc.com/news/world-europe-61179093 (last accessed: 19.01.2024); M. Hunder, Timeline: Russia’s siege of the Ukrainian city of Mariupol, Reuters, 30.03.2022, reuters.com/world/europe/russias-siege-ukrainian-city-mariupol-2022-03-30 (last accessed: 19.01.2024); on the situation during the siege see also the film 20 Days in Mariupol by M. Chernov, trailer available at: <https://20daysinmariupol.com> (last accessed: 19.01.2024).

²⁷ Amnesty, „Children” – The attack on the Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine, 2022, available at: <https://www.amnesty.de/sites/default/files/2022-06/Amnesty-Bericht-Ukraine-Russland-Kriegsverbrechen-Bombenangriff-Theater-Mariupol-Juni-2022.pdf> (last accessed: 19.01.2024), p. 10 [hereinafter: Amnesty Report].

²⁸ OHCHR, High Commissioner updates the Human Rights Council on Mariupol, Ukraine, 16.06.2022, available at: <https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine> (last accessed: 19.01.2024).

²⁹ Amnesty Report, p. 10

³⁰ Live map Ukraine, available at: <https://liveuamap.com/en/time/15.03.2022> (last accessed: 08.08.2023).

³¹ Mariupol: Key moments in the siege of the city, BBC News, 17.05.2022, available at: bbc.com/news/world-europe-61179093 (last accessed: 19.01.2024).

³² OHCHR, High Commissioner updates the Human Rights Council on Mariupol, Ukraine, 16.06.2022, available at: <https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine> (last accessed: 19.01.2024).

³³ H. Andersson, The agony of not knowing, as Mariupol mass burial sites grow, BBC, available at: <https://www.bbc.com/news/world-europe-63536564> (last accessed: 19.01.2024).

³⁴ H. Andersson, *ibid.*

³⁵ OHCHR, High Commissioner updates the Human Rights Council on Mariupol, Ukraine, 16.06.2022, available at: <https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine> (last accessed: 19.01.2024).

³⁶ OHCHR, *ibid.*

II. The Attack on the Mariupol Drama Theater

1. The Mariupol Drama Theater

The Mariupol Drama Theater was built in 1960 and constituted a cultural landmark of the city located in the Tsentralnyi District. It was a widely visible and isolated building³⁷ surrounded by two squares to the East and West and surrounded by trees with “no other obvious structure within 100m”.³⁸

From the beginning of the full-scale invasion, the theater served as one of the public shelters and gathering points for possible evacuations. Immediately after the invasion started, the city government already posted online that the Mariupol Drama Theater could be used as a shelter.³⁹ On 4 March, there was a public announcement that a humanitarian corridor would be opened with the Mariupol Drama Theater being one possible meeting point.⁴⁰ After the evacuation was canceled on 5 March 2022, “several hundred people decided to stay at the theatre” which led to a drastic increase in the number of inhabitants of the Drama Theater.⁴¹ Thereafter, further civilians fled from the fighting and the airstrikes kept coming. Based on extensive interviews, photographs and videos analysis, the CST believes that at the peak of its population, 2000 people were sheltering in the theater.

Accounts as to the number of civilians still present in the Mariupol Drama Theater on 16 March 2022 vary. On 14 and 15 March 2022, many people – particularly those with cars – left the shelter because a humanitarian corridor had been opened.⁴² At the same time, new people were arriving at the theater from other parts of the city to escape the fighting there.⁴³ The estimates range between approximately 300 and 1.300 civilians.⁴⁴ Based on spatial analysis of the building, analysis of photographs and videos as well as witness testimonies, CST estimates that at the time of the attack, the number of people roughly halved in comparison to the peak of its population and thus still amounted to about 1000 civilians, whereas significantly lower accounts appear very unlikely.

The theater served as a humanitarian hub with a clearly visible “civilian pattern of life”.⁴⁵ As illustrated by the accounts of the survivors who spoke to CST, the theater became a “city within a building”, a

³⁷ J. Verini, Witnesses to the Massacre in Mariupol, 04.09.2022, available at: <https://www.nytimes.com/2022/09/01/magazine/ukraine-mariupol-theater.html> (last accessed: 19.01.2024).

³⁸ G. Collett, Explosive engineering assessment – Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine, 15.11.2022, p. 3.

³⁹ J. Verini, Witnesses to the Massacre in Mariupol, 04.09.2022, available at: <https://www.nytimes.com/2022/09/01/magazine/ukraine-mariupol-theater.html> (last accessed: 19.01.2024).

⁴⁰ Amnesty Report, p. 14.

⁴¹ Amnesty Report, p. 15.

⁴² Amnesty Report, p. 22.

⁴³ Amnesty Report, p. 25.

⁴⁴ Amnesty Report, p. 3, 43; Mariupol: Key moments in the siege of the city, BBC News, 17.05.2022, available at: [bbc.com/news/world-europe-61179093](https://www.bbc.com/news/world-europe-61179093) (last accessed: 19.01.2024); J. Verini, Witnesses to the Massacre in Mariupol, 04.09.2022, available at: <https://www.nytimes.com/2022/09/01/magazine/ukraine-mariupol-theater.html> (last accessed: 19.01.2024); Human Rights Watch (HRW), Ukraine: Mariupol Theater Hit by Russian Attack Sheltered Hundreds, 16.03.2022, available at: <https://www.hrw.org/news/2022/03/16/ukraine-mariupol-theater-hit-russian-attack-sheltered-hundreds> (last accessed: 19.01.2024); H. Bachega/O. Khimiak, A bomb hit this theatre hiding hundreds - here's how one woman survived, BBC, 22.03.2022, available at: <https://www.bbc.com/news/world-europe-60835106> (last accessed: 19.01.2024); L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024); W. Benedek/V. Bílková/M. Sassòli, Report on Violations of International Humanitarian Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022, 13.04.2022, available at: <https://www.osce.org/files/f/documents/f/a/515868.pdf> (last accessed: 19.01.2024), p. 48.

⁴⁵ Amnesty Report, p. 63.

civilian self-organized way to survive the Russian siege.⁴⁶ A field kitchen was set up outside of the theater with inhabitants taking turns in cooking there and on fires in the surrounding areas.⁴⁷ Almost all of the witnesses interviewed by CST described that they went outside to cook or to queue for water in front of the theater, including on the morning of 16 March. Many cars of the inhabitants were parked on the squares in front of the theater. Already around 13 March, the word “CHILDREN” spelled in Russian was written in front and at the back of the theater in large capital letters visible from planes.⁴⁸

On 11 March 2022, soldiers of the Azov regiment filmed a video showing the civilian life in the theater, including the various floors crowded with people, the shortness in basic supplies and the attempts to treat sick and wounded civilians in the theater.⁴⁹ Besides one soldier on camera interviewing a witness and presumably one filming, no further military personnel are visible anywhere. Apart from this isolated visit of the theater by military personnel, witnesses described that every day “a small number of police or military – usually one or two people – would come and share information”⁵⁰, particularly on possible evacuations, or to drop off further civilian evacuees.⁵¹ They also provided the inhabitants of the shelter with humanitarian aid such as the infrastructure for the field kitchen, food, diapers, and medical supplies.⁵² These items were stored and distributed from a “warehouse” in the theater.⁵³ According to one witness, the drop-offs usually took 10 to 15 minutes.⁵⁴ While two witnesses who spoke to CST described that from what they had seen the military personnel always stayed outside, according to a report by Amnesty, another witness recollected that they would only occasionally and briefly come into the theater on these occasions.⁵⁵

Beyond these regular very short visits, there are accounts of witnesses who spoke to CST describing that two or three individual members of the Ukrainian Territorial Defence Forces slept in the theater at night, though it is unclear whether they did so regularly or only occasionally. The report by Amnesty similarly describes an account of one witness who “told investigators she saw four members of the military sleeping in the theater several nights before the attack; another said she heard that a few members of the military were eating in the theater one evening before the attack, but she never saw them herself.”⁵⁶ Additionally, the Amnesty report describes that “[f]our people said they were told (possibly from the same person) that the Ukrainian military was in the Taruta Centre – a group of buildings 100-150m away from the theater – on the morning of the attack, but none saw any soldiers. ‘[After we heard that soldiers might be nearby] we barricaded [some of] the doors in case the war came to us, but no soldiers came to the theater before the attack,’” a witness told Amnesty.⁵⁷

⁴⁶ CST, A CITY WITHIN A BUILDING: The Russian airstrike on the Mariupol Drama theater Part 1, 15.03.2023, available at: <https://www.youtube.com/watch?v=j4EOd5kvCfg> (last accessed: 19.01.2024).

⁴⁷ CST, *ibid.*, time stamp 12.44 ff.

⁴⁸ Amnesty Report, p. 4, 63.

⁴⁹ Mariupol Shelter Theater [Маріуполь. Театр-укриття], 11.03.2022, available at: www.youtube.com/watch?v=_nsVWyzKQJU (last accessed: 19.01.2024).

⁵⁰ Amnesty Report, p. 15.

⁵¹ Amnesty Report, p. 25.

⁵² J. Verini, Witnesses to the Massacre in Mariupol, 04.09.2022, available at: <https://www.nytimes.com/2022/09/01/magazine/ukraine-mariupol-theater.html> (last accessed: 19.01.2024); Amnesty Report, p. 25.

⁵³ Amnesty Report, p. 20.

⁵⁴ Amnesty Report, p. 25.

⁵⁵ Amnesty Report, p. 25.

⁵⁶ Amnesty Report, p. 26.

⁵⁷ Amnesty Report, p. 27.

No other witness testimonies or reports potentially hint at the presence of military personnel or military objects at the moment of the attack on the Mariupol Drama Theater – to the contrary, the Amnesty report points out that based on satellite images, no large, armored vehicles, artillery or other military objects could be identified in the vicinity.⁵⁸

2. The Airstrike on the Theater

On 16 March 2022, shortly after 10am, the Mariupol Drama Theater was attacked. Various victims described that they heard or even saw a plane.⁵⁹

The airstrike hit the roof over the performing area of the theater. As satellite images taken after the attack as well as video and photographic material show, the impact of the strike was massive: The structure of the building was significantly damaged, the back part of the building destroyed. Debris fell to both north and south side of the building burying the field kitchen in the south underneath it.⁶⁰

Witnesses described many people being severely injured by the attack.⁶¹ Estimations of how many were killed vary: Ukrainian authorities declared that approximately 300 persons had died.⁶² Based on floor plans, interviews with survivors, videos and pictures, an Associated Press report concluded that it could have been up to 600 people.⁶³ Amnesty was able to verify the death of twelve victims through witness interviews as well as a review of reports in the media, pointing out that “it is likely that many additional fatalities remain unreported.”⁶⁴ Further investigations in the theater could not be undertaken since Russian forces occupied the area shortly after and ultimately entirely demolished the building in December 2022.⁶⁵

Ukrainian authorities blamed Russia for dropping a bomb on the theater.⁶⁶ The Russian government and Ministry of Defence denied that Russian forces had attacked the theater claiming that it was a false flag

⁵⁸ Amnesty Report, p. 37.

⁵⁹ Amnesty Report, p. 32. V. Noskov/D. Volokha ‘They were trying to kill me, but I wasn’t killed.’ — a story of a woman who saw the airstrike on the Drama Theater in Mariupol, 06.10.2022, Human Rights in Ukraine, available at: <https://khp.org/en/1608811239> (last accessed: 19.01.2024); L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

⁶⁰ Amnesty Report, p. 28; L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

⁶¹ Amnesty Report, p. 46 ff.

⁶² Мариупольська міська рада [Mariupol City Council], К сожалению, начинаем этот день с плохих новостей. От очевидцев появилась информация о том, что в Драматическом театре Мариуполя в результате бомбардировки русским самолетом погибло около 300 человек [Unfortunately, we start the day with bad news. From eyewitnesses reports that the Mariupol Drama Theater was bombed by a Russian plane. Bombing by a Russian airplane killed about 300 people.], 25.03.2022, available at: <https://t.me/mariupolrada/8999> (last accessed: 19.01.2024).

⁶³ L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024); War Crimes Watch Ukraine, Aerial bomb strikes theater filled with people in Mariupol, killing as many as 600 people, including children, 17.03.2022, available at: <https://www.pbs.org/wgbh/frontline/interactive/ap-russia-war-crimes-ukraine/?facets=Mariupol%7C%7CCivilian+Deaths> (last accessed: 19.01.2024).

⁶⁴ Amnesty Report, p. 3.

⁶⁵ CST, A CITY WITHIN A BUILDING: The russian airstrike on the Mariupol Drama theater Part 1, 15.03.2023, available at: <https://www.youtube.com/watch?v=j4EOd5kvCfg> (last accessed: 19.01.2024).

⁶⁶ И. Бойко [I. Boyko], "Очередное военное преступление режима Путина": МИД о бомбардировке театра в Мариуполе ["Another war crime of the Putin regime": the Foreign Ministry on the bombing of the theater in Mariupol], 16.03.22, available at: <https://www.unian.net/war/voyna-v-ukraine-mid-otreagiroval-na-bombardirovki-teatra-v-mariupole-novosti-vtorzheniya-rossii-na-ukrainu-11746801.html> (last accessed: 19.01.2024).

operation by the Ukrainian forces' Azov regiment which had blown the theater up from within and allegedly set up its headquarters in the theater and taken civilians there hostage to use the theater as a cover to shoot from.⁶⁷ It was furthermore suggested that Ukrainians had fired on the theater with tanks.⁶⁸

III. The Attack as a War Crime

Based on the currently available information summarized in Section II., the attack on the Mariupol Drama Theater constituted a war crime under the Rome Statute of the International Criminal Court by members of the Russian military. The available evidence strongly suggests that the attack was committed by Russian forces [1.]. The perpetrators likely intentionally targeted the civilians sheltering in the theater and the theater as protected civilian object [2.]. But even in the event that they erroneously considered the Mariupol Drama Theater to be a military objective, the foreseeable harm to civilians was clearly excessive compared to any conceivable concrete military advantage, and the attack was thus disproportionate [3.].

1. Commission of the Attack by the Russian Military in the Context of an International Armed Conflict

Based on the available evidence, it is highly likely that the destruction of the Mariupol Drama Theater was brought about by an airstrike with one or two 500kg bombs carried out by the Russian military in the context of the war of aggression against Ukraine, an international armed conflict.

The commission of a war crime presupposes that the potentially criminal conduct be committed “in the context of” an armed conflict⁶⁹ and thus that the existence of the conflict played a substantial part in the perpetrators ability or motivation to commit the crime or the manner in which it was committed.⁷⁰ The Russian war of aggression against Ukraine is an international armed conflict⁷¹, which was decisive for the commission of the attack on the Mariupol Drama Theater.

While the Russian authorities have denied responsibility for the attack, accusing Ukrainian forces of blowing up the theater from within as a false flag operation, they have not provided any evidence to

⁶⁷ В Минобороны РФ опровергли обвинения в якобы нанесении авиаудара по зданию драмтеатра в Мариуполе [The Russian Ministry of Defence refutes accusations of allegedly hitting the Mariupol Drama Theatre with an air strike], 17.03.2022, available at: <https://tvzvezda.ru/news/2022316210-pDXTh.html> (last accessed: 19.01.2024); Azov battalion militant blow up Mariupol theatre building – Defense Ministry, TASS: Russian News Agency, 16.03.2022, tass.com/world/1423275 (last accessed: 08.08.2023); Неонацисты "Азова"* взорвали мариупольский драмтеатр с сотнями гражданских внутри [Neo-Nazis from Azov [military unit] blew up the Mariupol Drama Theatre with hundreds of civilians inside], 17.03.2022, available at: https://tsargrad.tv/news/neonacisty-azova-vzorvali-mariupolskij-dramteatr-s-sotnjami-grazhdanskih-vnutri_512898 (last accessed: 08.08.2023); Д. Пирогова [D. Ёоргогрова], Минобороны РФ: боевики «Азова» взорвали театр в Мариуполе [According to the Russian Ministry of Defence, militants from Azov [military unit] blew up the theatre in Mariupol], 17.03.2022, available at: <https://ura.news/news/1052539074> (last accessed: 19.01.2024).

⁶⁸ Украинские боевики специально расстреляли театр в Мариуполе, заявили в ДНР [Donetsk People's Republic claims that Ukrainian militants targeted the theatre in Mariupol], 17.03.2022, available at: <https://ria.ru/20220317/mariupol-1778649842.html> (last accessed: 08.08.2023).

⁶⁹ See R. Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2010/2011, p. 285.

⁷⁰ See R. Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2010/2011, p. 286; ICTY, *Prosecutor v. Kunarac, IT-96-23 & 23/1, Judgment, Appeals Chamber*, 12.06.2002, para 58.

⁷¹ UNHRC, *Report of the Independent International Commission of Inquiry on Ukraine*, 18.10.2022, A/77/533, available at: <https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf> (last accessed: 19.01.2024), para 17.



authenticate these claims.⁷² Their further claim not to hit civilian sites in Ukraine has been refuted many times – including in Mariupol.⁷³

On the contrary, the available evidence suggests that the attack was undertaken by a Russian airplane dropping one or two bombs on the Mariupol Drama Theater. Several witnesses described hearing an aircraft immediately before the strike. One even reported to have seen it launch two explosives towards the theater, another to have heard the sound of bombs dropping.⁷⁴

There does not seem to be any open-source information on remnants of the weapons. However, Amnesty, Associated Press, BBC and CST have all interviewed or assigned experts with analyzing the attack and have on the basis of their results all come to the conclusion that the impact and scope of the destruction as visible on satellite images, pictures and videos support the contention that the theater was most likely hit by one or possibly two 500-kilogram bombs dropped from a plane.⁷⁵ Mark Cancian, an explosives analyst at the Center for Strategic and International Studies and a former artillery officer interviewed by Associated Press, pointed out that the destruction is “much too much for an artillery shell”.⁷⁶ Analysts of the McKenzie Intelligence Services stated that “[d]ue to the missile appearing to accurately hit the centre of the building, [they] believe[d] it [was] a laser-guided bomb, likely the KAB-500L or similar variant, launched from an aircraft”.⁷⁷ An expert opinion prepared for CST similarly found that – against the background of the engagement scenario and current Russian Federation warfare doctrine – the airstrike had likely been undertaken with one or two KAB-500S-E guided bombs, but that unguided bombs could not be excluded.⁷⁸ Based on the way how and into which directions debris had been thrown out and the fact that there is no visible crater, the opinion concluded that “with a high degree of confidence, [...] at least one large item of ordnance entered through the frangible roof and detonated shortly thereafter” between the roof space and the performing stage.⁷⁹

As Amnesty pointed out, there is no evidence supporting that – instead of a Russian airplane – it could have been a Ukrainian one which dropped the bombs: Apart from the fact that not even Russia raised this claim, no Ukrainian aircrafts were reported in Mariupol and the rocket motor characteristic for the sole ballistic missile used at this point by Ukraine – the Tochka-U – was not found at the site of the attack.⁸⁰

⁷² Ukraine says Russia strikes Mariupol theatre sheltering residents, Moscow denies attack, Reuters, 16.03.2022, available at: <https://www.reuters.com/world/russian-bombing-hits-theatre-mariupol-sheltering-residents-city-council-2022-03-16/> (last accessed: 19.01.2024).

⁷³ H. Bacheга/O. Khimiak, A bomb hit this theatre hiding hundreds - here's how one woman survived, BBC, 22.03.2022, available at: <https://www.bbc.com/news/world-europe-60835106> (last accessed: 19.01.2024).

⁷⁴ Amnesty Report, p. 32. V. Noskov/D. Volokha ‘They were trying to kill me, but I wasn't killed.’ — a story of a woman who saw the airstrike on the Drama Theater in Mariupol, 06.10.2022, Human Rights in Ukraine, available at: <https://khpg.org/en/1608811239> (last accessed: 19.01.2024); L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

⁷⁵ For an overview see Amnesty Report, p. 32 ff., discussing various scenarios.

⁷⁶ L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

⁷⁷ H. Bacheга/O. Khimiak, A bomb hit this theatre hiding hundreds - here's how one woman survived, BBC, 22.03.2022, available at: <https://www.bbc.com/news/world-europe-60835106> (last accessed: 19.01.2024).

⁷⁸ G. Collett, Explosive engineering assessment – Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine, 15.11.2022, p. 3.

⁷⁹ G. Collett, *ibid.*, p. 4, 6.

⁸⁰ Amnesty Report, p. 39 f.

The reports and expert opinions also refuted the Russian claim that the theater had been blown up from within.⁸¹ This would have presupposed that someone had been “able to suspend a large mass of explosive above the performing stage.”⁸² None of the witnesses interviewed by the organizations, including CST, mentioned that soldiers had set up their headquarters in the building let alone that they had placed a bomb of several hundred kilos on or above the stage.⁸³ Given that likely around 1000 but in any event several hundred people were still living in the theater, it is, moreover, inconceivable that civilians would not have noticed the preparations and tried to stop the soldiers or flee the theater. Instead, the witnesses describe that at the time of the attack they were cooking, eating, or moving freely around the theater as they had on other days.⁸⁴ Additionally, the area of the stage served as a transit area to reach the medical room, food storage facilities and the internal kitchen. Two of the witnesses passed through this area 10 to 15 minutes before the attack.

Against this background, it can be concluded that the perpetrators of the attack were with a very high likelihood members of the Russian military. While the direct perpetrators were the ones who flew the plane and dropped bombs on the theater⁸⁵, their commanders⁸⁶ and other soldiers aiding them in conducting the strike⁸⁷ could also incur individual criminal responsibility.

2. Intentional Attack Against Civilians and Civilian Objects

While the motivation of the Russian military for the attack is ultimately unclear, given the obvious civilian nature of the building and its exposed, isolated location, the most likely scenario is that it was targeted by Russian forces in the knowledge that it was a civilian object and that civilians were sheltering inside. On the basis of the currently available information on the attack, it thus likely constituted a war crime under the Rome Statute in the sense of an intentional attack against the civilian population as such or against individual civilians not taking direct part in hostilities⁸⁸ and against civilian objects, that is, objects which are not military objectives⁸⁹.

a. Attack Against Civilians and the Theater as Specially Protected Building of Art

The commission of an intentional or targeted attack against civilians or civilian objects presupposes the actual commission of a military attack, while causing actual harm is not necessary.⁹⁰

⁸¹ Amnesty Report, p. 40; W. Benedek/V. Bílková/M. Sassòli, Report on Violations of International Humanitarian Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022, available at: <https://www.osce.org/files/f/documents/f/a/515868.pdf> (last accessed: 19.01.2024), p. 48.

⁸² G. Collett, Explosive engineering assessment – Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine, 15.11.2022, p. 6.

⁸³ See also L. Hinnant/M. Chernov/V. Stepanenko, AP evidence points to 600 dead in Mariupol theater airstrike, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

⁸⁴ Amnesty Report, p. 40

⁸⁵ See Art. 25 Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, available at: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (last accessed: 19.01.2024) [Rome Statute].

⁸⁶ See Art. 25(3)(b) or Art. 28 Rome Statute.

⁸⁷ See Art. 25(3)(c) Rome Statute.

⁸⁸ Art. 8(2)(b)(i) Rome Statute.

⁸⁹ Art. 8(2)(b)(ii) and (ix) Rome Statute.

⁹⁰ See G. Werle/F. Jeßberger, *Völkerstrafrecht*, 2016, p. 615, para 1342.

Such an attack must have been directed against civilians not taking direct part in hostilities. Civilians are all persons who are not members of the armed forces⁹¹ and thus combatants.⁹² In case of doubt, a presumption speaks for the status as civilian.⁹³ According to the information collected by CST, about 1.000 civilians were still sheltering inside the theater at the time of the attack who became the object of the attack.

Even if at the time of the attack individual Ukrainian soldiers, members of the Ukrainian Territorial Defence or members of the Ukrainian police should have been present in the vicinity or within the building, this finding would not be altered:

- Members of the Ukrainian police would already not to have been classified as “members of the armed forces”, because they have not been legally incorporated into the armed forces of Ukraine⁹⁴ and were not actively participating in the hostilities but merely providing information and humanitarian aid to the civilians.⁹⁵ Members of the Ukrainian police present would thus have qualified as civilians themselves.
- By contrast, both soldiers⁹⁶ of the Ukrainian armed forces as well as members of the Ukrainian Territorial Defence – and thus of a voluntary group under a command responsible to the state of Ukraine⁹⁷ – are members of the armed forces and qualify as combatants. Such combatants can principally be lawfully targeted. The presence of individual members of the armed forces does not, however, strip the overwhelmingly large number of non-combatants present at the theater of protection from military attacks.⁹⁸ According to the accounts of witnesses interviewed by CST, at most three members of the Territorial Defence may have been present. This would not have led to a loss of the civilian status of the about 1.000 civilians otherwise present.

Moreover, the Mariupol Drama Theater itself was a civilian object specially protected under International Humanitarian Law, namely a building serving the art. Civilian objects are all objects which do not qualify as military objectives – “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.”⁹⁹ Again, in case of doubt whether an otherwise civilian object is used to make an effective contribution to military action, a presumption speaks for the continuous civilian status.¹⁰⁰

⁹¹ Art. 50(1) Additional Protocol I; ICRC, International Humanitarian Law Database, Commentary on Art. 50 Additional Protocol I, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-50/commentary/1987?activeTab=undefined> (last accessed: 19.01.2024), para 1913.

⁹² ICRC, Armed Forces, available at: https://casebook.icrc.org/a_z/glossary/armed-forces (last accessed: 19.01.2024).

⁹³ Art. 50(1)3 Additional Protocol I.

⁹⁴ Organization for Security and Co-operation in Europe (OSCE), Country Profile Ukraine, available at: <https://polis.osce.org/country-profiles/ukraine> (last accessed: 19.01.2024).

⁹⁵ See Art. 43(3) Additional Protocol I; ICRC, International Humanitarian Law Database, Customary IHL, Rule 4, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule4> (last accessed: 19.01.2024).

⁹⁶ See ICRC, Combatants and POWs, available at: <https://casebook.icrc.org/law/combatants-and-pows#chapter2> (last accessed: 19.01.2024).

⁹⁷ M. Bielieskov, Ukraine’s Territorial Defence Forces: The War So Far and Future Prospects, 11.05.2023, RUSI, available at: <https://www.rusi.org/explore-our-research/publications/commentary/ukraines-territorial-defence-forces-war-so-far-and-future-prospects> (last accessed: 19.01.2024). See in more detail on the preconditions ICRC, Combatants and POWs, available at: <https://casebook.icrc.org/law/combatants-and-pows#chapter2> (last accessed: 19.01.2024).

⁹⁸ See Art. 50(3) Additional Protocol I.

⁹⁹ Art. 52(2) Additional Protocol I; J.-M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, Volume 1, Rules, 2005, p. 30.

¹⁰⁰ Art. 52(3) Additional Protocol I.

While a principally civilian object can thus be turned into a military one by its use to make an effective contribution to military action, if its destruction therefore offers a definite military advantage, this was not the case concerning the Mariupol Drama Theater:

- The theater originally served as a building of art and was during the beginning of the full-scale invasion turned into a humanitarian hub serving as a shelter for about 1.000 people at the time of the attack. The evidence available does not support that the theater lost its civilian character. Neither the witnesses interviewed by CST or other organizations nor satellite images or open-source information substantiate the Russian claim that “the Ukrainian military was using the theatre as a base of operations, a place to store weapons, or a place from which to launch attacks.”¹⁰¹ This finding is not changed even if one to three individual members of the Ukrainian Territorial Defence should have stayed in the theater overnight: their number would not have been substantial enough to turn the theater itself into a military objective given that what is required is an “*effective* contribution to military action”.¹⁰² Moreover, “the mere fact that individuals who may be lawfully targeted (combatants, members of an organized armed group, or direct participants in hostilities) are present incidentally in a particular structure, such as a store or non-military-related government building, does not render the structure a military objective. Only if the individuals are somehow using, or intend to use, the structure itself—for instance as a command-and-control or storage facility, an observation post, or a location from which to snipe—does the issue of the building’s status as a military objective arise.”¹⁰³ There are no accounts according to which any such military use of the building took place.
- Additionally, the destruction of the theater did not offer a “definite military advantage”. In order to be definite, it would have to have been a “concrete and perceptible military advantage rather than a hypothetical and speculative one”.¹⁰⁴ Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population must be taken into consideration.¹⁰⁵ Moreover, it would have had to be a military, not a political, advantage in the sense of forcing the Ukrainian government to change its attitude in negotiating or terrorizing the population to force it to give up.¹⁰⁶ No such advantage of destroying the shelter is identifiable.

¹⁰¹ Amnesty Report, p. 4 f., 63 f.

¹⁰² See on the limiting function of the requirement of an ‘effective’ contribution C. Byron, *International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage*, Yearbook of International Humanitarian Law, vol. 13, 2010, p. 190 and Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, p. 87, according to which “there must exist a proximate nexus to military action”. The consideration that an individual combatant coming home on leave does not automatically lead to forfeiture of the civilian status is also illustrated by Art. 50(3) Additional Protocol I, see C. Byron, *International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage*, Yearbook of International Humanitarian Law, vol. 13, 2010, p. 178.

¹⁰³ M. N. Schmitt, *Targeting Dual-Use Structures: An Alternative Interpretation*, 28.06.2021, *Articles of War*, available at: <https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/> (last accessed: 19.01.2024).

¹⁰⁴ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, p. 85 f.; S. Redse Johansen, *The Military Commander’s Necessity*, 2019, p. 146.

¹⁰⁵ ICRC, *International Humanitarian Law Database*, *Commentary on Art. 52 Additional Protocol I*, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-52/commentary/1987?activeTab=undefined> (last accessed: 19.01.2024), para 2024.

¹⁰⁶ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2004, p. 86; Y. Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts*, *International Law Studies*, 2008, p. 184.

b. Indications for the Intentional Direction Against Civilians and the Theater

It can also be assumed that the attackers were aware of the civilian nature of the theater and its inhabitants and targeted them.

The commission of a war crime of intentionally attacking civilians and civilian objects presupposes that the perpetrator intended to hit the civilians or the civilian object as such. The perpetrator thus must have had awareness of the civilian status¹⁰⁷ and have known and intended to target them.¹⁰⁸

When applying these standards, it seems highly likely that the persons who ordered or executed the strike intended to hit the theater with awareness of its civilian status and of the presence of civilians inside of it. From the beginning of the invasion on, the use of the Mariupol Drama Theater as civilian shelter and meeting point for potential evacuations was publicly communicated online.¹⁰⁹ Moreover, the civilian use was widely visible before and at the time of the attack: Big signs reading “CHILDREN” were painted on both sides of the theater, people were queuing for water and cooking in the field kitchen outside of the building. Russian forces targeting the building were under an obligation to take precautions before attacking to make sure not to hit civilians or a civilian object.¹¹⁰ Given the known use of the theater as humanitarian hub and its original civilian character as building of art, they would have had to be particularly careful to disprove the presumption of its civilian use.¹¹¹ As pointed out by Amnesty, “[t]hese forces have access to real-time intelligence, surveillance, and reconnaissance (ISR) – including persistent real time overhead video of the type required to conduct a “pattern of life” analysis of a target – via drone platforms such as the Orlan-10.21.”¹¹² It therefore seems impossible that those executing the strike were unaware of the civilian presence on the ground or that they actually believed that the theater was being used as a military stronghold without any basis to support this claim visible on satellite images.

The evidence furthermore indicates that the theater was indeed the target of the attack and that the perpetrators thus intended to direct the attack against the civilian objects and the civilians sheltering inside of it. The expert opinions provided to CST, BBC, Associated Press and the analysis by Amnesty all concurred that “from the accuracy of the strike it is very likely that the theatre was the chosen target”¹¹³, given the good weather with clear sight as well as the isolated location of the theater which was “surrounded by approximately 100m of green space that is encircled by a wide road”.¹¹⁴ Both the report by Amnesty and the expert opinion provided to CST come to the conclusion that there was no

¹⁰⁷ ICC, Rome Statute, Elements of Crime, 2013, available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (last accessed: 19.01.2024), footnote 32.

¹⁰⁸ Art. 30 Rome Statute; O. Triffterer in K. Ambos, *The Rome Statute of the International Criminal Court*, p. 365, para 216 and p. 359, para 196 f.

¹⁰⁹ Мариупольська міська рада [Mariupol City Council], [✉✉✉ОФИЦИАЛЬНО! В Мариуполе начинается эвакуация мирного населения \[OFFICIAL! Evacuation of civilians begins in Mariupol\]](https://t.me/mariupolrada/8730), Telegram, 05.03.2022, available at: <https://t.me/mariupolrada/8730> (last accessed: 19.01.2024).

¹¹⁰ See Art. 57 Additional Protocol I.

¹¹¹ See Art. 52(3) Additional Protocol I.

¹¹² Amnesty Report, p. 12.

¹¹³ H. Bachega/O. Khimiak, *A bomb hit this theatre hiding hundreds - here's how one woman survived*, BBC, 22.03.2022, available at: <https://www.bbc.com/news/world-europe-60835106> (last accessed: 19.01.2024); L. Hinnant/M. Chernov/V. Stepanenko, *AP evidence points to 600 dead in Mariupol theater airstrike*, AP news, 04.05.2022, available at: <https://apnews.com/article/russia-ukraine-war-mariupol-theater-c321a196fbd568899841b506afcac7a1> (last accessed: 19.01.2024).

¹¹⁴ Amnesty Report, p. 4; G. Collett, *Explosive engineering assessment – Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine*, 15.11.2022, p. 3.

other plausible military target within the Circular Error Probable (CEP) of the bombs.¹¹⁵ An unguided bomb would have had a CEP of >30m, a guided bomb one between 7 and 12m. Accordingly, “other likely target buildings fall outside the CEP distance for unguided and guided bombs. As such, there is no mistake that the theatre was the intended target.”¹¹⁶ There were no hostilities ongoing in the immediate vicinity¹¹⁷ and even if the rumor that soldiers were located in the Taruta Centre, which four witnesses mentioned to Amnesty but which was not verified, was correct, the group of buildings was located 100 to 150 meters away from the theater and thus out of the bombs’ CEP. Moreover, that the intended target of a 500kg bomb destroying vast parts of the theater and dropped on its center were the isolated one or two soldiers, sporadically delivering humanitarian aid, or the few members of the Territorial Defence seems totally unlikely given the vast disproportionality of such an attack.¹¹⁸

Additionally, even in the – unlikely – event that the perpetrators of the attack had not directly aimed at the Mariupol Drama Theater but still dropped the bomb over this area which was known to be densely populated by civilians without directing their attack against an identified military target¹¹⁹, this would still fulfil the requirements of targeting of this civilian object and the approximately 1.000 civilians sheltering in it. The International Criminal Court has pointed out that indiscriminate attacks – namely such against an entire area with civilian presence or without taking necessary precautions to spare civilians – “may qualify as intentional attacks against the civilian population or individual civilians, especially where the damage caused to civilians is so great that it appears [...] that the perpetrator meant to target civilian objectives. Use of weaponry that has indiscriminate effects may, inter alia, show that the attack was directed at the civilian population or individual civilians”.¹²⁰ Dropping one or two bombs over the area of the theater in which so many civilians were evidently sheltering in any event indicates the intention to target them.

Based on the available evidence it hence appears highly plausible that those who executed the attack, their commanders and aiders, committed a war crime of an intentional attack against civilians and civilian object. This conclusion is shared by the above-mentioned reports and most notably the OSCE’s experts who held that “[t]his incident constitutes most likely an egregious violation of IHL and those who ordered or executed it committed a war crime”.¹²¹

3. In Any Event: Disproportionate Attack

Furthermore, even if the perpetrators indeed – erroneously – assumed that the theater itself constituted a military target or if they were launching the attack to kill individual combatants possibly present, they still would have committed a war crime under the Rome Statute in the form of an intentional attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to

¹¹⁵ Amnesty Report, p. 37.

¹¹⁶ G. Collett, Explosive engineering assessment – Donetsk Regional Academic Drama Theatre in Mariupol, Ukraine, 15.11.2022, p. 9.

¹¹⁷ Amnesty Report, p. 65

¹¹⁸ See below, Section III.3.

¹¹⁹ See ICRC, Indiscriminate attacks, available at: https://casebook.icrc.org/a_to_z/glossary/indiscriminate-attacks (last accessed: 19.01.2024).

¹²⁰ ICC, Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgement pursuant to Article 74 of the Statute, Trial Chamber II, 07.03.2014, para. 802; ICC, Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgement, Trial Chamber IV, 08.07.2019, para. 921; K. Doermann in Muenchener Kommentar zum StGB, 4th edition, 2022, Section 11 VStGB, para 149 w.f.r.

¹²¹ W. Benedek/V. Bílková/M. Sassòli, Report on Violations of International Humanitarian Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022, 13.04.2022, available at: <https://www.osce.org/files/f/documents/f/a/515868.pdf> (last accessed: 19.01.2024), p. 48.

civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹²²

Even where an attack is directed against a military objective, the incidental civilian damage must not be disproportionate to the anticipated military advantage. What is necessary is thus a balancing of, on the one hand, the anticipated civilian harm with, on the other hand, a concrete and direct overall military advantage. This “concrete and direct overall military advantage” again presupposes a “substantial and relatively close” advantage.¹²³ Given that no precise unit of measurement for this balancing exists, it is generally recognized that decision makers must be allowed a “considerable margin of appreciation”.¹²⁴ The assessment of proportionality by the court must be made from the point of view of a “reasonable military commander”¹²⁵ or “a reasonably well-informed person”¹²⁶ in the circumstances of the actual perpetrator, making reasonable use of the information available to him”¹²⁶. In order to be criminally responsible, perpetrators must have known that the attack would be disproportionate and thus have actually made this judgment themselves.¹²⁷ However, an “unreasonable judgement or an allegation that no judgement was made would, in a case of death, injury or damage clearly excessive to the military advantage anticipated, simply not be credible.”¹²⁸

Against this background, even if the Russian forces were intending to target a military objective – be it in an erroneous assumption concerning the theater, individual combatants, or a target close by – the anticipated civilian harm was obviously¹²⁹ excessive. As illustrated, they must have known about the presence of a vast number of civilians in and around the theater – even if many had left in the days before, it was evident from the activity around the theater that there was a possibility that several hundred civilians still sheltered in the theater. If any reconnaissance had priorly been undertaken – which they were obliged to do – they must also have known about the civilian nature of the theater itself.¹³⁰

In comparison, they could have targeted individual members of the Territorial Defence or the few soldiers delivering humanitarian aid. There is no evidence for other plausible military targets in or immediately around the Mariupol Drama Theater which could have been the reason for the attack – also taking into consideration the isolated location of the theater and the CEP of the bombs which hit the theater very accurately under conditions of best visibility, making a misdirected strike very unlikely. The anticipated advantage would thus have been to potentially kill a few enemy combatants – though there was no way to say whether the bomb would actually have this effect. Other political considerations – such as the terrorizing effect on the civilian population or an intimidation of the Ukrainian government

¹²² Art. 8(2)(b)(iv) Rome Statute.

¹²³ J. Pilloud/C. Pictet in Y. Sandoz/C. Swinarski/B. Zimmermann, *Commentary on the Additional Protocols*, 2020, Art. 57, para 2209; K. Doermann, *Muenchener Kommentar zum StGB*, 4th edition 2022, § 11 VStGB, para 85.

¹²⁴ See R. Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2010/2011, p. 300.

¹²⁵ See O. Triffterer in K. Ambos, *The Rome Statute of the Criminal Court*, p. 377, para 247; R. Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2010/2011, p. 300; ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 13.06.2000, para 50; P. Benvenuti, *The ICTY Prosecutor and the Preview of the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (2001) 12 *EJIL*, p. 517; M. Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY* (2001) 12 *EJIL*, p. 535.

¹²⁶ R. Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2010/2011, p. 300.

¹²⁷ R. Cryer et al, *ibid*, p. 302

¹²⁸ K. Doermann, *Preparatory Commission for the International Criminal Court: The Elements of War Crimes - Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts*, IRRC, 2001, p. 475.

¹²⁹ On this interpretation of the notion of “clearly excessive” see *supra* note 15.

¹³⁰ Amnesty Report, p. 64

to give in – do not constitute factors which can permissibly be taken into account to justify such an attack.

The attack was thus clearly disproportionate. If at all possible, the justification of using one or two 500-kg bombs to target the theater sheltering so many civilians and thus risking their lives would have called for an “extraordinarily high-value military objective that could not be destroyed or neutralized by other means and without warning to the civilian population”.¹³¹ Based on all the information available at the time of the attack, such an assumption would have been entirely unreasonable and the claim of a perpetrator to have acted on this basis simply not credible.

Accordingly, it is highly likely that members of the Russian forces committed a war crime of intentionally targeting civilians and a civilian object or, in any event, of a disproportionate attack when they conducted the air strike on the Mariupol Drama Theater.

IV. The Attack as a Potential Crime Against Humanity

Furthermore, in light of reports on the dramatic extent of airstrikes harming civilians and civilian infrastructure and the siege of the city from early March 2022 on, there are grounds to believe that the attack on the Mariupol Drama Theater also constitutes a crime against humanity under the Rome Statute¹³². A final assessment would, however, call for more evidence in this regard.

What sets crimes against humanity apart from ‘ordinary’ crimes and qualifies it as an international crime is that individual acts – such as murder or the infliction of serious injury to the body by means of an inhumane act – are committed in the context of a systematic or widespread attack against the civilian population. The attack must be directed against a group of civilians connected by common characteristics making them the target of the attack¹³³ – such as the civilians located in Mariupol and put under siege. Such an attack further presupposes “a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.¹³⁴ An attack against the civilian population can be considered to be widespread if it targets a broad number of persons.¹³⁵ It can be considered to be systematic if “a pattern of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence” exists.¹³⁶ The pursuance of a policy may serve as an indicator of the ‘systematicity’ of the

¹³¹ Amnesty Report, p. 65.

¹³² Art. 7 Rome Statute.

¹³³ See G. Werle/F. Jeßberger, *Völkerstrafrecht*, 2016, p. 427, para 923.

¹³⁴ ICC, Rome Statute, Elements of Crime, 2013, available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (last accessed: 19.01.2024), p. 3, Art. 7 para 3.

¹³⁵ See O. Triffterer in K. Ambos, *The Rome Statute of the International Criminal Court*, 2016, p. 170, para 19; ICTY, *Prosecutor v. Kunarac*, IT-06-23-T&IT-96-23/1-T, Judgment, Trial Chamber, 22.02.2001, para. 428; ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Judgment, Trial Chamber, 07.05.1997, para. 648; *Prosecutor v. Blaskic*, IT-95-14-T, Judgment, Trial Chamber, 03.03.2000, para. 202; ICTR, *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment, and Sentence, Trial Chamber II, 12.09.2006, para. 512; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment, Trial Chamber II, 01.12.2003, para. 871; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, Trial Chamber III, 15.05.2003, para. 329.

¹³⁶ See ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 07.03.2014, para 1113.



attack.¹³⁷ The perpetrator must have principally known of the ongoing widespread or systematic attack and intended to further it.¹³⁸

With regard to the situation in Mariupol at the time of the attack on the Mariupol Drama Theater on 16 March 2022, there are indications that a widespread and systematic attack against the civilian population living in the city was taking place. The siege had been ongoing for two weeks and witnesses described the use of explosive weapons as “‘constant’ and ‘never-ending’”.¹³⁹ Between 80 and 90 percent of residential buildings have been said to have been destroyed or damaged by Russian shelling.¹⁴⁰ The civilians trapped in the city were cut off basic supplies such as water and electricity and their evacuation through humanitarian corridors was refused. Thousands died in these months.¹⁴¹

There were accordingly numerous victims and it is well possible that patterns of grave human rights violations based on a policy will be identifiable. However, as the UN Commission of Inquiry has pointed out in its latest report of March 2023, while the bombardment of Mariupol and the siege may constitute crimes against humanity, the fact that Mariupol is still under occupation currently makes the gathering of evidence on the ground and a definite determination on this basis difficult.¹⁴² It should therefore be a priority of authorities both at the national and international level to conduct further investigations, particularly by hearing survivors’ testimonies. This is crucial to fully establish the crimes committed in Mariupol – including the airstrike which hit the Mariupol Drama Theater on 16 March 2022 – and hold those responsible to account.

¹³⁷ See O. Triffterer in K. Ambos, *The Rome Statute of the International Criminal Court*, 2016, p. 170, para 20; ICC, *Prosecutor v. Harun and Kushayb*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application, Pre-Trial Chamber, 27.04.2007, para. 62; ICTY, *Prosecutor v. Blaskic*, IT-95-14-A, Judgment, Appeals Chamber, 29.07.2004, para. 100; ICTY, *Prosecutor v. Brdanin*, IT-99-36-T, Judgment, Trial Chamber II, 01.09.2004, para. 137.

¹³⁸ ICC, *Rome Statute, Elements of Crime*, 2013, available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (last accessed: 19.01.2024), p. 3, Art. 7 para 2.

¹³⁹ UNHRC, *Report of the Independent International Commission of Inquiry on Ukraine*, 15.03.2023, A/HRC/52/62, available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (last accessed: 19.01.2024), para 27.

¹⁴⁰ W. Benedek/V. Bílková/M. Sassòli, *Report on Violations of International Humanitarian Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022*, 13.04.2022, available at: <https://www.osce.org/files/f/documents/f/a/515868.pdf> (last accessed: 19.01.2024), p. 32.

¹⁴¹ OHCHR, *High Commissioner updates the Human Rights Council on Mariupol, Ukraine*, 16.06.2022, available at: <https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine> (last accessed: 19.01.2024); H. Andersson, *The agony of not knowing, as Mariupol mass burial sites grow*, BBC, available at: <https://www.bbc.com/news/world-europe-63536564> (last accessed: 19.01.2024).

¹⁴² UNHRC, *Report of the Independent International Commission of Inquiry on Ukraine*, 15.03.2023, A/HRC/52/62, available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (last accessed: 19.01.2024), para 35.



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