

INTERNATIONAL COURT OF JUSTICE

**APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL
CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL
DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

REJOINDER

SUBMITTED BY THE RUSSIAN FEDERATION

VOLUME III

(ANNEXES 7 - 9)

10 MARCH 2023

TABLE OF CONTENTS

VOLUME III

Annexes 7-9

- Annex 7 Expert Report of Oleg Serzhevich Bondarenko, 10 March 2023.
- Annex 8 Second Expert Report of Valery Alexeyevich Samolenkov, 10 March 2023.
- Annex 9 Witness Statement of [REDACTED], 10 March 2023.

Annex 7

Expert Report of Oleg Serzhevich Bondarenko, 10 March 2023

(translation)

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(UKRAINE v. RUSSIAN FEDERATION)

**EXPERT REPORT
OF OLEG SERZHEVICH BONDARENKO**

10 MARCH 2023

TABLE OF CONTENTS

I.	INTRODUCTION.....	5
A.	Qualifications.....	5
B.	Questions Put to the Expert	6
II.	SUMMARY	7
III.	GENERAL REMARKS.....	11
A.	Classification of the Situation and Applicable Law	11
IV.	13 JANUARY 2015 SHELLING OF THE BUGAS ROADBLOCK	14
A.	Analysis of the Legal Status of the Object (Bugas Roadblock)	14
B.	Analysis of the Causes of Collateral Damage	16
V.	24 JANUARY 2015 SHELLING OF THE MARIUPOL OUTSKIRTS.....	19
A.	Analysis of the Legal Status of the Objects	19
B.	Analysis of the Causes of Collateral damage	20
VI.	10 FEBRUARY 2015 SHELLING OF KRAMATORSK AIRFIELD	23
A.	Analysis of the Legal Status of the Objects	23
B.	Analysis of the Causes of Collateral damage	23
VII.	SHELLINGS OF AVDEYEVKA FROM JANUARY TO MARCH 2017.....	25
A.	Analysis of the Legal Status of the Objects	25
B.	Analysis of the Causes of Collateral damage	25
VIII.	EXPERT DECLARATION	28
	LIST OF EXHIBITS	29

I. INTRODUCTION

A. QUALIFICATIONS

1. My name is Oleg Serzhevich Bondarenko. I am a colonel of the reserve of the Armed Forces of the Russian Federation. I have been asked to act as an expert in practical issues related to the implementation of international humanitarian law.
2. I describe my relevant experience below:
 - (a) I graduated from the Kharkov Guards Tank Command College in 1988, with specialisation in tactical command system of tank forces with the military rank of Lieutenant. Subsequently, I studied at the Military Academy of Armoured Forces, graduating in 1995 with specialisation in operational-tactical command and staff system of tank forces.
 - (b) I served in the Armed Forces of the USSR and of the Russian Federation in command and staff positions. During my service, I was involved in planning and conducting combat training activities. From 1998 I served in one of the military departments of the Ministry of Defence of the Russian Federation, where I was involved in developing and coordinating the development of documents relating to the preparation and conduct of combat operations (military doctrines).
 - (c) In 2000, I completed a basic course in the law of armed conflict at the International Institute of Humanitarian Law (San Remo, Italy).
 - (d) From 1998 to 2006 I was a member and executive secretary of the Russian Ministry of Defence's freelance working group on the integration of international humanitarian law. I am one of the authors of the Manual on International Humanitarian Law for the Armed Forces of the Russian Federation.¹
 - (e) From 2006 to 2020 I worked in the Moscow Regional Delegation of the International Committee of the Red Cross in the Russian Federation, Belarus and Moldova (the name of the structural unit is given as of July 2020). Last position:

¹ Minister of Defence of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation, 8 August 2001, available at: <https://docs.cntd.ru/document/1300243501?ysclid=le9upv99rh909315846> (Exhibit A).

FAS Delegate – Head of FAS unit at the Moscow Regional Delegation of the International Committee of the Red Cross to the Russian Federation, Belarus and Moldova (FAS Delegate – Head of FAS unit). My duties included liaising with the armed forces of Russia, Belarus and Moldova and with the executive and coordinating bodies of the Collective Security Treaty Organization and the Council of Defence Ministers of the Commonwealth of Independent States on matters relating to the implementation and integration of international humanitarian law and protection of victims of armed conflicts.

- (f) From 2004 to 2020 I was one of the lecturers of the Advanced Training Course for Officers of the Armed Forces of the Russian Federation in the Law of Armed Conflict, where not only representatives of the Russian Federation, but also foreign specialists from Armenia, Afghanistan, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Serbia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan were trained.
- (g) From 2010 to 2019, I was a freelance lecturer at the International Institute of Humanitarian Law (San Remo, Italy) and my duties included training in international humanitarian law / law of armed conflict for officials, including Russian and Ukrainian representatives.

B. QUESTIONS PUT TO THE EXPERT

- 3. I have been asked to prepare an expert report for submission to the International Court of Justice in the case before ICJ, "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination" (Ukraine v. Russian Federation). My task is to assess, from the perspective of international humanitarian law (hereinafter, IHL), Ukraine's allegations concerning alleged shelling of Bugas roadblock on 13 January 2015, of Kramatorsk on 10 February 2015, Mariupol on 24 January 2015 and Avdeyevka from January to March 2017 including the actions of the Ukrainian Armed Forces (hereinafter, UAF) in this context.

II. SUMMARY

4. As a result of the analysis of the available materials provided by Ukraine in support of its allegations as well as of publicly available sources I have come to the following conclusions.
5. General conclusions:
 - (a) Ukraine has argued that the armed conflict in Ukraine since 2014 is an international armed conflict. Based on this qualification, the Ukrainian side and its expert should have conducted a legal assessment of the hostilities in terms of the Geneva Conventions of 12 August 1949, and the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter, Protocol I).
 - (b) Assuming that the conflict was not of an international character, the Martens Clause, Article 3 common to all the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter, Protocol II) and customary international law applied to it.
 - (c) International practice showcases that only intentional acts against persons or property can be classified as a serious violation of IHL rules.
 - (d) The civilian casualties resulting from the shelling in question were caused by Ukrainian's failure to take, or the taking of ineffective precautions to protect civilian population, individual civilians and civilian objects from the dangers arising from military operations. All the objects attacked were under control of Ukraine. It was the Ukrainian side that was responsible for the security of persons and objects it controlled.
6. Conclusions regarding the shelling of the Bugas roadblock:
 - (a) The Bugas roadblock was a military objective in its purpose and use. DPR forces justifiably considered it as such.

- (b) Attacks on military objectives located deep within the lines of deployment of the UAF in the area of Ukraine's so-called "antiterrorist operation" zone (hereinafter, ATO), may have been carried out by DPR forces in order to gain an operational advantage.
- (c) Allegations by Ukraine and Lieutenant General Christopher Brown (hereinafter, General Brown) of a deliberate attack on the Bugas roadblock to terrorise civilians are not supported by the facts.
- (d) Considering that the Bugas roadblock was a purely civilian object (as the Ukrainian side claims), Ukraine has placed the civilian object within the lines of the UAF deployment and within reach of enemy weapons, thus endangering the safety of civilians passing through the roadblock. It follows, in particular, that Ukraine has failed to take all possible precautions to protect civilians and civilian objects under its control from the consequences of attacks, which is the rule applicable in both international and internal armed conflict.²
- (e) Also, if the Bugas roadblock was a civilian object, in order to ensure the security of civilians and in line with IHL principles, the UAF command could have informed the enemy of the civilian status of the roadblock to prevent attacks that endangered the security of civilians.

7. Conclusions regarding the shelling of Mariupol:

- (a) Contrary to General Brown's assertion, the Soviet and/or Russian "doctrine" explicitly requires the capture of settlements as objects ensuring the sustainability of defence by an attack from the march/after advance from depth or by assault, which requires the advancing troops to reliably hit all military objectives throughout the depth of the enemy's forces deployment.
- (b) The UAF military command decided to equip defence positions and lines in close proximity to urban areas, which does not comply with Article 58 (b) of Protocol I or even general precautions to protect civilians and civilian objects under their

² See, e.g. J.M. Henckaerts, L. Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 22, p. 87, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

control from the effects of attacks under customary law operating in an internal armed conflict.³

- (c) The UAF military command positioned military objectives in close proximity to urban areas and failed to take measures to evacuate civilians from the range of the enemy's primary means of destruction, as contemplated under Article 58 (a) of Protocol I or even mentioned common precautions under customary law operating in an internal armed conflict.⁴
- (d) There were defence positions on the outskirts of Mariupol, which were legitimate objectives for attacks, so Ukraine's claims of a deliberate attack on civilian objects based on intercepted radio traffic alone are questionable.

8. Conclusions regarding the shelling of Kramatorsk:

- (a) The deployment of the ATO headquarters of the UAF on the Kramatorsk airfield made it a particularly important military target, the destruction of which could affect the success of all military operations by the DPR, as disabling elements of the enemy's control system is one of the main objectives of modern military operations.
- (b) Ukraine failed to take the precautionary measures in relation to consequences of attacks, as required by Article 58 of Protocol I, specifically (i) the requirement to avoid locating military objectives within or near densely populated areas and (ii) the requirement to evacuate civilians from a dangerous area that is within the range of impact of the enemy's weapons, or even similar measures prescribed by customary humanitarian law for internal armed conflict.⁵
- (c) General Brown claims a deliberate attack on civilian objects by the DPR. In doing so, he himself says that his conclusions are only the most plausible, not proven. I consider these claims to be unsubstantiated. In view of General Samolenkov's conclusions, I believe that the damage to civilian objects was collateral damage from attacks targeting military objectives.

³ See, e.g., J.M. Henckaerts, L. Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁴ *Ibid.*

⁵ *Ibid.*, Chapter 6, Rule 22, p. 87; Rule 23, p. 91.

9. Conclusions regarding the shelling of Avdeyevka:
 - (a) The entire Avdeyevka area was probably included in the UAF defence positions and lines system.
 - (b) Confirmed and suspected UAF military facilities positioned in Avdeyevka were legitimate objectives for attacks.
 - (c) Civilian casualties and damage to civilian objects were consequences of attacks on legitimate military objectives.
 - (d) Ukraine failed to implement the requirements of the above-mentioned rules of IHL and did not take precautions against attacks (civilians were not evacuated from the defence area and remained within the range of enemy firepower).
 - (e) General Brown explicitly confirms Ukraine's failure to take precautions and acknowledges the UAF's use of civilian objects for military purposes.
 - (f) The allegation of deliberate attacks on civilian population and objects in order to induce fear among civilians is not supported by evidence.
 - (g) The very presence of civilians not evacuated by the Ukrainian authorities from the dangerous area in compliance with Article 58 (a) of Protocol I or even similar rules of customary humanitarian law applicable in an internal armed conflict in Avdeyevka caused fear among the civilian population. Moreover, I concede that the population was deliberately not evacuated to be used as a "shield".
10. I describe my findings in more detail below.

III. GENERAL REMARKS

A. CLASSIFICATION OF THE SITUATION AND APPLICABLE LAW

11. When considering the classification of the situation (including the determination of the applicable law), it should be noted that in 2015-2017, when the incidents (shelling) in question took place, there was an armed conflict in Ukraine between the government armed forces and the anti-government armed forces (armed forces and other armed formations of the DPR), who, being under responsible command, exercised control over part of Ukraine's territory. The control allowed them to carry out sustained and concerted military actions. This makes the DPR and LPR and Ukraine parties to an armed conflict that should have complied with IHL.
12. As a general analysis of the situation in 2015-2017 demonstrates, in order to promote the protection of civilians from the effects of hostilities, the representatives of the DPR armed forces distinguished themselves from the civilian population by wearing uniforms with appropriate insignia. General Brown states in his Second Expert Report (hereinafter also "General Brown's Second Report")⁶ that the DPR armed forces were following Russian doctrine⁷ "in the apparent absence of their own".⁸ In such a case General Brown should acknowledge that the DPR armed forces were also guided by Russian military doctrines or USSR regarding the enforcement of IHL rules (e.g. Manual on IHL for the Armed Forces of the Russian Federation).⁹
13. Ukraine stated that the armed conflict in Ukraine since 2014 is an international armed conflict. For example, one of the Ukrainian Foreign Ministry's 2018 statements reads:

"The Ministry of Foreign Affairs of Ukraine urges its partners to use all appropriate means in order to prevent the escalation of the international armed conflict in the territory of Ukraine...".¹⁰

⁶ General Brown's Second Report.

⁷ By doctrine, Mr Brown means documents on the organisation and conduct of combat operations. In the Russian Federation, these are regulations, charters, guidelines and instructions.

⁸ General Brown's Second Report, ¶22.

⁹ Minister of Defence of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation, 8 August 2001, available at: <https://docs.cntd.ru/document/1300243501?ysclid=le9upv99rh909315846> (Exhibit A).

¹⁰ Ministry of Foreign Affairs of Ukraine, Statement by the Ministry of Foreign Affairs of Ukraine on the 4th Anniversary of the Launch of Armed Aggression against Ukraine by the Russian Federation, 20 February 2018, available at: <https://uk.mfa.gov.ua/en/news/63090-zajava-mzs-ukrajini-do-4-kh-rokovin-pochatku-zbrojnoji->

14. Based on this qualification, the Ukrainian side and its expert should have made a legal assessment of the hostilities from the perspective of the Geneva Conventions of 12 August 1949 and Protocol I.
15. In my view, even assuming that the conflict was not of an international character, such provisions of IHL as the Martens Clause, Article 3 common to all the Geneva Conventions of 12 August 1949, and Protocol II applied to it. In addition, customary international law applied to the conflict in question.
16. Under IHL all means of intimidation or of terrorism against the civilian population are prohibited, as stated, for example, in Article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 or in Article 13 of Protocol II. Importantly, this prohibition refers to acts of violence the primary (main, initial) purpose of which is to spread terror among the civilian population,¹¹ rather than the death or injury of civilians in attacks on legitimate military targets. The phrase "the primary purpose of which is to spread terror among the civilian population" means that attacks on civilian population and civilian objects are to be carried out with the specific intent constituting the subjective (mental) element of guilt (*mens rea*). Even if the actual result of the action was fear of the civilian population, this still does not imply the existence of appropriate intent:

"Thus, the requisite *mens rea* for the crime of terror is the specific intent to spread terror among the civilian population; actual terrorization is not an element of the crime. As said, spreading terror must be the primary purpose of the acts or threats of violence and should go beyond a mere side-effect of war. '[T]error which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful' is not to be seen as spreading terror".¹²

17. It should be taken into consideration that even for ordinary war crimes (which do not require a specific intent to intimidate the population, but only an intent to harm civilians) significant harm against civilians may be considered acceptable:

"Even extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated.

agresiji-rf-proti-ukrajini (Exhibit B).

¹¹ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 51 (2).

¹² G.J. A. Knoops, *MENS REA AT THE INTERNATIONAL CRIMINAL COURT* (Leiden; Boston, 2017), p. 90.

The bombing of an important army or naval installation (like a naval shipyard) where there are hundreds or even thousands of civilian employees need not be abandoned merely because of the risk to those civilians".¹³

18. In addition, an important factor is the enemy's use of civilians and civilian objects to shield its armed forces and military installations, in violation of its obligation to take precautions to minimise danger to civilians. In such a case, the attacker's responsibility is correspondingly diminished:

"Moreover, the responsibility of the attacker for civilian losses can be mitigated by two factors: the failure of the defenders to clearly separate military from civilian objects, and the use of civilian facilities for military purposes. According to IHL, the defending state has an obligation to protect its own populations from an attack by removing civilians from the vicinity of military objectives and avoiding the placement of military facilities and personnel near populated civilian."¹⁴

19. This is supported by provisions in military manuals, such as the US Army Commander's Handbook:

"A party that is subject to attack might fail to take feasible precautions to minimize the harm to civilians, such as by separating the civilian population from military objectives. In some cases, a party to the conflict might attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack.... This enemy conduct, however, will diminish the ability to discriminate [civilian and military targets] and to reduce the risk of harm to the civilian population."¹⁵

¹³ Y. Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (3rd ed., Cambridge University Press, 2016), p. 121.

¹⁴ B. Cronin, *RECKLESS ENDANGERMENT WARFARE: CIVILIAN CASUALTIES AND THE COLLATERAL DAMAGE EXCEPTION IN INTERNATIONAL HUMANITARIAN LAW* (*Journal of Peace Research*, 2013, 50 (2)), p. 117.

¹⁵ US Department of the Army, US Department of the Navy, *The Commander's Handbook on the Law of Land Warfare* (FM 6-27) (MCTP 11-10C), August 2019, pp. 2-16, available at: https://biotech.law.lsu.edu/blog/ARN19354_FM-6-27-_C1_FINAL_WEB_v2.pdf.

IV. 13 JANUARY 2015 SHELLING OF THE BUGAS ROADBLOCK

A. ANALYSIS OF THE LEGAL STATUS OF THE OBJECT (BUGAS ROADBLOCK)

20. General Brown's Second Report confirmed General Samolenkov's conclusion that the UAF deployment in the area in question and at the time in question was focal in nature,¹⁶ which is one of the features of deployment of troops in non-international armed conflicts. General Brown also concludes that the location and equipment of the Bugas roadblock differed from the purpose, location and equipment of, for example, the combat position at Berezovoye. Based on this, General Brown concludes that the Bugas roadblock is not a military objective. Apparently, General Brown does not take into account the tactics of military operations in armed conflicts (as exemplified by actions of the US-led coalition forces in Iraq). Specifically, in his analysis he ignores purpose of such elements of troops deployment: the purpose of such use of temporary armed forces units is, for example, prevention of unauthorized entry into or exit from an area of combat operations, prevention of invasion of reconnaissance and sabotage groups into an area of combat operations. In accordance with the stated purpose, such roadblocks perform, above all, military functions.
21. For example, U.S. military manuals provide for roadblocks to protect transport corridors, protect strongpoints, control the area around the roadblock, interdict enemy movements, destroy enemy forces, prohibit enemy forces from contacting the local population, and more:

"Establishing checkpoints is a critical measure in a commander's overall protection efforts... They may be manned by military police or other unit personnel. These Soldiers report to the appropriate area movement control organization when each convoy, march column, and march serial arrives at and completes passage of their location..."

A deliberate checkpoint is a fixed position constructed and employed to protect an operating base camp, a well-established MSR, or a main road in a rural or built-up area. A deliberate checkpoint is typically a preplanned location linked to a larger tactical plan...

Deliberate checkpoints are typically used to...

- Prevent the movement of supplies to the enemy.
- Deny the enemy contact with or prevent insurgents from hiding within the local inhabitants.

¹⁶ General Brown's Second Report, ¶6.

- Dominate the area around the checkpoint.

To operate a checkpoint, task-organize the unit as follows: Assault element.
This element is responsible for...

- Preparing and occupying fortified fighting positions.

- Eliminating any hostile element that forces its way past the search team,
 according to the ROE."¹⁷

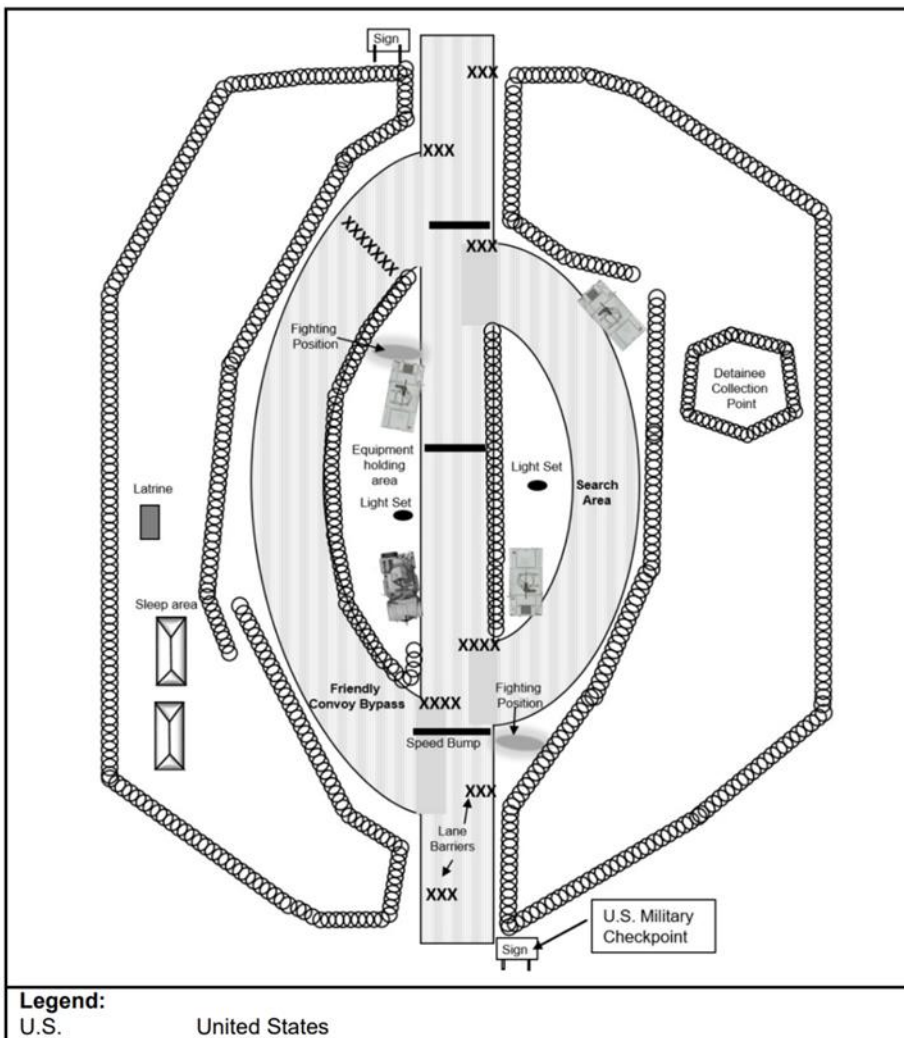


Figure 4-1. Example of a deliberate check point

Scheme of a permanent US Army roadblock with fortifications, firing positions and armoured vehicles¹⁸

¹⁷ Department of the Army US, Security and Mobility Support. Army Methods Publication No. 3-39.30, Washington, D.C. (21 May 2020), pp. 4.7 - 4.9, available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN22142_ATP_3-39x30_FINAL_WEB.pdf.

¹⁸ Department of the Army US, Security and Mobility Support. Army Methods Publication No. 3-39.30, Washington, D.C. (21 May 2020), pp. 4-7 - 4.9, available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN22142_ATP_3-39x30_FINAL_WEB.pdf.

22. Since the Ukrainian side did not provide any graphic combat documents or other documents confirming the performance of administrative functions only, the DPR armed forces reasonably regarded the Bugas roadblock as an element of the UAF deployment for conducting the ATO designed to restriction entry into or exit from the area of combat operations. In view of the aforesaid and based on the provisions of customary international law, applicable in both internal and international armed conflict,¹⁹ and reflected in Article 52 of Protocol I, it is obvious that the Bugas roadblock was a military facility in its purpose and use.
23. I agree with General Samolenkov that there was a combat unit, the Kiev-2 battalion, at the Bugas roadblock. General Brown's reference to Kiev-2 was a part of the Ukrainian Ministry of Internal Affairs does not negate the fact that it was a unit equipped with heavy weapons and carrying out combat tasks in the ATO zone. Since the ATO was led by the UAF and battalions such as Kiev-2 were placed under the operational military command, the Kiev-2 battalion should be recognised as a military unit.
24. I do not agree with General Brown that the personnel of the Ministry of Internal Affairs and the Border Guard Service of Ukraine allegedly did not have any combat mission. These units were, at a minimum, tasked with controlling and restricting the movement of the enemy from the combat area (ATO zone). This is precisely a combat mission.
25. General Brown very often refers to the fact that the attack on the Bugas roadblock did not provide any military advantage, as "there were numerous other targets in the area that offered a military advantage compared to the Bugas roadblock."²⁰ However, this approach only takes into account a tactical advantage, while attacks on military objectives located deep within the lines of UAF deployment in the ATO zone could have been carried out with the aim of gaining an operational advantage.

B. ANALYSIS OF THE CAUSES OF COLLATERAL DAMAGE

26. The arguments put forward by the Ukrainian side that the shelling in the daylight using MLRS and the deaths of civilians indicate a deliberate attack on the Bugas roadblock with

¹⁹ J.M. Henckaerts, L. Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 9, p. 42, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

²⁰ General Brown's Second Report, ¶11(c).

the aim of terrorising the civilian population²¹ are not substantiated. The arguments, put forward, do not imply an intention to harm or intimidate the civilian population *per se*.

27. General Brown's conclusions that the attack was carried out with premeditation (with a specific intent) are not based on facts and are intended not to reach the objective truth, but to prove the Ukrainian side's claim that the attack was premeditated and that its sole purpose was to intimidate the civilian population. General Brown points out that had the attack occurred at a different time,

"if there had been a similar number of vehicles queuing ... at the actual time of the attack, the centre of the barrage ... would have been directly over the line of civilian vehicles."²²

28. This is what refutes the assumption of a deliberate attack on civilians and confirms the lack of intent in the attack. If the aim of the DPR was really to intimidate the civilian population, the strike would have taken place at the moment of maximum civilian concentration at the roadblock.
29. The intercept evidence²³ indicates that DPR fighters tried to avoid civilian casualties, which indirectly confirms the implementation by the DPR armed forces of Russian military doctrines regarding the enforcement of IHL.
30. Taking into account the earlier findings, there arises an acute issue of precautions against consequences of the attack, which the Ukrainian side could and should have taken in accordance with the provisions of IHL as reflected in Article 58 of Protocol I, and even on general precautions under customary law applicable in an internal armed conflict,²⁴ but failed to take. Specifically:

- (a) Ukraine and General Brown refer to the Bugas roadblock as a civilian roadblock.²⁵

In such a case, the issue of concern is the location of the said roadblock within the

²¹ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 51 (2).

²² General Brown's Second Report, ¶14.

²³ General Brown's Second Report, ¶12.

²⁴ J.M. Henckaerts, L. Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 22, p. 87; Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

²⁵ Reply, ¶219.

lines of the UAF deployment in the ATO zone and within the range of the enemy's weapons (which is confirmed by the facts). By analogy with other objects related to the location (position) of persons under international legal protection: for example, prisoners of war are required to be placed in camps situated in an area far enough from the combat zone for them to be out of danger.²⁶ Thus, positioning the Bugas roadblock directly within the combat zone jeopardised the safety of civilians passing through the roadblock;

- (b) General Brown agrees with General Samolenkov's conclusions that the DPR fighters could not visually control the situation at the Bugas roadblock.²⁷ In such a case, assuming that the Bugas roadblock had only a civilian/administrative function, it is not clear why the UAF command did not inform the enemy about this to prevent attacks endangering the safety of civilians, although non-hostile contacts with the enemy are envisaged by IHL, for example when establishing demilitarized zones.²⁸

²⁶ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 19.

²⁷ General Brown's Second Report, ¶14.

²⁸ Protocol I, Article 60.

V. 24 JANUARY 2015 SHELLING OF THE MARIUPOL OUTSKIRTS

A. ANALYSIS OF THE LEGAL STATUS OF THE OBJECTS

31. General Brown's position regarding the analysis of the situation and the likely tactics of the opposing forces is surprising.²⁹ In particular, General Brown argues that an attack on the defence positions of the Ukrainian forces was inadvisable because according to Soviet and Russian doctrines³⁰ the city (i.e. Mariupol) should be besieged. Unfortunately, General Brown demonstrated insufficient knowledge of the guidelines governing the preparation and conduct of combat operations specifically by the Soviet and (or) Russian armed forces, which unequivocally require the capture of populated places by an attack on the march (after advance from depth) or by assault, which requires the advancing troops to reliably hit military facilities throughout the depth of the enemy's forces deployment:

"279. The capture of a populated area is usually carried out from the march. The battalion (company), operating in the direction of a populated area, while advancing from the depth destroys the enemy defending on the approaches to it, breaks into the populated area, and relentlessly develops the attack in depth. If it is not possible to capture a populated area on the march, the senior commander arranges for it to be surrounded (blockaded) and taken by assault after comprehensive preparation."

"288. Prior to assault of an object, it is engaged by all fire weapons of the assault squad. The assault squad (group) at this time takes up an initial position as close to the object of attack as possible and, at the established time, proceeds to attack.

Fire weapons of the fire support group (subgroups) destroy the enemy in the attacked and adjacent objects, and the assault groups (capturing subgroups), using breaches in walls, underground communications, passageways, entrances, building ledges, move to the object and at the preset time under the cover of fire of all means and aerosol screens burst into the object."³¹

32. On the basis of Figures 12, 13 and 15 in General Brown's Second Report, it can be concluded that Mariupol had been prepared for defence. In any event, a system of lines of defence, defence positions and artificial obstacles had been established on the outskirts

²⁹ General Brown's Second Report, ¶¶20-25.

³⁰ As I pointed out above, by doctrines General Brown means documents on the organisation and conduct of combat operations. In the Russian Federation these are manuals, charters, guidelines and instructions.

³¹ Minister of Defence of the Russian Federation, Combat Manual on Preparation and Conduct of Combined-Arms Military Combat. Part 2. Battalion, Company, 2006, available at: <https://www.rulit.me/books/boevoy-ustav-podgotovke-i-vedeniyu-obshchevojskovogo-boya-chast-2-batalon-rota-get-399026> (Exhibit C).

of the city to prevent it from being captured on the move (after advance from depth). In particular, there were a number of equipped defence positions and facilities in close proximity to the city, such as roadblock 4014, and a line of defence along the eastern edge. From the IHL perspective, both of the above-mentioned object were military: roadblock No. 4014 in nature, purpose and use, and the defence positions (line of defence) along the eastern edge in nature and purpose (the absence of manpower, weapons and military equipment on the line is not a reason not to consider this object as non-military). Speaking of the roadblock and the line of defence, it should be noted that General Brown's conclusions (e.g. regarding the roadblock) that "any military advantage from neutralizing the checkpoint would only accrue if followed up immediately by a ground assault"³² are incorrect, especially with regard to the obligatory condition concerning a subsequent ground assault. It is necessary to remind General Brown that during Operation Allied Force in Kosovo (March to June 1999) NATO did not plan to use ground forces at all (planned no offensive actions), but relied only on the use of long-range weapons. The same can be said of the operations in Iraq, where the use of ground forces was preceded by long phases of hitting the entire depth of the enemy troops (forces) with all available means.

B. ANALYSIS OF THE CAUSES OF COLLATERAL DAMAGE

33. IHL does not contain mandatory rules prohibiting the use of settlements in military operations. However, the International Committee of the Red Cross (hereinafter, ICRC), for example, identified a number of serious humanitarian problems arising in the conduct of military operations in such situation and prepared relevant recommendations,³³ which are well known to the UAF leadership.
34. Since it is clear that the Ukrainian military command decided to use Mariupol to ensure the sustainability of the defence, which gave the Ukrainian side additional advantages, the precautions against attacks when establishing defences must be taken into account while considering the attack. Based on the data presented, it can be concluded that:

³² General Brown's First Report, ¶49.

³³ ICRC, REDUCING CIVILIAN HARM IN URBAN WARFARE: A COMMANDER'S HANDBOOK (2021), available at: <https://shop.icrc.org/reducing-civilian-harm-in-urban-warfare-a-commander-s-handbook.html>.

- (a) The UAF military command decided to establish defensive positions and lines in the immediate vicinity of urban areas, which does not comply with the provisions of Article 58 (b) of Protocol I or common precautions under customary law operating in an internal armed conflict;³⁴
- (b) The UAF military command, having located military facilities in close proximity to urban areas, failed to take measures to evacuate civilians³⁵ from the range of the enemy's primary weapons.
35. It must be borne in mind that urban combat is an extremely intense type of combat, where it is particularly difficult to avoid damage to civilian objects, even when using high-tech, high-precision weapons. This is confirmed by manuals of the armed forces:
- "The density of civilian populations in urban areas and the multidimensional nature of the environment make it more likely that even accurate attacks with precision weapons will injure noncombatants."³⁶
36. It also seems difficult to agree with General Brown's view that the capture of a city must necessarily imply the preservation of its infrastructure and industrial capacity.³⁷ If the objective is to crush fierce resistance and destroy the enemy's defending forces, an "upper limit" on the applicable force is extremely difficult to establish:

"The desired end state for the urban area dictates the level of force used. For example if the desired end state is to retain the city as a viable commercial entity (terrain control focus), the sufficient level of force used must be limited and collateral damage must not destroy the population, commercial infrastructure, or essential processes of the city. Urban operations normally benefit from a balance between extremes of force levels used in this example. Conversely, and with respect to laws of armed conflict in necessity, distinction, and proportionality, if the end state is to destroy all enemies who

³⁴ J.M. Henckaerts, L. Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 22, p. 87; Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

³⁵ Protocol I, Article 58 (a), *see also* J.M. Henckaerts, L. Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

³⁶ US Department of the Army, US Department of the Navy, Urban Operations. Army Techniques Publication No. 3-06 (ATP 3-06 MCTP 12-10B) (MCTP 11-10C), July 2022, p. 4-9, available at: https://irp fas.org/doddir/army/atp3_06.pdf.

³⁷ General Brown's Second Report, ¶21.

remain in the city (enemy destruction focus), the sufficient level of force used is nearly limitless and the resulting collateral damage will be much greater."³⁸

37. Given that fortified areas and positions had been established on the approaches to Mariupol which were part of a system of defence positions system, lines and areas in the Mariupol direction and, therefore, legitimate objectives for attacks, the evidence of an intentional attack on civilian objects that is based on radio intercepts alone is questionable. That said, it is necessary to take a closer look at the intercepts.³⁹ In particular, the Ukrainian side states the following: at 10:38 a.m. on the day of the shelling, Kirsanov called Sergey Ponomarenko, a member of the DPR, to report on the damage, saying that Vostochny has been seriously damaged.⁴⁰
38. Considering this intercepted dialogue, it is also possible to draw a conclusion different from that of Ukraine, for instance, that the attacking party regrets missing a military objective. Moreover, the intercepted conversations between Valery Kirsanov and O. Yevdoty ("Pepel"), provided by Ukraine and cited by the Russian side in the Counter-Memorial (ICSFT),⁴¹ create doubts regarding the Ukrainian position and confirm that the attack was not deliberately directed at the Vostochny neighbourhood.

³⁸ US Department of the Army, US Department of the Navy, Urban Operations. Army Techniques Publication No. 3-06 (ATP 3-06 MCTP 12-10B) (MCTP 11-10C), July 2022, p. 2-10, available at: https://irp.fas.org/doddir/army/atp3_06.pdf.

³⁹ See Reply, ¶236.

⁴⁰ Memorial, ¶94.

⁴¹ Counter-Memorial (ICSFT), ¶¶ 429, 430, 431, 434, 435, 436, 437.

VI. 10 FEBRUARY 2015 SHELLING OF KRAMATORSK AIRFIELD

A. ANALYSIS OF THE LEGAL STATUS OF THE OBJECTS

39. Both the Russian and Ukrainian sides⁴² agree that the Kramatorsk airfield was a military objective (in the context of Article 52 of Protocol I). Furthermore, from a military point of view, the key aspect was that the UAF's ATO headquarters had been deployed at the airfield, which made it a particularly important military objective whose destruction could affect the success of all military operations conducted by the DPR armed forces (i.e. it could create an undeniable military advantage, because disabling elements of the enemy's control system is a primary (top priority) objective of modern-day military operations). This has a significant impact on the assessment of collateral damage.
40. The Russian and Ukrainian sides also agree that the BM-30 Smerch MLRS, armed with cluster munitions, is a suitable weapon to engage this military target. As General Brown points out:

"...BM-30 is not just the only weapon available, it is also the ideal weapon for neutralization of an airfield and its associated infrastructure, accompanying units, tented accommodation and soft-skinned vehicles. BM-30 firing 9M55K sub-munition missiles is optimized to defeat personnel, armoured and soft targets in concentration areas, artillery batteries, command posts and ammunition depots."⁴³

B. ANALYSIS OF THE CAUSES OF COLLATERAL DAMAGE

41. It is an undisputed fact that the ATO command made a decision to place on the approaches to the city a military object the destruction or neutralization of which would give the DPR armed forces an undeniable military advantage.⁴⁴
42. From an IHL perspective, it is obvious that Ukraine failed to take precautionary measures against the effects of attacks, as described in IHL,⁴⁵ including in Article 58 of Protocol I. In particular, it failed to meet:

⁴² General Brown's First Report ¶66; Written Statement by Denis Goiko, Record of Interrogation of the Victim, 20 August 2015, Memorial, Annex 239; Written Statement by Alexander Bondaruk, Record of Interrogation of the Victim, 20 August 2015, Memorial, Annex 240.

⁴³ General Brown's First Report, ¶68.

⁴⁴ General Brown's Second Report, Figure 18; Memorial, ¶102, Map 5.

⁴⁵ J.M. Henckaerts, L. Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 22, p. 87; Rule 23, p. 91,

- (a) the requirement to avoid locating military objectives within or near densely populated areas;
- (b) the requirement to evacuate civilians from a dangerous area that is within the range of the enemy's weapons.

43. General Brown himself qualifies his conclusions about a premeditated attack on civilian objects⁴⁶ as most plausible only, not proven. The statement that it is not dissimilar to the evidence emerging from the current war in Ukraine of liberal Russian military use of rockets and cluster munitions is unsubstantiated and does not bring him any closer to achieving the goal of being objective in his expert assessment – all the more so in view of General Brown's view that cluster munitions are the "ideal" weapon to hit a military target such as a headquarters and an airfield.⁴⁷ Moreover, by acknowledging the technological sophistication of the BM30 Smerch 9M55K munition, General Brown himself indirectly admits that the use of such munition imposes stringent requirements on the qualifications of BM30 crews, including during pre-launch checkouts and test firing.⁴⁸ Therefore, given General Samolenkov's conclusions concerning malfunction or failure of the on-board range adjustment equipment⁴⁹ and the assumption of insufficient competence of BM30 crew(s), it would also be plausible to assume, in the General's Brown terminology, that the attack on civilians and civilian objects was unintentional.

available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁴⁶ General Brown's Second Report, ¶48.

⁴⁷ General Brown's First Report, ¶68.

⁴⁸ General Brown's Second Report, ¶45.

⁴⁹ General Brown's Second Report, ¶44.

VII. SHELLINGS OF AVDEYEVKA FROM JANUARY TO MARCH 2017

A. ANALYSIS OF THE LEGAL STATUS OF THE OBJECTS

44. The materials of Memorial⁵⁰ and General Brown's first expert report (hereinafter, General Brown's First Report)⁵¹ suggest that Avdeyevka was incorporated into the system of the UAF defence positions, lines and areas. In particular, General Brown points out with reference to the International Partnership for Human Rights' report that the main defensive positions of the UAF were established on the southwestern outskirts of Avdeyevka to ensure "protection against any attack by the DPR". However, neither the Ukrainian side nor General Brown take into account that the defence is not linear, i.e. any defence area or position has not only front but also depth.
45. So, for example, the defence area of a battalion tactical group can be from 2.5 to 5 kilometres deep. The UAF could have established strongpoints, firing and cutting-off positions and other elements of the defence structure to this depth. This is evidenced by the location of military objects on Map 6,⁵² such as a roadblock, locations of ammunition stockpiles and military vehicles, positions of personnel, firing positions and UAF quarters in the town. Further, the location of the UAF⁵³ artillery firing position near the lake to the north of the town allows for a conclusion that the entire Avdeyevka was included in the system of defence positions and lines. The later extensive use of civilian infrastructure objects (including industrial enterprises) by the UAF in the course of combat operations in 2022 and 2023 (e.g. in Mariupol) also may indicate that defence positions and defences not shown on Map 6 could have been established directly within the populated area. Thus, the existing UAF positions on the approaches to the town and within the town itself and likely military objects were legitimate objectives for attack.

B. ANALYSIS OF THE CAUSES OF COLLATERAL DAMAGE

46. The inclusion of Avdeyevka in the system of defence areas, positions and lines and preparing Avdeyevka for defence may indicate that civilian deaths (injuries) and damage

⁵⁰ Memorial, p. 70, Map 6 "Shelling Impacts in Avdeyevka".

⁵¹ General Brown's First Report, ¶¶83-84.

⁵² Memorial, p. 70, Map 6 "Shelling Impacts in Avdeyevka".

⁵³ General Brown's First Report, ¶83.

to civilian objects could have been consequences of attacks on legitimate military objectives and the consequence of ineffective precautions against attacks, including because civilians were not evacuated from the defence area and remained within the range of all enemy weapons (from heavy machine guns to BM21 MLRS⁵⁴) as described in IHL,⁵⁵ including in Article 58 of Protocol I.

47. It cannot be established whether other precautions were taken to protect the civilian population, individual civilians and civilian objects under UAF control against the dangers resulting from military operations as prescribed by IHL rules, including Article 58 (c) of Protocol I, e.g. whether civilians were able to take shelter from attacks.
48. Given the absence of UAF combat control documents in the case file, it is impossible to determine the extent to which the Ukrainian side avoided locating military objectives within or near densely populated areas as prescribed by IHL rules,⁵⁶ including Article 58(b) of Protocol I. The lack of precautions and the version that the attacks were carried out on military objectives are also supported by General Brown's statement that "delineation between UAF and civilian activity is more blurred". He cites as evidence the words of the commander of the UAF's 72nd Brigade, responsible for the defence of Avdeyevka, who confirms that the UAF used civilian objects for military purposes while organising the defence.⁵⁷ This confirms my conclusion that Avdeyevka was included in the system of UAF's defence positions. It is important to note that a military commander was responsible for the defence of Avdeyevka (!), but not for the defence on its approaches, which supports the version that the entire Avdeyevka was included in the system of UAF's defence positions.
49. Any allegations of deliberate attacks on the civilian population and civilian objects in Avdeyevka are not supported by evidence of intentional strikes. Despite claims in

⁵⁴ General Brown's First Report, ¶80.

⁵⁵ J.M. Henckaerts, L. Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 22, p. 87; Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁵⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 23, p. 91, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁵⁷ General Brown's Second Report, ¶52.

paragraph 110 of Memorial that DPR forces deliberately attacked civilian infrastructure objects such as a hospital and a kindergarten, paragraph 111, which follows it, provides no examples / or evidence of such attacks, specifically, no evidence of an attack on (shelling) of Avdeyevka Central Hospital, although the latter was within the probable area of the tUAF defence. This suggests that the DPR armed forces avoided attacking protected persons and objects (the Central Hospital, as a medical facility, was probably marked with the protective emblem of the Red Cross). Moreover, there arises the following issue for what reason was the civilian population of Avdeyevka not evacuated? Perhaps the civilian population was used by the UAF as a "human shield", which is a serious violation of IHL.

50. Moreover, the version that intentional attacks on civilian objects were carried out in order to cause fear among civilians⁵⁸ is totally unsubstantiated. Furthermore, the very presence of civilians in Avdeyevka, who had not been evacuated by the Ukrainian authorities from the dangerous area, as prescribed by IHL rules,⁵⁹ including Article 58 (a) of Protocol I, caused fear among the civilian population.

⁵⁸ See Memorial, ¶113.

⁵⁹ J.M. Henckaerts, L. Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I RULES* (ICRC and Cambridge University Press, Vol I, 2005, reprint 2009), Chapter 6, Rule 24, p. 95, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

VIII. EXPERT DECLARATION

51. I confirm that all the matters in respect of which I have stated my opinion are within my area of expertise and competence.
52. I understand that it is my duty to assist the ICJ in deciding the issues in respect of which this Report has been prepared. I have complied with, and will continue to comply with, that duty.
53. I confirm that the conclusions I have reached in this Report are unbiased, objective and impartial; they have not been influenced by the pressures of the proceedings or by any of the parties to the proceedings.

Expert

Oleg Serzhevich Bondarenko

Moscow, 10 March 2023

LIST OF EXHIBITS

Number:	Name of exhibit:
Exhibit A	Minister of Defence of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation, 8 August 2001.
Exhibit B	Ministry of Foreign Affairs of Ukraine, Statement by the Ministry of Foreign Affairs of Ukraine on the 4th Anniversary of the Launch of Armed Aggression against Ukraine by the Russian Federation, 20 February 2018.
Exhibit C	Minister of Defence of the Russian Federation, Combat Manual on Preparation and Conduct of Combined-Arms Military Combat. Part 2. Battalion, Company, 2006.

Exhibit A

Minister of Defence of the Russian Federation, Manual on International Humanitarian Law for
the Armed Forces of the Russian Federation, 8 August 2001

(excerpt, translation)

Excerpt
Translation

Minister of Defence of the Russian Federation, Manual on International Humanitarian Law for the Armed Forces of the Russian Federation, 8 August 2001, available at: <https://docs.cntd.ru/document/1300243501?ysclid=le9upv99rh909315846>.

APPROVED
by the Minister of Defence
of the Russian Federation
on 8 August 2001

**MANUAL ON INTERNATIONAL HUMANITARIAN LAW FOR THE
ARMED FORCES OF THE RUSSIAN FEDERATION**

A manual on International Humanitarian Law for the Russian Armed Forces has been developed in accordance with the Constitution of the Russian Federation, the Federal Law "On Military Duty and Military Service", the Charter of Internal Service of the Russian Armed Forces, and pursuant to international treaties regarding International Humanitarian Law to which the Russian Federation is a party, for the purposes of study and observance by commanders and staffs of the tactical level and by all members of the Armed Forces of the Russian Federation of the norms of international humanitarian law in preparation for and in the conduct of hostilities.

The provisions of this Manual are to be applied as appropriate to the circumstances, with determination to achieve the unconditional execution of combat tasks in compliance with International Humanitarian Law.

The norms of International Humanitarian Law are summarised in this Manual. In the event that it is necessary to read the norms in their entirety, the text of the aforementioned treaties should be used.

[...]

Exhibit B

Ministry of Foreign Affairs of Ukraine, Statement by the Ministry of Foreign Affairs of Ukraine
on the 4th Anniversary of the Launch of Armed Aggression against Ukraine by the Russian
Federation, 20 February 2018

Statement by the Ministry of Foreign Affairs of Ukraine on the 4th Anniversary of the Launch of Armed Aggression against Ukraine by the Russian Federation

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Statement by the Ministry of Foreign Affairs of Ukraine on the 4th Anniversary of the Launch of Armed Aggression against Ukraine by the Russian Federation

On the 20 February 2014, the Russian Federation launched against Ukraine a military aggression it had planned beforehand, which resulted in the temporary illegal occupation of the Autonomous Republic of Crimea, the City of Sevastopol as well as an attempt by the Russian Federation to annex the aforementioned administrative divisions and extend the international armed conflict to Donetsk and Luhansk Regions of Ukraine. These criminal acts claimed the lives of more than 10,000 people, brought about colossal destruction of property in the conflict area, turned 1,8 million Ukrainians into internally displaced persons.

Showing full disregard for international law, the Russian occupation authorities are committing large scale, serious violations of human rights in the occupied territories, aiming to break down and subdue all those disagreeing with the Kremlin's aggressive policies, demonstratively ignoring the order by the International Court of Justice on the matter, as well as directly organising and encouraging its puppets to perpetrate similar actions in certain areas of Donetsk and Luhansk Regions.

The occupying power resorts to taking Ukrainian citizens hostage as a result of falsified criminal cases, dozens of persons have been illegally detained in Russia as well as in the temporarily occupied territories of Crimea and Donbas. Their release remains one of the main priorities for Ukraine and the international community.

The international community is unanimous in condemning the illegal acts by the Russian aggressor. This is proven by the numerous decisions made by Ukraine's partner states, the United Nations, the Council of Europe, OSCE, the European Union, NATO and other international organizations.

Ukraine is grateful to its international partners for their clear position with regard to protecting and restoring Ukraine's sovereignty and territorial integrity within its internationally recognized borders.

A United Nations peacekeeping mission deployed throughout the occupied Donbas area, including areas adjacent to the temporarily uncontrolled segment of the Ukrainian-Russian border, should become an effective instrument for the restoration of Ukraine's sovereignty and territorial integrity.

The Ministry of Foreign Affairs of Ukraine urges its partners to use all appropriate means in order to prevent the escalation of the international armed conflict in the territory of Ukraine caused by the Kremlin's aggressive policy, force the Russian Federation to stop its aggression, violations of human rights and support of terrorist activities, establish a United Nations peacekeeping mission, end the occupation of Crimea and the seized territories of the Ukrainian Donbas, as well as make a full reparation of inflicted damage.

Exhibit C

Minister of Defence of the Russian Federation, Combat Manual on Preparation and Conduct of
Combined-Arms Military Combat. Part 2. Battalion, Company, 2006

(excerpt, translation)

Excerpt

Translation

Minister of Defence of the Russian Federation, Combat Manual on Preparation and Conduct Of Combined-Arms Military Combat, Part 2, Battalion, Company, 2006, available at: <https://www.rulit.me/books/boevoy-ustav-po-podgotovke-i-vedeniyu-obshchevojskovogo-boya-chast-2-batalon-rota-get-399026>.

MINISTRY OF DEFENCE OF THE RUSSIAN FEDERATION

COMBAT MANUAL

ON PREPARATION AND CONDUCT OF COMBINED-ARMS MILITARY COMBAT

PART 2

BATTALION, COMPANY

MINISTRY OF DEFENCE OF THE RUSSIAN FEDERATION



COMBAT MANUAL

ON PREPARATION AND CONDUCT OF COMBINED-ARMS MILITARY COMBAT

Part 2

BATTALION, COMPANY

Put into effect by Order No. 130 dated 31 August 2004 of the Commander-in-Chief of the Ground Forces of the Russian Federation – Deputy Minister of Defence of the Russian Federation

MOSCOW
MILITARY PUBLISHING HOUSE
2006

P. 2

The Combat Manual on the Preparation and Conduct of Combined-Arms Military Combat, Part 2 (Battalion, Company) sets out the basic provisions for the preparation and conduct of combined arms combat by mechanised infantry, tank and machine gun/artillery battalions and companies in cooperation with the subdivisions of other forces, special forces and internal troops of the Ground Forces, other branches and types of the Armed Forces, troops, military formations and institutions of other armed forces of the Russian Federation.

The provisions of the Manual should be applied creatively and in a way that is appropriate to the situation. They form the basis for the development of tactical modes and methods of operations in each particular case.

With the issuance of this manual, the Combat Manual of the Ground Forces, Part 2 (Battalion, Company), enacted by Order No. 50 of 1989 of the Commander-in-Chief of the Ground Forces, shall cease to have effect.

[...]

P. 247

278. Battalion support and logistics units, as well as motor vehicles of motorised infantry units, cross a stream using tactical stream-crossing equipment, ferries and bridges following artillery units.

Transportation of the wounded and sick to their own shore is carried out using the tactical stream-crossing equipment returning after disembarkation of units, or if necessary, by specially allocated means of crossing.

6. CAPTURE OF A RESIDENTIAL SETTLEMENT

279. The capture of a populated area is usually carried out from the march. The battalion (company), operating in the direction of a populated area, while advancing from the depth destroys the enemy defending on the approaches to it, breaks into the populated area, and relentlessly develops the attack in depth. If it is not possible to capture a populated area on the march, the senior commander arranges for it to be surrounded (blockaded) and taken by assault after comprehensive preparation.

280. Inside the residential settlement, the battalion usually advances as part of a brigade (regiment) along one or two main streets and adjacent residential blocks with a front line of **up to 1 km**. A company advances along one street or within a block.

The combat mission of a battalion (company) in an offensive in a residential settlement may

P. 248

be smaller in depth than under normal conditions. When storming a settlement, **the immediate objective of a battalion** is to capture a stronghold or two, or sometimes two or three blocks, while the **longer-range goal** is to capture important targets (blocks) deep in the enemy's defences.

The company's immediate objective is to capture a building (part of a large building or several small buildings) in the enemy's stronghold.

When attacking in a residential settlement, the largest part of the grenade launcher and anti-tank platoons (company anti-tank squad), mortar battery, artillery battalion (battery), tanks and flamethrower units are assigned to companies (platoons).

Battalion (company) combat formation in a residential settlement is usually formed in two echelons. In order to capture large structures or important facilities of the settlement, a special assault group composed of up to one reinforced motorized infantry company may be formed at the battalion's level of command, provided there are sufficient forces and equipment available.

281. The battalion commander examines the residential settlement and the peculiarities of the enemy's defences in advance using a large-scale map (plan, photographs), and organises reconnaissance.

When taking decisions for an offensive in a settlement, the battalion (company) commander, apart from the usual issues, determines the most important areas and objects (buildings) which

P. 249

must be taken in the first instance, the composition of the assault team, and the methods of striking the enemy with firearms taking into account the particular construction of buildings, structures, and other objects.

When assigning combat tasks to the elements of the combat order (units), in addition to the usual issues, the following shall be specified:

for the first echelon units - the objects to be taken first; the objects to be secured under the threat of enemy counterattacks and actions of his forces remaining in the rear;

for the second echelon (general reserve) units - the procedure for clearing the enemy and securing captured buildings (objects) and covering the flanks, the elimination of the enemy remaining in the rear of the first echelon units, allocated forces;

for the artillery units (units) – allocation of guns to the assault team, tasks for the destruction of buildings, stone fences and barricades.

The battalion commander, when assigning combat tasks to the assault team, indicates: reinforcement means and procedure for their reassignment; object of attack; directions for

concentrating the main efforts by stage in the assault of the object; tasks to be carried out by the first and second echelon units and by senior commanders in the interests of the assault team; time of readiness. In addition, the following

P. 250

may be specified: routes of advancement to the object of attack and starting position for the assault; procedure for the use of units, forces and equipment attached to the assault team.

When organising interaction, the battalion commander most carefully coordinates the actions of the first and second echelon units, artillery, and the assault group.

282. As units approach a residential settlement, artillery suppresses and destroys the enemy in strongholds simultaneously on the approaches to it and on its outskirts. As the units reach the outskirts of the residential settlement, artillery shifts fire onto buildings and other structures in the interior of the strongholds and prevents the approach of enemy reserves to the attacked objects.

The battalion (company), using gaps and weakly occupied areas in the enemy defences, as well as the results of fire, advancing from deep into the settlement and moving along the streets, systematically captures the buildings and blocks (important objects).

Tanks and flamethrower operators usually operate in the battle formation of motorised infantry units or behind them, and with their fire destroy the enemy first of all in basements, lower floors of buildings and other shelters. Armoured infantry fighting vehicles (armoured personnel carriers), following the tanks, move from cover to cover,

P. 251

destroy the enemy obstructing the tanks and their units by firing guns and machine guns.

The battalion (company) commander may allocate observation posts to cover the flanks and repel enemy counterattacks, as well as to block certain fortified buildings, while the main forces continue to develop the offensive.

283. Battalion support and logistics units are normally deployed outside the residential settlement or on its outskirts. Means for the evacuation and repair of weapons and military equipment, vehicles with the necessary quantity of missiles, ammunition and fuel, as well as the battalion medical unit move into the settlement. A technical observation post is deployed in the streets as close as possible to the advancing companies of the first echelon. To search and evacuate the wounded, stretcher-bearer groups are formed besides the regular forces and equipment.

284. When capturing a residential settlement by storm, a battalion (company) may be assigned to act in **an assault unit**. The assault unit is reinforced with tanks, guns, mortars, anti-tank guided systems, grenade launchers, flamethrowers, as well as by engineering troops and radiation, chemical and biological defence troops, and is supplied

with explosive charges and aerosol and flame-igniting agents.

P. 252

Forward air controllers may be included in the command structure of assault troops.

The combat order of an assault unit usually includes two or three assault groups, a reserve group, a cover group, a fire support group, and a breaching group. A demolition group may also be assigned to demolish particularly strong objects (buildings).

The purpose of an assault group is to capture an object of attack or a part of it. It is usually formed as part of a reinforced motorised rifle company (platoon).

The reserve is intended to reinforce the assault or covering groups, to develop success, and to carry out other tasks that may suddenly arise. An assault unit may have a reserve of up to one platoon.

A cover group is intended to consolidate a captured object and cover the flanks and rear of the assault unit. Up to a company may be assigned to it.

The purpose of the fire support group is to support the actions of assault groups with fire. It may include artillery, tank, anti-aircraft units, grenade launchers, machine gunners, snipers and flamethrower operators.

The breaching group's objective is to make passages through barriers in front of the enemy defence line, undermine the walls of the attacked object, demine it, and carry out other tasks.

P. 253

It comprises attached engineering and sapper units.

The combat order of an assault group may include capture, control, and fire support subgroups. The capture subgroup is formed on the basis of a motorised rifle platoon (squad) and is designed to destroy the enemy in the object of the attack and capture it. It may comprise flamethrower operators.

The control and fire support subgroup comprising infantry fighting vehicles (armoured personnel carriers), tanks, guns, mortars, grenade launchers, anti-tank and flamethrower units is designed to control the actions of the capturing subgroups and to deliver fire against the enemy firepower and manpower covering the attack object and those located inside it.

285. The commander of an assault unit (group) carefully examines the nature of the enemy defence, especially the system of fire and the possibility of flanking the unit with fire from adjacent buildings, the most convenient approaches, the presence and nature of obstacles, develops a plan, makes a decision, assigns combat tasks and organises interaction.

The blueprint for the stages of the mission determines: areas of concentration of the main forces; forms and methods of the mission performance (the order and methods of closing in on

the enemy, overcoming

P. 254

obstacles and fences, capturing and securing the attack object, with indication of the procedure for disabling the enemy on the approaches to and inside the object, and preventing the enemy from breaking through to it from other directions, including by way of underground communication routes); the distribution of forces and means (formation of a fighting order); and the ensuring of secrecy and stealth in preparation for and during combat.

286. When assigning combat tasks, the commander of the assault unit (group) gives directions:

to the assault group (capture subgroup) – on reinforcement means and order of their reassignment; object of attack; directions of concentration of main efforts by stages of action; tasks carried out by cover, fire support and breaching group by means of the senior commander; time of readiness. In addition, the following may be specified: routes of advance to the object of attack and starting position for the assault;

to reserve – on composition; starting position; possible tasks to be prepared for; time of readiness;

to cover group – on composition; tasks for securing the captured object and preventing enemy reserves from breaking through to it, including using underground communications; starting position; time of readiness;

to the fire support group (subgroup) – on composition; tasks to support the actions of assault

P. 255

groups (capturing subgroups), covering and breaching groups; initial position and locations of firing positions (firing lines); time of readiness;

to the breaching group – on composition; locations and time of ensuring passages through barriers in front of the attacked object; tasks to undermine its walls (structural elements) and demining; initial position; time of readiness.

287. In organising interaction, the battalion (company) commander coordinates: the procedure for units to reach the attacked object, including the use of concealed approaches and underground communications; the actions of the units upon assaulting (storming) the object and during combat inside of it; the procedure for interaction with neighbours and measures to prevent enemy reserves from approaching and counterattacking; provisioning of flanking assault groups (capture subgroups); the procedure for countering enemy sabotage and reconnaissance groups in the rear of the units; ways to identify one's own troops in the attack and signals to designate one's position inside the attacked object, and other issues.

288. Prior to assault of an object, it is engaged by all fire weapons of the assault squad. The assault squad (group) at this time takes up an initial position as close to the object of attack as possible and, at the established time, proceeds to attack.

Fire weapons of the fire support group (subgroups) destroy the enemy in the attacked and adjacent objects, and the assault

P. 256

groups (capturing subgroups), using breaches in walls, underground communications, passageways, entrances, building ledges, move to the object and at the preset time under the cover of fire of all means and aerosol screens burst into the object. The attack is carried out swiftly, using hand grenades on firing points, manpower and through windows inside the buildings.

Once inside the building, the assault teams (capture subgroups) seize stairwells, platforms, and get a foothold on them, clearing the adjoining rooms of the enemy, seeking to disengage the enemy forces and deprive their units of the ability to communicate with each other and help each other.

Fire support is provided until the motorised infantry units penetrate the object of the attack, and then the fire is transferred to other objects in order to isolate the attacked object. Combat in a large building breaks up into separate disjointed battles on the floors.

Engineering units that are part of the assault unit make passages in the walls and interfloor ceilings, and, if necessary, demine captured buildings.

Once the battalion (company) has captured a building or neighbourhood, it continues to fight for other buildings and blocks and fulfils the assigned mission. Individual pockets of resistance and small groups of the enemy are destroyed by the

P. 257

covering team and reserves. Particularly strong, long-term firing structures are blocked and blown up along with the garrisons defending them. Captured important buildings and crossroads are secured by a cover group. Exits from underground communications are guarded or destroyed.

Annex 8

Second Expert Report of Valery Alexeyevich Samolenkov, 10 March 2023

(translation)

INTERNATIONAL COURT OF JUSTICE

**APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE
SUPPRESSION OF THE FINANCING OF TERRORISM AND
OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

**SECOND EXPERT REPORT
OF VALERY ALEXEYEVICH SAMOLENKOV**

10 MARCH 2023

TABLE OF CONTENTS

I.	INTRODUCTION.....	5
A.	Qualifications.....	5
B.	Questions put to the expert	5
II.	SUMMARY	7
III.	13 JANUARY 2015 SHELLING OF THE BUGAS ROADBLOCK.....	13
A.	Substantiation of the shelling of the Bugas roadblock by UAF artillery.....	13
B.	Intercepted conversations show that the DPR was taking steps to reduce harm to civilians, which refutes General Brown's argument that the DPR intended to harm civilians.....	20
C.	General Brown's analysis is based on unverified data and is fundamentally flawed	22
D.	The Bugas roadblock was a facility with military functions and tasks	36
E.	Ukraine did not take steps to separate a military facility from civilian objects, civilians were used as "human shields" by the UAF.....	67
F.	Rationale for the attack on the Bugas roadblock as a military object.....	71
G.	The timing of the attack on the Bugas roadblock does not support the allegation of the DPR's intention to harm civilians	84
IV.	24 JANUARY 2015 SHELING WHICH CAUSED DAMAGE TO THE VOSTOCHNIY DISTRICT OF MARIUPOL	90
A.	Ukraine's documents confirm that the DPR had no intention of hitting residential areas of Mariupol, since the spotter Kirsanov deliberately gave the DPR incorrect coordinates, while the DPR's target was the UAF positions on the outskirts of the city	90
B.	The mere fact that civilian targets were hit does not mean that the shelling was deliberate or indiscriminate, contrary to General Brown's arguments	92
C.	The collateral damage was primarily caused by Ukraine's actions	93
D.	Ukraine does not dispute that shortly before the shelling, DPR forces were planning an offensive on Mariupol in order to seize it, which proves the expediency of strikes against the city's defences	95
E.	Possible plans by DPR forces, including to encircle Mariupol, do not refute that the shelling of Ukrainian positions on eastern outskirts of city was expedient.....	98
F.	Even in the absence of any subsequent ground offensive, the defeat of the Ukrainian positions defending the city was justified from a militarily point of view	100

G.	The choice of weapon system is not indicative of the indiscriminate or deliberate nature of the shelling.....	104
H.	"Possible firing positions" misidentified by Ukrainian experts	106
I.	Even without taking into account Kirsanov's transmission of incorrect coordinates, the hits on residential areas could have been the result of errors and malfunctions.....	106
V.	SHELLINGS OF AVDEYEVKA BETWEEN JANUARY AND MARCH 2017	110
A.	The reasons for the collateral damage during the shellings of Avdeyevka were the UAF's use of this settlement as a large fortified area and the fact that civilians were not evacuated	110
B.	Lack of evidence of indiscriminate shellings and presence of military targets in Avdeyevka	112
C.	The necessity and possibility of hitting reserves advancing to combat positions and preventing the supply of ammunition	114
D.	The possibility of civilian targets being hit by error or as a result of deviations of projectiles is an obvious fact.....	118
E.	The DPR's choice of weaponry does not indicate a deliberate character of shelling of civilian objects, nor an indiscriminate character of the shellings	119
VI.	10 FEBRUARY 2015 SHELLING OF RESIDENTIAL AREAS AND AIRFIELD IN KRAMATORSK	125
A.	Damage to civilian objects in Kramatorsk is collateral damage in connection with the attack on the airfield	125
B.	The DPR had taken steps to mitigate collateral damage, but it was almost inevitable that it would occur, as the UAF had positioned a critical military facility in close proximity to the city.....	134
C.	Technical malfunctions and operator errors are the likely causes of missiles hitting the residential neighbourhood of Kramatorsk. Numerous examples of guided munitions use confirm this	135
D.	UAF repeatedly used MLRS with cluster munitions.....	137
E.	The timing of the attacks does not support General Brown's argument of two different attacks	138
F.	"Possible firing positions" were misidentified by Ukrainian experts	139
VII.	EXPERT DECLARATION	141

I. INTRODUCTION

A. QUALIFICATIONS

1. I, Valery Alexeyevich Samolenkov, previously prepared an expert report analysing the circumstances of the following instances: (1) shelling of the Bugas roadblock on 13 January 2015; (2) shelling on the outskirts of Mariupol on 24 January 2015; (3) shelling in Kramatorsk on 10 February 2015; (4) several shellings in the frontline town of Avdeyevka from January 2017 to March 2017. I was also previously asked to assess the conclusions about the goals of the above shellings reached by Lieutenant General Christopher Brown ("General Brown") in his expert report dated 5 June 2018 ("First Brown Report").¹
2. My expert report of 8 August 2021 was submitted to the International Court of Justice in the case before ICJ, "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)" (hereinafter the "First Report").²
3. My qualifications and experience are described in the First Report.

B. QUESTIONS PUT TO THE EXPERT

4. I have been asked to review General Brown's second expert report dated 21 April 2022 (hereinafter also referred to as "Second Brown Report").³ In addition, I was asked to review the expert report of Ms. Catherine Gwilliam and Air Vice-Marshal Anthony Sean Corbett dated 20 April 2022 (hereinafter also referred to as the "Gwilliam and Corbett Report"),⁴ so far as it relates to my First Report and the analysis of the circumstances surrounding the firings in question.
5. I have been provided with a copy of the second expert report of Colonel A. A. Bobkov dated 10 March 2023 (hereinafter the "Second Bobkov Report"). I will also make

¹ Memorial, Annex 11.

² Counter-Memorial (ICSFT), Annex 2.

³ Reply, Annex 1.

⁴ Reply, Annex 2.

references to the first expert report of Colonel A. A. Bobkov dated 8 August 2021 (hereinafter referred to as the "First Bobkov Report").⁵ Also I continue to base my research on the files, provided to the Court by the Ukraine itself or which are available through open sources.

⁵ Counter-Memorial (ICSFT), Annex 1.

II. SUMMARY

6. In the course of my analysis I came to the following conclusions.
7. I do not support the infliction of harm to the civilian population and civilian objects by military operations. However, I disagree with the claims that in the instances in question the infliction of harm to civilian objects was a deliberate tactic of the DPR and that the attacks were indiscriminate.
8. In this report I provide numerous examples of collateral damage caused by military actions of Ukraine and NATO member states and their allies. I condemn such actions. Nevertheless, these examples show that:
 - (a) Unfortunately, collateral damage is a very common (almost unavoidable) consequence of warfare;
 - (b) The mere existence of collateral damage is insufficient to establish that the strikes were indiscriminate and/or intentional.
9. Conclusions regarding the shelling of the Bugas roadblock:
 - (a) The main cause of the collateral damage resulting from the shelling was that Ukraine organised searches of civilians and vehicles on the territory of a military object.
 - (b) The choice of weaponry (BM-21 Grad) does not in itself imply the indiscriminate nature of the attack. Had any other type of artillery been used, the risk of collateral damage would have remained due to Ukraine's failure to separate the functions of a military facility from the functions of a civilian checkpoint. The bus that was on the territory of the Bugas roadblock at the time of the shelling could have been hit by a shell fired at the roadblock from any type of artillery.
 - (c) Ukraine submitted evidence that the missiles that hit the Bugas roadblock had spoiler rings, which General Brown fails to take into account. This refutes General Brown's theory that shelling took place from DPR-controlled positions.

- (d) The correct calculation of the firing distance based on both the analysis of the craters and the angle of descent of shell fragments proves that the shelling was carried out from positions controlled by the UAF.
- (e) The data I have studied indicates that the Bugas roadblock was hit by UAF artillery fire.
- (f) The intercepts confirm that the DPR's tactics included the taking of measures to avoid damage to civilian objects. This refutes allegations of a deliberate attack on civilians. General Brown raises no objections against my analysis of the intercepts, but merely points out that the intercepts do not, in his view, directly relate to the shelling of the Bugas roadblock.
- (g) If one was to assume that the roadblock was shelled by the DPR after all (which I believe to be wrong), such shelling could have been carried out in order to neutralize an enemy military facility located within the lines of the UAF troops deployment in Volnovakha – Dokuchayevsk direction.
- (h) The Bugas roadblock was regarded by Ukraine itself as a military object, which is confirmed by SBU documents submitted by Ukraine in these proceedings and by Ukrainian regulatory acts.
- (i) There were units of armed personnel and armoured vehicles at the Bugas roadblock. The roadblock was equipped with firing positions and trenches for personnel and equipment and could hold all-round defence.
- (j) The roadblock performed military tasks on an important route, which played a critical role in supplying Ukrainian positions in the vicinity of Dokuchayevsk.
- (k) Shelling in the middle of the day is not indicative of an intention to harm civilians, as queues of civilian vehicles were forming near the Bugas roadblock during the night. If the shelling had been at night time rather than in the middle of the day, it would have resulted in more casualties.
- (l) General Brown misjudged the firing range and the location of the firing position by using incorrect and unverified data. He uncritically relies on the SBU's analysis of

the craters. His own analysis is contradictory and does not support his conclusion that the shelling was carried out from a distance of “19.4-19.8 km”.

10. Conclusions regarding shelling on the outskirts of Mariupol on 24 January 2015:

- (a) The very location of UAF military positions in close proximity to residential areas, combined with the fact that the population had not been evacuated from nearby areas, was the principal condition for the occurrence of collateral damage. When combat activity takes place in close proximity to residential areas from which civilians have not been evacuated, collateral damage is almost inevitable. The warfare practice of NATO member states in modern history confirms this.
- (b) The available evidence suggests that the attack on the residential area of Mariupol was the result of an honest and reasonable mistake and that the real purpose of the attack was to engage military facilities and achieve the overall military goal of creating conditions for capturing the city.
- (c) The documents provided by Ukraine itself (testimonies obtained by SBU and intercepts) and other Ukrainian sources (Ukrainian court judgments, statements by the Ukrainian prosecutor's office, reports of Ukrainian media) confirm that the DPR intended to engage the UAF's defensive positions on the outskirts of the city, and the hitting of residential areas was the result of Kirsanov providing knowingly incorrect target coordinates.
- (d) The shelling of UAF's positions on the outskirts of the city was justified from a military point of view, as it was carried out to support the announced offensive operation to capture Mariupol.
- (e) The purpose of the shelling could have been to strengthen DPR's positions or to gain a better position for subsequent actions around the city. The shelling of targets in this area made military sense not only in the principal lines of military operations, but also in other lines of operations. The shelling could also have been part of exchange of fire.
- (f) I have no reason to believe that the DPR had cannon artillery available to shell UAF's positions on the outskirts of Mariupol. The Second Bobkov Report refutes the conclusion of Ukrainian experts that D-30 howitzers can be seen on the satellite

imagery of DPR's positions in this area. In any case, the choice in favour of MLRS could have been made based on military necessity and expediency, since MLRS have advantages over cannon artillery and/or could have been the only available means of engagement at the relevant time.

- (g) The mere choice of MLRS as a means of attack does not in itself imply the indiscriminate nature of the shelling, as MLRSs are not inherently indiscriminate weapons.
- (h) As NATO's warfare experience shows, even the use of highest precision weapons inevitably results in civilian casualties, especially when used in urban areas.

11. Conclusions regarding the shelling of Avdeyevka in January-March 2017:

- (a) UAF members had taken up positions in the residential area of Avdeyevka and used civilian buildings in Avdeyevka for military purposes, as confirmed by General Brown. There is ample evidence that the UAF pursued a tactic of placing tanks and other military objects in residential neighbourhoods of Avdeyevka (in particular, for attacks on Donetsk). This was the principal condition for the occurrence of collateral damage during the intensified hostilities in this area of combat operations.
- (b) The shellings were aimed exclusively at military targets and were justified by the need to engage enemy firing positions, defensive positions and supply lines. The argument that civilian objects were intentionally targeted is not confirmed.
- (c) The DPR's units were faced with a choice: either to allow the UAF to shell their positions unhindered and to deliver supplies and reinforcements to their forward positions, or to hit enemy positions and military vehicles as they were on their way to those positions. Notably, the DPR hit mobile targets too for which known methods for hitting mobile targets with artillery fire could be used.
- (d) The use of weapons that allow for wide area of engagement (such as BM-21 Grad) to shell UAF's positions and other military targets in Avdeyevka does not in itself indicate that the attackers intended to harm civilians. There are numerous examples of the use of such weapons in urban areas both by NATO forces and by the UAF themselves.

- (e) The rules of engagement applied by many countries allow for strikes resulting in collateral damage if such strikes achieve a military advantage and/or other military goals and objectives.
12. Conclusions regarding the shelling in Kramatorsk on 10 February 2015:
- (a) The damage to civilian objects in the city was a consequence of the UAF's deploying critical military facilities in the immediate vicinity of the city.
 - (b) The shelling with the use of BM-30 Smerch system was targeted at facilities located at the Kramatorsk airfield (ATO command post, combat aircraft, tactical weapon systems, ammunition depots, and personnel). Hitting these targets was, from a military perspective, the most important task and number one priority for the DPR. General Brown acknowledges this.
 - (c) General Brown also confirms that BM-30 Smerch was the most appropriate weapon for engaging targets at the Kramatorsk airfield.
 - (d) The choice of BM-30 Smerch as the means of engagement does not mean that the attack was indiscriminate. The UAF themselves have repeatedly used BM-30 Smerch and other systems with cluster munitions to shell downtown of Donetsk and other settlements. In contrast to the shelling of Kramatorsk, those attacks had no military rationale consisting in shelling a large area with military targets (military headquarters, combat aircraft, depots, etc.) spread over its territory.
 - (e) The shelling of Kramatorsk residential areas was unintentional and most likely related to failures of flight range adjustment systems of a small number of rockets. Unintentional nature of the shelling of residential areas and the desire to avoid hitting those areas is confirmed by the DPR's use of a UAV for target reconnaissance in the airfield prior to the attack.
 - (f) The fact that the shelling was directed against military targets is confirmed by the OSCE SMM's information on the area of the shelling and the casualties: the area of the shelling, as assessed by the OSCE monitors, was "near Kramatorsk airfield" and the victims were predominantly UAF servicemen (at least 33 dead and wounded

servicemen, 33 dead and wounded civilians – according to the information of the Ukrainian side, provided by the OSCE SMM).⁶

- (g) Contrary to General Brown's assertion, the shelling of the Kramatorsk airfield by DPR forces could not have been carried out from south in the north direction, because in such case BM-30 Smerch launch site would have been deeply behind UAF's positions. In any case, debris from the carrier elements of the rockets are much less dangerous than their cluster munitions.
- (h) Technical faults and human error can cause even the highest-precision munitions to deviate from targets. This has been proven by numerous examples from NATO military campaigns. The mere presence of collateral damage caused by the use of guided munitions cannot in itself be evidence of deliberate targeting of civilian objects.

13. My conclusions are set out in more detail below.

⁶ Memorial, Annex 331, *See also* Memorial, Annex 107.

III. 13 JANUARY 2015 SHELLING OF THE BUGAS ROADBLOCK

A. SUBSTANTIATION OF THE SHELLING OF THE BUGAS ROADBLOCK BY UAF ARTILLERY

i. The presence of spoiler rings on MLRS missiles used to shell the Bugas roadblock indicates that the shelling was carried out by UAF's artillery

14. General Brown claims that "no evidence of spoiler rings was found by the investigators".⁷ This is not the case. Annex 123 to Ukraine's Memorial includes expert report No. 16/8, prepared by the Ukrainian Scientific Research Institute of Special Equipment and Forensic Expert Examination dated 7 May 2015. It describes the fragments found in the territory of the roadblock after the shelling. The descriptive part and one of the conclusions based on the chemical examination of the fragments (metal composition) notes the following:

"object (No. 3) may be a fragment of a 'big ring' or 'small ring' of M-21OF (9M22U) shell." ⁸

15. Spoiler rings are used to hit the target at close range. Spoiler rings are not intended to be used when firing at a maximum range as the rockets will not reach the target. Spoiler rings improve the accuracy and dispersion slightly, but the range is significantly reduced.

16. General Brown claims that the shelling was carried out from a range of "between 19.4 and 19.8 kilometres".⁹ General Brown obtained this range using data from firing tables,¹⁰ and the angle of descent (between 52 and 55 degrees) determined by SBU.¹¹ General Brown used the tables in relation to the firing without spoiler rings.

17. As I pointed out above, however, the rockets that were fired at the Bugas roadblock had spoiler rings on them.

18. For a projectile with a small spoiler ring the maximum range is 15,836 m and for a shell with a large spoiler ring the maximum range is 11,840 m.¹² Therefore, the use of spoiler

⁷ Second Brown Report, para 15.

⁸ Memorial, Annex 123, p. 15 and 16.

⁹ Second Brown Report, para 15 (a) (i).

¹⁰ Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

¹¹ First Brown Report, para. 26.

¹² Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

rings means that it is impossible to fire from a range of between 19.4 and 19.8 km. A projectile with a spoiler ring would simply not be able to fly that distance.

19. Given the evidence of the use of spoiler rings, it does not appear to make any tactical sense for the DPR to use spoiler rings, much less small spoiler rings, for a number of reasons:
 - (a) there is no reason why the firing of rockets should not be carried without the use of spoiler rings, since the Bugas roadblock was not in the front line of the UAF defence line in the area;
 - (b) firing with the use of small spoiler rings from the nearest DPR's positions, which were about 15 km away from the roadblock, suggests firing at a maximum range.¹³ However, firing from a maximum distance is not practiced normally due to high projectile dispersion and low probability of hitting the target.
20. For this reason, if the firing was carried out from a distance of about 15 km, the use of spoiler rings would be ruled out.
21. If large spoiler rings were used, then, given the above parameters (rockets' angles of descent), the firing range can be no more than 11,400 metres, i.e. again this is close to the maximum range. Taking into account data provided by Ukraine, specifically, the characteristics of blasting site No 2¹⁴ (middle of the burst front, its bearing grid angle (6 to 32 degrees), and angle of descent (53 degrees)), I conclude that the presumable launch site was two kilometres south-east of Novotroitskoye village, in close proximity to UAF positions.
22. Ukraine's own evidence thus refutes General Brown's conclusions. It was impossible for DPR's MLRS units to carry out the mission (i.e., to move into a position in close proximity to UAF positions) under such conditions, as DPR's MLRS would have been hit by close combat weapons or by UAF artillery. The fact that BM-21s are not fired from positions

¹³ The maximum range of fire with the use of small spoiler rings is 15,836 m.

¹⁴ Memorial, Annex 87, Record of Inspection by SBU Lieutenant Colonel of Justice O. Martynyuk dated 16 January 2015.

close to the enemy is confirmed by General Brown himself.¹⁵ In this regard, I believe that the Bugas roadblock was attacked not by DPR's MLRS but by UAF's MLRS.

ii. Nature of damage to the bus confirms shelling by UAF artillery

23. General Brown relied entirely on the angles of descent provided by the SBU. As I point out below, such data is not objective and in any case is not accurate.
24. However, there is another method by which the projectile's angle of descent can be calculated: by analysing the dispersion pattern of projectile fragments. The dispersion pattern of fragments depends on the angle of descent. Approximately 70-80% of the fragments are dispersed in a spray pattern perpendicular to the direction of fire (see Figure 1).¹⁶ This method was not used by General Brown, despite the fact that such method is based on objective data describing the fragments' dispersion pattern.

¹⁵ Second Brown Report, para 15 (a) (ii), footnote 70.

¹⁶ Manual for the Study of the Rules of Firing and Fire Control of Artillery (PSiUO-2011), Part 1, Battalion, Battery, Platoon, Gun, introduced by the Chief of Missile Forces and Artillery of the Ground Forces in 2011, p.13, available at: www.fa.ru/org/chair/voen/Documents/ObrazDoc/Пособие%20по%20изучению%20ПСиУО.pdf.

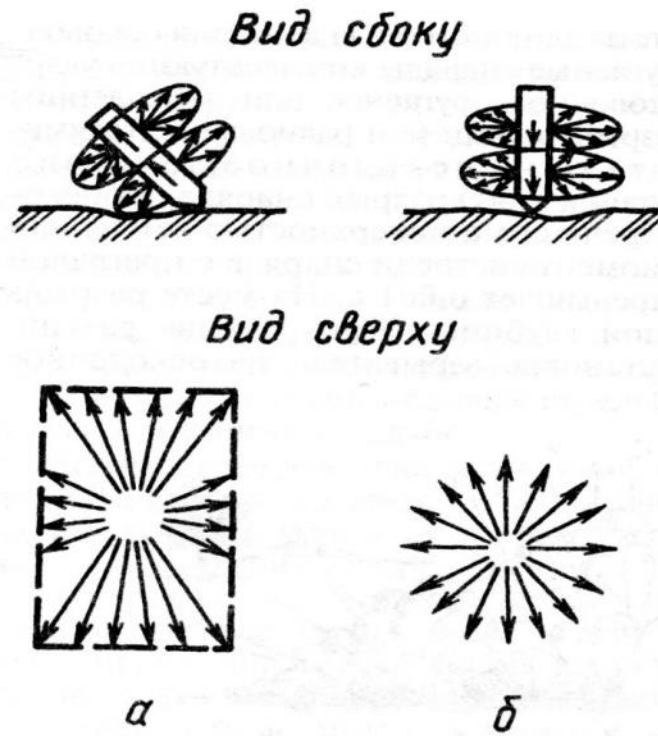


Рис. 2. Разлет осколков при установке взрывателя на осколочное действие

*Side view

Top view

Fig. 2 Fragment dispersion when the fuze is set to fragmentation action

Figure 1 - Schematic diagram of dispersion of fragments

25. Having analysed the distribution pattern of the fragments captured in the photos of the damage to the bus, I see that the orientation of these fragments along the side of the bus (a spray of fragments equal to 70-80% of the total number of fragments) forms an angle, which is the projection of the projectile's angle of descent (see Figure 2).
26. Even without taking measurements, one can conclude that the angle is much less than between 52 and 55 degrees indicated by the SBU and General Brown. In reality, the angle is between 35 and 40 degrees.

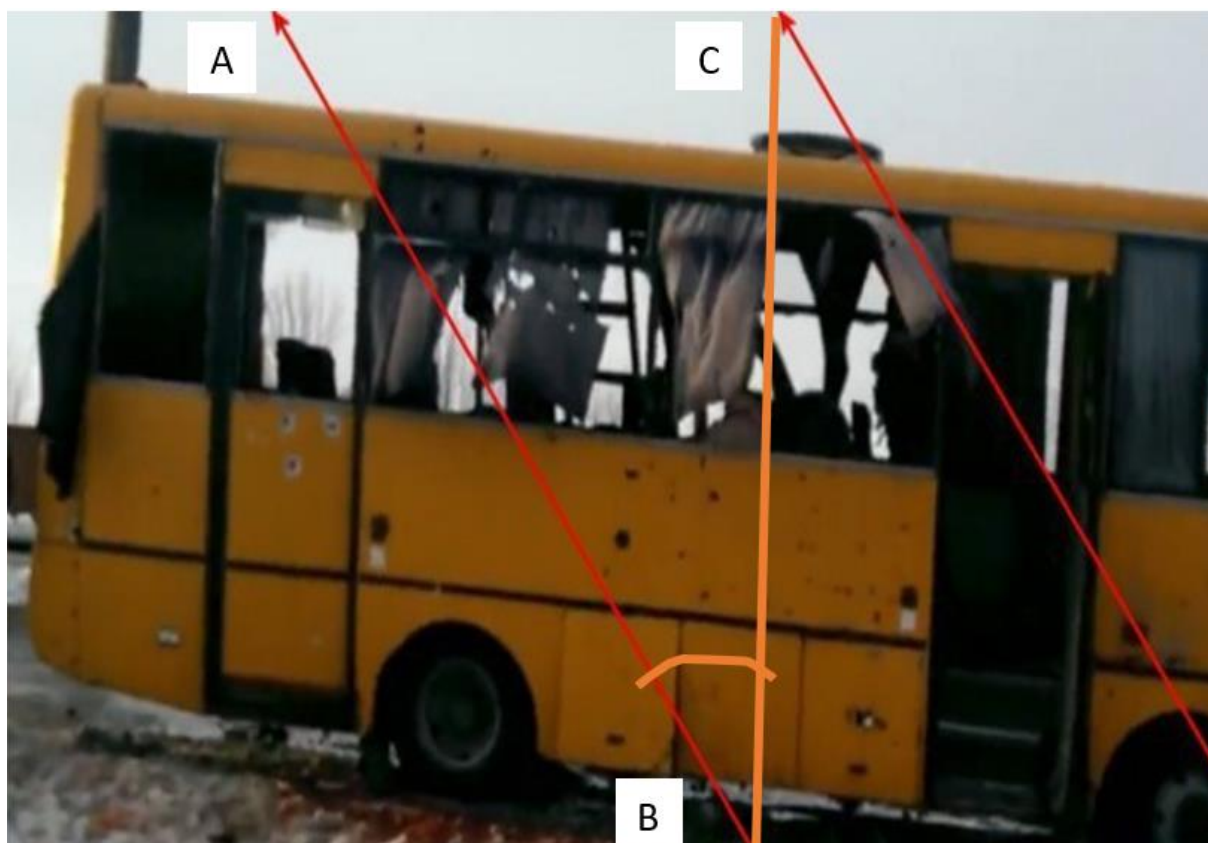


Figure 2 - Fragment distribution pattern.

27. The projectile's angle of descent allows the firing range to be determined. Taking into account the actual angle of descent (between 35 and 40 degrees), the firing range is as follows: between 9.7 and 10.6 km when firing with the use of a large spoiler ring; between 12.5 and 13.2 km when firing with the use of a small spoiler ring.
28. Such range also confirms my conclusion that the Bugas roadblock was shelled by UAF artillery, as the shelling was carried out from territory under UAF control (see Figure 3).¹⁷

¹⁷ First Bobkov Report, Figure 23.

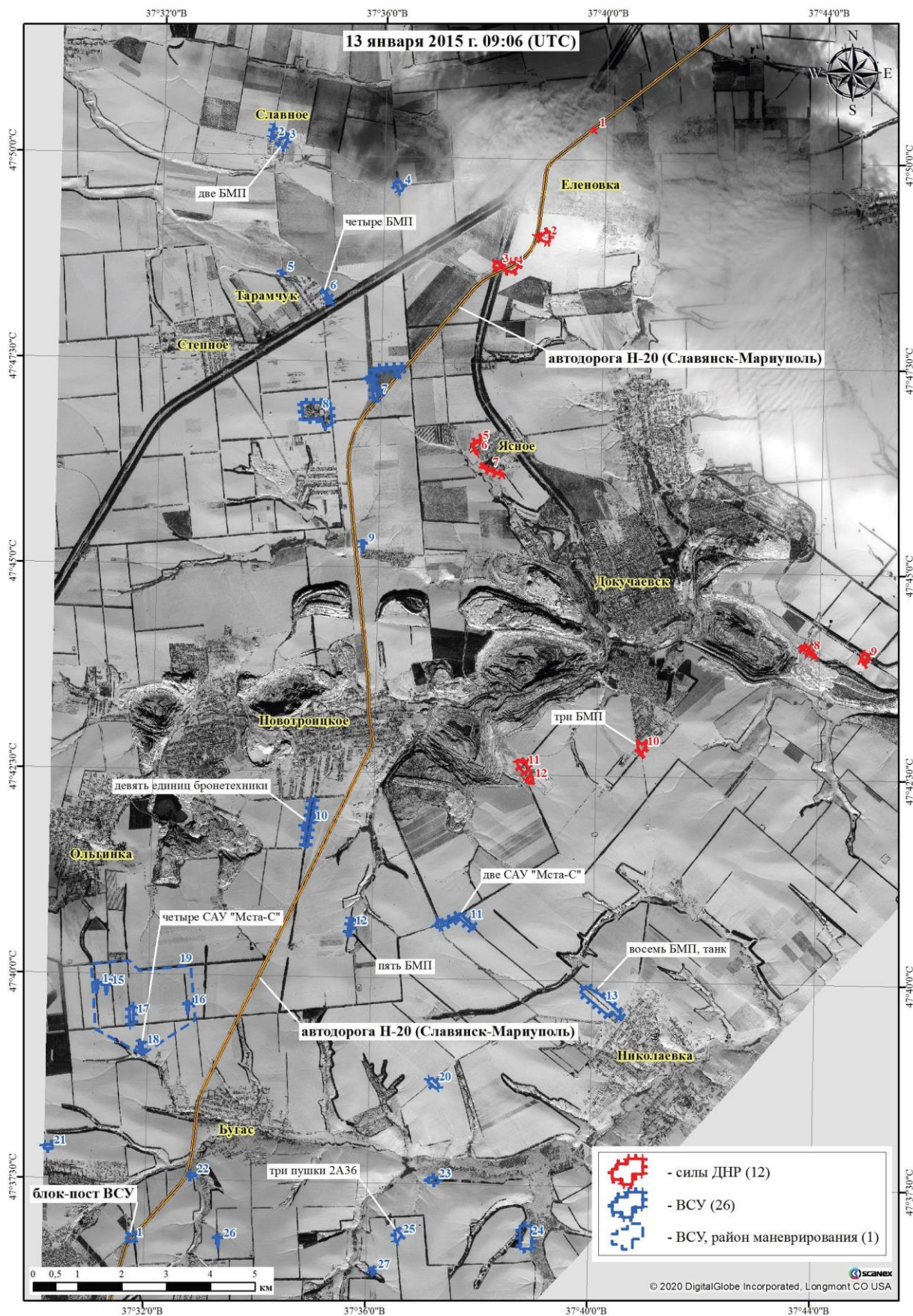


Figure 3 - Positions of UAF and DPR forces as of 13 January 2015.

* two infantry fighting vehicles

four infantry fighting vehicles

H-20 highway (Slavyansk-Mariupol)

ten armoured vehicles

two self-propelled howitzers

four Msta-S self-propelled howitzers

eight infantry fighting vehicles, a tank

five infantry fighting vehicles

H-20 highway (Slavyansk-Mariupol)

three guns 2A36

UAF roadblock

Legend:

DPR forces

UAF forces

UAF, maneuver area

iii. The Bugas roadblock could have been hit by fire from UAF artillery

29. General Brown calls "absurd" the view I put forward in the First Report that the Bugas roadblock was shelled by the UAF.¹⁸ However, there is no refutation of this view in Second Brown Report. In this regard I would like to draw attention to the following.
30. Firstly, General Brown should be well aware of the concept of "friendly fire" in military science. Friendly fire is a phenomenon that occurs very frequently in actual combat situations. With that in mind friendly fire can occur as a result of accidents and errors, or as a result of deliberate action.
31. By making a claim of "absurdity", General Brown only "brushes off" a possible scenario of events – the Bugas roadblock being hit by friendly fire from Ukraine's own artillery.

¹⁸ Second Brown Report, para 15.

32. At the same time, I cannot rule out the possibility that the UAF deliberately hit the Bugas roadblock, where Kiev-2 Battalion was stationed, for example as a provocation (to justify the need for the continuation of the military operation in south-eastern Ukraine, to justify the claim that the UAF are fighting with "terrorists", etc.).
33. It is the UAF (Ukraine) that could have known the exact moment when the bus was at the roadblock. As there is no evidence that means of reconnaissance such as UAVs were used by the DPR in the Bugas area (I assume that the DPR had a shortage of modern reconnaissance tools such as UAVs in principle), I am confident that the DPR had no real-time surveillance of the roadblock. This, in my view, confirms that the attack was carried out by the UAF with the aim of provocation.
34. Secondly, if the claim that the Bugas roadblock was shelled by UAF artillery is "absurd", then Ukraine's numerous statements about DPR's and LPR's forces or the Russian Armed Forces firing at their own positions should also be considered absurd.¹⁹
35. Thus, based on the available material, I conclude that the shelling of the Bugas roadblock came from Kiev-controlled areas, indicating that the attack was carried out by the UAF, possibly with the aim of provocation.

B. INTERCEPTED CONVERSATIONS SHOW THAT THE DPR WAS TAKING STEPS TO REDUCE HARM TO CIVILIANS, WHICH REFUTES GENERAL BROWN'S ARGUMENT THAT THE DPR INTENDED TO HARM CIVILIANS

36. General Brown supports Ukraine's claim that the shelling of the Bugas roadblock was a deliberate attack on civilians by the DPR.²⁰
37. However, this claim is contradicted by intercepted conversations of DPR forces who were engaged in active combat operations in the immediate area of the line of contact to the

¹⁹ For example, "For the sake of blaming Ukrainian troops, militants opened fire on heavy weapons at their own positions near the village of Pikuzy", Hromadske, *Militants shelled their own positions to blame it on the Ukrainian military - Operational Command "Vostok"* (19 February 2022), available at: <https://hromadske.ua/ru/posts/boeviki-obstrelyali-svoi-zhe-pozicii-chtoby-obvinit-v-etom-ukrainskih-voennyh-otg-vostok> (Exhibit A). MIL.IN.UA, *Russian troops shelled Olenivka with targeted artillery – General Staff of the Armed Forces of Ukraine* (29 July 2022), available at: <https://mil.in.ua/en/news/russian-troops-shelled-olenivka-with-targeted-artillery/> (Exhibit B). "According to local residents, Russian troops have shelled 20 of their own vehicles in Polohy<...>", Ukrainian Pravda, *Zaporizhzhia Region: Russian troops shell their own vehicles to avoid going to front* (9 May 2022,), available at: <https://news.yahoo.com/zaporizhzhia-region-russian-troops-shell-055003398.html> (Exhibit C).

²⁰ Second Brown Report, para. 14.

west and northwest of Dokuchayevsk (including near the settlements of Berezovoye and Slavnoye) during the period in question (specifically, 13 and 14 January 2015).²¹

38. The intercepts indicate that members of DPR forces were taking steps to avoid damage to civilians. I would like to stress that General Brown has no objections to my analysis of the intercepts and my conclusions. As his only objection, General Brown points out that the intercepts are not, in his view, relevant to the 13 January 2015 shelling of the Bugas roadblock.
39. As I detailed above, I believe that the attack on the Bugas roadblock was not carried out by DPR forces. In any case, however, the intercepted conversations of members of DPR forces demonstrate that the DPR had no intention of harming civilians. On the contrary, in their attacks they tried to draw fire away from civilian objects.²²
40. In particular, the following is evident from these intercepts:
- (a) The intercepts discuss the closure of civil traffic on the day of the shelling, presumably near the settlement of Berezovoye. I believe that the closure of traffic was caused by active hostilities, hence aimed at reducing the risk of civilian casualties;²³
 - (b) The DPR artillery requested clarifying information on the targets after it became known that the coordinates they had received were in a residential area;²⁴
 - (c) DPR forces used ranging shots²⁵ and spotters²⁶, while diverting fire away from the residential area.²⁷

²¹ First Report, paras. 19-42.

²² First Report, para. 26 et seq.

²³ First Report, para. 37.

²⁴ Memorial, Annex 257, Translation of transcripts of Y. Shpakov's conversations, conversation no. 2, 13 January 2015, *See also* First Report, para. 25.

²⁵ *Ibid.*, conversation no. 15, *See also* First Report, paras. 29-31.

²⁶ *Ibid.*, conversation no. 19, *See also* First Report, paras. 29-31.

²⁷ *Ibid.* conversation no. 20, *See also* First Report, para. 33.

41. This evidence demonstrates what the objectives, tactics and fighting practices of DPR forces in the area during the days of shelling were. There is nothing in the intercepts to confirm that the DPR allegedly intended to hit civilians.
42. Thus, the claim that DPR forces deliberately attacked civilians at the Bugas roadblock is unfounded and refuted by the intercepts.

C. GENERAL BROWN'S ANALYSIS IS BASED ON UNVERIFIED DATA AND IS FUNDAMENTALLY FLAWED

i. General Brown conducted an incorrect analysis of the craters, as a result he determined the firing range incorrectly in any event

43. First of all, it should be noted that General Brown's analysis is based almost entirely on evidence compiled by the SBU, primarily on the Bugas roadblock inspection records.²⁸ General Brown did not himself inspect or analyse the craters after the shelling.
44. Such evidence obtained from the SBU is not objective because the SBU is an interested party whose aim was not to establish the truth, but to place the blame for the shelling on the DPR as Ukraine's enemy.
45. For example, I have noticed the following obviously unreliable information in the documents prepared by the SBU. Thus, in A.M. Pavlenko's testimony:²⁹
 - (a) Reference is made to the alleged sounds of BM-21 Grad fire which A. M. Pavlenko said he had seen passing through the position in Yelenovka (Olenivka) some 2-2.5 hours earlier. From the sound of shelling, A. M. Pavlenko was able to determine: (1) the location from which the shelling was taking place; (2) the direction of the shelling; (3) the number of vehicles that were shelling.
 - (b) A. M. Pavlenko is a civilian (who came to Donetsk to work at a mine). According to him, he gained the necessary experience to analyse the sounds of the BM-21 system while on correctional work in Donetsk from November 2014 to January 2015, where he "often heard" the operation of BM-21.

²⁸ Memorial, Annex 87.

²⁹ Memorial, Annex 209.

- (c) The distance between the settlements of Yelenovka and Dokuchayevsk is approximately 6-8 kilometres. At such a distance it is possible to hear the sound of BM-21 rounds. However, even with good knowledge of the terrain, it is almost impossible to determine the exact location of firing positions, nor is it possible to determine the direction of fire. When the MLRS is firing, it emits loud sounds that spread over the terrain, reflecting and resonating depending on the terrain and even the weather conditions. The same applies to the sounds of explosions resulting from projectile impacts. If A.M. Pavlenko did hear any sounds, it could also have been another shelling: as is known from the case file and open sources, there were active hostilities in the area.
- (d) A.M. Pavlenko's ability to indicate (even approximately) the number of shells fired after he allegedly heard shelling at such a distance is also surprising, as is his professionalism in describing the combat vehicles he saw. A.M. Pavlenko, who is not in the military, uses military terminology peculiar to experts in official communication, e.g: "Grad multiple rocket launcher systems based on the Ural vehicle". Moreover, the witness notes that:
- “Each of the three Grad systems had the protective covers removed from their barrels <...> which they should be equipped with, indicating that these combat vehicles were in a ready-to-fire condition”.³⁰
- (e) However, A. M. Pavlenko “did not see if the barrels of those systems contained missiles”.³¹
- (f) To me, it is quite obvious that this description is the least likely to be a civilian's observation – by A.M. Pavlenko's own admission, he had previously only seen these vehicles on the streets in Donetsk and on television.
46. The statements of witnesses who were at the roadblock must also be treated with caution. In particular, witness A.A. Kalus unequivocally identified that:
- “the I-Van and Yutong buses were damaged by the explosion of Grad shells fired from the direction of Dokuchayevsk, Donetsk Region”.³²

³⁰ Memorial, Annex 209.

³¹ *Ibid.*

³² Memorial, Annex 204.

47. However, it is not clear how A.A. Kalus determined the type of shells and the direction of the shelling, being a civilian and taking cover in the building of the former traffic police at the time of the shelling.

48. Witness A.Y. Fadeev noted in his statement:

“I can say unequivocally that the Grad missiles <...> came from the north-east direction. This was evident from the way the bursts were "laying" in the field along the road - they were approaching the post from the north. Also, when I was under fire <...> I saw with my own eyes how, having flown over our roadblock from the north-east, one shell entered the ground at a 60-65 degree angle to the north-east”.³³

49. It is clearly not possible to determine such facts at the time of shelling, especially in relation to the flight of the projectile:

(a) “flown over from the north-east”,

(b) “entered the ground at a 60-65 degree angle to the north-east”.

50. Even if a witness could calmly and concentratedly observe the shelling from a known safe location, the projectile's speed (about 690 metres per second) would in any case prevent him from observing the projectile's approach to the ground and the angle of its impact with the ground when it explodes. Obviously, this is physically impossible.

51. The conclusion that the SBU materials cannot be considered objective evidence was drawn, for example, by the District Court of The Hague, who heard the criminal case against those accused of involvement in the crash of flight MH-17 (hereinafter emphasis added by me):

"The Public Prosecution Service provided reasons whenever it used material with potential probative value that had been provided by or via the SBU. In so doing, the prosecution explicitly considered the questionable reputation that the SBU had in 2014 according to sources, which prompted it to exercise caution and to conduct verification and validation studies. <...>

Therefore, if the court makes use of evidence introduced via the SBU, it will do so with due caution, in accordance with the applicable provisions. <...>

According to the prosecution, in this investigation more caution was exercised in respect of evidence from Ukraine than would be customary in

³³ Memorial, Annex 244.

international cooperation on criminal matters, in that the evidence was always validated."³⁴

52. General Brown himself admits that his initial analysis of the projectile dispersion zone was incorrect because it was based on inaccurate data provided by the SBU on the number and location of the craters. In particular, General Brown originally used in his analysis a map with 50 craters at the site of the shelling³⁵ and gave the dimensions of the "actual" dispersion ellipse (640 by 580 metres),³⁶ which is approximately five times smaller in area than the dispersion ellipse given by General Brown in his second report, based on the already 92 craters (1305 by 1300 metres).³⁷ In his second report, General Brown stresses that he was unable to confirm the data provided to him by the SBU on the craters that were used in the analysis in the First Brown Report.³⁸
53. General Brown attempts to explain such a significant discrepancy in the data provided to him by the Ukrainian side by claiming that the SBU "focused on identifying the locations of missile impacts that caused injury or material damage" and "it made no sense for them to look for missiles that fell without causing harm". This point of view, strange in itself (why it "made no sense" for the body in charge of investigating the incident and analysing the site of the incident to locate the rocket impact), is even less understandable in light of the date General Brown obtained this data (2018, a full four years after the incident), and certainly not explainable in light of the fact that General Brown relied on this data in his first report – which he himself claimed was a priori incomplete.
54. In my view, this calls into question all the work done by General Brown, for his further analysis also uses the data provided by the SBU. For example, General Brown is still using the same angle of incidence of shells, which was given to him by the SBU before the First Brown Report was prepared, to determine the range of fire.³⁹ General Brown himself did not take any measurements of the angles of impact of the shells, nor did he

³⁴ District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14036&showbutton=true&keyword=09%252f748005-19&idx=1%2F>. (Exhibit D).

³⁵ Second Brown Report, para. 15 (a) (iii).

³⁶ First Brown Report, para. 23.

³⁷ Second Brown Report, para. 15 (a) (iii).

³⁸ *Ibid.*, para. 15 (a) (iii), footnote 72.

³⁹ *Ibid.*, para. 15 (a) (i).

verify the data he received from the SBU. Consequently, it is possible that his analysis here too is based on "incomplete" data from an unreliable source.

55. It is particularly noteworthy that even after receiving new data from the SBU on the projectile dispersion area (size of the ellipse, number of craters) General Brown still claims that the shelling took place from a distance of "19.4-19.8 km". In other words, even after using significantly different data, and despite "increasing" the dispersion ellipse area by approximately five times, General Brown in the second report arrives at the same result he arrived at in the first report: the shelling was allegedly conducted from a distance of 19.6 km.⁴⁰
56. I already pointed out earlier my disagreement with the method used by General Brown to determine the firing range to be "between 19.4 and 19.8 km" based on the crater study which included the taking of measurements of angles of descent and the collection of projectile fragments.⁴¹ I believe that the angles of descent taken by General Brown from the SBU's record of inspection of the scene were, in either event, not established with sufficient accuracy to enable him to draw such conclusions about the range of firing.⁴² This kind of analysis is fraught with almost inevitable errors. Even an error of 5 degrees in determining the angle of descent will cause an error of 1 kilometre in determining the range of firing.
57. There are other reasons why General Brown's analysis is flawed. For example, he relied on incorrectly determined projectile impact sites in analysing the distance to the firing position.
58. According to the Second Bobkov Report, experts Gwilliam and Corbett misidentified "craters" (projectile impact sites). Thus, some of the objects in the satellite imagery that Ms Gwilliam and Air Vice-Marshal Corbett thought were shell craters are in fact traces of agricultural activity that had been at the same locations at an earlier time, several months before the shelling of the Bugas roadblock.⁴³

⁴⁰ First Brown Report, paras. 26, 30.

⁴¹ First Report, para. 67 et seq.

⁴² *Ibid.*, para. 70.

⁴³ Second Bobkov Report, para. 36, 37, Figures 6, 7 and 8.

59. However, General Brown himself admits that even within the latest data provided to him the SBU did not identify a quarter of all the craters that would have been left by a salvo from three BM-21 launchers.⁴⁴ However, General Brown's analysis includes traces of agricultural activity as "identified craters". Consequently, the number of craters identified is actually even lower. Not surprisingly, General Brown nowhere gives the exact number of the craters that he considers to be "identified" and that he used in his analysis.⁴⁵
60. This means that the size of the ellipse describing the distribution of shell craters and General Brown's subsequent calculations of the firing range are incorrect.
61. Further, one of the "possible firing positions" located at a distance of "between 19.4 and 19.8 km" from the Bugas roadblock, which is described in paragraph 38 of Gwilliam and Corbett Report, cannot be related to the 13 January 2015 shelling of the Bugas roadblock. As Colonel Bobkov showed, this scorched area of land did not appear until mid-February 2015.⁴⁶

ii. General Brown's analysis of the location of the craters does not support his own conclusions about the range of fire

62. General Brown uses the projectile dispersion area around the roadblock to confirm his conclusions about the range of fire.⁴⁷ However, in reality, General Brown's analysis of the location of the craters contains contradictions and does not confirm his own conclusions about the range.
63. Firstly, as General Brown indicates:

“The actual ellipse of the 92 craters from the 21 February 2015 satellite imagery above of 1,305 metres long x 1,300 metres wide covers 166% of the expected range spread and 100% of the expected lateral spread of rockets fired from a range of 19.6 km”.⁴⁸

⁴⁴ Second Brown Report, para 15 (a) (iii).

⁴⁵ Paragraph 15(a)(iii) of the Second Brown Report points to 92 craters found in Gwilliam and Corbett Report (which includes traces of agricultural activities) and 88 craters found by the SBU.

⁴⁶ Second Bobkov Report, paras. 44-47.

⁴⁷ Second Brown Report, para 15(a) (iii), Figure 6 and 7.

⁴⁸ *Ibid.*, para 15(a) (iii).

64. As General Brown points out, if firing took place from a distance of 19.6 km, the ellipse would have had an elongated shape with dimensions of 1,305 m by 784 m⁴⁹ (and an area of 803,556 m² respectively). Whereas the "actual" ellipse, according to General Brown, has a circular shape of 1,305 m by 1,300 m (and an area of 1,332,426 m², respectively).
65. The fact that the actual ellipse differs so significantly - by 66% - from the expected 19.6 km distance (and consequently has radically different dimensions and shape) means that General Brown's own analysis does not support his claim of a 19.6km firing range ("19.4-19.8 km").
66. Secondly, General Brown's analysis does not support his second assumption - that it was fired from a distance of 15.6 km.⁵⁰ Brown's expected ellipse (having either diameter⁵¹ or circumference⁵² of 928 m) is also significantly different from the actual ellipse, which according to General Brown is 1,305 by 1,300 m. That is, the actual projectile dispersion, according to Brown's own calculations, covered an area twice as large as that expected when firing from 15.6 km.
67. Consequently, General Brown was unable to substantiate his conclusions about shelling from the distance of 19.6 km, as well as about shelling from the distance of 15.6 km.
68. General Brown's fundamental error in his analysis of the craters location is that he uses projectile dispersion data for one BM-21 unit. In the meantime, he himself states that the shelling probably was carried out from three units.
69. In this situation, in order to determine the parameters of the dispersion ellipse (namely the median deviations: *Bd* and *Bb*), it is necessary to apply the method of converting the results of firing from three units to the result of firing from one unit. According to this method:

“... the range dispersion of projectiles when firing a battery increases by an average of 25% compared with the dispersion of projectiles when firing a single gun”.⁵³

⁴⁹ Second Brown Report, para 15, Figure 6.

⁵⁰ *Ibid*, para 15(a) (iii).

⁵¹ *Ibid*, para 15, Figure 7.

⁵² *Ibid*, para 15(a) (iii).

⁵³ G. I. Blinov, GROUND ARTILLERY FIRING THEORY (Military Artillery Command Academy, Leningrad, 1956), pp. 30 (Exhibit E).

70. General Brown notes that the actual dispersion ellipse differs from the expected range ellipse by 66% (i.e. the length of the ellipse is 166% of the ellipse expected from the fire from a distance of 19.6 km, 100%). In reality, however, it should have differed from the expected one by only 25%, which in itself refutes General Brown's conclusion about the range of fire.
71. Moreover, even using General Brown's "actual" dispersion ellipse parameters, the calculation of the firing distance of battery of three Grad units shows that this firing distance is in any case significantly less than General Brown claims.
72. According to the above formula for converting the battery firing results to a single unit firing result (to be able to check against the firing range table referred to by General Brown), if we take the length of the actual dispersion zone used by General Brown (1,305 m) and take it as 125%, then 100% would equal 1,044 m. This value (1044 m) must be divided by 8 to obtain the range median dispersion value (*Bd* or "PEd" in General Brown's reports)⁵⁴, which equals 130.5 m. If we refer to the firing range tables for fire without spoiler rings, the specified *Bd* ("PEd") value corresponds to a firing distance of 13,200 to 13,400 m.⁵⁵
73. Referring to the firing tables with spoiler rings, a *Bd* ("PEd") of 130.5 m corresponds to firing distance of 8,800 to 9,000 m with small spoiler rings and 6,600 to 6,800 m with large spoiler rings.⁵⁶
74. Thus, the actual dispersion zone used by General Brown demonstrates that the firing position must have been located in territory controlled by the UAF: at most 13,200 – 13,400 m (if, as General Brown states, the firing was without spoiler rings); 8,800 – 9,000 m (with small spoiler rings) or 6,600 – 6,800 meters (with large spoiler rings). However, since there is an indication amongst the Ukrainian evidence of spoiler rings within the missile debris, it is the latter two options that would be most likely (in case the analysis was based on General Brown's dispersion ellipse data).

⁵⁴ Second Brown Report, para 15, Figure 6; First Report, para 86, Figure 7.

⁵⁵ Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-210F (1985).

⁵⁶ *Ibid.*

75. Consequently, even if the length of General Brown's ellipse is accepted as correct, his conclusions about the firing distance of 19.6 km or 15.6 km are not confirmed. The DPR could not have fired at the Bugas roadblock from a range of less than 15 km (see Figure 3).⁵⁷ So, even taking into account General Brown's ellipse, the firing positions must have been located in Kiev-controlled territory.
76. However, in order to determine the range correctly from the parameters of the dispersion ellipse, not only the range dispersion is used, but also the directional dispersion (*Bb* or "PER"). As already shown above, in this respect, General Brown's "drawn" "actual" dispersion ellipse does not in principle fit within the values provided by the firing tables, even taking into account the increased dispersion area when firing from multiple units.⁵⁸ If the firing was, as General Brown claims, from 19.6 km, then the dispersion ellipse could not be circular in shape and 1,305 m long; if the dispersion ellipse were elongated (as it should be when firing from maximum range) at 1,305 m, then its width would have to be well over 1,300 m and would be far beyond the table values even for maximum range.
77. This leads to the conclusion that the "actual" dispersion ellipse itself is fundamentally incorrectly defined by General Brown. Below I give a proper calculation of the dimensions and shape of the dispersion ellipse, allowing for determining of the correct firing range in this particular case.
- iii. Analysis of the craters near the Bugas roadblock indicates a different range of fire, which cannot be more than 11.6 km**
78. As I noted above, the use of projectiles with a small spoiler ring allows for a maximum range of 15,836 m, and for projectiles with a large spoiler ring a maximum range of 11,840 m. In practice, however, the firing range should be shorter, as firing at targets at maximum range greatly increases the number of errors (firing accuracy decreases).
79. One of the methods I used was to determine the angle of descent of the projectile based on the pattern of the dispersion of the fragments on the side of the bus (see Figure 2 above). In doing so, the angle of descent of the projectile was found to be in the range of

⁵⁷ First Bobkov Report, Figure 23.

⁵⁸ Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

35-40 degrees. Based on this angle of descent, the range is: between 9.7 and 10.6 km for fire with the use of large spoiler rings, or between 12.5 and 13.2 km fire with the use of small spoiler rings. Note that if these measurements had been taken on a real target they would have been much more accurate.

80. Since, as I indicated above, General Brown incorrectly determined the dimensions of the ellipse at the Bugas roadblock, I will calculate the firing range based on the dimensions of the ellipse, relying on the map provided in Annex 89 of the Memorial and the map-scheme provided in paragraph 84 of the Memorial (Figure 4), with adjustments to the data from the Second Bobkov Report.



Figure 4 - Projectile dispersion ellipse on map with satellite survey data and craters plotted.

81. Based on my measurements the axis length of the dispersion ellipse in range (direction 3-4 in Figure 4) is about 1,100 m, and the axis length of the dispersion ellipse in direction is 750 m (direction 1-2 in Figure 4). The projectile impact craters indicated by the yellow squares are excluded because they fall out of the total coverage area and are anomalous deviations.

- 82. To determine the parameters of the ellipse (dimensions Bd , Bb) it is necessary to apply the above mentioned method of converting the results of firing from three units to the result of firing from one unit.
- 83. The dispersion of shots fired from three launchers differs from the dispersion in direction only slightly and can be neglected. The dispersion in range for the firing from three units is on average 25% greater than that for the firing from a single launcher.⁵⁹ By carrying out the appropriate calculations, I conclude that Bd is 103 m and Bb is 93 m.
- 84. Under these conditions, when a small spoiler ring is used, the range will be approximately 11.4 to 11.6 km (see Figure 5). If a large spoiler ring is used, the range will be between 8.2 km and 10 km (see Figure 6).⁶⁰

Заряд из пороха РСИ-12М

Дальность	Привеса	Изменение дальности при изменении привеса на 1 тис.	Ужкая ванна (4 ВВ)	Срединные отклонения	
				по дальности	боковые
Д	П	$\Delta X_{\text{тис}}$	В	Bd	Bb
м	тис.	м	тис.	м	м
11000	326	20	21	107	84
200	336	20	21	103	85
400	346	19	21	103	87
600	356	19	21	101	89
800	366	18	21	99	91
12000	377	18	22	97	93
200	388	17	22	96	93
400	400	17	22	94	97
600	412	16	23	93	99
800	424	15	23	91	101
13000	436	15	24	90	103
200	449	14	24	89	105
400	463	14	25	87	107
600	477	13	26	86	109
800	492	13	27	84	111

Заряд из пороха РСИ-12М

Дальность	Привеса	Изменение дальности при изменении привеса на 1 тис.	Ужкая ванна (4 ВВ)	Срединные отклонения		направление		$\Delta W_{\text{дл}}$	$\Delta W_{\text{бк}}$	$\Delta W_{\text{дл}}$	$\Delta W_{\text{бк}}$
				по дальности	боковые	направление	направление				
Д	П	$\Delta X_{\text{тис}}$	В	Bd	Bb	Y_a	Y_b	$\Delta W_{\text{дл}}$	$\Delta W_{\text{бк}}$	$\Delta W_{\text{дл}}$	$\Delta W_{\text{бк}}$
м	тис.	м	тис.	м	м	м	м	тис.	тис.	тис.	тис.
6000	184	26	23	148	48	76	51	2	2	11.4	11.4
200	192	25	23	143	60	81	51	2	2	11.4	11.4
400	199	24	23	138	51	86	51	2	2	12.5	12.5
600	207	24	23	134	53	91	52	2	2	12.5	12.5
800	216	23	23	130	54	97	52	2	2	13.2	13.2
7000	224	22	23	126	56	103	52	2	2	13.2	13.2
200	233	21	23	122	58	109	52	2	2	14.0	14.0
400	242	20	23	118	61	115	52	2	2	15.0	15.0
600	252	20	23	114	61	121	52	2	2	15.0	15.0
800	262	19	23	111	63	128	52	2	2	16.0	16.0
8000	273	18	24	108	65	135	52	2	2	16.0	16.0
200	284	17	24	104	67	142	52	2	2	17.0	17.0
400	296	17	24	101	69	150	53	2	2	18.0	18.0
600	308	16	24	98	70	158	53	2	2	18.0	18.0
800	321	15	25	95	72	166	53	2	2	19.0	19.0
9000	334	15	25	92	74	174	53	2	2	19.0	19.0
200	348	14	25	89	76	183	54	2	2	20.0	20.0
400	362	13	26	86	78	192	54	2	2	21.0	21.0
600	377	13	26	83	79	202	54	2	2	21.0	21.0
800	393	12	26	80	81	212	54	2	2	22.0	22.0

Figure 5 - Extract from the firing tables for high explosive fragmentation projectiles M-21OF with a small spoiler ring.

Figure 6 - Extract from the firing tables high explosive fragmentation projectiles M-21OF projectile with a large spoiler ring.

- 85. As indicated above, the firing range determined based on the pattern of the dispersion of the fragments (see Figure 2 above) is between 9.7-10.6 km (when firing with a large spoiler ring) and between 12.5-13.2 km (when firing with a small spoiler ring).

⁵⁹ G. I. Blinov, GROUND ARTILLERY FIRING THEORY (Military Artillery Command Academy, Leningrad, 1956), pp. 30 (Exhibit E).

⁶⁰ Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

86. If the firing range is determined by the size of the dispersion ellipse it is about 8.2-10 km (with the use of large spoiler rings) and 11.4-11.6 km (with the use of small spoiler rings). At the same time, the above *Bd* (103 m) and *Bb* (93 m) values actually do not correspond to any of the range values in the firing range tables when firing without spoiler rings.⁶¹ In other words, a dispersion ellipse with such characteristics cannot occur when firing without spoiler rings. This once again confirms my conclusion about the use of spoiler rings when firing at the Bugas roadblock.
87. Hence, the correct method of calculating the firing range should include using the method of converting the results of firing from three units to the results of firing from one unit. The firing range obtained in this way also confirms my conclusion that the Bugas roadblock was shelled by UAF artillery, as the shelling was carried out from the territory controlled by the UAF (see Figure 3 above).⁶²

iv. Ukraine used two different methods with different accuracy, but obtained the same result

88. Para. 38 of Gwilliam and Corbett Report gives the coordinates of the scorched area within the range of 19.4 and -19.8 km from the Bugas roadblock: 47 46 20 N, 37 39 39 E. It notes that:

"While the cause of this particular scorched area cannot be determined based on the imagery alone, and it is possible that this is unrelated to DPR MLRS activity, circumstantially ... the geographical positioning within the 19.4 to 19.8 km range from the Buhas checkpoint is of interest."

89. In para. 70 of the First Report, I noted that the method used by SBU to measure the angles of descent had significant inaccuracies.
90. Based on the measurements by SBU, General Brown concludes that the direction of fire and the shells' angles of descent correspond to the firing position located approximately 19.4 to 19.8 km from the Bugas roadblock.⁶³
91. Thus, Ukraine has used two different methods with different accuracy, but with the same result:

⁶¹ Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

⁶² First Bobkov Report, Figure 23.

⁶³ Second Brown Report, para 15 (a) (i); First Brown Report, para 26.

- (a) The range of 19.4 to 19.8 km to the "possible firing position" of MLRS, which was determined based on the satellite imagery and is discussed in paragraph 38 of Gwilliam and Corbett Report, was determined with a high degree of accuracy;
 - (b) The range to the firing position of MLRS, which was determined by measuring the angles of descent and, as a consequence, with relatively low accuracy, is nevertheless completely the same, 19.4 to 19.8 km.
92. Obviously, the range values for the MLRS firing position obtained by methods that are significantly different in accuracy must also be significantly different from each other and may not coincide completely.
93. These circumstances lead us to conclude that the purpose of General Brown's analysis was not to establish the true distance to the launch site, but to confirm the Ukrainian position.
- v. **Location of craters does not support the aim of causing harm to civilian objects**
94. The location of the crater dispersion zone (see Figure 4), including the one used by General Brown,⁶⁴ demonstrates that the centre of the dispersion zone was to the north-east (right) of the roadblock, while the accumulation of civilian vehicles (and the affected bus) was to the south (left of the roadblock). However, the affected bus was on the very edge of the dispersal zone (see Figure 4).
95. In my view, this refutes claims of deliberate targeting of civilian objects, because if the shooters had intended to hit civilian vehicles, the centre of fire should have been shifted to the south-west (left) of the roadblock.
- vi. **The range determined by General Brown is the maximum range, which is not used when firing from MLRS, as it does not ensure accuracy in hitting the target**
96. As one of the arguments, General Brown claims that the DPR BM-21 position could not be closer than 19.4 to 19.8 km, and that placing the firing position at a distance of between 10 and 13 km "would be tactical absurdity",⁶⁵ as in such case the positions would be close

⁶⁴ Second Brown Report, para 15(a) (iii)., Figure 5.

⁶⁵ Second Brown Report, para 15.

to UAF positions, whereas, in his opinion, they should be placed far behind the front line. At the same time, General Brown admits that the firing position could have been placed near the village of Yasnoye at a range of 19.4 km determined from the analysis of the imagery in Gwilliam and Corbett Report in proximity to the DPR fighting position, i.e. near the line of contact and just near the UAF defensive positions.⁶⁶

97. General Brown fails to take into account the following. The range of 19.4 to 19.8 km is practically the maximum range for this type of shells used without spoiler rings.⁶⁷ The range determined by General Brown is questionable, in part because shelling is almost never carried out at a maximum range due to high shell dispersion and low probability of hitting the target.

vii. Presence of UAF MLRS in possible launch area is confirmed by open sources

98. As I indicated above, I believe that one of the possible launch areas for MLRS (in case large, rather than small, spoiler rings were used) was two kilometres southeast of Novotroitskoye village - in close proximity to UAF positions (if the data provided by Ukraine on angles of descent etc. is correct).
99. The presence of the UAF MLRS near the village of Novotroitskoye is confirmed by the shelling of DPR positions from this area with BM-21 Grad units of UAF (similar to those that Ukraine claims were used to shell the Bugas roadblock). The victims of this shelling were civilians.
100. Open source data indicates that DPR-controlled territory near Dokuchayevsk was shelled in the days preceding the shelling of the Bugas roadblock from the Novotroitskoye village area from BM-21 Grad. According to these sources:
- (a) Locals report again heavy shelling from Novotroitskoye and Bugas settlements on the night of 8 January to 9 January 2015. Two private houses were destroyed and at least one person was killed.⁶⁸

⁶⁶ Second Brown Report, para 15 (a) (ii).

⁶⁷ The maximum range indicated in the firing table is 20,127 m. See Memorial, Annex 599, Firing Tables for High Explosive Fragmentation Projectiles M-21OF (1985).

⁶⁸ VKontakte page, *Novorossiia militia updates. Photo and video from eyewitnesses* (9 January 2015), available at: https://vk.com/wall-57424472_38522, https://vk.com/wall-57424472_38414 (Exhibit F).

- (b) On the evening of 8 January 2015, at 23:00, positions near Dokuchayevsk came under fire from the village of Novotroitskoye.⁶⁹
- (c) On 10 January 2015, hostilities became more intense. Militia positions near Dokuchayevsk were shelled at 9:15, 13:00 and 13:45 with mortars and at 10:30 with cannon artillery.⁷⁰ The city was shelled twice in the evening: at 17:50⁷¹ and 18:26.⁷² The shelling continued into the night with the use of heavy artillery and BM-21 Grad MLRSs. There were hits on the outskirts: Novy W and the pumping station were hit. The Ukrainian troops made an unsuccessful attempt to break through the defences near the city.⁷³
- (d) There was also intense shelling of nearby areas: from Novotroitskoye, Taramchuk, and Slavnoye settlements; Yelenovka was shelled (from 11:30 to 12:40). At 13:10, from the direction of Stepnoye village, UAF tanks shelled DPR positions in the vicinity of Yasnoye settlement. There has been fighting near Novotroitskoye settlement since morning.⁷⁴

D. THE BUGAS ROADBLOCK WAS A FACILITY WITH MILITARY FUNCTIONS AND TASKS

101. In this section I will assume that the Bugas roadblock was shelled by DPR forces (even though I'm inclined to believe it was shelling by the UAF). I will consider the characteristics of the Bugas roadblock as a military facility that might have been the reason for the DPR's attack on it.

⁶⁹ VKontakte page, *Novorossiya militia Updates. Overview report* (9 January 2015), available at: https://vk.com/wall-57424472_38467 (Exhibit G).

⁷⁰ VKontakte page, *Novorossiya militia Updates. Summary of military developments in Novorossiya* (11 January 2015), available at: https://vk.com/wall-57424472_38757 (Exhibit H).

⁷¹ VKontakte page, *Novorossiya militia Updates. Morning report* (11 January 2015), available at: https://vk.com/wall-57424472_38748 (Exhibit I).

⁷² VKontakte page, *Novorossiya militia updates due to the intense shelling of Donetsk* (10 January 2015), available at: https://vk.com/wall-57424472_38666 (Exhibit J).

⁷³ VKontakte page, *Novorossiya militia Updates. UAF shelled our positions about 45 times overnight* (11 January 2015), available at: https://vk.com/wall-57424472_38754 (Exhibit K).

⁷⁴ VKontakte page, *Novorossiya militia Updates. Artillery volleys were heard near Yelenovka* (10 January 2015), available at: https://vk.com/wall-57424472_38605 (Exhibit L).

i. The Bugas roadblock was seen by Ukraine as a military object; General Brown did not refute this

102. General Brown, in both expert reports, claims, without basis, that the Bugas roadblock was a civilian-vehicle checkpoint with only police (non-military) functions.⁷⁵

103. In doing so, General Brown stubbornly ignores the obvious fact that security roadblock like this one are officially recognised military objects, including under Ukrainian law itself.

104. For example, the SBU documents drawn up immediately after the shelling describe the Bugas roadblock as a "security roadblock of the Ukrainian Armed Forces", i.e. it was considered to be specifically a military roadblock:

"<...> conducted a review – sections of land located near a roadblock of the Armed Forces of Ukraine, located on the territory of fixed post No. 5 of the Department of the State Automobile Inspection of the Directorate of the Ministry of Internal Affairs of Ukraine (UDAI GUMBS) in the Donetsk region on highway N-20 <...>";⁷⁶

" The subject of the review is the section of the area located on the area of a roadblock of the Armed Forces of Ukraine <...>";⁷⁷

"<...> conducted a review of the scene (territory) located around the roadblock of the Armed Forces of Ukraine on highway N-20 <...>".⁷⁸

105. I referred to these documents in my First Report,⁷⁹ but General Brown has not provided any comments on or refuted them in any way.

106. However, it is the term "roadblock" (and not, for example, "entry control checkpoint") that is used in Ukrainian SBU documents. The term "roadblock" means a fortified position set up in an area of armed conflict to control terrain, roads, etc.

107. This is how the term "roadblock" was understood in Ukrainian regulations:

"A roadblock (hereinafter, "RB") is a barrier point in a certain place (on a sector of terrain, in a building or a complex of buildings) in the ATO area, which is designed to: control the movement of people and vehicles; check

⁷⁵ First Brown Report, para 20, Second Brown Report, para 10.

⁷⁶ Memorial, Annex 87, Record of inspection by SBU Captain V.V. Romanenko dated 16 January 2015.

⁷⁷ *Ibid.*

⁷⁸ Memorial, Annex 87, Record of inspection by SBU Lieutenant Colonel of Justice O. V. Martynyuk dated 16 January 2015.

⁷⁹ First Report, para. 47.

identity documents of persons; conduct searches of persons and inspections of things they are carrying; conduct inspections of vehicles and things they are carrying in order to prevent unauthorized entry by persons into uncontrolled territory, infiltration from uncontrolled territory by terrorists and their accomplices, and the import (export), into and out of the ATO area, of items and substances withdrawn from civilian circulation or restricted in circulation; and to protect forces and means involved in the ATO from unlawful encroachments by terrorists and illegal armed (paramilitary) groups",⁸⁰

"A roadblock is a fortified checkpoint temporarily established by decision of the military command at the entrance to/exit from a territory under martial law and under a special regime (except for the state border), where such facilities are set up as places for checking persons, vehicles, luggage and goods; positions for weapons and military equipment; and rest areas and facilities for life support for personnel who perform tasks at such access control point, who may include officers of military formations and law enforcement bodies engaged, in accordance with the law, to enforce the legal regime under martial law."⁸¹

108. Thus, the SBU documents refer to the Bugas roadblock as a "security roadblock of the Armed Forces of Ukraine", while in the Ukrainian regulations adopted in relation to the so-called Anti-Terrorist Operation in the south-east of Ukraine (hereinafter also referred to as "ATO"), the term "roadblock" means exactly a fortified military facility where "positions for weapons and military equipment" and "officers of military formations" are placed, and the role of this facility is "to protect from unlawful illegal armed groups" (which under Ukrainian terminology means DPR and LPR).

109. The Ukrainian Ground Forces statute stipulates that roadblocks should be set up at defence lines:

"490. <...> The basis of defence in blocked directions is company strongholds positioned laterally (the width being of up to 2 km) and in depth (up to 1.5 km). Roads are blocked by roadblocks or entry control checkpoints where a

⁸⁰ Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine No. 27og on Temporary procedure for controlling the movement of persons, vehicles and cargo along the contact line within Donetsk and Lugansk regions, 22 January 2015, para. 1.2, available at: <https://zakon.rada.gov.ua/rada/show/v0027950-15#Text> (Exhibit M). Order of the First Deputy Head of the Anti-Terrorist Centre at the Security Service of Ukraine No. 415og on Temporary procedure for controlling the movement of persons, vehicles and goods across the contact line within Donetsk and Lugansk regions, 12 June 2015, para. 1.3, available at: https://zakon.rada.gov.ua/rada/show/v415_950-15#Text (Exhibit N).

⁸¹ Procedure establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1455, 29 December 2021, para. 3, available at: <https://zakon.rada.gov.ua/laws/show/1455-2021-rr#Text> (Exhibit O).

platoon may be stationed. The units are usually formed in a single echelon with holding out a reserve: a platoon or company in a battalion".⁸²

110. The same understanding of the functions and tasks of roadblocks in a war zone corresponds to the practice of other countries. For example, U.S. Army documents describe the following characteristics and functions of a roadblock:

"DELIBERATE CHECKPOINT

D-32. Deliberate checkpoint is permanent or semi-permanent. It is established to control the movement of vehicles and pedestrians, and to help maintain law and order. They typically are constructed and employed to protect an operating base or well-established roads. Like defensive positions, deliberate checkpoint should be improved continuously. Deliberate checkpoints: <...>

- Prevent the movement of supplies to the enemy;
- Deny the enemy contact with the local inhabitants;
- Dominate the area of responsibility around the checkpoint <...>⁸³

111. Consequently, General Brown's position that the Bugas roadblock was a civilian object contradicts Ukraine's official documents (including regulations).

112. The positioning of a civilian-vehicle checkpoint on the territory of a military roadblock does not change the military nature of this object, but merely raises the issue of the Ukrainian side's failure to fulfil its obligation to separate military and civilian objects in order to avoid civilian casualties.

ii. There were fire emplacements, armoured vehicles and other military equipment at the Bugas roadblock

113. General Brown claims "the lack of armoured vehicles at the Bugas roadblock".⁸⁴ In a footnote to this statement, he says that the BRDM-2, shown on a 25 October 2014 image, is a lightly armoured vehicle, used for scouting and "typically internal and security/policing roles".⁸⁵ This claim is incorrect.

⁸² Ministry of Defence of Ukraine, Combat Statute of the Ground Forces of the Armed Forces of Ukraine, Part 2 (battalion, company), 29 December 2010, available at: <https://drive.google.com/file/d/1MEA8sqi1GpgwGJOgRkpSfeNbgtrmbxj9/view>.

⁸³ US Army Fort Benning, *Training Manuals, Doctrine Supplements*, available at: https://www.benning.army.mil/Infantry/DoctrineSupplement/ATP3-21.8/appendix_d/CheckpointsandTrafficControlPoints/TypesofCheckpoints/index.html.

⁸⁴ Second Brown Report, para. 8.

⁸⁵ Second Brown Report, para. 8, footnote 17.

114. The BRDM-2, which presence at the Bugas roadblock General Brown does not deny, is a combat armoured reconnaissance scout vehicle (abbreviated "BRDM" in Russian). This combat vehicle falls under the category of "Armoured Combat Vehicles" of the Wassenaar Arrangement (in particular, paras. 2.1.2 and 2.2.1 of Annex 3) in terms of its qualities (armour, armament, cross-country capability, reconnaissance capabilities). It also qualifies as a combat vehicle under the Combat Manual of the Ground Forces of the Russian Federation (see Figure 7).⁸⁶ Consequently, the claim that there were no armoured military vehicles at the Bugas roadblock is incorrect.

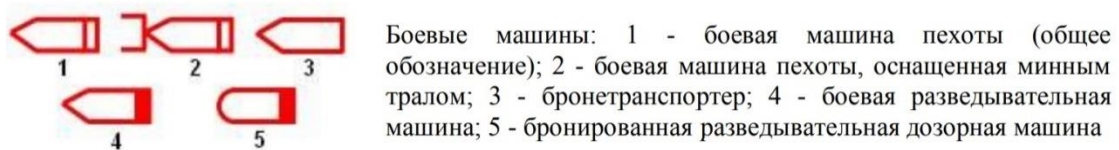


Figure 7 - Excerpt from the Combat Manual for the Preparation and Conduct of Combined Arms Warfare.⁸⁷

* Combat vehicles: 1 - Armoured infantry combat vehicle (generic designation); 2 - Armoured infantry combat vehicle equipped with mine tracker; 3 - Armoured personnel carrier; 4 - Reconnaissance combat vehicle; 5 - Armoured reconnaissance scout vehicle

115. Further, not only is the BRDM-2 not "typically" used, it is never in principle used for policing or "internal and security" roles. It is designed exclusively for military tasks: reconnaissance, scouting, sabotage, combined arms combat etc.
116. The BRDM-2 turret, which can be seen on one of the images of the Bugas roadblock published online on 25 January 2015,⁸⁸ has an automatic grenade launcher mounted on it.

⁸⁶ "2. Tracked, semi-tracked or wheeled self-propelled vehicles, with armoured protection and cross-country capability designed, or modified and equipped ... 2.1.2 with an integral or organic weapon of at least 12.5 mm calibre ... 2.2.1 with organic technical means for observation, reconnaissance, target indication, and designed to perform reconnaissance missions" Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Vol. 1, Founding Documents, Appendix 3, p. 11, available at: <https://www.wassenaar.org/app/uploads/2021/12/Public-Docs-Vol-I-Founding-Documents.pdf>.

⁸⁷ Ministry of Defence of the Russian Federation, Combat Manual for the Preparation and Conduct of Combined Arms Warfare, Part 3, Platoon, Detachment, Tank, enacted by Order of the Commander-in-Chief of the Ground Forces No. 19 of 24 February 2005, p. 141. 141, available at: http://militera.lib.ru/regulations/0/g/2005_bu3.pdf.

⁸⁸ Counter-Memorial (ICSFT), Annex 193, Svetlana Kondriyanenko's page on the social network Odnoklassniki, 25 January 2015.

This was pointed out in Bobkov First Report.⁸⁹ Such a weapon as an automatic grenade launcher cannot be used on a vehicle designed for "policing" purposes.

⁸⁹ First Bobkov Report, para. 46, figure 14, image 3.



Figure 8 - Photo of a BRDM-2 equipped with an automatic grenade launcher at the Bugas roadblock.



Figure 9 - Automatic grenade launcher on the BRDM-2 turret at the Bugas roadblock (excerpt of Figure 14 from Second Bobkov Report).

* Automatic grenade launcher

Ammunition box

Grenade launcher mount

BRDM-2 turret

Observation post

BRDM-2

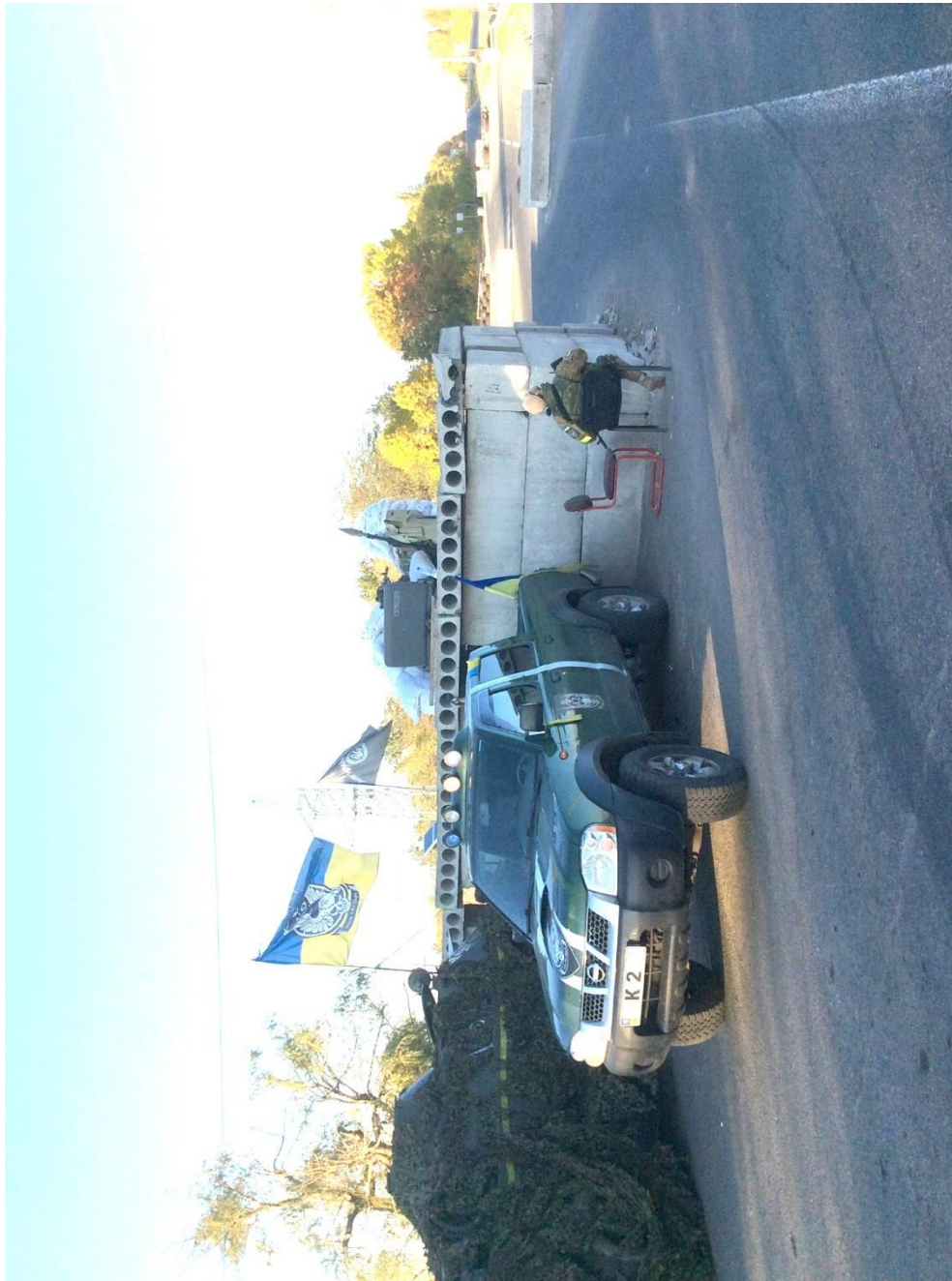


Figure 10 - Photo of a BRDM-2 (left of the pick-up truck), large-calibre machine gun and grenade launcher at the Bugas roadblock.⁹⁰

⁹⁰ Counter-Memorial (ICSFT), Annex 151, "Special Operations Battalion 'Kiev-2'" Facebook page, 2 October 2014.



Figure 11 - NSV heavy machine gun, RPG-7 grenade launcher and grenade pocket (excerpt of Figure 10 from Second Bobkov Report).

* RPG-7 grenade launcher with a grenade

NSV heavy machine gun

Sandbags

Grenade pocket

BRDM-2

Observation post



Figure 12 - Photo of an MT-12 anti-tank gun at the Bugas roadblock.⁹¹

⁹¹ Counter-Memorial (ICSFT), Annex 186, Andrei Skaternyi's blog, "Volnovakha-Donetsk Bugas roadblock. The One", 20 January 2015.



Figure 13 - MT-12 anti-tank gun (excerpt of Figure 12 from the Second Bobkov Report).

*Gun barrel

Low shield

Wheel

Muzzle brake "with circular holes like mesh screen"

MT-12 anti-tank gun

Camouflage netting

117. The photos of the Bugas roadblock (see figures 8 through 13 above) also show:
- (a) MT-12 anti-tank gun.
 - (b) NSV large-calibre machine gun;
 - (c) RPG-7 grenade launcher with a grenade (as well as grenade pocket for RPG-7).⁹²
118. All this equipment is not typical of a police checkpoint and is more than typical of a military roadblock.

iii. The Bugas roadblock had protective structures, in line with UAF regulations

119. As Colonel Bobkov pointed out,

" As at 09:08 (UTC) on 13 January 2015, the Bugas Roadblock was equipped and adapted for accommodating military units. This is evidenced by trenches and fighting holes for personnel, dug-out positions for armoured vehicles, fortified and protected observation posts, two army tents, motor transport suitable for transporting personnel."⁹³

120. The protective structures of the Bugas roadblock included, among other things, "trenches for personnel with a total length of about 100m" and fortified dug out positions for armoured vehicles.⁹⁴

121. General Brown considered the protective structures of the Bugas roadblock insufficient to conclude that the facility had a military function:

"The trenches appear to be for individual protection"

"The dug-out positions for armoured vehicles are not sited tactically: they are sited so that vehicles could park there, for which the earthworks provided limited protection <...>"⁹⁵

122. I disagree with this assessment. First, the mere presence of trenches for personnel and armoured vehicles, which General Brown does not deny, demonstrates the military function of the roadblock.

⁹² First Bobkov Report, paras. 44-45.

⁹³ *Ibid.*, para. 38.

⁹⁴ *Ibid.*, para 36.

⁹⁵ Second Brown Report, para. 9.

123. Secondly, UAF regulations prescribe organising circular defence of strongholds where personnel are stationed:

"85. <...> The basis of the defence of an outpost (picket) is individual company and platoon strongpoints prepared for circular defence, firing positions for mortars, artillery, and other fire weapons. Firing positions for combat vehicles are to be equipped both within close squad positions and along the perimeter of the strongpoint in the most likely directions of enemy action."⁹⁶

124. Similar provisions can be found in Russia's combat regulations, e.g:

"493. <...> The position of an outpost (roadblock) is prepared for circular defence and is arranged taking into account the necessity of drawing duty for a long time: the main, reserve and temporary firing positions (which are equipped with firing slits (ports) and splinter-proof head covers), trenches and full-size communication trenches, blindages, shelters for ammunition, food and water are created; places for storing weapons and combat training are established: water and food supplies and the necessary stocks of illuminations and signal devices are created; main and reserve (temporary) firing positions are set up for military equipment; controlled minefields and, on concealed approaches, signal mines are laid. The boundaries of the outpost zone are marked with signs indicating the conduct standards. At night-time, passage through and entry to the outpost (roadblock) are closed."⁹⁷

125. As I detail below, the Bugas roadblock was manned by personnel. Satellite imagery confirms that the roadblock had also virtually circular defence (dug-out positions and trenches for equipment and personnel from the northern, eastern and southern sides, firing positions and concrete barriers), which is generally in line with the UAF's combat regulations.

126. Thirdly, the existing fortifications had a defensive function and could be used by the personnel at the roadblock to repel direct attacks from the north, east and south (to the west of the roadblock was territory controlled by the UAF). This coincides with the most likely directions of possible attacks on the roadblock.

⁹⁶ Ministry of Defence of Ukraine, Combat Statute of the Ground Forces of the Armed Forces of Ukraine, Part 2 (battalion, company), 29 December 2010, available at: <https://drive.google.com/file/d/1MEA8sqi1GpgwGJOgRkpSfeNbgtrmbxj9/view>.

⁹⁷ Ministry of Defence of the Russian Federation, Combat Manual for the Preparation and Conduct of Combined Arms Warfare, Part 2, Battalion, Company, enacted by Order of the Commander-in-Chief of the Ground Forces, Deputy Minister of Defence of the Russian Federation No 130 of 31 August 2004, available at: <https://www.rulit.me/books/boevoy-ustav-po-podgotovke-i-vedeniyu-obshchevojskovogo-boya-chast-2-batalon-rota-get-399026.html>.

127. Fourthly, should the UAF forces retreat closer to Volnovakha, the roadblock equipment (firing-points, trenches, shelters, fortifications, etc.) would be used to accommodate larger numbers of personnel and create an important strongpoint to repel enemy attacks on the line of contact and fire control over the N-20 highway leading to Mariupol. This confirms the military role of the Bugas roadblock.

iv. Bugas roadblock was part of the defence system UAF

128. First of all, General Brown, in his second report, agreed with me that there was no monolithic front line in Ukraine during the period in question:

"<...> there was no monolithic front-line in the sense of unbroken defensive positions typical of the Western Front in the First World War. The situation in eastern Ukraine in 2015 was more fluid with dispersed combat positions able to cover the intervening open ground and a “no-man’s-land,” typically around 3 km wide in the Volnovakha sector."⁹⁸

129. However, in General Brown's opinion,

"Checkpoints where civilian movement can safely be controlled by internal security or police forces are routinely separated geographically and functionally from combat forces in armed conflict zones <...> The Kyiv-2 Battalion personnel and the Border Guard Service members based at the Buhas checkpoint had no combat role: they were well behind both the first and second UAF lines of defence <...>"⁹⁹

130. General Brown's claim is unfounded. Firstly, he continues to refer to the Bugas roadblock as something it was not (a civilian-vehicle checkpoint). Searches were conducted at the Bugas roadblock in connection with a military operation (so-called ATO); they were done by members of a combat unit (the Kiev-2 Battalion).¹⁰⁰ Such roadblocks are not organised deep in the territory; they are needed in the war zone to block the enemy and their supply routes. This is confirmed by the practice of other countries, such as the USA:

"DELIBERATE CHECKPOINT

D-32. Deliberate checkpoint is permanent or semi-permanent. It is established to control the movement of vehicles and pedestrians, and to help maintain law and order. They typically are constructed and employed to protect an operating base or well-established roads. Like defensive positions, deliberate checkpoint should be improved continuously. Deliberate checkpoints: <...>

⁹⁸ Second Brown Report, para. 6.

⁹⁹ *ibid.*, para. 8.

¹⁰⁰ *See*, for example, Memorial, Annex 206.

- Prevent the movement of supplies to the enemy;
- Deny the enemy contact with the local inhabitants;
- Dominate the area of responsibility around the checkpoint <...>¹⁰¹

131. Secondly, concepts such as "front-line defensive position" and "second-line defensive position", which General Brown uses, are nominal, especially in relation to the Bugas roadblock area during the period in question.
132. It is not clear to me why General Brown continues to insist that the Bugas roadblock was not part of the "front-line or second-line defensive positions of the UAF", when in para. 6 of his second report he admits that there was no monolithic and unbroken front-line in Ukraine in 2015.
133. As I noted above, the Bugas roadblock had circular defence in accordance with UAF military regulations, which confirms that the roadblock was part of the UAF defence system.
134. The fact that the Bugas roadblock was part of the UAF defensive lines is also evidenced by Ukrainian sources describing the situation around the roadblock.¹⁰² In particular, they point to the exchange of small-arms fire near the roadblock in 2015 and to the fact that the vicinity of the roadblock was mined as of 2015:

"A group escorting a humanitarian aid convoy of Akhmetov's HQ came under crossfire near Volnovakha today. They were on their way from Donetsk, where the HQ's logistics centre is located, towards the Bugas roadblock.

No members of the Humanitarian HQ were injured. The escort vehicle turned around and drove away to a safe distance.

At the same time, there were Red Cross humanitarian mission vehicles near Bugas, returning from Donetsk after delivering aid. The Red Cross convoy was also forced to turn around."¹⁰³

¹⁰¹ US Army Fort Benning, *Training Manuals, Doctrine Supplements*, available at: https://www.benning.army.mil/Infantry/DoctrineSupplement/ATP3-21.8/appendix_d/CheckpointsandTrafficControlPoints/TypesofCheckpoints/index.html

¹⁰² Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khhg.org/1441791221> (Exhibit P). See also, Rinat Akhmetov's Foundation, *How to drive across the contact line. Step-by-step instructions* (25 September 2015), available at: <https://akhmetovfoundation.org/ru/news/kak-prochat-cherez-lynyyu-soprykosnovenyya-poshagovaya-ynstruktsyya> (Exhibit Q).

¹⁰³ Rinat Akhmetov Foundation, *Akhmetov's Headquarters Humanitarian Aid Escort Team Comes under Fire* (25 June 2015), available at: <https://akhmetovfoundation.org/ru/news/grupa-suprovedu-gumanitarnogo-vantazhu-shtabu-ahmetova-potrappyla-pid-obstril> (Exhibit S).

"If you go through the Bugas roadblock, you book a night in Mariupol, you can't go there and back in a day (well, except on Sundays I guess) <...> there are no portable toilets (like at Zaitsevo roadblock) here and people go to the bushes. Signs of "mines" are not installed everywhere, demining has not been done completely, so six civilians have been blown up this summer alone. They just went 'to the bushes'."¹⁰⁴

135. It is difficult to imagine laying mines in the surroundings of an ordinary police checkpoint for "administrative purposes" - especially in such a way that civilians could have been, and have been, wounded by mines. The placement of mines in the area around the Bugas roadblock was carried out only for military purposes, for example: to prevent sabotage and reconnaissance groups from penetrating the area while bypassing the roadblock, to prevent the enemy from encircling the roadblock, etc.
136. I should reiterate that in areas of combat operations defensive lines, areas where military units are deployed, fighting positions, artillery positions, material depots, roadblocks, etc. are set up in a certain order. Depending on the situation they may or may not be occupied by certain units. All these elements are geographically separated, but are functionally linked in the context of operational preparedness into a certain system to implement the command's intent.
137. Regardless of the distance to the UAF defence lines, each of these elements performs a specific task. The execution of these tasks is spread out over time according to the command's intent.
138. Roadblocks are usually tasked with preventing various enemy mobile teams, including sabotage and reconnaissance teams, from entering the area.
139. Roadblocks also perform the "fire control" function in relation to a particular section of road (supply route) or terrain, i.e. they exercise control not through physical presence but through the ability to attack a particular area.
140. The Bugas roadblock clearly fulfilled military tasks. They included preventing enemy mobile groups and sabotage and reconnaissance groups from entering the area, as well as fire control over the H-20 road section and the relevant terrain. I spoke about these

¹⁰⁴ Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khpg.org/1441791221> (Exhibit P).

functions of the roadblock in my First Report.¹⁰⁵ These functions have not been taken into account or evaluated in any way by General Brown. Thus, General Brown has not refuted that the Bugas roadblock was a military facility.

141. The relative remoteness of the Bugas roadblock from other UAF positions should not fundamentally affect the assessment of its role. In any case, as shown in Figure 24 and Table 3 of the First Bobkov Report, the nearest military objects visible on satellite imagery were located at a short distance to the Bugas roadblock - less than 2 km (including self-propelled artillery positions, trenches and dug-out positions for armoured vehicles).¹⁰⁶ This confirms that the roadblock was "embedded" in the general system of the UAF defensive lines.
142. General Brown points out that I have not provided evidence that the artillery positions near the Bugas roadblock were occupied at the time of the shelling.¹⁰⁷ However, the relevant evidence is available to Ukraine. If the artillery positions had indeed not been occupied, the Ukrainian side would have provided confirmation of this. As no such evidence has been presented, I assume that these positions were used at the relevant time period.
143. As far as can be ascertained from open sources, these artillery positions were actively used during the shelling of the Bugas roadblock. For example:

“13.01.15. Military review by military correspondent with call sign "Samur".

...

The town of Dokuchayevsk remains under fire from Ukrainian punitive forces. It is being shelled from artillery positions to the west of Yelenovka and in the vicinity of Volnovakha. The town is in the "focus" of the intersection of two directions of fire.

On the morning of 12 January, a day shift who had arrived by bus at the Dokuchayevsky dolomite quarry was forced to rush out of the bus and immediately hit the ground: at the same time another firing attack began.

On the same day, shrapnel hit a resident of the village of Aleksandrinka, east of Dokuchayevsk. The shells landed specifically in the private sector there”.¹⁰⁸

¹⁰⁵ First Report, paras. 47-53.

¹⁰⁶ Second Bobkov Report, Table 3, paragraphs 22 and 26 in Table 3.

¹⁰⁷ Second Brown Report, para.14.

¹⁰⁸ VKontakte page, *Novorossiya militia reports. Military review by military correspondent call sign "Samur"* (13 January 2015) available at: https://vk.com/wall-57424472_39169 (Exhibit T).

144. Consequently, I believe that the fact that the Bugas roadblock has a combat mission and that its geographical location and the presence there of an active offensive combat or reconnaissance unit, which was performing its tasks at the time of the shelling, indicate that the Bugas roadblock occupied an important place in the UAF defence system.

v. **The Bugas roadblock was manned by military units**

145. General Brown cites the following to support his conclusions about the civilian role of the roadblock:

"The Kyiv-2 Battalion personnel and the Border Guard Service members based at the Buhas roadblock had no combat role: they were ... "part of the Ministry of Internal Affairs'."¹⁰⁹

146. In other words, to substantiate his argument that there were no military units at the roadblock, General Brown refers only to the fact that the Kiev-2 Battalion was part of the Ukrainian Ministry of Internal Affairs.

147. I have already noted in my First Report that the Kiev-2 Battalion carried out combat missions and was equipped with heavy weapons and military equipment,¹¹⁰ that is, it was not a police unit in the usual sense, but a combat formation. General Brown did not refute this.

148. The deployment of combat formations at roadblocks is a common practice stipulated by military regulations. For example:

"477. <...> In addition, a battalion (company) may be called upon to support the service and combat activities of border troops, conduct combat and other actions during a border armed conflict and during the resolution of a border incident (provocation). In an internal armed conflict, in cooperation with units of other troops, it may participate in disarmament activities (seizure of weapons) from the local population; assist law enforcement agencies in performing their assigned tasks (reinforcement of public order enforcement posts, roadblocks, maintenance of special movement regime in the area of an armed conflict,, etc.).¹¹¹

¹⁰⁹ Second Brown Report, para. 8.

¹¹⁰ First Report, paras. 53-55.

¹¹¹ Ministry of Defence of the Russian Federation, Combat Manual for the Preparation and Conduct of Combined Arms Warfare, Part 2, Battalion, Company, enacted by Order of the Commander-in-Chief of the Ground Forces, Deputy Minister of Defence of the Russian Federation No 130 of 31 August 2004, available at: <https://www.rulit.me/books/boevoj-ustav-po-podgotovke-i-vedeniyu-obshchevojskovogo-boya-chast-2-batalon-rota-get-399026.html>.

149. It is not clear to me why General Brown is convicted that the personnel stationed at the roadblock were not performing combat tasks. As I pointed out above and in my First Report,¹¹² the personnel stationed at the Bugas roadblock were performing several important tasks directly related to combat operations. These tasks included, at least, the following:
- (a) To control the N-20 highway leading to Mariupol and prevent the DPR and LPR forces from using the highway;
 - (b) To be ready to repel possible attacks directed at the roadblock;
 - (c) To prevent DPR or LPR sabotage and reconnaissance groups from entering the area of hostilities or crossing the line of contact; and
 - (d) To protect the redeployment of military equipment by road to supply and reinforce troops.
150. The absence of UAF personnel at the Bugas roadblock during the shelling (if indeed they were not there) can only be demonstrated by the Ukrainian side by presenting documents on the location and tasks of the UAF units deployed in that period (plans, instructions, orders, battle books, etc.). Ukraine did not provide such documents. On the contrary, it follows from the documents provided by the Ukrainian side that the UAF personnel were stationed at the roadblock, as the roadblock is directly referred to as an "UAF roadblock":

"... conducted a review – sections of land located near a roadblock of the Armed Forces of Ukraine, located on the territory of fixed post No. 5 of the Department of the State Automobile Inspection of the Directorate of the Ministry of Internal Affairs of Ukraine (UDAI GUMBS) in the Donetsk region on highway H-20 <...>"¹¹³

" The subject of the review is the section of the area located on the area of a roadblock of the Armed Forces of Ukraine <...>"¹¹⁴

"<...> conducted a review of the scene (territory) located around the roadblock of the Armed Forces of Ukraine on highway N-20 <...>"¹¹⁵

¹¹² First Report, paras. 53-55, Annex 1.

¹¹³ Memorial, Annex 87, Record of inspection by SBU Captain V.V. Romanenko dated 16 January 2015.

¹¹⁴ *Ibid.*

¹¹⁵ Memorial, Annex 87, Record of inspection drawn up by SBU Lieutenant Colonel of Justice O. V. Martynyuk dated 16 January 2015.

151. Even if only servicemen from the Kiev-2 Battalion (formally part of the Ukrainian Ministry of Internal Affairs) and staff from the Ukrainian Border Guard Service were present at the Bugas roadblock at the time of the shelling, this does not mean that the Bugas roadblock was a purely civilian object.
152. First of all, the so-called ATO was led by the UAF. It is widely known that not only the UAF, but also the so-called "volunteer battalions" or "territorial defence battalions" fought on the Ukrainian side against the DPR and LPR armed forces, one of which was the Kiev-2, which was redeployed to the Bugas roadblock in October 2014 during a rotation (according to reports by Kiev-2 representatives).¹¹⁶ In June 2014, a few months before the Bugas roadblock was shelled, the Ukrainian Ministry of Defence had announced that all battalions participating in the ATO in south-eastern Ukraine would be operationally subordinated to the ATO leadership.¹¹⁷
153. Thus, not only was the Kiev-2 Battalion in practice a combat unit equipped with heavy weapons and military equipment,¹¹⁸ but it was also formally subordinate to the ATO command.
154. Since the Bugas roadblock was occupied by a combat unit (Kiev-2 Battalion), it certainly played a military role and was one of the elements in the overall system of the UAF defensive lines in the ATO zone.

vi. **The Kiev-2 Battalion stationed at the Bugas roadblock was not a police force but a combat unit made up of members of neo-Nazi groups**

155. General Brown, insisting that the personnel stationed at the Bugas roadblock had not played any offensive role, refers only to the Kiev-2 Battalion's incorporation into the Ministry of Internal Affairs and the location of the roadblock away from the DPR's forward positions.¹¹⁹

¹¹⁶ First Report, para. 54.

¹¹⁷ Ministry of Defence of Ukraine, Press Release, Territorial Defence Battalions Will Be Subordinated to ATO Leadership, - Mikhail Koval, 18 June 2014, available at: https://web.archive.org/web/20140618193418/https://www.kmu.gov.ua/control/uk/publish/article?art_id=247399455&cat_id=244276429 (Exhibit U).

¹¹⁸ First Report, paras. 53-55.

¹¹⁹ Second Brown Report, para. 8.

156. In addition to the data already given in the First Report and above that the Kiev-2 Battalion was actively involved in combat operations¹²⁰ and was a military formation both in practice and officially (due to its subordination to the ATO command), I would like to draw attention to the following circumstances:

- (a) The Kiev-2 Battalion included representatives of radical neo-Nazi groups;
- (b) References to Nazi symbols are present on the battalion's flag;
- (c) Representatives of the battalion have been accused by the Ukrainian authorities of committing grave crimes.

157. The core of the Kiev-2 Battalion consisted of members of the right-wing radical groups C14 (Sich) and Svoboda, as the commander of the Kiev-2 Battalion Bogdan Voitsekhovsky,¹²¹ and the leader of the organisation's movement Yevgheniy Karas reported in interviews with the press.¹²² For example, one of the leaders of C14, Andrey Medvedko, who is accused of murdering prominent Ukrainian journalist Oles Buzina, fought in Kiev-2 Battalion:

"During the revolution, C14 played an important role in Svoboda's seizure of the Kiev Municipal Administration building, where Medvedko was one of the custodians. The group's activities as part of the self-defence on Maidan were repeatedly criticised: the fans caught "unreliables" and allegedly even set up a "torture room" in the basements of the Kiev Municipal Administration. However, according to eyewitnesses, C14 did not directly participate in the clashes on 18-20 February.

After Yanukovich was overthrown and the clashes in the east began, most of the fans continued to stay in Kiev. In May 2014, Medvedko tried to run for the Kiev Council on behalf of Svoboda, but was defeated. Already in the summer, during active hostilities, he joined the Kiev-2 Battalion of the Ministry of Internal Affairs and went to the front together with other C14 members. Menson [Medvedko] officially left the battalion just a couple of weeks before his arrest."¹²³

¹²⁰ First Report, paras. 53-55, Addendum 1.

¹²¹ Spilno, *Kiev-2 Battalion Commander - I Wish Children Wanted to Live in Our Country. I Wish Our country Was in Order* (24 December 2017), available at: <https://spilno.net/komandir-batalona-kiev-2-ya-xochu-chtoby-deti-xoteli-zhit-u-nas-v-strane-chtoby-v-etoj-strane-by-l-poryadok/> (Exhibit V).

¹²² Radio Liberty, "C14". *Radical Nationalists or Neo-Nazis?* (19 March 2018), available at: <https://www.radiosvoboda.org/a/29109819.html> (Exhibit W).

¹²³ Vesti Reporter, *Manson, Warrior of Allah* (26 June - 2 July 2015), available at: <https://web.archive.org/web/20150629231944/http://reporter.vesti-ukr.com/art/y2015/n22/16392-menson-voin-allaha.html#.VZHS13bP02w> (Exhibit X).

"C14's street activity has been growing markedly in recent months. Fighters from the group were seen attacking the anarchist march on 1 May, but the real breakthrough for the group was organising an attack on the Kiev Gay Pride. Although Right Sector then claimed responsibility for the clashes with the police, the main mobilisation of right-wing radicals was through the C14-owned Zero Tolerance public service.¹²⁴

158. "C14" was recognised as a nationalist organisation by the Bureau of Democracy, Human Rights and Labour of the US State Department for its violent attacks on members of national minorities, journalists, etc.¹²⁵

159. The international terrorism research and analysis organisation TRAC has listed C14 as a terrorist organisation.¹²⁶ "C14" is named as a neo-Nazi organisation:

(a) in a statement from the UK Parliament:

"<...> That this House is deeply concerned by the reporting by the BBC of the Kiev-based organisation C14, a far right organisation with neo-Nazi origins; considers the reporting of C14 activities fails to uphold BBC editorial values; is further concerned that the BBC has afforded a degree of legitimacy to C14."¹²⁷

(b) In statements by human rights organisations, for example:

"This attack came just 10 days after members of the neo-Nazi paramilitary group C14 filmed themselves carrying out a pogrom in the Lysa Hora nature reserve near Kyiv, where they drove fifteen families from their homes. As reported by ERRC on April 21, a C14 gang, carrying weapons, attacked the Roma. A video posted days later showed whole families with small children fleeing in terror, chased by masked men who hurled stones and sprayed them with gas canisters, before setting their tents ablaze.

Official collusion

What is especially sinister is the evidence of official collusion in each of these attacks. Following the first attack, the prominent C14 member Serhiy Mazur openly boasted on his Facebook page about the successful operation, as the

¹²⁴ Vesti Reporter, *Manson, Warrior of Allah* (26 June - 2 July 2015), available at: <https://web.archive.org/web/20150629231944/http://reporter.vesti-ukr.com/art/y2015/n22/16392-menson-voin-allaha.html#.VZHS13bP02w> (Exhibit X).

¹²⁵ Ukrainian News, *US Considers C14 and National Corps Nationalist Hate Group* (14 March 2019), available at: <https://ukranews.com/en/news/619748-u-s-considers-c14-and-national-corps-nationalist-hate-groups> (Exhibit Y).

¹²⁶ Ukrainian News, *Ukrainian Nationalist Organisation C14 Has Been Listed As a Terrorist Organisation by TRAC International* (15 November 2017), available at: <https://ukranews.com/news/530220-mezhdunarodnaya-organyzacyya-trac-vnesla-ukraynskuyu-nacyonalystycheskuyu-organyzacyyu-s14-v> (Exhibit Z).

¹²⁷ UK Parliament, *REPORTING OF UKRAINE BY THE BBC - Early Day Motions* (30 October 2017), available at: <https://edm.parliament.uk/early-day-motion/50927> (Exhibit AA).

result of collaboration between C14 and the Holosiyiv District Administration."¹²⁸

"The United States Holocaust Memorial Museum expresses deep concern regarding recent manifestations of intolerance and antisemitism in Ukraine including violence directed against the Romani communities in Kyiv and L'viv. On April 21 members of the neo-Nazi Ukrainian organization C14 in the Holosiyiv District of Kyiv forced 15 families to flee the area and burned down their dwellings. On May 9, approximately 30 masked men burned down the Rudne settlement in the L'viv district."¹²⁹

"Neo-Nazi C14 vigilantes appear to be cooperating with Kiev police in latest 'purge' of Roma

Members of the neo-Nazi C14 movement, together with the NGO Kiev City Watch, which is led by C14 activist Sergey Bondar, conducted another raid, kicking Roma out of the area around Kiev's Yuzhny railway station. The raid did not seem to be accompanied by shocking footage of violence like the other five this year, but that is the only positive difference. What is far more worrying is that the action appears to have been facilitated by the police and, in fact, received enthusiastic coverage on national television news".¹³⁰

- (c) In stories by international news agencies and media outlets, for example:

"The recent brutal stabbing of a left-wing anti-war activist named Stas Serhiyenko illustrates the threat posed by these extremists. Serhiyenko and his fellow activists believe the perpetrators belonged to the neo-Nazi group C14 (whose name comes from a 14-word phrase used by white supremacists). The attack took place on the anniversary of Hitler's birthday, and C14's leader published a statement that celebrated Serhiyenko's stabbing immediately afterward."¹³¹

"Marking the start of the wave of violence was an arson attack on the Lysa Hora nature reserve settlement in Kiev on 21 April by roughly 30 members of C14, a neo-Nazi group. Police arriving at the scene allegedly failed to protect the families and instead advised them to leave Kiev."¹³².

¹²⁸ European Roma Rights Centre, *Anti-Roma Pogroms in Ukraine: On C14 and Tolerating Terror* (12 June 2018), available at: <http://www.errc.org/news/anti-roma-pogroms-in-ukraine-on-c14-and-tolerating-terror> (Exhibit AB).

¹²⁹ US Holocaust Memorial Museum, *US Holocaust Memorial Museum Expresses Deep Concern About Anti-Romani Violence and Antisemitism in Ukraine* (14 May 2018), available at: <https://www.ushmm.org/information/press/press-releases/museum-expresses-deep-concern-about-anti-romani-violence-and-antisemitism-i> (Exhibit AC).

¹³⁰ Kharkiv Human Rights Group, *Neo-Nazi C14 vigilantes appear to work with Kiev police in latest "purge" of Roma* (25 October 2018), available at: <https://khpg.org/en/1540419843> (Exhibit AD).

¹³¹ The Washington Post, *Ukraine's ultra-right militias are challenging the government to a showdown* (15 June 2017), available at: <https://www.washingtonpost.com/news/democracy-post/wp/2017/06/15/ukraines-ultra-right-militias-are-challenging-the-government-to-a-showdown/>(Exhibit AE).

¹³² The Guardian, *"They wanted to kill us": masked neo-fascists strike fear into Ukraine's Roma* (27 August 2018), available at: <https://www.theguardian.com/global-development/2018/aug/27/they-wanted-to-kill-us-masked-neo-fascists-strike-fear-into-ukraines-roma> (Exhibit AF).

160. Further, the Kiev-2 Battalion has its own flag with a coat of arms. It can be seen, for example, in the photo of the Bugas roadblock given in Bobkov First Report.¹³³ This photo was posted on the battalion's Facebook page¹³⁴ (see Figure 10 above). The flag has symbols used in Nazi Germany or at least referring to Nazi symbols (skull, runes Teivaz (Tur)¹³⁵ and Algiz (Lebensrun)¹³⁶, see Figure 14). Also on the flag is the slogan "Freedom or Death", used by Ukrainian nationalists.¹³⁷
161. C14 also uses neo-Nazi symbols (See Figures 15 - 18).¹³⁸ The very name "C14" is a reference to the neo-Nazi slogan "14/88".¹³⁹
162. Cultivation of Nazi ideas and admiration for the Wehrmacht army by the commander of the Kiev-2 Battalion is confirmed by former battalion member Dmytro Tsvetkov.¹⁴⁰
163. All these facts further demonstrate that the Kiev-2 Battalion was not a regular police unit, allegedly busy checking documents at the roadblock (as General Brown is trying to claim), but an active combat unit that took part in military operations against DPR and LPR forces.

¹³³ See Figures 9 and 10 and image 1 in Appendix 4 to Bobkov First Report.

¹³⁴ Counter-Memorial (ICSFT), Annex 152, The Facebook page of the Kiev-2 Special Purpose Battalion, 10 October 2014.

¹³⁵ Greater Manchester Police Counter Terrorism Branch Prevent Team, Extreme Right Wing symbols, numbers and acronyms, available at: <https://web.archive.org/web/20200512034250/https://www.trafford.gov.uk/residents/community/community-safety/docs/extreme-right-wing-symbols.pdf> (Exhibit AG).

¹³⁶ Bell Tower, *Rune Symbols and Meanings: Life / Man Rune* (21 July 2018), available at: <https://www.belltowernews.com/die-man-rune-51318/> (Exhibit AH).

¹³⁷ Nash Kiev, *Ukrainian Nationalism: Freedom or Death and the Preservation of Statehood*, <https://nashkiev.ua/life/ukrainskii-natsionalizm-volya-abo-smert-ta-zberezhennya-derzhavnosti> (Exhibit AI).

¹³⁸ Source photo: Nigilist, "*C14*" and "*Osvytnya Assambleya*": teaching bad things at the public's expense (28 October 2017), available at: <https://www.nihilist.li/2017/10/28/s14-i-osvitnya-asambleya-nauchim-plohomu-zabshhestvenny-j-schyot/>(Exhibit AJ).

¹³⁹ ADL, *1488: Symbol of Hate*, available at: <https://www.adl.org/resources/hate-symbol/1488> (Exhibit AK).

¹⁴⁰ See YouTube, *Dmitriy Tsvetkov, Battalion "Kiev-2". The Confidential Materials. Part 1* (9 February 2015), available at: <https://www.youtube.com/watch?v=oOt7OPcaGYM> (Exhibit AL).

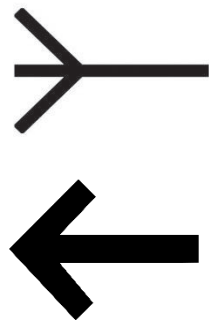


Figure 14 - Flag of the Kiev-2 Battalion and symbols from the flag (skull and runes Tur (Teivaz) and Algiz (Lebensrun), inscription "Freedom or Death" in Ukrainian.



Figure 15 - The use of the Algiz rune by neo-Nazis.¹⁴¹

¹⁴¹ ADL, *Runa of Life: Symbol of Hate*, available at: <https://www.adl.org/resources/hate-symbol/life-rune> (Exhibit AM).



Figure 16 - The use of the Tur rune by neo-Nazis.¹⁴²

¹⁴² ADL, *Runa Tur: Symbol of Hate*, available at: <https://www.adl.org/resources/hate-symbol/tyr-rune> (Exhibit AN).

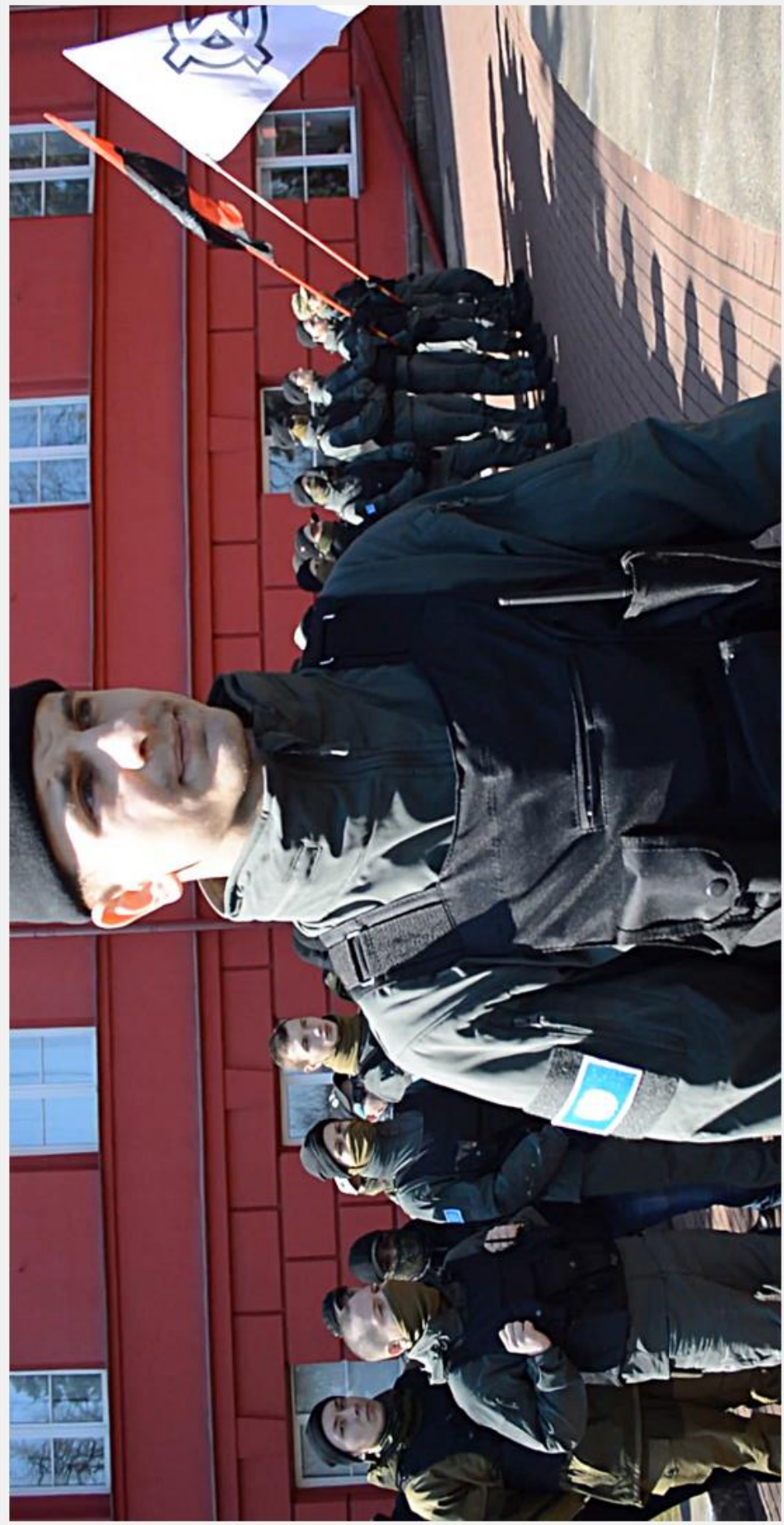


Figure 17 - C14 leader Yevgheniy Karas and C14 members with neo-Nazi symbols.



Figure 18 - C14 leader Yevgheniy Karas and C14 members with neo-Nazi symbols.

E. UKRAINE DID NOT TAKE STEPS TO SEPARATE A MILITARY FACILITY FROM CIVILIAN OBJECTS, CIVILIANS WERE USED AS "HUMAN SHIELDS" BY THE UAF

164. In this section, I will proceed on the assumption that the shelling of the Bugas roadblock was carried out by DPR forces (I don't agree with this and I am inclined to the version of shelling by the UAF). I will consider the reasons for the damage caused to civilians as a result of the attack on the roadblock.

i. Ukraine has not taken steps to separate a military facility from civilian objects

165. As I will show below in a separate section, the Bugas roadblock was a military facility and, therefore, a legitimate military target for shelling. I believe that collateral damage occurred due to Ukraine's failure to make a separation between a military facility and civilian objects. If, as Ukraine claims, there were checks on civilians and civilian vehicles at the Bugas roadblock, this means that these individuals and vehicles were at risk of being fired upon while at the military facility.

166. As can be seen from the analysis of satellite imagery cited in Bobkov Second Report, an appropriate separation was carried out by DPR forces on the outskirts of Yelenovka: the entry control checkpoint for civilian vehicles was separated from the fortified roadblock. As Colonel Bobkov points out:

"There was a DPR strongpoint 400m further southeast, which had already existed by the time the construction of the checkpoint began, meaning that the checkpoint was being constructed at a fairly considerable distance from the existing combat position (see Figure 4)."¹⁴³

167. Ukraine subsequently carried out such separation, but this was done several months after the shelling of the Bugas roadblock. As seen on satellite imagery, Ukraine built a new entry control checkpoint on the N-20 highway near the settlement of Berezovoye which became operational in June 2015.¹⁴⁴ That is, Ukraine relocated the crossing point for civilian traffic from the Bugas roadblock to a new location. The fortified combat position (roadblock) was no longer co-located with the checkpoint, as previously, but was placed separately, a few hundred metres away.¹⁴⁵ This shows that Ukraine understood the

¹⁴³ Second Bobkov Report, para 28.

¹⁴⁴ *Ibid.*, para 30.

¹⁴⁵ *Ibid.*, paras. 31-32.

dangers of co-locating military and civilian facilities, but in the case of Bugas roadblock it failed to take this precautionary measure, exposing the civilian population.

168. A similar separation of a fortified roadblock from a civilian checkpoint has been implemented by Ukraine on other occasions. As Colonel Bobkov points out on the basis of a satellite imagery analysis:

"when constructing the new checkpoint in Berezovoye, Ukraine (just like DPR in Yelenovka) chose to separate the military facility from the civilian facility, thereby refusing to use the same object as both a military roadblock and a checkpoint for civilian traffic (unlike the Bugas roadblock in January 2015)" ¹⁴⁶

169. Furthermore, the subsequent separation of military and civilian functions at the Bugas roadblock by Ukraine is confirmed by the fact that in 2018 (at the time of General Brown's visit) the Bugas roadblock continued to be used by Ukraine as a fortified combat position:

"(a) the area of the roadblock had increased by 42%;
(b) concrete blocks in the carriageway designed to reduce the speed of vehicles on both sides of the roadblock had been removed;
(c) the length of trenches for personnel had increased eightfold (up to 800 m).¹⁴⁷

170. Thus, the military equipment, fortifications and presence of a combat unit at the Bugas roadblock in January 2015 meant that the roadblock was a military object. As Colonel Bobkov correctly pointed out, Ukraine did not separate the facilities at the Bugas roadblock which had an administrative function (document checks and inspection of civilian vehicles) and a military function (preventing the entry of enemy mobile groups, deployment of personnel, fortifications, etc.). This is the main reason for the collateral damage that occurred when the Bugas roadblock was hit by artillery.

ii. Ukraine used civilians as "human shields"

171. The Ukrainian legislation adopted in relation to so-called ATO explicitly provided for the possibility of conducting searches of civilians in the territory of a roadblock where personnel, military equipment and firing positions were simultaneously deployed:

"A roadblock (hereinafter, "RB") is a barrier point in a certain place (on a sector of terrain, in a building or a complex of buildings) in the ATO area,

¹⁴⁶ Second Bobkov Report, para 31.

¹⁴⁷ *Ibid.*, para 49.

which is designed to: control the movement of people and vehicles; check identity documents of persons; conduct searches of persons and inspections of things they are carrying; conduct inspections of vehicles and things they are carrying in order to prevent unauthorized entry by persons into uncontrolled territory, infiltration from uncontrolled territory by terrorists and their accomplices, and the import (export), into and out of the ATO area, of items and substances withdrawn from civilian circulation or restricted in circulation; and to protect forces and means involved in the ATO from unlawful encroachments by terrorists and illegal armed (paramilitary) groups”¹⁴⁸

“A roadblock is a fortified checkpoint temporarily established by decision of the military command at the entrance to/exit from a territory under martial law and under a special regime (except for the state border), where the following facilities are set up: places for checking persons, vehicles, luggage and goods; positions for weapons and military equipment; and rest areas and facilities for life support for military personnel who perform tasks at such access control point, who may include officers of military formations and law enforcement bodies engaged, in accordance with the law, to enforce the legal regime under martial law.”¹⁴⁹

172. In addition, reports from NGOs confirm that the UAF repeatedly used civilian objects to deploy military personnel, military equipment, ammunition armoured vehicles during the conflict with the DPR and the LPR:

“29. On August 18, 2014, Ukrainian government forces entered School Number 14 in Ilovaisk and set up a headquarters there. The school principal told Human Rights Watch that the soldiers remained in the school building for two weeks.

30. During their stay, the principal said, the soldiers damaged the school furniture, broke all the doors and smashed 11 school computers. Neighbors and a school caretaker told Human Rights Watch that government forces fired at rebel forces from positions in the field near the school. Researchers found several unexploded landmines on the school grounds, apparently ejected from the supply truck they were stored on when the truck was attacked while parked in the schoolyard.”¹⁵⁰

¹⁴⁸ Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine No. 27og on Temporary procedure for controlling the movement of persons, vehicles and cargo along the contact line within Donetsk and Lugansk regions, 22 January 2015, para. 1.2, available at: <https://zakon.rada.gov.ua/rada/show/v0027950-15#Text> (Exhibit M). The same definition is enshrined in the Order of the First Deputy Head of the Anti-Terrorist Centre at the Security Service of Ukraine No. 415og on Temporary procedure for controlling the movement of persons, vehicles and goods across the contact line within Donetsk and Lugansk regions, 12 June 2015, para. 1.3, available at: https://zakon.rada.gov.ua/rada/show/v415_950-15#Text (Exhibit N).

¹⁴⁹ Procedure establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1455, 29 December 2021, para. 3, available at: <https://zakon.rada.gov.ua/laws/show/1455-2021-#Text> (Exhibit O).

¹⁵⁰ International Committee of the Red Cross, Eastern Ukraine, Attacks Against and Military Use of Schools,

"Ukraine's Ministry of Education and Science has acknowledged that Ukrainian government forces have used schools for military purposes. The Ukrainian government should deter the military use of schools by, among other things, endorsing the UN Safe Schools Declaration."¹⁵¹

"On 31 July 2014, Mr Anton Verenich and Mr Vasiliy Verenich were detained by Ukrainian military on suspicion that they were engaged in artillery spotting for the armed groups of the 'Lugansk people's republic'. They were taken to the unit of the Ukrainian Armed Forces then located in a recreational facility located near the village of Vesolaya Gora (Slovianoserbskyi district, Lugansk region). The men were held in a dry well with round concrete walls. A drunken soldier, reportedly convinced that they were involved in the death of a colleague, threw a combat grenade into the well, killing both men."¹⁵²

173. Such tactics by the UAF must be taken into account when assessing the causes of collateral damage in the shelling of the Bugas roadblock.
174. In my view, this indicates that the UAF were deliberately using the civilian population as a "human shield", an additional protective factor for their own forces at the Bugas roadblock.
175. That said, the rules of engagement do not prohibit commanders from deciding to hit a target if it is likely to cause collateral damage. An attack may be carried out even if there is a risk of collateral damage. The commander weighs that risk against the objective of hitting the military target. For example, the German rules for the conduct of military actions say:

"415. The presence or movements of civilians may not be used to render certain locations immune from military operations, in particular to shield military objects from attacks or to shield, favour or impede military operations. The Parties to the conflict must not direct the movements of civilians in order to attempt to shield military objectives from attacks or to shield military operations (4 28; 5 51 para.7). The misuse of protected persons as a shield for military objectives is a violation of international law and is punishable as a war crime (33 8 para.2 lit.b xxiii; 35 11 para.1 no.4). What is

available at: <https://casebook.icrc.org/case-study/eastern-ukraine-attacks-against-and-military-use-schools>.

¹⁵¹ Global Development Commons, *Attacks on Schools. Military Use of Schools during the Armed Conflict in Eastern Ukraine*, 2016, available at: <https://gdc.unicef.org/resource/attacks-schools-military-use-schools-during-armed-conflict-eastern-ukraine>.

¹⁵² OHCHR, Report on the Accountability for killings in Ukraine from January 2014 to May 2016, Annex I, para. 61 available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf.

more, this does not mean that the military objective must not be attacked
<...>".¹⁵³

176. Therefore, the collateral damage caused by the shelling of the Bugas roadblock is a consequence of the UAF tactic of using civilians as "human shields".

F. RATIONALE FOR THE ATTACK ON THE BUGAS ROADBLOCK AS A MILITARY OBJECT

177. In this section, I will assume that the Bugas roadblock was shelled by DPR forces (even though I am inclined to the version of shelling by the UAF). I will consider the military rationale and in general the reasons for the attack by DPR forces on the Bugas roadblock as a military object.

i. The shelling of the Bugas roadblock was not an "isolated incident"

178. General Brown, in his second report, concludes that the attack in question was isolated: there had allegedly been no shellings in the area for some time. General Brown points out that Colonel Bobkov's analysis does not include the craters that would have resulted from ongoing shellings of targets in the area.¹⁵⁴

179. First of all, this statement is puzzling in light of General Brown's overall position. After all, if, as he claims, the DPR forces would indeed have intended to "terrorise" civilians travelling through the roadblock, such shellings would undoubtedly have been repeated, and precisely at times when civilians are most concentrated. On the contrary, if, as he also claims, the shellings of the roadblock did not achieve military objectives, the cessation of such shellings after the one that was "unsuccessful" from a military perspective would confirm that the DPR forces were guided solely by military necessity. Thus, this conclusion by General Brown only confirms the position that the attack on the roadblock, if indeed carried out by DPR forces, was for purely military rather than "terrorist" purposes.

180. General Brown also considers my assumptions about shellings in the area to be based on "unverified social media posts".¹⁵⁵ This claim by General Brown is incorrect.

¹⁵³ Federal Ministry of Defence of the Federal Republic of Germany, Joint Service Regulation (ZDv) 15/2, Law of Armed Conflict, Manual, May 2013, available at: <https://www.onlinelibrary.iuhl.org/wp-content/uploads/2021/05/GER-Manual-Law-of-Armed-Conflict.pdf>.

¹⁵⁴ Second Brown Report, para 11.

¹⁵⁵ *Ibid.*

181. Para. 15 of my First Report also cites official sources: judgments of Ukrainian courts against individuals prosecuted for allegedly providing information to the DPR. It follows from these official documents of Ukraine (I assume their authenticity) that active hostilities did take place in the vicinity of the Bugas roadblock during the period in question. General Brown does not comment on these documents in any way.
182. For example, the decisions of Ukrainian courts state that, on 5 December 2014, a self-propelled howitzer battery was shelled from BM-21 Grad MLRS near the village of Blyzhneye (about 2 km from the Bugas roadblock),¹⁵⁶ on 26 December 2014, the movement of military vehicles through Volnovakha town and Bugas settlement (about 3 km from the Bugas roadblock) was observed,¹⁵⁷ and, on 22 January 2015, the presence of UAF military vehicles was discovered in Blyzhneye and Rybinskoye settlements (about 6 km from the Bugas roadblock).¹⁵⁸
183. Regarding social media publications, I would like to disagree with General Brown: if there is a sufficient number of such sources, and they are different, then the results of the analysis of these sources can shed considerable light on the event in question.
184. Moreover, as Colonel Bobkov noted, there were active artillery positions of the UAF near the Bugas roadblock.¹⁵⁹ Bobkov Second Report reiterates that these artillery positions were located 4-5 km away from the roadblock.¹⁶⁰ This leads me to believe that UAF vehicles carrying ammunition for the artillery positions passed through the Bugas roadblock and that ammunition supplies were probably stored on the roadblock territory.
185. Finally, contrary to General Brown's assertion,¹⁶¹ the Bugas roadblock underwent quite significant changes in 2018. Firstly, "the roadblock structures for civilian passage across the line of contact between the opposing sides were dismantled",¹⁶² while the size of the

¹⁵⁶ Counter-Memorial (ICSFT), Annex 57, Ukraine, Oktyabrsky District Court of Mariupol, Case No. 263/574/15-k, Judgment, 15 January 2015.

¹⁵⁷ Counter-Memorial (ICSFT), Annex 60, Ukraine, Volnovakha District Court, Case No. 221/1370/15-k, Sentence, 20 May 2015.

¹⁵⁸ Counter-Memorial (ICSFT), Annex 62, Ukraine, Volnovakha District Court, Case No. 221/1556/15-k, Sentence, 23 September 2015.

¹⁵⁹ First Bobkov Report, para. 55, figure 23.

¹⁶⁰ Second Bobkov Report, para 53.

¹⁶¹ Second Brown Report, para. 10.

¹⁶² Second Bobkov Report, para 50.

roadblock increased, with the total length of the trenches increasing eightfold. In other words, the roadblock in 2018 still fulfilled the function of a military facility (a fortified roadblock), but it no longer combined this military function with a civilian one. I agree with Colonel Bobkov that this demonstrates that the Bugas roadblock was in 2015 (and remained in 2018) a military facility.¹⁶³

ii. **Military equipment and supplies for UAF positions passed through the Bugas roadblock**

186. General Brown states that

"There is neither evidence that the shelling was targeted against military supplies nor that resupply convoys or UAF reinforcements were transiting the Buhas roadblock at the time of the ... shelling".¹⁶⁴

187. However, as mentioned above, in para. 15 of my First Report, there are court decisions from which it follows that there was movement of UAF military equipment near the Bugas roadblock.¹⁶⁵ I am certain that this military equipment passed through the Bugas roadblock for the purposes of supplying and resupplying the UAF and its personnel, because the roadblock is located on a key section of the H-20 highway, which could not but be used for the movement of UAF vehicles to forward positions.

188. Ukraine has not provided as evidence any plans, orders or battle books which could help analyse the deployment and movement of military equipment and troops in the area of the Bugas roadblock. Therefore, General Brown's claims that there is no evidence that "the shelling was targeted against military supplies nor that resupply convoys or UAF reinforcements were transiting"¹⁶⁶ do not suggest that such activities were not planned or did not take place in the area.

189. Evidence that could in theory disprove that the Bugas roadblock was used to deploy troops or to supply the UAF with supplies and reinforcements can only be presented by

¹⁶³ Second Bobkov Report, para. 48-50.

¹⁶⁴ Second Brown Report, para 11.

¹⁶⁵ Counter-Memorial (ICSFT), Annex 57, Ukraine, Oktyabrsky District Court of Mariupol, Case No. 263/574/15-k, Sentence, 15 January 2015; Counter-Memorial (ICSFT), Annex 60, Ukraine, Volnovakha District Court, Case No. 221/1370/15-k, Sentence, 20 May 2015; Counter-Memorial (ICSFT), Annex 62, Ukraine, Volnovakha District Court, Case No. 221/1556/15-k, Sentence, 23 September 2015.

¹⁶⁶ Second Brown Report, para 11 (a).

the Ukrainian side. As such evidence has not been presented and other evidence paints a picture of the military situation in the area, I continue to believe that military vehicles were passing through the Bugas roadblock during the period in question for the purpose of supplying and reinforcing the UAF positions.

iii. The shelling of the Bugas roadblock was militarily reasonable even in the absence of a ground offensive by the DPR

190. According to General Brown,

"the road and the checkpoint "had military value" ... only if the DPR were intent on breaking through the UAF combat forces in order, say, to capture Volnovakha."¹⁶⁷

191. I disagree with this assertion. The shelling of the roadblock achieved military objectives even in the absence of any subsequent offensive.

192. It is unknown to me whether and if so, which military regulations the DPR and LPR forces were guided by. According to media reports, both sides of the conflict had former military personnel from different countries in their ranks. In addition, many of the rebels from the DPR and LPR were former Ukrainian military servicemen. Thus, I believe that DPR and LPR forces were guided by Ukrainian or Russian military regulations.

193. According to the provisions of both Ukrainian and Russian military regulations, targets are included in a certain system of fire control and hit not only in the interests of preparing for an offensive action, but also as necessary in the light of the evolving situation as part of the exchange of strikes:

"292. A battalion (battery) carries out fire missions set by the commander of the combined arms unit (detachment) or the senior (commanding) artillery officer. The battalion (battery) commander may also decide to perform fire missions on his own initiative, based on the prevailing situation and taking into account the firing capabilities of the units. Fire missions may be set in advance (predesignated missions) or immediately prior to their execution (contingency missions).

"295. The decision to perform fire missions is taken by the battalion (battery) commander based on an understanding of the missions set by the combined arms unit (detachment) commander or the senior (commanding) artillery officer, and an assessment of the conditions for their performance. The battalion (battery) commander takes a decision to perform fire missions on

¹⁶⁷ Second Brown Report, para 11.

his own initiative on the basis of a study of the targets selected to be hit and the conditions for the performance of fire missions."

"297. The fire mission is determined on the basis of the nature and importance of each target, the mission of the combined arms unit (detachment), the firing capabilities of the artillery units and the availability of ammunition of appropriate types.

"298. When determining the sequence of fire missions and the time of opening fire (readiness to fire) and ceasing fire on each target, account is to be taken of its nature, danger and importance and of the position and mission of combined arms units. The time of opening and ceasing fire on targets which are objects of the attack is to be co-ordinated with the actions of combined arms units.

"299. When determining the number of batteries (platoons, guns) required to be involved in firing, account is to be taken of the firing capabilities of the units.

"300. The total time of fire on a target, the number of fire attacks and the duration of each attack are determined on the basis of the situation, the mission at hand and the mode of fire of the guns (mortars).

"303. The duration of the harassment fire is determined according to the current situation. Firing is carried out by single shots, by series of continuous (successive) fire of the battery (platoon, gun) or a combination thereof with unequal time intervals between series of fires (shots). The ammunition consumption is determined according to the chosen order and duration of fire.¹⁶⁸

194. There are similar provisions in the Ukrainian rules of artillery firing.¹⁶⁹

195. An exchange of artillery strikes may continue over a long period of time with attenuation and intensification phases to produce a systematic effect on the enemy without any intention of the troops to go on the offensive and may aim to destroy or suppress a target or exhaust the enemy:

"2. In the course of combat operations, artillery units carry out fire missions to engage various targets <...>

The fire for effect missions can be: annihilation, destruction, suppression, and attrition.

¹⁶⁸ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.far.org/chair/voen/Documents/ObrazDoc/Правила%20стрельбы%20и%20управления%20огнем.pdf>.

¹⁶⁹ See, e.g., Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No. 6., 5 January 2018, paras. 183-184, 278, 282, 551, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>. (Exhibit AO).

A target is annihilated when such a loss (damage) is inflicted on the target that it completely loses its combat effectiveness.

Destroying a target is to render it unusable.

Suppressing a target is inflicting such losses (damage) on the target or creating such conditions by fire that the target temporarily loses operational capability or its manoeuvring is restricted or its control is impaired.

Attrition consists in the moral and psychological impact on enemy manpower by the conduct of harassing fire with a limited number of guns and ammunition for a fixed period of time.¹⁷⁰

196. Further, a target is characterised by its importance, that is, its relevance to combat operations at the current moment in time. The Bugas roadblock can be characterised as a militarily important target because of the fact that it:

- (a) was part of a system of combat positions equipped in an area of combat operations;
- (b) was protecting a route that the enemy could use for potential attacks,
- (c) was used to station combat units to repel potential attacks;
- (d) was used to protect redeployment of military equipment by road to supply and reinforce troops;
- (e) prevented the penetration or exit of mobile (including sabotage and reconnaissance) groups of the enemy; and
- (f) was used to control the passage of people and vehicles in order to block enemy contacts and supplies.

197. The importance of the target varies according to the operational situation and is determined by the person who makes a decision regarding the shelling of targets.

198. Regular exchanges of artillery fire were part of the military conflict in Ukraine. Neither in accordance with military regulations, nor in practice were such exchanges of strikes

¹⁷⁰ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces of 1 February 2011, available at: <http://www.far.org/chair/voen/Documents/ObrazDok/Правила%20стрельбы%20и%20управления%20огнем.pdf>. Similar provisions are contained in Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No. 6., 5 January 2018, para. 3, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>. (Exhibit AO)

tied solely to the preparation or conduct of an offensive, contrary to General Brown's assertions.

iv. **The choice of weaponry (BM-21) does not mean that the attack on the Bugas roadblock was indiscriminate**

199. General Brown argues that the choice of BM-21 Grad to strike the roadblock itself characterises the shelling as indiscriminate:

"For BM-21 Grad the doctrinal "minimum dimensions of the target (front x depth) 400 x 400 m." The size of the Buhas checkpoint is approximately 100 x 100m. BM-21 Grad is therefore inherently indiscriminate for a target of this size in that, even if the checkpoint had been accurately targeted, the fall of shot pattern would inevitably have resulted in more than 50% of the rockets falling outside their intended target."¹⁷¹

200. This statement is knowingly incorrect. Firstly, if the documents provided by the SBU are to be trusted, the shell fragments hit the passenger bus, when the bus was actually in the Bugas roadblock territory. Thus, based on the protocols of interviews drawn up by the SBU, at that moment the bus was stopped at the roadblock and inspected by Ukrainian servicemen.¹⁷²

201. Even if the shelling had been carried out from cannon artillery, the shells that were fired at the roadblock and landed on its territory could have hit the passenger bus in the same way.

202. For this reason, regardless of the DPR's choice of weaponry, the risk of collateral damage existed precisely because of Ukraine's organisation of civilian transport inspections at the Bugas roadblock.

203. Secondly, there is no such criterion for selecting artillery weaponry that would prescribe that 50% of the projectiles must hit the target. General Brown cites no source to support his stated criterion, so I assume that this criterion is merely General Brown's opinion. I disagree with this opinion for the reasons described below.

204. Thirdly, General Brown claims that the DPR should have used cannon artillery and provides a fall of shot pattern created by a 122 mm artillery gun firing from a distance of

¹⁷¹ Second Brown Report, para. 16.

¹⁷² See, for example, Memorial, Annex 206.

15 km.¹⁷³ However, the schematic he provides has dimensions of 208 by 80 m, which also means that a significant portion of shells would have fallen outside the roadblock area (100 by 100 m) given by General Brown.

205. Fourthly, 15.4 km is the maximum range for firing the appropriate type of cannon artillery that General Brown refers to (D-30 howitzer).¹⁷⁴ If one was to agree with General Brown that the shelling was carried out from a distance of between 19.4 and 19.8 km, this already meant that it was impossible for the DPR to use cannon artillery (which cannot fire beyond 15.4 km).
206. At the same time, cannon artillery has much lower mobility and a lower density of fire. A strike of the same intensity would require several guns to be moved into positions close to UAF positions, and continuous firing from such a position for a long period of time. This would make the defeat of a DPR artillery position by retaliatory fire by the UAF almost inevitable. Whereas a strike from BM-21 Grad MLRS requires only a few minutes, and the units themselves can move quickly to a position and just as quickly leave it after completing the mission.
207. Fifthly, General Brown's assertion that the alleged minimum target size for BM-21 is 400 m by 400 m is also incorrect. General Brown misrepresents the contents of the 2011 Rules of Firing and Fire Control (hereinafter "the Rules").¹⁷⁵
208. General Brown refers to the commentary to the 2011 Rules of Firing and Fire Control.¹⁷⁶ However, this provision (para. 409 of the Rules) applies when determining the number of projectiles to be fired and the method of firing:

"409. When determining the number of projectiles to be fired at a target and the method of firing, the minimum front and depth dimensions of a group or separate target are taken to be equal to: 300 m for medium calibre rocket artillery; 200 m for large calibre rocket artillery; 400 m for medium calibre,

¹⁷³ Second Brown Report, para. 16, Figure 8.

¹⁷⁴ *Ibid*, para. 16, footnote 87.

¹⁷⁵ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.fa.ru/org/chair/voen/Documents/ObrazDoc/Правила%20стрельбы%20и%20управления%20огнем..pdf>.

¹⁷⁶ Second Brown Report, para. 16, footnote 84, Manual for the Study of the Rules of Firing and Fire Control of Artillery (PSiUO-2011), Part 1, Battalion, Battery, Platoon, Gun, enacted by the Chief of Missile Forces and Artillery of the Ground Forces in 2011, available at: www.fa.ru/org/chair/voen/Documents/ObrazDoc/Пособие%20по%20изучению%20ПСИУО.pdf.

medium and long range rocket artillery; 500 m for large calibre, long range rocket artillery when firing high-explosive fragmentation projectiles and 600 m for cluster fragmentation projectiles."¹⁷⁷

209. It is clear from the content of the above provision that 400 m by 400 m is the notionally accepted (rather than actual) minimum target size, which is used to determine the number of projectiles to be fired to hit the target:

"In firing theory it is assumed that a separate target is dimensionless. Therefore, the number of projectiles to be fired to hit a separate unobservable target is specified per target and the fire method parameters are determined taking into account the minimum dimensions of the target."¹⁷⁸

210. Accordingly, 400 m by 400 m is the notional minimum size of an isolated target used to calculate the projectile consumption. At the same time, para. 409 of the Rules does not prohibit firing of BM-21 at such a target with a notional size of less than 400 m by 400 m. The Rules only prescribe a certain order of projectile consumption and the method of firing at such target. For example, the very next paragraph (para. 410 of the Rules) specifies the manner in which a target must be fired if its dimensions are less than those specified in para. 409:

"410. When firing to engage a target whose front and depth dimensions do not exceed the minimum ones, the battalion applies concentrated battery fire in an overlapping way, at one aiming setting. A battery executing a firing mission against such a target on its own also applies concentrated fire at one aiming setting."¹⁷⁹

211. Thus, the Rules prescribe concentrated (overlapping) fire at such a target. Consequently, firing at a target which is less than 400 m by 400 m in dimensions is not prohibited by the Rules, contrary to General Brown's assertion.

212. Consequently, BM-21 is not an indiscriminate weapon and its use does not imply an indiscriminate strike against a roadblock.

¹⁷⁷ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.faru.org/chair/voen/Documents/ObrazDoc/Правила%20стрельбы%20и%20управления%20огнем..pdf>.

¹⁷⁸ Manual for the Study of the Rules of Firing and Fire Control of Artillery (PSiUO-2011), Part 1, Battalion, Battery, Platoon, Gun, introduced by the Chief of Missile Forces and Artillery of the Ground Forces in 2011, available at: www.faru.org/chair/voen/Documents/ObrazDoc/Пособие%20по%20изучению%20ПСИУО.pdf.

¹⁷⁹ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.faru.org/chair/voen/Documents/ObrazDoc/Правила%20стрельбы%20и%20управления%20огнем..pdf>.

v. **Even the use of the most high-precision weaponry does not eliminate the risk of collateral damage**

213. Even the use of the most high-precision weapons does not mean there is no risk of collateral damage, especially given that Ukraine had been inspecting civilian vehicles within a military facility.
214. Instances of erroneous strikes at civilian targets by even the most technically equipped and professionally trained armies are well-known in history.
215. In this Report I am giving some examples of NATO forces hitting targets in Yugoslavia in 1999.¹⁸⁰ Those strikes, which resulted in civilian casualties, involved the use of self-homing precision-guided munitions. For example, on 12 April 1999, a civilian passenger train was hit twice by bombs using a laser-guided system in the Grdelica gorge, when a bridge was allegedly attacked. Both times, NATO claims, the pilot was not aiming at the train,¹⁸¹ however, even the use of precision weapons by a qualified pilot resulted in both of the two strikes hitting a civilian rather than a military target, with many civilian casualties.¹⁸² Nevertheless, the incident was found by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") committee not to contain elements of a war crime¹⁸³: the first strike was found legitimate because the target was a bridge and not a train, while the second strike was found to be "an honest and reasonable mistake made in the heat of the moment".¹⁸⁴
216. During the military campaign in Afghanistan in the 2000s, NATO forces claimed the use of precision weapons, but the number of civilian casualties was higher than in the NATO military campaign in Yugoslavia in 1999:

¹⁸⁰ The present Report, paras. 215, 243, 257, 359, 372, 423.

¹⁸¹ The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final report to the Prosecutor of the ICTY, available at: <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVB1>.

¹⁸² "At least 10 people died in the incident and 15 were injured." *See* the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final report to the Prosecutor of the ICTY, available at: <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVB1>.

¹⁸³ *Ibid.*

¹⁸⁴ A. Rogers, *What is a legitimate military target?* in R. Burchill, N. White, J. Morris, INTERNATIONAL CONFLICT AND SECURITY LAW ESSAYS IN MEMORY OF HILAIRE MCCOUBREY (CUP, 2005), p. 167, available at: <http://ndl.ethernet.edu.et/bitstream/123456789/60413/1/49.pdf>.

"HISTORICAL EXAMPLE - AVOIDING COLLATERAL DAMAGE, AFGHANISTAN 2002-2003

The campaign to remove the Taliban Government and forces from control of Afghanistan occurred at a point in weapons development when over half the air and ship-launched weapons available were precision-guided, surveillance and geopositioning. Coalition armed forces were alert to their responsibilities under the LOAC according to which their ROE were tailored. Yet the civilian casualty rate in Afghanistan was twice that of the bombardment of Serbia in the North Atlantic Treaty Organisation Kosovo operation, despite employing one third of the number of attack sorties and using half the number of weapons. Whilst both sets of figures are remarkably low by standards of previous wars, this raw comparison raises questions on proportionality".¹⁸⁵

217. Similarly, the use of exceptionally high-precision weapons was claimed during the military operation by the US and their allies in Syria, which began in 2014:

"We'll perhaps never know how many civilians they killed. Coalition commanders insist on the precision of their airstrikes, but precision airstrikes are only as precise as the information about the targets. Then there's the size of the bombs dropped. Time and again, we saw entire buildings destroyed in Raqqa. When bombs big enough to take out whole buildings are being used, as well as artillery with wide-area effects, any claims about minimising civilian casualties are unsupportable".¹⁸⁶

218. Thus, numerous examples confirm that the use of even the most high-precision weapons results in collateral damage. The key factor is the presence of civilians in the targeted area. In the case of the Bugas roadblock, civilians were present at the roadblock due to the fact that Ukraine had organised the inspection of civilian vehicles right in territory of the roadblock.

219. Moreover, as I pointed out in the First Report, the attackers may not have had an alternative way of hitting the target. In any case, military regulations drafted in accordance with international law do not require striking with the highest-precision weapons available to the commander.

220. For example, the Australian military doctrine indicates that the commander has the right to choose a less precise weapon, even if such weapon may cause collateral damage:

¹⁸⁵ Armed Force of Australia, Law of Armed Conflict manual, Australian Defence Doctrine Publication, 11 May 2006, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>.

¹⁸⁶ The Guardian, "Precision" airstrikes kill civilians. In Raqqa, we saw the devastation for ourselves (5 June 2018), available at: <https://www.theguardian.com/commentisfree/2018/jun/05/british-us-airstrikes-raqqa-civilians-killed> (Exhibit AP).

"Precision-guided weapons. 8.38 The existence of precision-guided weapons, such as GBU 10 and Harpoon missiles, in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating the LOAC requirements. It is a command decision as to which weapon to use. This decision will be guided by the basic principles of the LOAC: military necessity, avoidance of unnecessary suffering and proportionality."¹⁸⁷

221. Similar provisions are found in the military doctrine of Denmark:

"Limited operational capabilities or an increased risk of harm to one's own forces may, depending on the circumstances, justify an attack on an objective, even if the attack in question is not the attack among multiple potential attacks that poses the least danger to protected persons or objects."¹⁸⁸

222. Similar prescriptions are found in US military doctrine:

"Similarly, the U.S. reservation to CCW Protocol III on Incendiary Weapons makes clear that U.S. forces may use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons."¹⁸⁹

223. Consequently, General Brown's assertion that the mere use of BM-21 means the indiscriminate nature of the Bugas roadblock shelling is unfounded.

vi. The choice of the Bugas roadblock as a target for shelling does not imply an intention to intimidate the civilian population

224. General Brown suggests that shelling the Bugas roadblock with MLRS would have a greater intimidating effect on civilians than shelling populated areas with MLRS.¹⁹⁰ I disagree with this assumption by General Brown.

¹⁸⁷ Armed Force of Australia, Law of Armed Conflict manual, Australian Defence Doctrine Publication, 11 May 2006, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>.

¹⁸⁸ Danish Ministry of Defence, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, September 2016, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/DK-Military-Manual-International-Operations.pdf>.

¹⁸⁹ US Ministry of Defence, Department of Defense Law of War Manual, June 2015 (updated December 2016), available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/USA-Law-of-War-Manual.pdf>.

¹⁹⁰ Second Brown Report, para. 14.

225. The roadblock is not close to residential areas. On the contrary, the Bugas settlement has residential areas just a few kilometres (and closer) from DPR positions. Similarly, there was no shortage of civilian targets in the settlements of Novotroitskoye and Olginka southeast of Dokuchayevsk and north of the Bugas roadblock.
226. As I pointed out in my First Report,¹⁹¹ if the person responsible for the shelling intended to harm civilians, it is more likely that the shelling would have targeted these areas rather than the Bugas roadblock.
227. It also seems to me that given the active combat operations in the direction west of Dokuchayevsk, the DPR's use of as many as three BM-21 MLRSs for "intimidation" and even more so to "hit civilians" made no sense whatsoever.
228. A shelling of a military objective such as the Bugas roadblock, where military personnel were present, is more expected than shells hitting a residential area away from UAF positions. The presence of the military at the roadblock was a well-known fact among the residents of the area, as evidenced, for example, by the recommendations of Ukrainian non-governmental organisations on crossing the contact line in 2015,¹⁹² which means that civilians were aware that they were entering a military facility.
229. Hence, I do not believe that in this case the intention to harm specifically civilians as described by General Brown is discernible. On the contrary, the circumstances of the shelling indicate an intention to achieve military objectives relating to the neutralisation of the Bugas roadblock as a military facility.

¹⁹¹ First Report, para. 60.

¹⁹² Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khpg.org/1441791221> (Exhibit P).

G. THE TIMING OF THE ATTACK ON THE BUGAS ROADBLOCK DOES NOT SUPPORT THE ALLEGATION OF THE DPR'S INTENTION TO HARM CIVILIANS

230. In this section, I will proceed on the assumption that the shelling of the Bugas roadblock was carried out by DPR forces (I disagree with this and am leaning towards a version that the roadblock was shelled by UAF forces) and consider the issues relating to the mid-day attack on the roadblock.

i. The shelling of the Bugas roadblock at night, in my opinion, would have resulted in more civilian casualties

231. General Brown agrees with Ukraine's statement that "the attack was a deliberate targeting of civilians" with reference to the shelling of the roadblock during the day and not at night.¹⁹³ In particular, General Brown points out that unlike the shelling of the Bugas roadblock, the shelling of the DPR roadblock in Yelenovka was carried out at night.¹⁹⁴

232. However, Ukraine's own sources refute the claim that firing at the Bugas roadblock at night would have resulted in fewer civilian casualties. For instance, recommendations on passing through the Bugas roadblock in 2015 pointed to an important feature of the roadblock: unlike other roadblocks, queues of civilian vehicles formed at the Bugas roadblock at night:

"Features of the Bugas roadblock (Volnovakha, Mariupol direction) <...>.

It is in the Mariupol direction that [people willing to pass] most frequently spend the nights under the open sky."¹⁹⁵

233. Therefore, sources of the Ukrainian side directly confirm the opposite. If the shelling had taken place at night, there would have been a risk of shells hitting a concentration of civilian vehicles. This would have significantly increased the risk of harm to the civilian population. This is because the attackers (especially if they were the DPR's forces as Ukraine claims) may not have and most likely did not have high-tech night-vision devices

¹⁹³ Second Brown Report, para. 14, para. 18 (d).

¹⁹⁴ Second Brown Report, para. 17.

¹⁹⁵ Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khp.org/1441791221> (Exhibit P). See also, Rinat Akhmetov's Foundation, *How to drive across the contact line. Step-by-step instructions* (25 September 2015), available at: <https://akhmetovfoundation.org/ru/news/kak-prochat-cherez-lynyyu-soprykosnovenyya-poshagovaya-ynstruktsyya> (Exhibit Q).

for guidance and adjustment of fire. On the contrary, the commander who decided to shell the Bugas roadblock in the middle of the day may have assumed that the queue of vehicles that had accumulated during the night would have dwindled to nothing by then.

234. This is confirmed by the satellite image analysed in the First Bobkov Report: it shows that in the morning there were queues of civilian vehicles in both directions from the roadblock.¹⁹⁶ However, according to the video of the shelling, there were far fewer, if not non-existent, vehicles during the shelling itself.¹⁹⁷

235. Consequently, there is no reason to argue (as General Brown does) that shelling at night would mean a reduced risk of harm to civilians.

236. General Brown also points out:

"If the attack had occurred at the time of the satellite image or if there had been a similar number of vehicles queuing from the direction of Buhas at the actual time of the attack, the centre of the barrage (mean point of impact) would have been directly over the line of civilian vehicles."¹⁹⁸

237. This assertion is not supported by anything other than General Brown's suggestion that there was no military expediency in neutralising the Bugas roadblock in the middle of the day.

238. Ukraine has not provided any evidence in its exclusive possession that could help analyse the deployment and movement of military equipment at or near the Bugas roadblock on 13 January 2015. Furthermore, although Ukraine provided video footage from a camera at the Bugas roadblock at the time of the shelling and immediately prior to the shelling, the recording does not last more than one hour (approximately from 14:00 to 15:00).¹⁹⁹ The video does not show what the situation was like at the Bugas roadblock earlier that day. Apparently, it is not in the interests of the Ukrainian side to provide a more complete recording.

239. In any case, if whoever was directing the shelling really had the intention of harming civilians, it is unlikely that lunchtime would have been chosen, especially given the

¹⁹⁶ First Bobkov Report, para. 36 (2), Figure 8.

¹⁹⁷ Memorial, Annex 696, Dashboard camera footage of the 13 January 2015 shelling.

¹⁹⁸ Second Brown Report, para. 14.

¹⁹⁹ Memorial, Annex 695, Footage of a surveillance camera at the roadblock, 10 January 2015.

limited amount of ammunition available to DPR forces as trophy weapons. According to General Brown's logic, the shelling should have been carried out in the morning, when there was the highest concentration of vehicles.

240. As I indicated above, carrying out the shelling at night would essentially mean that it would be impossible to visually verify the coordinates of the target. Such verification is usually done during the day when the target is well visible. At night, however, the same procedure requires expensive equipment to ensure that the target can be seen at night. It is very likely that the DPR forces did not have such equipment to carry out coordinate checks at night. From this point of view, carrying out the shelling at night would mean a higher risk of harm to civilians, as it would make hitting the military objective (roadblock) more difficult.

241. The commander in charge of the strike determines the timing of the strike in terms of the mission assigned to him by his command. Contrary to General Brown's assertion, shelling the roadblock during the day does not automatically imply an intention to harm civilians. The commander who made the decision to engage the target must have had information or a mission to justify the need to strike during the day (e.g. intelligence about the presence of enemy formations, military equipment, supply vehicles, etc. at the roadblock at that time).

ii. **The mere fact that the shelling occurred during the day (rather than at night) does not in itself constitute a violation of the rules of warfare, nor does it indicate an intention to harm civilians**

242. As can be seen from the examples of NATO strikes on civilian targets that I cite below, shelling in the daytime can be explained by military expediency and cannot in itself prove an intention to harm civilians and targets.

243. I will give examples of the strikes at certain targets by NATO forces in Yugoslavia in 1999, which were discussed in NATO press briefings and reports by international organisations, and were also reviewed in the final report to the Prosecutor of the ICTY, prepared by the Committee which was set up to examine the NATO bombings of the Federal Republic of Yugoslavia. In particular, NATO forces attacked infrastructure facilities (such as bridges, tunnels) in order to, as it was claimed, create difficulties for enemy communications. Convoys, civilian buildings and other objects were also

destroyed. The attacks were carried out during daylight hours and civilians were killed in the course of the attacks:

- (a) Airstrike on a railway bridge located across the Grdelica Gorge and on which a passenger train was riding (time of the attack: 11:40 a.m., passenger train struck, see also the present Report, para. 215).²⁰⁰
- (b) Attack on a convoy of Albanian refugees (mostly children, women and elderly; time of the attack: midday):

"63. On April 14, 1999 [...] on the Djakovica-Prizren road, near the villages of Madanaj and Meja, a convoy of Albanian refugees was targeted three times. Mostly women, children and old people were in the convoy, returning to their homes in cars, on tractors and carts. <...>

Total casualty figures seem to converge around 70-75 killed with approximately 100 injured. The FRY publication NATO War Crimes in Yugoslavia states 73 were killed and 36 were wounded.

65. <...> At around 1030, the pilot spotted a three-vehicle convoy near to the freshest burning house, and saw uniformly shaped dark green vehicles which appeared to be troop carrying vehicles. He thus formed the view that the convoy comprised VJ and MUP forces working their way down towards Djakovica and that they were preparing to set the next house on fire. <...> The target was verified as a VJ convoy at 1216 and an unspecified number of bombs were dropped at 1219. In the next 15 or so minutes (exact time unspecified), the same aircraft appears to have destroyed one further vehicle in the convoy. Simultaneously, two Jaguar aircraft each dropped 1 GBU-12 bomb each, but both missed their targets. Between 1235 and 1245, the first F-16 aircraft appears to have dropped three further bombs, at least one of which appears to have missed its target.

66. <...> This conversation is alleged to establish both that the attack on the convoy was deliberate and that a UK Harrier pilot had advised the F-16 pilot that the convoy was comprised solely of tractors and civilians. The F-16 pilot was then allegedly told that the convoy was nevertheless a legitimate military target and was instructed to fire on it. This same report also suggests that the convoy was attacked with cluster bombs, indicated by bomb remnants and craters left at the site. <...>

69. It is the opinion of the committee that civilians were not deliberately attacked in this incident. <...>

70. While this incident is one where it appears the aircrews could have benefitted from lower altitude scrutiny of the target at an early stage, the committee is of the opinion that neither the aircrew nor their commanders

²⁰⁰ The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final report to the Prosecutor of the ICTY, available at: <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVB1>.

displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges. The committee also notes that the attack was suspended as soon as the presence of civilians in the convoy was suspected. Based on the information assessed, the committee recommends that the OTP not commence an investigation related to the Djakovica Convoy bombing."²⁰¹

- (c) Attack on road bridges on which civilian vehicles were riding (time of the attack: 13:00, civilian vehicles struck):

"Colonel Freytag: Yesterday, NATO maintained its pressure on the Yugoslav leadership. Another day of good weather enabled us to fly almost 800 sorties. Our air attacks included 323 strike and 92 air defence suppression sorties out of precisely a total of 772. We struck highway bridges at Vladicine, Bare and Donjetrinjanga, further impeding the lines of communication for the Serbian security forces into Kosovo <...>

Fred Coleman (USA Today): Two questions on the bombing of the bridge at Varvarin: first of all, can you confirm that the attack took place at 1.00 p.m., or at least in the middle of the day; and second, if it did take place in the middle of the day, how does that square with your repeated assertions, NATO does everything to avoid civilian casualties, since clearly you are going to take more civilian casualties in the middle of the day, than you would in the middle of the night?

Colonel Freytag: You are aware of our press release of yesterday, and there is nothing to add. But I confirm to you again the time; it was 11.01 zulu time, which is 1 p.m.²⁰²

"Dimitri Khavine, Russian Line: Although the figures you have released are very impressive and terrible, still can we hope to get some explanation tomorrow, or the day after tomorrow, about the timing of this strike, because it's very important to understand the targeting policy? Why it was stricken just exactly in time when the civilian casualties are most probable. Could we hope to receive the explanation?

Colonel Freytag: Dimitri, I don't think that we will have more details tomorrow than that what we have already released to you in writing last night, and what I have repeated this afternoon. We are not on the ground; we cannot confirm Serb press reports.

Dimitri: No, but about the timing of the strike. From the common sense, it is exactly the time when the traffic is most intensive there. It's not like in midnight.

Colonel Freytag: Well, as we said in our press release, this was a legitimate military target because it belonged to the major lines of communications, that's why the bridge was hit on two ends and taken down.²⁰³

²⁰¹ *Ibid.*

²⁰² NATO Spokesman Jamie Shea and Colonel Konrad Freytag, Press conference at NATO Headquarters, Allied Powers in Europe, Brussels, 31 May 1999, available at: <https://www.nato.int/kosovo/press/p990531a.htm>.

²⁰³ *Ibid.*

(d) Attack on tunnels (time of the attack: 15:15):

"Antonio Esteves Martins, RTP: I have got a question for Colonel Freytag concerning the attack on the convoy where some journalists were hit. I know the pilot is going on debriefing. Do you have an idea about what the target really was, what kind of aircraft, and what really happened? And another question after this, our local correspondent was hit, and she was invited on the night of Saturday to go, she was a little bit hesitating about whether to go or not, is it possible for NATO to know whether, in some areas of Kosovo or elsewhere, western journalists are trying to do their job? <...>

Colonel Freytag: If, I could begin. There was only one NATO attack which took place near the location at which the journalists are reported to have been injured. The media reports are a bit different. At 15.15 hrs local time yesterday, NATO aircraft carried out attacks on a tunnel on the Prizren-Prezovika road. We attack tunnels like this because you can use those tunnels for secure storage of VJ and MUP equipment as well as to hide people. All attacks were successful and the bombs hit the target areas at both ends of the tunnel. This was a legitimate military target. The air crews did not see any civilian vehicles in the area".²⁰⁴

(e) Attack on a operating machine-building plant:

"Patricia Kelly, CNN: <...> we are told that you hit a car plant. Don't civilians work in car plants? How you can be sure that they weren't working on an assembly line? I realise that at the moment the car plant's capacity to produce, because of sanctions, would be lessened but nevertheless civilians do work in these plants.

Air Commodore David Wilby: <...> In terms of the "car plant", our intelligence says that it is not a car plant, that it produces military machinery and of course, as I said to you, we would look very carefully into the collateral damage or damage to civilians before we attacked that particular plant.²⁰⁵

244. In each of these cases, the NATO command claimed to have struck legitimate military targets. The committee formed by the ICTY recommended that the incidents not be investigated.²⁰⁶

245. Thus, the mere fact that the Bugas roadblock was attacked during the day does not in itself confirm Ukraine's claim (supported by General Brown) that DPR forces intended to harm civilians.

²⁰⁴ *Ibid.*

²⁰⁵ NATO Spokesman Jamie Shea and Air Commodore David Wilby, Press conference at NATO Headquarters, Brussels, 9 April 1999, available at: <https://www.nato.int/kosovo/press/p990409a.htm>.

²⁰⁶ The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final report to the Prosecutor of the ICTY, para. 91, available at: <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVB1>.

IV. 24 JANUARY 2015 SHELLING WHICH CAUSED DAMAGE TO THE VOSTOCHNIY DISTRICT OF MARIUPOL

A. UKRAINE'S DOCUMENTS CONFIRM THAT THE DPR HAD NO INTENTION OF HITTING RESIDENTIAL AREAS OF MARIUPOL, SINCE THE SPOTTER KIRSANOV DELIBERATELY GAVE THE DPR INCORRECT COORDINATES, WHILE THE DPR'S TARGET WAS THE UAF POSITIONS ON THE OUTSKIRTS OF THE CITY

246. In connection with the shelling of the Vostochniy neighbourhood in Mariupol, Ukraine convicted Valeriy Kirsanov, an alleged DPR gun spotter. It follows from the documents submitted in these proceedings that the SBU and the Ukrainian court believed that because Kirsanov had given the DPR coordinates, the Vostochniy residential district had been shelled.²⁰⁷

247. However, firstly, the Kirsanov's testimony does not indicate the coordinates of which specific targets he was handing over to the DPR. The military facilities on the outskirts of the city and their coordinates must have been well known to the DPR. I do not rule out that the coordinates given could also have been for military targets inside the city.

248. Secondly, the documents submitted, as well as other publicly available materials, confirm that the DPR's target was the UAF positions on the outskirts of the city – it was the coordinates of these military targets that were requested from Kirsanov, as he himself indicates in his testimony.²⁰⁸ Moreover, Kirsanov claims that he deliberately gave the DPR incorrect coordinates, passing them off as the coordinates of military targets.²⁰⁹

249. This is stated in Kirsanov's testimony, which he gave to the SBU and which Ukraine presented in the present case:

"I always intentionally gave him wrong coordinates."

" On 21 and 22 January, 2014, I provided coordinates for the sites in Taganrogsкая Street and Marshala Zhukova Street. However, those coordinates were wrong".²¹⁰

²⁰⁷ See, for example, Counter-Memorial (ICSFT), Annex 77, Verdict against V. Kirsanov; Memorial, Annex 213, Signed Declaration of V. Kirsanov.

²⁰⁸ Memorial, Annex 213, Signed Declaration of V. Kirsanov.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

250. The same is alleged in the verdict of the Ukrainian Court in the Kirsanov's case:

"He added that at PERSON_5's request, he gave him false information about the coordinates of the UAF's positions. Further, he did not ask PERSON_5 why he needed such coordinates. He transmitted this information about UAF roadblocks using a Google map from the Internet. At the same time, he noted that the location of such roadblocks was common knowledge. While communicating with PERSON_5, he also met PERSON_7, whose last name he did not know. He confirmed that the information he gave to PERSON_7 was similar to the information provided by him to PERSON_5, which was false."²¹¹

251. Thus, the official documents of the SBU, which was investigating Kirsanov case, and of the Ukrainian court show that Kirsanov gave the DPR incorrect coordinates of the UAF positions near Mariupol, while the target of the 24 January 2015 shelling by the DPR was not residential areas, according to the Ukrainian security services themselves, but the UAF positions on the outskirts of the city.

252. This is also confirmed by Ukrainian media reports citing data obtained by the SBU during its investigation:

"The SBU officers established that former Mariupol police officer Valeriy Kirsanov was involved in adjusting the fire. According to the special services, the militants' main targets were military roadblocks near Mariupol, but due to inaccurate coordinates, the shells hit a residential area."²¹²

"According to the Ukrainian special services, the militants wanted to shell a roadblock of the ATO forces, which was about a kilometre away from residential buildings, but missed."²¹³

253. The fact that the coordinates given by Kirsanov to the DPR were erroneous and that the target of the shelling was UAF positions and not a residential area of Mariupol was stated, among others, by the Donetsk Region Prosecutor's Office (a Ukrainian state body) in 2016:

"Thus, on 24 January 2015, the former policeman also adjusted the terrorists' fire. Their main target, according to investigators, was roadblocks and other places where UAF forces were deployed near the city of Mariupol. However,

²¹¹ Ordzhonikidze District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 22 June 2016, available at: <http://web.archive.org/web/20211128095111/https://reyestr.court.gov.ua/Review/58450086> (Exhibit AQ).

²¹² Mariupol City, *Mariupol Court Adjourns Trial of Vostochny Shelling Spotter* (16 January 2018), available at: https://mrpl.city/news/view/v-mariupole-perenesli-zasedanie-suda-po-delu-navodchika-obstrela-vostochnogo?utm_source=ukr_net&utm_medium=referral&utm_campaign=rss (Exhibit AR).

²¹³ MediaPort, *Mariupol shelling: court finds ex-policeman guilty of adjusting fire* (23 June 2016), available at: <https://www.mediaport.ua/obstrel-mariupolya-sud-priznal-vinovnym-eks-milicionera-v-korrektirovke-ognya> (Exhibit AS).

due to inaccurate coordinates, the militants shelled the Vostochny residential area in Levoberezhny district of Mariupol from Grad launchers.²¹⁴

254. Judging from the reports of the Ukrainian prosecutor's office and Ukrainian media, the SBU has more complete data indicating that the target of the shelling was not residential areas, but military positions. In these proceedings Ukraine has not provided this data, apparently because it contradicts the claim that the shelling of residential area was intentional in nature.
255. The intercepted conversations in the case file also confirm that the residential area was not the target of the strikes.²¹⁵
256. Hence, all available sources clearly indicate that the shelling of residential area in Mariupol was due to targeting errors and that the actual target of the DPR shelling was Ukrainian defensive positions outside the city.

B. THE MERE FACT THAT CIVILIAN TARGETS WERE HIT DOES NOT MEAN THAT THE SHELLING WAS DELIBERATE OR INDISCRIMINATE, CONTRARY TO GENERAL BROWN'S ARGUMENTS

257. As a result of errors in targeting, use of guidance systems, etc., civilian targets are often hit. For example, in NATO military operations, such errors have led to numerous civilian casualties:

(a) NATO military operation in Yugoslavia, 1999:

"U.S. Deputy Defense Secretary John Hamre has provided the only analysis regarding the "30 instances of unintended damage" that the Pentagon seems to acknowledge. Of those, he says one third occurred when the target was hit but innocent civilians were killed at the same time. Of the remaining twenty, three were said to be caused by human error when the pilot identified the wrong target, and two were caused by technical malfunction. In the other fourteen instances, the Pentagon has not yet announced whether human error or mechanical failure was responsible."²¹⁶

²¹⁴ Donetsk Regional Prosecutor's Office, Press release, *A sentence was passed to the former policeman who directed "Grads" of terrorists during the shelling of the neighborhood "Eastern" in Mariupol (PHOTO)* (22 June 2016), available at: https://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=187414 (Exhibit AT).

²¹⁵ First Report, paras. 171-172.

²¹⁶ Human Rights Watch, Report, *Civilian Deaths in the NATO Air Campaign*, February 2000, available at: <https://www.hrw.org/reports/2000/nato/index.htm#TopOfPage>, https://www.hrw.org/reports/2000/nato/Natbm200.htm#P37_987.

(b) NATO military operation in Libya, 2011:

"NATO's characterization of four of five targets where the Commission found civilian casualties as "command and control nodes" or "troop staging areas" is not reflected in evidence at the scene and witness testimony. The Commission is unable to determine, for lack of sufficient information, whether these strikes were based on incorrect or out-dated intelligence and, therefore, whether they were consistent with NATO's objective to take all necessary precautions to avoid civilian casualties entirely."²¹⁷

"On June 19 a NATO bomb hit a family home in a residential neighborhood of Tripoli, killing five civilians and wounding at least eight. This is the only case in which NATO admitted a mistake, saying it missed its intended target due to a "weapons system failure which may have caused a number of civilian casualties." NATO has not explained the cause of the failure, beyond "laser guidance problems," or taken action on behalf of the victims."²¹⁸

258. Obviously, the mere fact that civilian targets were hit and civilians were killed is not enough to say that such strikes were carried out intentionally. Similarly, the fact that shells hit residential areas is not enough to accuse the DPR of deliberate or indiscriminate shelling, despite all of General Brown's assumptions.

C. THE COLLATERAL DAMAGE WAS PRIMARILY CAUSED BY UKRAINE'S ACTIONS

259. I disagree with General Brown's assertion that:

"Roadblock 4014 was only "dangerous" and "overshooting could have impacted the residential area beyond" only if the prescribed procedures were not followed."²¹⁹

260. The cumulative effect of possible errors, even if the appropriate procedures were properly followed in real-world combat conditions, would not completely rule out the targeting of residential areas.

261. The very location of Ukrainian military positions in close proximity to residential areas, combined with the fact that adjacent houses and other civilian facilities were not

²¹⁷ UN International Commission of Inquiry on Libya, Report, 8 March 2012, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>.

²¹⁸ Human Rights Watch, Unacknowledged Deaths, Civilian Casualties in NATO's Air Campaign in Libya, Report, 13 May 2021, available at: https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya#_ftn22.

²¹⁹ Second Brown Report, para. 33.

evacuated, is a crucial point. This was precisely the condition for the danger of civilian targets being hit.

262. When military operations are conducted in close proximity to residential areas from which civilians have not been evacuated, collateral damage is almost inevitable.
263. General Brown cites measures for avoiding casualties among own troops as set out in the rules of firing.²²⁰ These include adjustment of fire (use of spotters), determining the firing mission setting with the use of adjustment corrections (ranging point registration) and predicted fire.
264. However, in the case of rocket artillery, the primary method of determining the firing mission settings for surprise firing is on the basis of full preparation. Usually, no fire adjustment is carried out in such cases for rocket artillery as the firing is done until the full salvo is expended. General Brown's assertions that MLRS fire in this case had to be adjusted are therefore unfounded.
265. The intercepted conversations of DPR forces presented by Ukraine, to which General Brown refers, also refute General Brown's claim that the DPR forces took no measures to avoid collateral damage.
266. Thus, in conversation No 144, *Yugra* discusses with *Terek* changing their targets to "move [them] away from the big houses".²²¹ In addition, according to intercepted conversations of *Yugra* and *Gorets*, the DPR attempted to create ranging points to increase the accuracy of their fire.²²² In addition, spotters were also used.²²³
267. This directly contradicts Ukraine's claim, supported by General Brown's conclusions, that the deliberate targeting of civilian targets was part of DPR tactics. On the contrary, the DPR had the opposite tactic.

²²⁰ Second Brown Report, para 30 (a) (i), footnote 150; Reply, Annex 61.

²²¹ Counter-Memorial (ICSFT), Annex 253, Intercepted conversations of M. Vlasov, conversation no. 144 (10:18:48), 24 January 2015.

²²² *Ibid.*, conversation No 31 (17:59:51), 23 January 2015: Maks "Jugra": "In general, I always create a ranging point, but I don't just shoot. All the time with (unintelligible word)".

²²³ *Ibid.*, conversation no. 153 (11:05:53) 24 January 2015.

268. In any case, General Brown's assertion that there is no evidence that any measures used to prevent the destruction of civilian objects were taken to control artillery fire in this attack does not mean that such measures were not taken: such procedures are implemented at the level of the specific officials carrying out the mission and may be unavailable to the general public, since they are the standard actions of artillery specialists.
269. Thus, in my view, the main reason for the occurrence of the collateral damage in the case in question is that the Ukrainian defensive positions were in close proximity to non-evacuated civilian facilities.

D. UKRAINE DOES NOT DISPUTE THAT SHORTLY BEFORE THE SHELLING, DPR FORCES WERE PLANNING AN OFFENSIVE ON MARIUPOL IN ORDER TO SEIZE IT, WHICH PROVES THE EXPEDIENCY OF STRIKES AGAINST THE CITY'S DEFENCES

270. Ukraine's and General Brown's arguments about the deliberate nature of the attack on residential areas in order to allegedly intimidate the civilian population are contradicted by the fact that the DPR was planning an offensive on Mariupol. This fact has been acknowledged by Ukraine and by General Brown.²²⁴ In particular, General Brown points out:

“Ukraine was in no doubt that the DPR objective, loudly trumpeted in the days leading up to the BM-21 attack on the civilian residential area, was to capture Mariupol”.²²⁵

271. In my First Report, I assumed that the shelling that hit Mariupol on 24 January 2015 had to be considered in the context of the overall offensive against the UAF positions in the area and the planned offensive on the city. Once again, I would like to draw attention to the following facts confirming that the offensive was planned.
272. Between 19 and 23 January 2015, there was an escalation of hostilities in areas adjacent to Mariupol, in particular, UAF positions came under fire both near the city and further to the north-north-east.²²⁶

²²⁴ Second Brown Report, para 21.

²²⁵ *Ibid.*, paras. 21, 22.

²²⁶ First Report, paras. 111 - 124.

273. The day before the shelling, the DPR announced a large-scale offensive operation to retake Mariupol, a port city that plays an important strategic role. In particular, on 23 January 2015, DPR leader Aleksandr Zakharchenko said: "We will advance as far as the borders of Donetsk Region" and indicated that the militia planned to seize the western and southern territories, including Mariupol, which was under the control of the Ukrainian armed forces.²²⁷
274. On 23 January 2015, Ukrainian positions defending the city were shelled.²²⁸
275. The transcripts of conversations provided to me indicate that DPR forces actually intended to advance deep into UAF-controlled territory towards Mariupol,²²⁹ which is consistent with public statements about the offensive on the city.
276. Therefore, the shelling of UAF positions near Mariupol was a logical preparatory stage of the planned offensive.
277. There could be a variety of reasons why the planned ground offensive on the city did not take place (including due to tactical considerations and more important tasks in other active combat areas at the moment). However, this does not change the fact that such an offensive was being prepared.
278. As I pointed out above, General Brown is not disputing the fact that the offensive was prepared, but is merely speculating about whether it was advisable to storm the city.²³⁰ This discussion is without substance.
279. The fact that there were other UAF positions to the north of Mariupol to which General Brown refers²³¹ does not negate the military expediency of hitting UAF positions to the east of the city.

²²⁷ Counter-Memorial (ICSFT), *Newsweek*, "Civilians Caught in Crossfire as Ukraine Separatists Make Gains", 23 January 2015.

²²⁸ Counter-Memorial (ICSFT), Annex 103, *UNIAN*, "ATO Headquarters: militants not advancing on Mariupol, but they are intensely shelling its outskirts", 23 January 2015.

²²⁹ First Report, paras. 127-133.

²³⁰ Second Brown Report, paras. 21, 22.

²³¹ *Ibid.*, para 21.

280. In view of General Brown's assertion that the UAF positions in the north were more fortified than the positions in the east,²³² however, it makes more military sense to attack in the less fortified direction (east).

281. General Brown incorrectly states that Russian doctrine allegedly envisages encircling a city as the only possible way to capture it.²³³ On the contrary, Russian doctrinal documents stipulate two principal methods of capturing the city: by frontal assault or with an encirclement (blockade) followed by an assault after preparation:

"279. The capture of a populated area is usually carried out from the march. The battalion (company), operating in the direction of a populated area, while advancing from the depth destroys the enemy defending on the approaches to it, breaks into the populated area, and relentlessly develops the attack in depth. If it is not possible to capture a populated area on the march, the senior commander arranges for it to be surrounded (blockaded) and taken by assault after comprehensive preparation."

"288. Prior to assault of an object, it is engaged by all fire weapons of the assault squad. The assault squad (group) at this time takes up an initial position as close to the object of attack as possible and, at the established time, proceeds to attack.

Fire weapons of the fire support group (subgroups) destroy the enemy in the attacked and adjacent objects, and the assault groups (capturing subgroups), using breaches in walls, underground communications, passageways, entrances, building ledges, move to the object and at the preset time under the cover of fire of all means and aerosol screens burst into the object."²³⁴

282. I assume that DPR forces may have been guided in their tactics by Russian military doctrine or Ukrainian one, which contains the same provisions.

²³² *Ibid.*, para. 22.

²³³ *Ibid.*, para. 22.

²³⁴ Ministry of Defence of the Russian Federation, Combat Manual for the Preparation and Conduct of Combined Arms Warfare, Part 2, Battalion, Company, enacted by Order of the Commander-in-Chief of the Ground Forces, Deputy Minister of Defence of the Russian Federation No 130 of 31 August 2004, available at: <https://www.rulit.me/books/boevoj-ustav-po-podgotovke-i-vedeniyu-obshchevojskovogo-boya-chast-2-batalon-rota-get-399026.html>.

E. POSSIBLE PLANS BY DPR FORCES, INCLUDING TO ENCIRCLE MARIUPOL, DO NOT REFUTE THAT THE SHELLING OF UKRAINIAN POSITIONS ON EASTERN OUTSKIRTS OF CITY WAS EXPEDIENT

283. In reviewing the DPR's plans, General Brown states that the DPR allegedly did not intend to assault Mariupol frontally, but was going to encircle the city.²³⁵
284. In this regard, it should be noted that unambiguous conclusions about the modus operandi of the troops in this area could be drawn if combat documents (commander's decisions, plans, orders) were available in the case file. Since such documents are not available, the analysis should be based on available material, including reports from the parties to the conflict. In my view, General Brown deliberately ignores such sources completely.
285. General Brown's attempts to build a model for the actions of DPR forces in capturing Mariupol, in which they bypass it from the north in order to encircle it so that the city is cut off from the rest of Ukraine, is just his guess, with which he seeks to cast doubt on the need for DPR forces to launch fire attacks from the eastern direction.
286. General Brown's reference to Sun Tzu's theoretical legacy in the context of the circumstances at hand is frankly absurd.²³⁶ Tactics and methods of warfare have changed fundamentally over thousands of years. First of all, in Sun Tzu's time there were no weapons in use today, nor were there the laws and customs of war that now limit the actions of armed forces in the presence of civilians.
287. Moreover, under modern conditions, hostilities are often conducted in urbanised areas and so the storming of populated settlements is objectively required; in such circumstances there is simply 'no other choice'. Therefore, the point that fortresses should be besieged "only when there is no other choice" is rather an exception to the rule in modern conditions.
288. Furthermore, the conflict in Donbass had a number of peculiarities, including a limited amount of forces and means engaged, which influenced the nature of hostilities beyond traditional doctrines.

²³⁵ Second Brown Report, paras. 21, 22.

²³⁶ Second Brown Report, para. 22.

289. In this regard, artillery shelling of UAF positions on the outskirts of the city could have been carried out in support of the announced and planned offensive operation, the purpose of which, it was declared, was to capture Mariupol.²³⁷ I also do not rule out that the aim of the offensive was to strengthen the DPR's positions or to take a more advantageous position for subsequent actions around the city, including its capture.
290. General Brown tries to confirm his conclusions by referring to the capture of Mariupol by the Russian Armed Forces in 2022 by encircling it. However, even if DPR forces intended to encircle Mariupol, this would also involve neutralizing Ukrainian positions to the east and northeast in order to form up elements of encirclement in those directions, which also makes it militarily expedient to shell such positions.

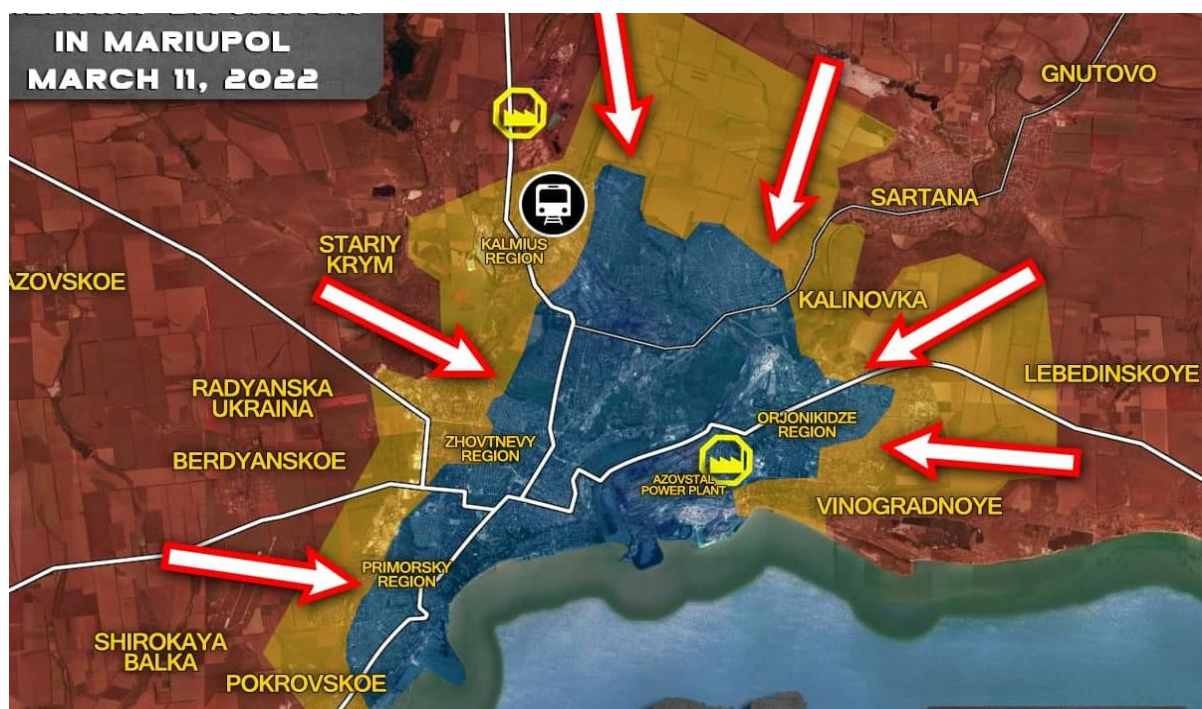


Figure 19 – Schematic map showing Mariupol blockade²³⁸

291. In this regard, whether the troops were "to outflank Mariupol to the north, on an axis between Sartana and Orlovskoye" (as claimed by General Brown²³⁹) or whether another plan to capture the city was developed is irrelevant in this case. The events of 2022 only

²³⁷ Counter-Memorial (ICSFT), Annex 229, *YouTube*, "Zakharchenko on the beginning of the offence on Mariupol", 24 January 2015: "I will say the following: today an offensive on Mariupol has begun <...>".

²³⁹ Second Brown Report, paras. 21, 22.

confirm the need to neutralise all Ukrainian defensive positions in order to capture the city.

292. Hence, Ukraine's claim, supported by General Brown's conclusions, that the artillery hitting residential quarters in Mariupol on 24 January 2015 indicates a deliberate indiscriminate strike by the DPR of the city is unfounded and does not take into account the course of hostilities in the area.
293. Regardless of the modus operandi of the DPR's ground troops in the interests of the planned capture of Mariupol, fire attacks on targets in the area took the form of exchange of fire not only in the possible main lines of operations of the said troops, but also in other directions.
294. The objectives of such attacks could be not so much direct fire support to ground forces' actions in this direction, but rather assistance to the offensive of ground forces in other, possibly more favourable directions. The task in this case could be to block Mariupol from the eastern directions (preventing the enemy units from manoeuvring in the area, fire control of available directions, causing damage to the troops (facilities) in the area).
295. Combatants appear to have preselected targets for attacks, which could have been allocated between different weapons. Those targets could have been hit either simultaneously or sequentially and several times a day.
296. In this regards, it is clear that the strikes carried out near Pavlopol, Talakovka and Sartana were linked by a single intent and plan with the strikes of the targets in the direction adjacent to the eastern part of Mariupol.

F. EVEN IN THE ABSENCE OF ANY SUBSEQUENT GROUND OFFENSIVE, THE DEFEAT OF THE UKRAINIAN POSITIONS DEFENDING THE CITY WAS JUSTIFIED FROM A MILITARILY POINT OF VIEW

297. General Brown questions the appropriateness of neutralizing positions east of the residential area of Mariupol, arguing that:

"any military advantage from neutralizing the roadblock would only accrue if followed up immediately by a ground assault ".²⁴⁰

²⁴⁰ Second Brown Report, para. 25.

298. As I noted above, artillery strikes can be carried out not only to directly support ground forces, but also to pre-empt enemy action in deploying forces for an offensive. Thus, the attempt to hit the positions to the east of the residential area of Mariupol must be considered in the context of shelling of all other targets and areas in the immediate vicinity.
299. As I pointed out above regarding the circumstances of the Bugas roadblock shelling, the exchange of artillery strikes is a normal tactic of warfare as prescribed by military regulations. The regulations prescribe hitting the targets not only in preparation for an offensive action, but also as necessary in the light of the evolving situation as part of an exchange of strikes, for example:

"292. A battalion (battery) carries out fire missions set by the commander of the combined arms unit (detachment) or the senior (commanding) artillery officer. The battalion (battery) commander may also decide to perform fire missions on his own initiative, based on the prevailing situation and taking into account the firing capabilities of the units. Fire missions may be set in advance (predesignated missions) or immediately prior to their execution (contingency missions)."

"298. When determining the sequence of fire missions and the time of opening fire (readiness to fire) and ceasing fire on each target, account is to be taken of its nature, danger and importance and of the position and mission of combined arms units. The time of opening and ceasing fire on targets which are objects of the attack is to be co-ordinated with the actions of combined arms units."

"300. The total time of fire on a target, the number of fire attacks and the duration of each attack are determined on the basis of the situation, the mission at hand and the mode of fire of the guns (mortars)."²⁴¹

300. There are similar provisions in the Ukrainian combat regulations.²⁴² In particular, Ukrainian doctrine provides for hitting with artillery fire, for example, single important targets and areas not occupied by the enemy and prepared for holding the defense:

"264. For successive concentration of fire of a battalion (battery), taking into account the enemy defence structure, the following are assigned as targets:

²⁴¹ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.far.org/chair/voen/Documents/ObrazDoc/Правила%20стрельбы%20и%20управления%20огнем..pdf>.

²⁴² See e.g. Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No. 6., 5 January 2018, paras. 183-184, 278, 282, 551, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>. (Exhibit AO)

occupied (prepared) defensive positions of platoons;

single important targets;

prepared areas that the enemy may use for defensive purposes during battle."²⁴³

301. As I also pointed out in paras. 106-110, 169 of the First Report, Ukrainian positions on the eastern and north-eastern outskirts of Mariupol were fortified and together with the other UAF positions (from Gnutovo in the north to Vinogradnoye in the south) formed a single Mariupol defence barrier on the line of contact with the DPR.²⁴⁴

302. An exchange of artillery strikes may continue over a long period of time with attenuation and intensification phases to produce a systematic effect on the enemy without any intention of the troops to go on the offensive and may aim to destroy or suppress a target or exhaust the enemy:

"2. In the course of combat operations, artillery units carry out fire missions to engage various targets <...>

The fire for effect missions can be: annihilation, destruction, suppression, and attrition.

A target is annihilated when such a loss (damage) is inflicted on the target that it completely loses its combat effectiveness.

Destroying a target is to render it unusable.

Suppressing a target is inflicting such losses (damage) on the target or creating such conditions by fire that the target temporarily loses operational capability or its manoeuvring is restricted or its control is impaired.

Attrition consists in the moral and psychological impact on enemy manpower by the conduct of harassing fire with a limited number of guns and ammunition for a fixed period of time.²⁴⁵

303. Thus, General Brown's assertion that shelling must be followed by a ground offensive is not supported by either practice or theory of warfare.

²⁴³ *Ibid.*, paras. 183-184, 278, 282, 551.

²⁴⁴ See First Report, Figure 10; First Bobkov Report, Figure 25.

²⁴⁵ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces of 1 February 2011, available at: <http://www.far.org/chair/voen/Documents/ObrazDok/Правила%20стрельбы%20и%20управления%20огнем..pdf>. Similar provisions are contained in Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No. 6., 5 January 2018, para. 3, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>. (Exhibit AO).

304. General Brown, in para. 28 of his second report, misrepresents my words and states that I allegedly claimed that the target of the attack was company position 4013.²⁴⁶ The intercept cited in the First Report²⁴⁷ substantiates, first of all, the fact that "Vostochny" does not refer to the area of Mariupol, but to other sites or positions which have the same name.²⁴⁸
305. In the meantime, the supposed targets for destruction, the attacks on which could have resulted in hitting residential areas of Mariupol for some reason, may also have been different. In particular, we know that roadblock 4014 (i.e. object 20 in the First Bobkov Report²⁴⁹) was also shelled on 24 January 2015.²⁵⁰ Although roadblock 4014, which was dangerously close to a residential area, may indeed have been one of the targets of shelling by the DPR, which affected residential areas on 24 January 2015, roadblock 4014 was not the only likely target of shelling outside the city. I would like to point out that another military position is mentioned in the verdict against Valery Kirsanov.²⁵¹ I am referring to position 25 in the First Bobkov Report,²⁵² which is located approximately 600 metres from the city just in front of the Vostochniy neighbourhood. It follows from the verdict that this position was indicated by the ATO headquarters as one of the positions of the National Guard of Ukraine in the area.²⁵³ I do not know what equipment or personnel

²⁴⁶ First Report, para. 158.

²⁴⁷ Counter-Memorial (ICSFT), Annex 228, *YouTube*, "SBU intercepted conv, 24 January 2015. Judging by the context, Ponomarenko and "Pepel" are discussing the same "Vostochniy" in this conversation as in the transcript given in Memorial, Annex 418.

²⁴⁸ Counter-Memorial (ICSFT), Annex 221, *YouTube*, "Mariupol, vostochniy checkpoint under Grad Fire | Video, 5 September 218, another source mentions the eastern roadblock in Counter-Memorial (ICSFT), Annex 218, *YouTube*, "Mariupol, vostochniy checkpoint 04.09.14, 4 September 2014.

²⁴⁹ See First Bobkov Report, Figure 32.

²⁵⁰ Memorial, Annex 328, OSCE, *Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM), 24 January 2015: Shelling Incident on Olimpiyska Street in Mariupol (24 January 2015)*. See also Counter-Memorial (ICSFT), Annex 191, Facebook page "Defence of Mariupol, 24 January 2015.

²⁵¹ "Point No. 6 B=47 °07 '09.34", L=37 °42 '08.30", 23.01.15, company stronghold No. 4014 of the 18th Operational Regiment of the National Guard of Ukraine, 23.01.15 recorded shelling with BM-21, no casualties". See Counter-Memorial (ICSFT), Annex 77, Ukraine, Primorsky District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 18 June 2019, p. 16.

²⁵² First Bobkov Report, para. 69, figure 33.

²⁵³ I note that the same number is used in relation to (1) the facility referred to in the letter of the MoI as roadblock 4014 (Memorial, Annex 183, MoI of Ukraine Letter No. 27/6/2-3553, mentioned in paragraph 48 (d) of the First Brown Report, and (2) point No. 6 from the verdict against Kirsanov ("stronghold 4014"). However, it appears that these positions are different. According to the description in the letter from the MoI and the First Brown Report, roadblock no. 4014 is located 100 m to the east of the junction of Olimpiyskaya Street and the M-14 highway (however, no coordinates are provided, unlike for the other positions mentioned in the same letter). In the verdict against Kirsanov, the coordinates of point No. 6 are given, which corresponds to position 25 in Figure

were there on 24 January 2015, and whether Kirsanov informed the DPR representatives about this target, but it is quite possible given that this position is part of the defensive positions in Mariupol.

306. Therefore, I believe (and all the facts point to this) that the strike missed the UAF defensive lines on the outskirts of the city, which were intended to be hit by the DPR. Therefore, the allegations of deliberate shelling of the Vostochniy residential area are unfounded.

G. THE CHOICE OF WEAPON SYSTEM IS NOT INDICATIVE OF THE INDISCRIMINATE OR DELIBERATE NATURE OF THE SHELLING

307. General Brown's position regarding the advisability of using BM-21 is based on the assumption that alternative weapons could and should have been used to shell UAF positions "at the northern roadblock or outpost".²⁵⁴ I disagree with General Brown's conclusions for the following reasons:

- (a) It does not follow from the materials I studied that the DPR forces had cannon artillery in this area (for example, D-30 howitzers, which are mentioned in para. 34 of the Second Brown Report). Moreover, the Second Bobkov Report refutes²⁵⁵ the claim of experts Gwilliam and Corbett that they found 3 D-30 howitzers in the satellite imagery of the area.²⁵⁶
- (b) I would also like to stress that artillery guns that belong to cannon artillery take longer to prepare for firing and are less manoeuvrable than MLRS, and during a tense battle they can be destroyed quite quickly by return fire.²⁵⁷ I do not believe it can be said with any degree of certainty that it would have been appropriate to use standard artillery pieces in this case, given (as far as can be judged from the combat

32 of the First Bobkov Report. It is possible that the use of the same number is explained by the fact that position 25 is in fact an extension of the same stronghold with a roadblock (position 20), various trenches (positions 19-23) and the outpost mentioned in the verdict against Kirsanov (position 25). It is the latter position that, as far as I understand, corresponds exactly to Point 6. See First Bobkov Report, Figure 32.

²⁵⁴ Second Brown Report, para. 34.

²⁵⁵ Second Bobkov Report, para. 92.

²⁵⁶ Gwilliam and Corbett report, para. 67 and Figure 30.

²⁵⁷ The D-30 howitzer takes up to 20 minutes to prepare to fire (and 10 minutes to leave the position), while the MLRS can open fire after only 5-7 minutes after arriving at the position and then immediately leave it.

context described above) the strong defensive positions of the UAF near Mariupol and the much slower rate of fire of standard artillery pieces.

308. That said, as I mentioned above, the main reason for the damage to civilian objects in Mariupol is that the UAF positions were in close proximity to residential areas, and the civilian population continued to be present in residential areas. As NATO military experience shows, even the use of the highest-precision weapons in an urban environment inevitably results in civilian casualties and damage to civilian objects:

"Airwars monitoring has shown a consistent pattern during international military actions in both Iraq and Syria. The greater the intensity of explosive weapons use – predominantly in urban areas – the higher the civilian toll. As Airwars noted in a recent report, outcomes for civilians caught in urban battles were far less influenced by the use of Coalition ‘smart’ munitions versus Russian ‘dumb’ bombs than might be expected. <...>

The benefits of precision strikes in mitigating civilian harm are not so much wrong, as significantly overstated in urban environments. This has been termed the ‘Precision Paradox’ by Major Amos C. Fox of the US Army, a former planning officer with Operation Inherent Resolve: The battle [for Mosul] illuminated a misconception of modern warfare with the precision paradox – the proposition that the employment of precision weaponry can make war antiseptic and devoid of collateral damage or civilian casualties... The Battle of Mosul, a nine-month slog, blending U.S. and coalition precision weapons with Iraqi frontal attacks against an ensconced and determined enemy, precisely leveled the city one building at a time".²⁵⁸

"Thirty-three incidents occurred as a result of attacks on targets in densely populated urban areas (including six in Belgrade). Despite the exclusive use of precision-guided weapons in attacks on the capital, Belgrade experienced as many incidents involving civilian deaths as any other city."²⁵⁹

"The interactive website, Rhetoric versus Reality: How the ‘most precise air campaign in history’ left Raqqa the most destroyed city in modern times, is the most comprehensive investigation into civilian deaths in a modern conflict. Collating almost two years of investigations, it gives a brutally vivid account of more than 1,600 civilian lives lost as a direct result of thousands of US, UK and French air strikes and tens of thousands of US artillery strikes in the Coalition’s military campaign in Raqqa from June to October 2017."²⁶⁰

²⁵⁸ Airwars, Report, Credibility Gap. United Kingdom civilian harm assessments for the battles of Mosul and Raqqa, 2018, available at: <https://airwars.org/wp-content/uploads/2018/09/UK-Inquiry-into-Mosul-and-Raqqa-2018.pdf>. (Exhibit AU)

²⁵⁹ Human Rights Watch Report, Civilian Deaths in the NATO Air Campaign, February 2000, available at: <https://www.hrw.org/reports/2000/nato/index.htm#TopOfPage>, https://www.hrw.org/reports/2000/nato/Natbm200.htm#P37_987.

²⁶⁰ Amnesty International, *Press release, Syria: Unprecedented investigation reveals US-led coalition killed more than 1,600 civilians in Raqqa ‘death trap’* (25 April 2019), available at: <https://www.amnesty.org/en/latest/press-release/2019/04/syria-unprecedented-investigation-reveals-us-led-coalition-killed-more-than-1600-civilians-in-raqqa-death-trap/>. (Exhibit AV)

309. Hence, I am confident that the choice of BM-21 to attack Ukrainian combat positions was justified in terms of the weaponry available to the DPR, the mission assigned to the respective commander and the operational situation.

310. In any case, the mere choice of BM-21 as a weapon does not in itself imply (contrary to Ukraine's claims) an indiscriminate or deliberate attack, as the above examples demonstrate.

H. "POSSIBLE FIRING POSITIONS" MISIDENTIFIED BY UKRAINIAN EXPERTS

311. I draw attention to the fact that the "possible firing positions" from which Mariupol was shelled on 24 January 2015 are incorrectly identified in Gwilliam and Corbett Report.

312. The first of the positions identified by Ms Gwilliam and Air Vice Marshal Corbett is not the position from which Mariupol was shelled, as the azimuth (direction) of the shelling does not correspond to where Mariupol is relative to this position.²⁶¹

313. The traces of artillery usage on the satellite image of the "second possible position" appeared much earlier than the time of Mariupol shelling (autumn of 2014) and have remained unchanged since then.²⁶² Consequently, this location has nothing to do with the shelling of Mariupol on 24 January 2015 either.

I. EVEN WITHOUT TAKING INTO ACCOUNT KIRSANOV'S TRANSMISSION OF INCORRECT COORDINATES, THE HITS ON RESIDENTIAL AREAS COULD HAVE BEEN THE RESULT OF ERRORS AND MALFUNCTIONS

314. As I pointed out above, Ukrainian documents demonstrate that the DPR intended to hit combat positions on the eastern outskirts of the city, but were given false coordinates. I believe this is the most likely and main reason for hitting the residential areas.

315. I disagree with General Brown that the shelling of the residential areas could not have been the result of an attempt to target a nearby military position, because the miss distance is too great to be put down to a technical error.²⁶³ Even leaving aside the incorrect

²⁶¹ Second Bobkov Report, para. 98.

²⁶² *Ibid.*, para 100.

²⁶³ Second Brown Report, para. 30.

coordinates received from V. Kirsanov, there were many factors that could have caused the shells to hit the residential areas.

316. In this regard, I would like to point out that from the analysis of the material submitted to me for examination, I can also assume the existence of the following several factors or a combination thereof:
- (a) errors in the information received about the coordinates of firing positions and selected military targets,
 - (b) errors in aiming the launchers,
 - (c) improper technical preparation of the launchers,
 - (d) malfunction of the launchers.
317. It may also be a "human error", such as misinterpretation of received orders (commands) during fire control, reduced capabilities of personnel due to tensions in operations, enemy pressure, etc.
318. I do not rule out a general lack of training of specific artillery crews, in terms of complying both with the relevant rules for the preparation of fire and the relevant recommendations concerning operations in firing positions during the delivery of fire.
319. General Brown, speaking of the unlikelihood of any errors, presents a certain ideal picture of the conditions and actions of artillery units: the calculations are prepared to a high standard, the equipment is in perfect condition, there is no enemy influence, etc. This picture is far from the one that actually takes place during combat operations.
320. In addition, General Brown, noting that the mean point of the shelling of the residential area was 2.5 km from the Company Position 4013 (which, in his opinion, implies an error of 2.5 km in the coordinates of the firing position), considers only one factor that influenced the shelling of the residential area - an error in the coordinates of the position.²⁶⁴ In this case, however, one must take into account the transmission of deliberately false coordinates to the DPR, which could have led (and in fact did lead) to significant targeting errors.

²⁶⁴ Second Brown Report, para. 30.

321. In any case, as I pointed out, one should consider the totality of factors (possible errors) and their combination, and also take into account the target, which was intended to be hit, relative to which the error is determined.
322. Regarding malfunction of several launchers, General Brown states:
- "... the intercept evidence that 'Yugra' informed the unit commander that "one vehicle was overshooting, ... could not account for the number of rockets that impacted the residential area."
- "All the launchers appear to have fired coherently, resulting in a fall of shot pattern consistent with firing tables: if launchers were "out of order," the likelihood of the nature of their damage resulting in a single consistent error across at least four launchers is implausible. An inconsistently large spread of the fall of shot would be expected".²⁶⁵
323. However, this fact (firing error made by one launcher) explains the existence of at least one possible factor (malfunction of a single launcher) and does not refute the possibility that other factors are also present.
324. General Brown's theory that all of the four launchers were firing coherently, with the result that the fall of shot pattern was consistent with the firing tables, and that they were unlikely to malfunction simultaneously, is not true, as the same launcher could have been used to hit a single target and a number of targets.
325. However, the launcher could hit the same target, as well as a number of other targets, from different firing positions (as the rules require an immediate change of firing positions after completing a mission (salvo)) and at different times.
326. General Brown's reference to "fall of shot pattern consistent with firing tables" is incorrect, as the fall of shot map provided by Ukraine (see Figure 20) indicates otherwise - there are no (it is impossible to derive any) clear contours of fall of shot ellipses on the map. General Brown does not provide them either.

²⁶⁵ Second Brown Report, para 30 (c).

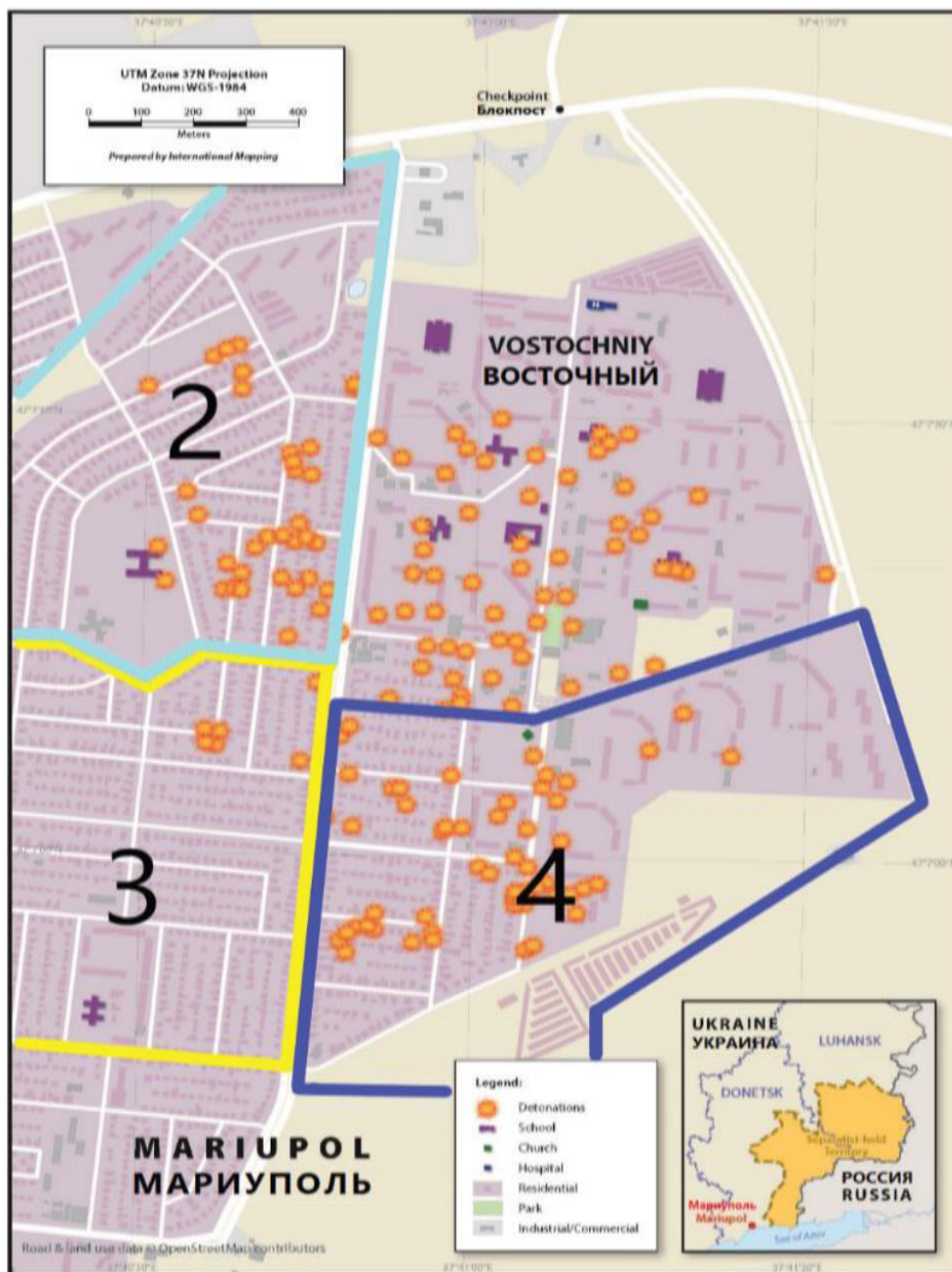


Figure 20 – Shelling impacts on the map provided by Ukraine. ²⁶⁶

327. Overall, all of General Brown's arguments about possible errors are purely theoretical, which cannot either confirm or refute the existence of honest and reasonable mistakes that led to the strike at the residential area of Mariupol.

²⁶⁶ Memorial, Annex 25.

V. SHELLINGS OF AVDEYEVKA BETWEEN JANUARY AND MARCH 2017

A. THE REASONS FOR THE COLLATERAL DAMAGE DURING THE SHELLINGS OF AVDEYEVKA WERE THE UAF'S USE OF THIS SETTLEMENT AS A LARGE FORTIFIED AREA AND THE FACT THAT CIVILIANS WERE NOT EVACUATED

328. Avdeyevka was incorporated into the UAF system of defensive lines, positions and strategic defence areas and, during the conflict, became a large fortified area the capabilities of which had been building since 2014. The UAF units that were occupying defensive positions in the settlement had set up respective strongholds, both on the front lines and in the depth, firing positions, staging areas, equipment depots, roadblocks, etc., i.e. were deployed throughout the city where civilians were present. The Avdeyevka defence system during combat operations in 2022-2023 is further evidence of this.

329. With that in mind, the troops used existing civilian facilities to station personnel in urban areas, such as health facilities, sanitation facilities, communications or power supply facilities, and factories - a fact acknowledged by Ukraine and General Brown.

330. At the same time, the civilian population was not evacuated by Ukraine and remained in the city.

331. Ukraine has not provided complete information on the presence and deployment of troops on the territory of Avdeyevka, in particular in the areas of shelling. Initially, General Brown tried to present the shellings of Avdeyevka as instances that were totally unrelated to the fighting. The First Brown Report claimed that:

"that there was no apparent threat to the DPR from the UAF positions in the residential areas of the town".²⁶⁷

332. However, following the presentation of evidence contained in the Russia's Counter-Memorial (ICSFT) regarding the deployment of the UAF in residential areas and heavy fighting for the city during the relevant period, General Brown acknowledged these facts. Thus, Brown Second Report quotes the commander of the 72nd UAF brigade in charge of the Avdeyevka defence as confirming that civilian objects were used in the organisation of the UAF defence.²⁶⁸

²⁶⁷ First Brown Report, para. 84.

²⁶⁸ Second Brown Report, para. 52.

333. General Brown himself admits:

"in Avdiivka the delineation between UAF and civilian activity is more blurred."²⁶⁹

334. This refutes General Brown's own claims that the shelling of civilian objects in Avdeyevka is indicative of the indiscriminate nature of the shelling.

335. Open source evidence suggests that the information on Ukraine's military positions that it presented in Annex 28 to its Memorial is misleading at the very least. There were many more such positions, and residential areas were used to set up firing positions for MLRS, from which Donetsk, which was 6 km from Avdeyevka, was shelled:

"<...> the militia has a serious need to take Avdeyevka under control. Ukrainian artillery, including rocket-propelled artillery, conducts heavy fire from there, from residential areas. No fewer than ten salvos of Grad rockets were fired at Donetsk and Makeyevka from there last night. It is difficult to respond to this shelling - we would have had to fire on the residential areas of Avdeyevka and Peski, from where the Ukrainian armed forces are firing. It makes sense to take these settlements under control <...>".²⁷⁰

336. That said, reports from NGOs confirm that the UAF repeatedly used civilian facilities (such as schools) to station personnel and store ammunition and military equipment during the conflict with the DPR and LPR:

"Ukraine's Ministry of Education and Science has acknowledged that Ukrainian government forces have used schools for military purposes. The Ukrainian government should deter the military use of schools by, among other things, endorsing the UN Safe Schools Declaration."²⁷¹

"On 31 July 2014, Mr Anton Verenich and Mr Vasiliy Verenich were detained by Ukrainian military on suspicion that they were engaged in artillery spotting for the armed groups of the 'Lugansk people's republic'. They were taken to the unit of the Ukrainian Armed Forces then located in a recreational facility located near the village of Vesolaya Gora (Slovianoserbskyi district, Lugansk region). The men were held in a dry well with round concrete walls. A drunken soldier, reportedly convinced that they were involved in the death of a colleague, threw a combat grenade into the well, killing both men."²⁷²

²⁶⁹ *Ibid.*

²⁷⁰ RBC, *Who started the war in Avdeyevka* (31 January 2017), available at: <https://www.rbc.ru/newspaper/2017/02/01/589063099a79474b524c6b1d> (Exhibit R).

²⁷¹ Global Development Commons, *Attacks on Schools. Military Use of Schools during the Armed Conflict in Eastern Ukraine* (2016), available at: <https://gdc.unicef.org/resource/attacks-schools-military-use-schools-during-armed-conflict-eastern-ukraine>.

²⁷² OHCHR, Report on the Accountability for killings in Ukraine from January 2014 to May 2016, Annex I, para. 61 available at:

337. Such tactics by the UAF must be taken into account when assessing the causes of civilian objects being hit in Avdeyevka during the escalation of the conflict in 2017. However, General Brown, when describing the tactical situation, notes that the fact of fighting is of secondary importance in relation to the shelling of "residential areas away from the battle".²⁷³ This assertion is entirely unsubstantiated.
338. The escalation of the military conflict in Avdeyevka led to a more active movement of military equipment through the city streets. Some equipment and personnel regularly advanced to forward positions at the edge of the city and back into the city for support, reinforcement and rotation of units in the active combat zone. In addition, the UAF used residential areas as cover for artillery firing positions. The above means that military facilities of the UAF were present in residential areas of Avdeyevka, which directly affected the retaliatory strikes on the town by the DPR forces.

B. LACK OF EVIDENCE OF INDISCRIMINATE SHELLINGS AND PRESENCE OF MILITARY TARGETS IN AVDEYEVKA

339. In para. 49 of the Second Brown Report it is claimed that I allegedly confirmed the non-discriminatory character of certain shellings. This is not true. General Brown refers to para. 278 of my First Report, but he distorts the meaning of my statement.
340. In that section of my First Report, I said that it was not known to what instances of shelling the local residents' claims about absence of military targets in their part of town relate. Furthermore, I questioned how reliable the interviewees' own assessment of the military situation could be, as civilians do not always have accurate data about the position of military forces in the city and may not be allowed to discuss known military positions with journalists or private observers (under threat of being detained by the SBU and prosecuted by Ukrainian criminal justice).
341. On the contrary, my First Report, as well as the First Bobkov Report, provided ample evidence of the presence and movement of military targets in Avdeyevka during the period of escalated hostilities in early 2017.

https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf.

²⁷³ Second Brown Report, para 51.

342. As General Brown states, Colonel Bobkov's analysis of the imagery has not revealed any signs of troop presence in significant parts of the town. I would like to point out that Colonel Bobkov did not set himself a task of identifying objects on the territory of Avdeyevka. His task was to analyse the photographs provided to him and "determine the location of the objects shown on them".²⁷⁴
343. Evidence of the deployment of military equipment, artillery positions, and other military facilities in residential areas of Avdeyevka, such as Ukrainian court decisions, media reports, and NGO reports, were found in the public domain and provided along with my First Report.²⁷⁵ All this evidence, as well as the fact that the line of contact ran through the town, was completely ignored by General Brown in his initial analysis, where he tried to present the shelling of the town by the DPR as in no way related to the intense fighting that the UAF was conducting within the town. Brown's First Report states, without providing any proof, that:

"that there was no apparent threat to the DPR from the UAF positions in the residential areas of the town".²⁷⁶

344. The Second Brown Report acknowledges the presence of military facilities in Avdeyevka. However, it states that there is allegedly no evidence to demonstrate the presence of military targets of the UAF in the area of Krasnaya and Zavodskaya Streets or in the north of Avdeyevka.²⁷⁷ However, as I mentioned in the First Report (in the context of proven and acknowledged by General Brown practice of the UAF stationing its armed forces in residential areas of Avdeyevka), there is an abandoned brick (ceramic) factory near Zavodskaya Street and Krasnaya Street, which was used by the UAF as a fortified position in 2015 and 2016.²⁷⁸ I am confident that the same positions were very likely used by the UAF during the escalation of hostilities in early 2017, which explains the shelling in this area of Avdeyevka. Also, the area around Krasnaya and Zavodskaya Streets were likely supply routes for the forward UAF positions noted in Figure 26 of my First Report and Figure 21 of the Second Brown Report.

²⁷⁴ First Bobkov Report, para. 100.

²⁷⁵ First Report, para. 277 et seq.

²⁷⁶ First Brown Report, para. 84.

²⁷⁷ Second Brown Report, para 58, Figure 21.

²⁷⁸ First Report, para. 289, Appendix 2, Section D.

345. Finally, the impacts in northern Avdeyevka is most likely due to an UAF artillery position near the lake in the north of the city, which General Brown himself is referring to:

"there was an artillery firing position by the lake to the north of the town".²⁷⁹

346. For more details on numerous military targets see Addendum 2 to my First Report. In any case, the evidence that is publicly available also shows an active movement of military equipment and vehicles of the UAF within the city, which explains the shellings of different parts of the city.

C. THE NECESSITY AND POSSIBILITY OF HITTING RESERVES ADVANCING TO COMBAT POSITIONS AND PREVENTING THE SUPPLY OF AMMUNITION

347. The DPR was faced with a militarily important task, which was to strike the equipment that moved in and out of forward positions for support, reinforcement and rotation of units in the active combat zone during this period.

348. It is highly probable that, in addition to the vehicles needed for direct support of combat operations, second echelon (reserve) combat vehicles had to be moved around the residential areas to reinforce and rotate the first echelon troops.

349. From a military point of view, given the intensified fighting, the UAF needed to reposition reserves, ammunition and other materiel to forward positions. Those objects became targets for destruction.

350. If we place these routes on the map of the shellings of Avdeyevka,²⁸⁰ we will see that most of the damage to the old part of Avdeyevka (the area with private houses) claimed by Ukraine is located along these routes (see Figure 21).

²⁷⁹ First Brown Report, para. 83.

²⁸⁰ First Report, para. 271 and Figure 26.

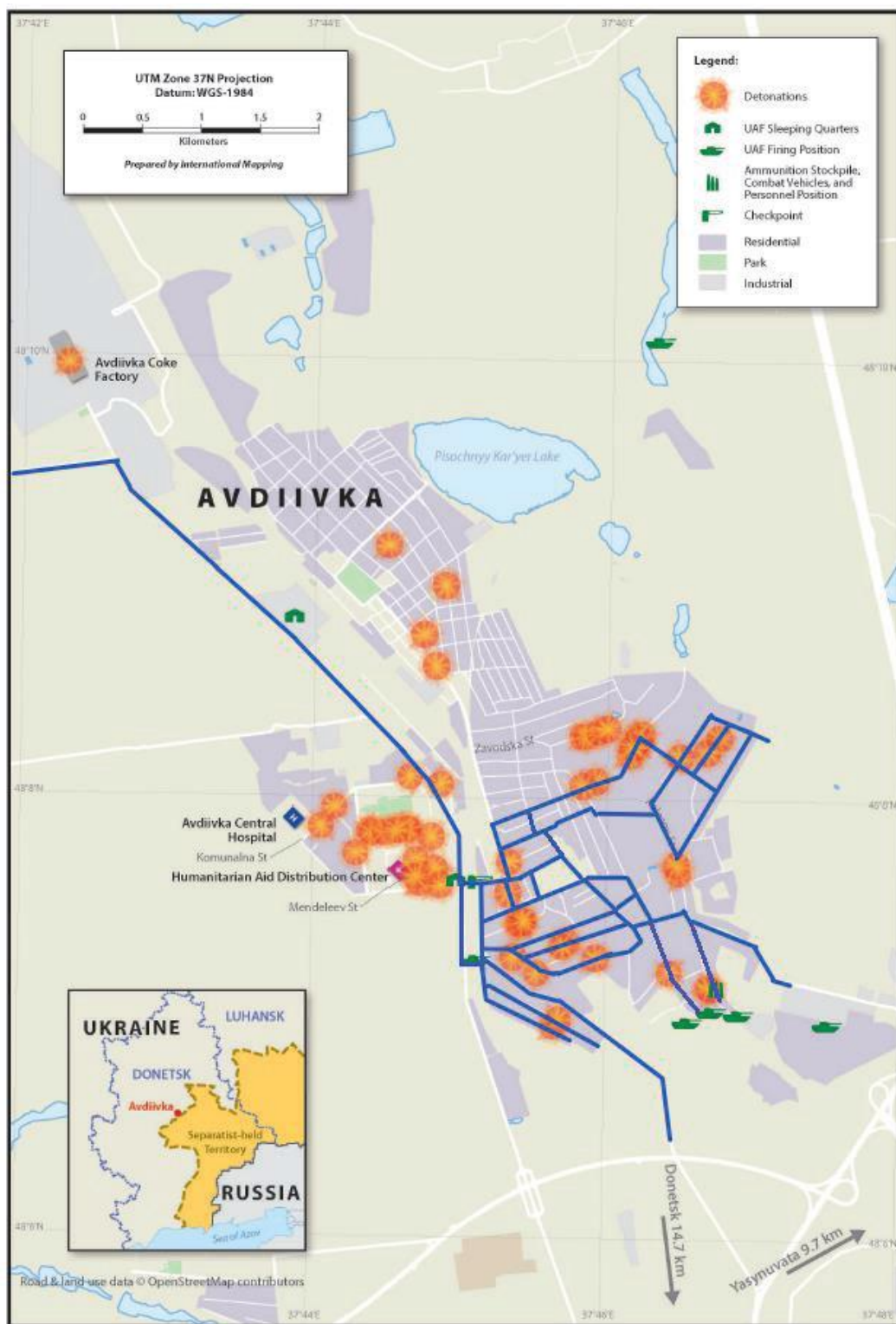


Figure 21 - Possible supply routes plotted on the map of shellings provided by Ukraine.²⁸¹

351. Preventing the transfer of reserves and ammunition through fire attacks obviously led to an anticipated specific and immediate military advantage of the DPR. In fact, fulfilling

²⁸¹ Counter-Memorial (ICSFT), para. 498.

such a task was a military necessity for DPR forces, largely determining the success of their military operations.

352. I am sure that in many cases DPR units were faced with the choice of either allowing the UAF to supply their forward positions unhindered or hitting the UAF military equipment as it moved towards those positions.

353. General Brown questions the DPR's capability to target supply convoys in a timely and effective manner:

"Effective targeting of moving vehicles in an urban environment would have required dedicated and well-practised observation, manned or unmanned, linked directly to the firing battery. General Samolenkov cites no evidence of such a capability nor of any successful engagement or disruption of UAF resupply.²⁸²

354. However, General Brown himself provides no evidence to support his assumption that the DPR lacked the capability to identify and engage mobile targets. On the contrary, General Brown is only stating his opinion. However, instances discussed in this case only indicate that the DPR had UAVs, informants and spotters to identify targets and adjust fire.

355. The rules of firing and fire control of artillery (of Russia and Ukraine) provide procedures for engaging mobile targets of the enemy, which include determining the most likely routes of movement, taking into account the existing road network, e.g.:

"243. For firing at a column, the most likely routes of the column movement are marked on the map, taking into account the road network in the enemy lines. The rendezvous points are marked within sight of the surveillance tools involved used for reconnaissance of the columns and the adjustment of fire on them, usually at road junctions, as well as at crossings (bridges), gulleys and other sections of the route where off-road movement of the columns is difficult or impossible."²⁸³

"236. To defeat the columns, the firing settings are assigned in advance to the meeting points. To this end, the commander (chief of staff) of the battalion marks on the map the most likely routes of the columns, taking into account the road network. The meeting points are assigned within sight of reconnaissance equipment, as a rule, at road junctions, crossings (bridges),

²⁸² Second Brown Report, para 56.

²⁸³ Russian Ministry of Defence, Rules of firing and fire control of artillery. Battalion, battery, platoon, gun. Part 1. Enacted by Order No. 8 of the Commander-in-Chief of the Ground Forces dated 1 February 2011, available at: <http://www.fa.ru/org/chair/voen/Documents/ОбразДос/Правила%20стрельбы%20и%20управления%20огнем..pdf>.

gorges and other areas where the movement of columns off roads is complicated or impossible".²⁸⁴

356. Consequently, the engagement of mobile targets may have been carried out by the DPR through the use of appropriate techniques.

357. I would like to note, as I pointed out above, that the evidence of "any successful engagement or disruption of UAF resupply" may only be contained in combat documents of Ukraine, which chose not to provide such documents. The open sources I have used confirm the DPR's capability to carry out the above mentioned tasks,²⁸⁵ contrary to General Brown's opinion.

358. Thus, the need to defeat reserves advancing to combat positions and to prevent the supply of ammunition and other materiel was determined for the DPR forces by the anticipated concrete and immediate military advantage, and therefore by military necessity.

359. Strikes against moving military targets, such as military convoys and vehicles, are common practice in modern military campaigns. The difficulty of hitting such targets does not in itself mean that such attacks cannot be justified from a military point of view. For example, NATO forces struck mobile targets in Yugoslavia in 1999, with some of such strikes resulting in damage to civilian objects and civilian deaths:

"Thirty-two of the ninety incidents occurred in Kosovo, the majority on mobile targets or military forces in the field. Attacks in Kosovo overall were more deadly-a third of the incidents account for more than half of the deaths. Seven troubling incidents were as a result of attacks on convoys or transportation links. Because pilots' ability to properly identify these mobile targets was so important to avoid civilian casualties, these civilian deaths raise the question whether the fact that pilots were flying at high altitudes may have contributed to these civilian deaths by precluding proper target identification".²⁸⁶

360. However, the examples of such attacks do not in themselves confirm that the attacking NATO forces intended to hit civilian rather than military targets.

²⁸⁴ Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), approved by Order of the General Staff of the Armed Forces of Ukraine No. 6 dated 5 January 2018, para. 3, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>.

²⁸⁵ First Report, para. 273.

²⁸⁶ Human Rights Watch, Report, Civilian Deaths in the NATO Air Campaign, February 2000, available at: <https://www.hrw.org/reports/2000/nato/index.htm#TopOfPage>, https://www.hrw.org/reports/2000/nato/Natbm200.htm#P37_987.

D. THE POSSIBILITY OF CIVILIAN TARGETS BEING HIT BY ERROR OR AS A RESULT OF DEVIATIONS OF PROJECTILES IS AN OBVIOUS FACT

361. General Brown claims that:

"Failure to conduct full firing preparations in such a stable tactical environment is therefore in itself an admission of indiscriminate targeting".²⁸⁷

362. I disagree with this statement. Firstly, General Brown himself provides a fall of shot pattern for cannon artillery (D-30 howitzer, 122 mm calibre), from which it follows that projectiles could be dispersed within an ellipse, measuring 208 m by 80 m.²⁸⁸ Thus, General Brown, in effect, admits that even if all the proper procedures are followed in ideal firing conditions the projectile may fail to hit the target. This is an obvious fact, which in the case of the shelling of Avdeyevka General Brown for some reason tries to deny.

363. Secondly, in the First Report I provide calculations²⁸⁹ to illustrate the possibility of artillery shell deviation and the effect of different types of errors on such deviation. In order to calculate the mean errors in each case, one must have information on the weaponry and exact location of DPR firing positions, as well as accurate data on military targets. This approach to estimating possible errors in relation to collateral damage needs to be applied in specific cases where comprehensive data is available. Neither I, nor apparently General Brown, have such comprehensive data.

364. Thirdly, General Brown contradicts himself, as he supports the Ukraine's claim that the DPR deliberately struck civilian targets in Avdeyevka. However, if the civilian targets were hit due to a violation of firing procedures (as General Brown admits), it means that the attackers had no intention to hit civilian targets. After all, if the attackers had intended to deliberately defeat civilian targets, they would not have deliberately disrupted their preparations for shelling (as it was civilian targets they would have been aiming at).

365. General Brown's claim that civilian targets were the result of irregularities in the preparation and conduct on shelling (which could have been due to incompetence, haste,

²⁸⁷ Second Brown Report, para 59.

²⁸⁸ *Ibid.*, para. 16, Figure 8.

²⁸⁹ First Report. Paras. 257-265.

special combat conditions, accidents, etc.) confirms that the DPR forces firing at civilian targets had no intention of hitting them.

366. Finally, I find that General Brown's statement about "indiscriminate targeting" is absurd for several reasons:

- (a) The operational situation in the Avdeyevka area during the reporting period was far from "stable",²⁹⁰ there was active fighting and an exchange of artillery strikes and other types of fire.²⁹¹
- (b) In a situation where the UAF were using residential areas to deploy firing positions for strikes on Donetsk and other settlements, the DPR forces were faced with a choice: either expose their own positions and their own civilians in Donetsk and other settlements to the threat of regular shelling,²⁹² or respond to strikes in order to hit UAF firing positions despite their deployment in residential areas.
- (c) Even if full firing preparations are made and all prescribed procedures are followed, some projectiles will miss the target, which is a virtually unavoidable part of artillery firing.

367. General Brown, therefore, unreasonably denies the possibility of civilian targets being hit in error or as a result of deviation of projectiles.

E. THE DPR'S CHOICE OF WEAPONRY DOES NOT INDICATE A DELIBERATE CHARACTER OF SHELLING OF CIVILIAN OBJECTS, NOR AN INDISCRIMINATE CHARACTER OF THE SHELLINGS

368. As I pointed out in the First Report, the choice of weaponry for shelling must be made on a case-by-case basis, taking into account (1) the positions of the parties, (2) the shelling objectives, and (3) the weapons actually available.²⁹³ It should, however, be understood that the shelling of targets in Avdeyevka took place during a period of heightened military situation.

²⁹⁰ Second Brown Report, para 59 (a).

²⁹¹ First Report, paras. 244-252.

²⁹² *Ibid.*, para. 360.

²⁹³ *Ibid.*, para. 368.

369. In such periods, a fire plan usually comes into play, which provides for engaging targets jointly, simultaneously, or sequentially. In addition to such plan, there is a need to engage newly discovered targets, as well as targets requiring immediate destruction. In such a case, the person who makes a decision to launch attacks is faced with the choice of which weapon to use based on the need to accomplish a particular mission.
370. General Brown claims that the use of BM-21 in itself meant indiscriminate fire.²⁹⁴ In the First Report I analysed the claims about the use of the BM-21 system, pointing out that many of these claims are contradictory.²⁹⁵ Their analysis shows that there is no basis for assuming that the hits cited were the result of deliberate firing at civilian targets.
371. However, as I have already pointed out, the use of BM-21 in a specific situation might have been militarily justified (for example, to strike back quickly against an enemy artillery position from a currently available weapon). The possession of other weapons by the DPR does not in itself mean that such weapons were available in a particular situation, much less that the use of other weapons was militarily expedient.
372. Furthermore, the use (if any) of weapons systems with wide-area effects (such as BM-21) in some cases during the shelling of UAF positions and other military targets in Avdeyevka does not in itself indicate that the attackers intended to harm civilians. For example, during the bombing of Yugoslavia in 1999, NATO forces used cluster munitions that resulted in civilian deaths:

"In Nis, the use of cluster bombs was a decisive factor in civilian deaths in at least three incidents. Overall, cluster bomb use by the United States and Britain can be confirmed in seven incidents throughout Yugoslavia (another five are possible but unconfirmed); some ninety to 150 civilians died from the use of these weapons".²⁹⁶

373. The nature of the damage left by the shelling presented to me for analysis indicates that the damage to civilians and civilian infrastructure is:

²⁹⁴ Second Brown Report, para. 60.

²⁹⁵ First Report, paras. 318-319, 323-325, 332, 344-345.

²⁹⁶ Human Rights Watch, Report, Civilian Deaths in the NATO Air Campaign, February 2000, available at: <https://www.hrw.org/reports/2000/nato/index.htm#TopOfPage>, https://www.hrw.org/reports/2000/nato/Natbm200.htm#P37_987.

- (a) collateral damage from the regular and violent exchanges of artillery fire described in the sources cited in the First Report (in particular the reports of the Special Monitoring Mission²⁹⁷);
- (b) collateral damage caused by the shelling of military facilities in Avdeyevka;
- (c) collateral damage from shelling to prevent the transfer of reserves and ammunition to forward positions, unit rotations, etc.

374. Finally, General Brown's assertion that munitions impacts on civilian targets in Avdeyevka indicate the indiscriminate nature of the shelling is inconsistent with General Brown's own observations that:

"in Avdiivka the delineation between UAF and civilian activity is more blurred."²⁹⁸

375. It should be noted that the DPR commanders who made the decisions to initiate the strikes certainly weighed the risks of collateral damage on the one hand, and the importance of the target, the need to hit a particular enemy firing position, etc., on the other.

376. Modern rules of engagement do not prohibit commanders from deciding to hit a target if it is likely to cause collateral damage. On the contrary, a commander may carry out an attack resulting in collateral damage, if the objective of defeating the military target so requires. For example, the German rules of engagement say:

"415. The presence or movements of civilians may not be used to render certain locations immune from military operations, in particular to shield military objects from attacks or to shield, favour or impede military operations. The Parties to the conflict must not direct the movements of civilians in order to attempt to shield military objectives from attacks or to shield military operations (4 28; 5 51 para.7). The misuse of protected persons as a shield for military objectives is a violation of international law and is punishable as a war crime (33 8 para.2 lit.b xxiii; 35 11 para.1 no.4). What is more, this does not mean that the military objective must not be attacked <...>".²⁹⁹

²⁹⁷ First Report, para. 360.

²⁹⁸ Second Brown Report, para. 52.

²⁹⁹ Federal Ministry of Defence of the Federal Republic of Germany, Joint Service Regulation (ZDv) 15/2, Law of Armed Conflict, Manual, May 2013, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/GER-Manual-Law-of-Armed-Conflict.pdf>.

377. However, appropriate strikes do not necessarily have to be carried out with the highest-precision weapons available to the commander. For example, Australian military doctrine indicates that the commander has the right to choose a less precise weapon, even if that weapon may cause collateral damage:

"Precision-guided weapons. 8.38 The existence of precision-guided weapons, such as GBU 10 and Harpoon missiles, in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating the LOAC requirements. It is a command decision as to which weapon to use. This decision will be guided by the basic principles of the LOAC: military necessity, avoidance of unnecessary suffering and proportionality."³⁰⁰

378. Similar provisions are found in the military doctrine of Denmark:

"Limited operational capabilities or an increased risk of harm to one's own forces may, depending on the circumstances, justify an attack on an objective, even if the attack in question is not the attack among multiple potential attacks that poses the least danger to protected persons or objects."³⁰¹

379. Similar prescriptions are found in US military doctrine:

"Similarly, the U.S. reservation to CCW Protocol III on Incendiary Weapons makes clear that U.S. forces may use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons."³⁰²

380. The military doctrines of many countries permit attacks that will result in collateral damage if such attacks help gain a military advantage or achieve other military goals and objectives. The power to decide on such attacks is vested in the commanders responsible for the fulfilment of particular combat missions:

(a) Australia:

" There must be an acceptable relationship between the legitimate destruction of military targets and the possibility of consequent collateral damage."

³⁰⁰ Armed Force of Australia, Law of Armed Conflict manual, Australian Defence Doctrine Publication, 11 May 2006, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>.

³⁰¹ Danish Ministry of Defence, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, September 2016, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/DK-Military-Manual-International-Operations.pdf>.

³⁰² US Ministry of Defence, Department of Defense Law of War Manual, June 2015 (updated December 2016), available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/USA-Law-of-War-Manual.pdf>.

"Collateral damage may be the result of military attacks. This fact is recognised by the LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack ".³⁰³

(b) UK:

"However, if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives."³⁰⁴

(c) Germany:

"In an international armed conflict, the mere presence of armed forces endangers the object to be protected as soldiers are combatants and thus constitute military objectives. The use of soldiers to protect civilian objects should therefore be carefully considered".³⁰⁵

(d) Denmark:

"Civilians and civilian objects may lawfully in connection with attacks on military objectives become the object of injury or damage in accordance with the rules on collateral damage."

"The concrete and direct military advantage is accorded weight on the basis of, among other factors, its importance to the future development of the conflict. The identification of the relationship between collateral damage and military advantages, i.e., the actual comparison between these two considerations, is ultimately based on an estimate. This estimate is to be made on the basis of a factual assessment of the information available and in good faith."

"On the other hand, it is not in itself suspicious that combatants lose their lives in connection with their participation in hostilities or that civilians die as a result of collateral damage in connection with the conduct of lawful military operations in an armed conflict."³⁰⁶

³⁰³ Armed Force of Australia, Law of Armed Conflict manual, Australian Defence Doctrine Publication, 11 May 2006, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>.

³⁰⁴ Joint Service of the UK Armed Force, Joint Service Manual of the Law of Armed Conflict, Joint Service Publication 383, 2004, UK, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/UK-Manual-Law-of-Armed-Conflict.pdf>.

³⁰⁵ Federal Ministry of Defence of the Federal Republic of Germany, Joint Service Regulation (ZDv) 15/2, Law of Armed Conflict, Manual, May 2013, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/GER-Manual-Law-of-Armed-Conflict.pdf>.

³⁰⁶ Danish Ministry of Defence, Military Manual on International Law Relevant to Danish Armed Forces in International Operations, September 2016, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/DK-Military-Manual-International-Operations.pdf>.

(e) New Zealand:

"An NZDF commander assessing the proportionality of an attack is to do so in the context of any larger operational plan of which the attack is a part <...> For example, a minor objective such as an isolated bridge may in fact be a significant chokepoint for large formations."³⁰⁷

(f) USA:

"Military necessity also justifies certain incidental harms that inevitably result from the actions it justifies.

"For example, a commander may determine that a precaution would not be feasible because it would result in increased operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to his or her forces.

"Feasible precautions' are reasonable precautions, consistent with mission accomplishment and allowable risk to attacking forces."

"Measures to minimize collateral damage to civilian objects should not include steps that will place U.S. and allied lives at greater or unnecessary risk."³⁰⁸

381. Consequently, the choice of a particular type of weapon, as well as the fact that civilian objects were harmed, cannot in themselves be evidence of the intention of the attackers to harm civilians, contrary to General Brown's assertion.

³⁰⁷ The New Zealand Defence Force, Manual of Armed Forces Law. Vol. 4. Law of Armed Conflict, August 2017, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf>.

³⁰⁸ US Ministry of Defence, Department of Defense Law of War Manual, June 2015 (updated December 2016), USA, available at: <https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/USA-Law-of-War-Manual.pdf>.

VI. 10 FEBRUARY 2015 SHELLING OF RESIDENTIAL AREAS AND AIRFIELD IN KRAMATORSK

A. DAMAGE TO CIVILIAN OBJECTS IN KRAMATORSK IS COLLATERAL DAMAGE IN CONNECTION WITH THE ATTACK ON THE AIRFIELD

i. Critical targets (ATO headquarters, combat aircraft and other) were located at the Kramatorsk airfield and the ideal weapon was chosen to hit them, as General Brown confirms

382. It is surprising to me that General Brown continues to insist that the mere selection of the BM-30 Smerch as a weapon to engage targets at the Kramatorsk airfield demonstrates the indiscriminate nature of the attack "by definition".³⁰⁹

383. The Kramatorsk airfield housed important military facilities, including the ATO command headquarters, UAF combat aircraft, air defence systems, long-range tactical missile systems (Tocka-U Missiles and BM-30 Smerch MLRS),³¹⁰ ammunition and fuel depots, at least 26 military units and others. The fact that the ATO command headquarters and other associated infrastructure were located on the airfield, making the airfield a military target, is acknowledged by General Brown.³¹¹ In particular, the First Brown Report states:

"The headquarters of the Anti-Terrorist Operation of the Ukrainian Armed Forces was based on the airfield approximately two km south-east of the urban edge of Kramatorsk. The airfield was also a helicopter base and the site of an SA-10 (Buk) air defence missile system. Indeed, the list of military casualties suggests there were at least 26 military units on the airfield".³¹²

384. This made the airfield a priority target for the DPR, as its defeat meant gaining a significant military advantage. In particular, the defeat of the ATO command post located on the airfield would have significantly reduced the UAF's ability to command the troops. And the defeat of the UAF combat aircraft would have limited the UAF's ability to support ground operations with arial attacks. This is also directly confirmed by General Brown:

³⁰⁹ Second Brown Report, para. 48 (c).

³¹⁰ First Report, paras. 193-194.

³¹¹ Second Brown Report, para. 38, First Brown Report, para. 66.

³¹² First Brown Report, para. 66.

Neutralization of such a target would significantly impact the operational capability of the Armed Forces of Ukraine, particularly in terms of command and control, but also in damage to material; personnel casualties were particularly heavy in senior officers, a reflection of the level of the headquarters. It would be a high priority target for any enemy."³¹³

385. That said, the airfield was essentially not a single target, but a large facility with multiple military targets spread across its territory (see Figure 22).³¹⁴

³¹³ First Brown Report, para. 66.

³¹⁴ First Bobkov Report, paras. 87-90, Figures 46, 47.

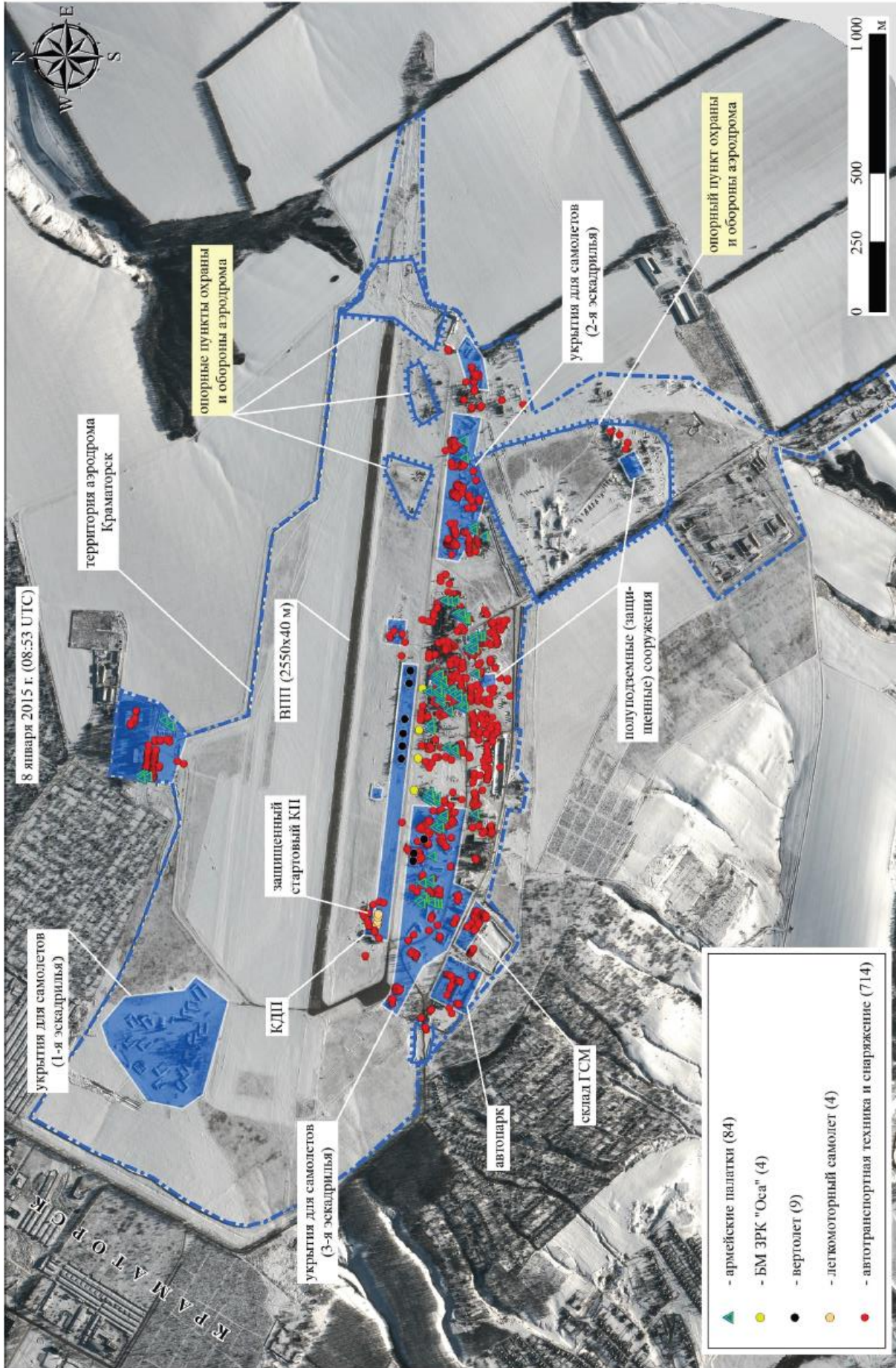


Figure 22 - Map of Kramatorsk airfield with military targets located there (as of 8 January 2015).

*

8 January 2015 (08:53 UTC)

	Shelters for aircraft (1 st squadron)		Territory of Kramatorsk airfield
			Airfield guard and defence stations
	Airfield control tower	Hardened command post	Air-strip (2,550 x 40 m)
Shelters for aircraft (3 ^d squadron)			
Fleet of vehicles			Shelters for aircraft (2 ^d squadron)
		Semi-buried (protected) structures	
	Fuel storage depot		
Army tents (84) SAMS combat vehicles "Osa" (4) Helicopters (9) Light aircraft (4) Mechanical transport and equipment (714)			Airfield guard and defence station

386. Long-range, large-calibre multiple launch rocket systems (such as BM-30 Smerch) were the best weapon to hit targets at the airfield. Hitting a number of targets at once would achieve the greatest impact on the enemy and be more likely to engage the command post. The BM-30 allows a large area to be struck at once, thereby achieving simultaneous striking of several targets located in the respective area.

387. The choice of BM-30 as the best weapon for engaging the Kramatorsk airfield is also confirmed by General Brown:

“BM-30 is not just the only weapon available, it is also the ideal weapon for neutralization of an airfield and its associated infrastructure, accompanying units, tented accommodation and soft-skinned vehicles. BM-30 firing 9M55K sub-munition missiles is optimized to defeat personnel, armoured and soft

targets in concentration areas, artillery batteries, command posts and ammunition depots.³¹⁵

388. In this regard, I am surprised by General Brown's conclusion that the mere choice of BM-30 as a weapon to engage targets on the airfield indicates that the attack was "by definition indiscriminate".³¹⁶
389. The shelling of such facility as a military airfield using BM-30 Smerch MLRS involves the distribution of aim points among the weapons in relation to elementary targets. In other words, elementary targets (points) are selected on the territory of the airfield to be hit by MLRS missiles.
390. In order to achieve the desired effect (degree of destruction), a certain (prescribed by regulations) number of missiles must be fired. In doing so, it is necessary to use such number of launchers that would ensure to the extent possible that all targets located on the site are simultaneously affected.
391. On this basis, from a military point of view, it makes no pragmatic sense to plan and launch attacks on a residential area of a city at the same time as attacking targets on an airfield. Obviously, the commander deciding on specific firing parameters intends to achieve maximum damage to military targets located on the airfield. In order to hit as many targets on the airfield as possible, he needs to use all the ammunition of BM-30 Smerch launchers available to him. To target a portion of the missiles away from the airfield would mean to apply less damage to critical military targets on the airfield.

ii. **Assessment of the link between strikes on residential neighbourhoods in Kramatorsk and facilities at the airfield, and the choice of weaponry**

392. Ukraine and General Brown view the strikes on the Kramatorsk airfield and the impacts on residential areas of Kramatorsk as two different attacks, with the claim that residential areas were the immediate target of the shelling.³¹⁷
393. Firstly, although General Brown claims two different attacks, he contradicts his own reasoning, as he actually views the city being hit as part of the airfield shelling - for

³¹⁵ First Brown Report, para. 68.

³¹⁶ Second Brown Report, para. 48 (c).

³¹⁷ Memorial, paras. 246-252.

example by pointing to the supposed areas (over the city) that in his opinion would be hit by cluster munition and carrier elements of those rockets that were targeted at the airfield.³¹⁸

394. Secondly, all of General Brown's analysis and conclusions are based on an extremely sparse and incomplete body of evidence, as he himself admits:

"The Ukrainian Security Service investigation was primarily focused on evidence of impacts that killed or injured civilians and damaged civilian property. Moreover, the investigation of the casualties and damage on the aerodrome appears to have been carried out separately by the military authorities. The Security Service report is therefore an incomplete picture".³¹⁹

395. Thus, Ukraine has chosen not to provide data on damage at the airfield, which could shed light on the circumstances of the incident. I believe this data goes against the claims of the Ukraine in the present case. That said, as I noted above, the evidence that was provided and produced by the SBU cannot be considered objective but should be further checked and confirmed, as pointed out, for example, by the Dutch investigation and the court in the MH-17 case.³²⁰

396. Given that even General Brown himself admits that the investigation by the Ukrainian Security Service is "an incomplete picture", neither can General Brown's conclusions about the deliberate targeting of residential areas in the city be considered sufficiently substantiated.

397. Thirdly, General Brown's version of a separate deliberate strike against residential areas of Kramatorsk is based on suppositions only. All known circumstances of the shelling in question clearly indicate that described impacts were simultaneous.

398. In particular, General Brown points out the following:

"The estimate from the professional UAF rocket artillery battery commander stationed on the aerodrome at the time of the attack is that between six and

³¹⁸ Second Brown Report, Figures 17, 18 and 19.

³¹⁹ Second Brown Report, para. 39(a).

³²⁰ District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022, available at: <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:14036&showbutton=true&keyword=09%252f748005-19&idx=1%2F> (Exhibit D).

twelve rockets landed within the perimeter of the aerodrome. This makes more sense doctrinally...³²¹

399. I believe it is likely that General Brown received his assessment from the commander of BM-30 Smerch battery of the UAF stationed at the airfield. As I pointed out in my First Report, the BM-30 Smerch MLRS of the UAF fired regularly at Donetsk and Gorlovka from the Kramatorsk airbase.³²²
400. As General Brown points out, the carrier elements of the rocket could fall within two to three kilometres of the impact zone of the rocket's payload.³²³ The SBU documents cite only three rocket tails allegedly photographed at addresses more than three kilometres from the north-west boundary of the airfield:
- (a) building No. 24 in Lenin Street,
 - (b) the Blooming Stadium,
 - (c) building No. 13 in Karpenka Street.³²⁴
401. Two other rocket parts photographed by the SBU at a distance of more than 3 km from the north-western boundary of the airfield (at the NKMZ Plant and at building No. 15 in Sotsialisticheskaya Street)³²⁵ are not parts of the rocket tail and are, in my opinion, parts of the same three rockets I mentioned above.
402. The other fragments of rockets from the SBU's record of inspection (building No. 47 in Dvortsovaya Street, building No. 4 in Gvardeitsev Kantemirovtsev Street, building No. 27 in Kramatorskiy Boulevard, in the territory of the Sputnik and Venera Garage Cooperatives) are located less than 3 km (and even less than 2 km) from the north-west boundary of the airfield and include only one fragment of the tail of the rocket.³²⁶ Consequently, as General Brown himself admits, these fragments belong to rockets whose cluster munitions must have fallen on the airfield.

³²¹ Second Brown Report, para. 39(b).

³²² First Report, para. 194.

³²³ Second Brown Report, para. 47(a).

³²⁴ Memorial, Annex 105.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

403. Therefore, I believe General Brown's estimate that "at least five rockets were targeted at the civilian residential area"³²⁷ is exaggerated. If the SBU's information is accepted as correct, only three rockets missed and landed outside the airfield.

404. The estimate given by the UAF commander of the of the MLRS battery that from 6 to 12 rockets hit targets at the airfield means that most rockets (up to 12) defeated military targets inside the airfield, and only 3 rockets missed for one reason or another and fell outside the airfield. This means that the primary target was a military target.

iii. The attack on the north-west sector of the airfield did not mean that civilian facilities were to be inevitably hit

405. I also disagree with the following statement by General Brown:

"The cluster munitions and rocket elements found among the garages on Rybalko Street could arguably be collateral damage from an attack on the northwest sector of the aerodrome. If this was the case, the damage to civilian property could nevertheless have been avoided, or at least mitigated, if the centre of the airfield, rather than the northwest sector, had been targeted as is evident from the comparison of the spread of the two ellipses above".³²⁸

406. First of all, as can be seen in Figure 22, there was a squadron of UAF combat aircraft on the north-western border of the airfield, the use of which gave the UAF an undeniable advantage over the DPR on the battlefield. Consequently, the defeat of this target was critical to the DPR.

407. General Brown refers to the diagram in figure 16 in his second report showing the fall of shot pattern resulting from the attack with BM-30 Smerch missiles at a range of 70 km. However, the dimensions of the ellipse shown are incorrectly calculated - they are significantly overestimated, because General Brown used the mean deviations that characterize the projectile dispersion area by range and direction, which are provided in the firing tables for the Smerch system.³²⁹ In reality, the dimensions of the ellipse would not be 1,840 m by 1,720 m, but 541 m by 490 m.

³²⁷ *Ibid.*, paras. 47(a), 48(a).

³²⁸ *Ibid.*, para 42 (a).

³²⁹ Memorial, Annex 656, Extract of Smerch Firing Table, Ministry of Defense of Ukraine (March 2018).

408. Furthermore, it is not clear to me why the Second Brown Report states that the range of fire was exactly 70 km.³³⁰ It appears from the First Brown Report that General Brown was of the opinion that the distance from the launch site could be anything between 50 and 70 km.³³¹ This change in General Brown's position is not substantiated in his second report.
409. I believe that in reality the distance to the launch site was significantly less than 70 km and should have been closer to 50 km. Firstly, as I pointed out above, Colonel Bobkov disproved that the "possible firing positions" of BM-30 Smerch MLRS were at a distance of 70 km from Kramatorsk as was indicated in Gwilliam and Corbett Report. Secondly, 70 km is the maximum range for firing cluster munitions from BM-30 Smerch. I said above that firing at the maximum range from MLRS is ineffective in most cases and therefore militarily impractical. Most likely, the launch could have been carried out from the area of Gorlovka settlement (as I understand it, under DPR control at the time), which is about 48 km southeast of Kramatorsk.³³² This is also stated in the First Brown Report.³³³ Therefore I believe that the distance from the launch point was approximately 50 km.
410. If we assume that the rockets were launched from a distance of 50 km (rather than 70 km as claimed by General Brown), the size of the impact area (ellipse) will be even smaller, at 420 m by 287 m. Given this size, there would have been no damage to civilian objects if the aim point selected had been in the northwest sector of the airfield.
411. As a consequence, the images in figures 17, 18 and 19 of the Second Brown Report are incorrect. They illustrate the areas of munition damage resulting from a single rocket (ellipses) with a diameter of approximately 1,850 metres. Whereas from my calculations it follows that in reality the diameter of the ellipse could not exceed 541 metres. This also corresponds to my experience – in general, one rocket fired from BM-30 Smerch "scatters" its projectiles over an area of 500 m by 500 m.

³³⁰ Second Brown Report, para. 41, para. 43 (b).

³³¹ First Brown Report, para. 65.

³³² First Report, para. 190. 190.

³³³ First Brown Report, para. 65.

B. THE DPR HAD TAKEN STEPS TO MITIGATE COLLATERAL DAMAGE, BUT IT WAS ALMOST INEVITABLE THAT IT WOULD OCCUR, AS THE UAF HAD POSITIONED A CRITICAL MILITARY FACILITY IN CLOSE PROXIMITY TO THE CITY

412. The fact that a critical facility the defeat of which would have helped the DPR significantly to achieve its military objectives was positioned by the UAF essentially on the outskirts of the city, coupled with the fact that the population had not been evacuated, contributed to the collateral damage in the first place.
413. The use of an UAV prior to the attack indicates that DPR forces were checking the coordinates for the upcoming strike and carried out reconnaissance of the area, including in order to adjust the target coordinates and prevent rockets from hitting civilian objects. However, it appears that the UAV was shot down by Ukrainian air defence forces stationed at the airfield³³⁴ prior to the shelling, so the relevant activities may not have been completed.
414. I disagree with General Brown's conclusion that the DPR forces had an opportunity to avoid civilian damage in the attack on the airfield by changing the direction of fire.³³⁵ General Brown states that the DPR should have positioned the BM-30 south of the airfield so that rocket fragments would fall exclusively north of the airfield.
415. However, as General Brown is well aware, the area south of Kramatorsk was controlled not by the DPR, but by the UAF, as evidenced, in particular, by the map published on 10 February 2015 by the National Security and Defence Council of Ukraine.³³⁶ Therefore, it was not possible for the DPR forces to change the azimuth of the shelling, as suggested by General Brown in order to completely prevent carrier elements of the rockets from hitting the territory occupied by civilian objects. In other words, the DPR forces could not fire from the southern direction to the north, because in such case the BM-30 Smerch launch site would have to be deeply behind the UAF positions.
416. That said, I disagree with General Brown's assertion that the carrier elements of a rocket (fragments of the non-warhead part) pose the same threat as the rocket's cluster

³³⁴ First Brown Report, para. 62., *See also* Memorial, Annex 238.

³³⁵ Second Brown Report, para 47 (b).

³³⁶ First Report, para. 190, Figure 15.

munitions.³³⁷ This statement is absurd. If it were true, then the BM-30 Smerch could fire blanks instead of the expensive and complex cluster munitions. In reality, the fragments of the carrier elements of a rocket pose much less of a threat than the payload: their impact zone and destruction density are not the same as those of the cluster munitions, they do not explode when they hit the ground, and the trajectory of their fall is random.

C. TECHNICAL MALFUNCTIONS AND OPERATOR ERRORS ARE THE LIKELY CAUSES OF MISSILES HITTING THE RESIDENTIAL NEIGHBOURHOOD OF KRAMATORSK. NUMEROUS EXAMPLES OF GUIDED MUNITIONS USE CONFIRM THIS

417. In paras. 43-45 of his second report General Brown questions the likelihood of both technical and human errors, which in my view are the cause of the munitions hitting civilian objects in Kramatorsk.
418. In particular, General Brown believes that a failure of the rocket's mechanisms in flight is impossible. That said, he considers only one possible source of fault: failure of the timer mechanism.³³⁸ However, there are other technical causes of failures in BM-30 rockets, the effect of which on the flight and performance of rockets is unpredictable.
419. For example, incorrect operation or a failure of the on-board range adjustment equipment could also have been caused by not unlocking this system during prelaunch preparation. In particular, to unlock the equipment, a contact between the electrical circuits of the launcher and the rocket is required. If such contact is broken for any reason, the range adjustment system will not function in flight.
420. Regarding possible human errors, General Brown states that launcher guidance errors are unlikely. However, to support this statement he describes the procedures followed by operators in performing their duties.³³⁹ This does not prove either that there could be no human error. Fire preparation procedures are designed to eliminate errors by operators, but their very existence cannot eliminate such errors completely.
421. General Brown states that the considerable deviation of the missiles that landed outside the airfield area could not have been the result of a combination of errors of a different

³³⁷ Second Brown Report, para 47 (a).

³³⁸ *Ibid.*, para. 43.

³³⁹ *Ibid.*, para. 45.

nature, and, therefore, the targets of the shelling were allegedly not only objects on the airfield, but also those in residential areas of Kramatorsk.³⁴⁰ I disagree with General Brown. The range errors in question could have been a result of so-called "human error" (gross error in the transmission or input of firing data), especially during retargeting (i.e. when new coordinates for targets located in other parts of the airfield are input), if the retargeting was done in fulfilling the mission to engage targets on the airfield.

422. General Brown unjustifiably claims that a malfunctioning rocket cannot be launched by BM-30.³⁴¹ He contradicts himself, for there he describes precisely the scenario of the launch of a malfunctioning rocket and its behaviour in flight:

“...any unseen fault in the propellant or casing would typically cause the rocket to drop short of its intended target, in practice shortly after launch”.³⁴²

423. Deviations of guided munitions can occur for various reasons and do occur in practice, even with the best-trained armed formations. For example, technical malfunctions and human errors caused civilian deaths and damage to civilian objects during the NATO bombing of Yugoslavia in 1999:

"Air Commodore Wilby: <...> I also have some video of one of our successful attacks and I am going to show you on the next freeze-frame where the collateral damage was in relation to the target. The mission report stated that one bomb appeared to be seduced off the target at the final stages. Close inspection of imagery indicates that it landed some 200-300 metres away in what seems to be a small residential area which I showed you. Obviously, we regret any unintended damage or loss of civilian life. I would like to stress that this was considered a critical target and collateral damage risks were taken into close consideration during our attack planning."³⁴³

"U.S. Deputy Defense Secretary John Hamre has provided the only analysis regarding the "30 instances of unintended damage" that the Pentagon seems to acknowledge. Of those, he says one third occurred when the target was hit but innocent civilians were killed at the same time. Of the remaining twenty, three were said to be caused by human error when the pilot identified the wrong target, and two were caused by technical malfunction. In the other fourteen instances, the Pentagon has not yet announced whether human error or mechanical failure was responsible.

³⁴⁰ Second Brown Report, para. 46.

³⁴¹ *Ibid.*, para. 43(b)(i).

³⁴² *Ibid.*, para. 43(a).

³⁴³ NATO Spokesman Jamie Shea and Air Commodore David Wilby, Press conference at NATO Headquarters, Brussels, 9 April 1999, available at: <https://www.nato.int/kosovo/press/p990409a.htm>.

"Seven troubling incidents were as a result of attacks on convoys or transportation links. Because pilots' ability to properly identify these mobile targets was so important to avoid civilian casualties, these civilian deaths raise the question whether the fact that pilots were flying at high altitudes may have contributed to these civilian deaths by precluding proper target identification".³⁴⁴

424. Thus, technical and human errors can be (and become) responsible for the deviation of munitions from their targets, which can (and does) result in human casualties and harm to civilian objects. The mere fact that harm is caused to the civilian population when guided munitions are used cannot in itself be evidence of deliberate targeting of civilian objects, contrary to General Brown's unsubstantiated claims.

D. UAF REPEATEDLY USED MLRS WITH CLUSTER MUNITIONS

425. As I noted above, given the characteristics of the military target (Kramatorsk airfield with ATO command headquarters, combat aircraft, tactical weapons, etc.), I am surprised by General Brown's conclusion that the mere choice of BM-30 Smerch as a weapon to engage targets on the airfield indicates an indiscriminate strike "by definition".³⁴⁵

426. In the meantime, the UAF used similar weapon systems in much less substantiated instances, when it was not necessary to engage a large enemy military facility with various military targets scattered across its territory. For example, in 2014, the UAF repeatedly launched BM-30 Smerch strikes against the densely populated centre of Donetsk.

427. The UAF use of BM-30 Smerch and BM-27 Uragan multiple rocket launchers and, generally, cluster munitions for attacks on populated areas in the DPR and the LPR during the conflict with the DPR and the LPR was repeatedly documented by international organisations. Specifically, in 2014, the UAF shelling of Donetsk, Starobeshevo, Makeyevka, Ilovaysk and Novosvetlovka from Smerch and Uragan MLRSs was documented and reported in the press:

"(Berlin) - Ukrainian government forces used cluster munitions in populated areas in Donetsk city in early October 2014, Human Rights Watch said today.
<...>

³⁴⁴ Human Rights Watch, Report, Civilian Deaths in the NATO Air Campaign, February 2000, available at: <https://www.hrw.org/reports/2000/nato/index.htm#TopOfPage>, https://www.hrw.org/reports/2000/nato/Natbm200.htm#P37_987.

³⁴⁵ Second Brown Report, para. 48 (c).

During a week-long investigation in eastern Ukraine, Human Rights Watch documented widespread use of cluster munitions in fighting between government forces and pro-Russian rebels in more than a dozen urban and rural locations. While it was not possible to conclusively determine responsibility for many of the attacks, the evidence points to Ukrainian government forces' responsibility for several cluster munition attacks on Donetsk. An employee of the International Committee of the Red Cross (ICRC) was killed on October 2 in an attack on Donetsk that included use of cluster munition rockets. <...>

Human Rights Watch found evidence of surface-fired 220mm Uragan (Hurricane) and 300mm Smerch (Tornado) cluster munition rockets. Human Rights Watch researchers observed and photographed the remnants of the cargo sections of 16 Uragan and 6 Smerch cluster munition rockets. Altogether, these 22 rockets would have contained 912 individual fragmentation submunitions.

The government of Ukraine has neither confirmed nor denied using cluster munitions in eastern Ukraine. It has not responded to a letter sent by the Cluster Munition Coalition in July or a letter sent by Human Rights Watch on October 13.”³⁴⁶

428. As I have already noted, the distinctive feature of the Kramatorsk airfield shelling in February 2015 was that a critical military objective (ATO command headquarters) and other important military targets (combat aircraft, etc.) were spread across the military airfield area. For this reason, as I said and as General Brown confirmed, the BM-30 Smerch MLRS was the best type of weapon to engage the relevant targets.

E. THE TIMING OF THE ATTACKS DOES NOT SUPPORT GENERAL BROWN'S ARGUMENT OF TWO DIFFERENT ATTACKS

429. Based on testimony³⁴⁷ General Brown assumes that the attack consisted of two salvos, five minutes apart, and draws conclusions with the general idea being that the engagement of targets at the airfield was unrelated to the attacks on the residential area of the city (the engagement of targets in residential areas was allegedly a separate task). At the same time, General Brown claims that the occurrence of a malfunction in the rockets that overflew the airfield is implausible.³⁴⁸

³⁴⁶ Human Rights Watch, Report, Ukraine: Widespread use of cluster munitions, Government Responsible for Cluster Attacks on Donetsk, 20 October 2014, available at: <https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions>.

³⁴⁷ Memorial, Annex 3, Witness Statement of Kyrylo Ihorevich Dvorskyi (4 June 2018), para. 8.

³⁴⁸ Second Brown Report, para. 43.

430. I have seen no evidence that the impacts on the airfield and the city occurred at different times. Ukraine states that the shelling of residential areas took place "approximately five minutes" after the shelling of the airfield, around 12:30.³⁴⁹ Meanwhile, the timings described in witness statements submitted by Ukraine are very approximate and point to a time interval between 12:00³⁵⁰ and 12:40.³⁵¹ I believe it cannot be concluded from this testimony that there were two attacks, five minutes apart.
431. Further, the report by the UAF ATO press centre and other sources said that the shelling of the airfield took place around 12:30.³⁵² A video of shells hitting the Kramatorsk airfield shows that the first shell fell at 12:30.³⁵³ According to OSCE reports, the residential areas were shelled at around 12:30 too.³⁵⁴ It does not follow from this evidence that the residential areas were attacked separately: on the contrary, it speaks in favour of simultaneous shelling which started at approximately 12:30.
432. Ukraine reported that approximately 30-40 minutes before the shelling in question, UAF air defence forces stationed at the airfield shot down a UAV.³⁵⁵ This supports the version that it was the airfield that was the target of the shelling, in relation to which reconnaissance was conducted prior to the shelling.

F. "POSSIBLE FIRING POSITIONS" WERE MISIDENTIFIED BY UKRAINIAN EXPERTS

433. As Colonel Bobkov notes, each of the two "possible firing positions" considered by Ms Gwilliam and Air Vice Marshal Corbett has nothing to do with the 10 February 2015 shelling of Kramatorsk.³⁵⁶

³⁴⁹ Memorial, para. 102.

³⁵⁰ Memorial, Annex 240, Signed Declaration of Oleksandr Bondaruk (20 August 2015).

³⁵¹ Memorial, Annex 219, Signed Declaration of Oleksandr Chorniy, Witness Interrogation Protocol (12 February 2015).

³⁵² BBC, citing the ATO press centre, reports that the airfield was shelled at 12:32. See Counter Memorial (ICSFT), Annex 109, *BBC News Ukraine*, "Shelling of Kramatorsk: at least seven people killed", 10 February 2015.

³⁵³ See time stamped video of the first explosion recorded at 12:30:58. See Counter-Memorial (ICSFT), Annex 232, *YouTube*, "Kramatorsk. 10 February 2015. The shelling of the city from the MLRS Video from the surveillance camera", 1 April 2016.

³⁵⁴ The Special Monitoring Mission heard explosions in the town at 12:33. See Memorial, Annex 331, OSCE, Report from the scene by OSCE Special Monitoring Mission to Ukraine (SMM): Shelling in Kramatorsk, 10 February 2015.

³⁵⁵ First Brown Report, para. 62., See also Memorial, Annex 238.

³⁵⁶ Second Bobkov Report, paras. 59-82.

434. "Possible firing position 1" is not the firing position of BM-30 Smerch, but the one of the less powerful BM-21 Grad, and the fire was carried out not in February 2015, but much earlier, as indicated by the lack of fresh scorch marks on the satellite imagery of this position.³⁵⁷
435. "Possible firing position 2" also has nothing to do with the 10 February 2015 shelling of Kramatorsk, as the satellite image taken 2 days after the shelling shows no traces whatsoever of the use of this position.³⁵⁸
436. Therefore, possible firing positions were determined incorrectly by the experts of Ukraine.

³⁵⁷ *Ibid.*, paras. 60-75.

³⁵⁸ *Ibid.*, para 77.

VII. EXPERT DECLARATION

437. I confirm that all the matters in respect of which I have expressed my opinion are within my area of expertise and competence.

438. I understand that it is my duty to assist the Court in deciding the issues in respect of which this Report has been prepared. I have complied with, and will continue to comply with, that duty.

439. I confirm that the conclusions I have reached in this Report are unbiased, objective and impartial; they have not been influenced by the pressures of the proceedings or by any of the parties to the proceedings.

Expert

Valery Alexeyevich Samolenkov

Moscow, 10 March 2023

LIST OF EXHIBITS

Number:	Name of exhibits:
Exhibit A	Hromadske, <i>Militants shelled their own positions to blame it on the Ukrainian military - Operational Command "Vostok"</i> (19 February 2022).
Exhibit B	MIL.IN.UA, <i>Russian troops shelled Olenivka with targeted artillery – General Staff of the Armed Forces of Ukraine</i> (29 July 2022).
Exhibit C	Ukrainian Pravda, <i>Zaporizhzhia Region: Russian troops shell their own vehicles to avoid going to front</i> (9 May 2022).
Exhibit D	District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky, 17 November 2022.
Exhibit E	G. I. Blinov, <i>GROUND ARTILLERY FIRING THEORY</i> (Military Artillery Command Academy, Leningrad, 1956).
Exhibit F	Vkontakte page, <i>Novorossiya militia updates. Photo and video from eyewitnesses</i> (9 January 2015).
Exhibit G	Vkontakte page, <i>Novorossiya militia Updates. Overview report</i> (9 January 2015).
Exhibit H	Vkontakte page, <i>Novorossiya militia Updates. Summary of military developments in Novorossiya</i> (11 January 2015).
Exhibit I	Vkontakte page, <i>Novorossiya militia Updates. Morning report</i> (11 January 2015).
Exhibit J	Vkontakte page, <i>Novorossiya militia updates due to the intense shelling of Donetsk</i> (10 January 2015).
Exhibit K	Vkontakte page, <i>Novorossiya militia Updates. UAF shelled our positions about 45 times overnight</i> (11 January 2015).
Exhibit L	Vkontakte page, <i>Novorossiya militia Updates. Artillery volleys were heard near Yelenovka</i> (10 January 2015).
Exhibit M	Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine No. 27og on Temporary procedure for controlling the movement of persons, vehicles and cargo along the contact line within Donetsk and Lugansk regions, 22 January 2015.
Exhibit N	Order of the First Deputy Head of the Anti-Terrorist Centre at the Security Service of Ukraine No. 415og on Temporary procedure for controlling the

movement of persons, vehicles and goods across the contact line within Donetsk and Lugansk regions, 12 June 2015.

- Exhibit O Procedure establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1455, 29 December 2021.
- Exhibit P Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015).
- Exhibit Q Rinat Akhmetov's Foundation, *How to drive across the contact line. Step-by-step instructions* (25 September 2015).
- Exhibit R RBC, *Who started the war in Avdeyevka* (31 January 2017).
- Exhibit S Rinat Akhmetov Foundation, *Akhmetov's Headquarters Humanitarian Aid Escort Team Comes under Fire* (25 June 2015).
- Exhibit T VKontakte page, *Novorossiya militia reports. Military review by military correspondent call sign "Samur"* (13 January 2015).
- Exhibit U Ministry of Defence of Ukraine, Press Release, Territorial Defence Battalions Will Be Subordinated to ATO Leadership, - Mikhail Koval, 18 June 2014.
- Exhibit V Spilno, *Kiev-2 Battalion Commander - I Wish Children Wanted to Live in Our Country. I Wish Our country Was in Order* (24 December 2017).
- Exhibit W Radio Liberty, *"C14". Radical Nationalists or Neo-Nazis?* (19 March 2018).
- Exhibit X Vesti Reporter, *Manson, Warrior of Allah* (26 June — 2 July 2015).
- Exhibit Y Ukrainian News, *US Considers C14 and National Corps Nationalist Hate Group* (14 March 2019).
- Exhibit Z Ukrainian News, *Ukrainian Nationalist Organisation C14 Has Been Listed As a Terrorist Organisation by TRAC International* (15 November 2017).
- Exhibit AA UK Parliament, *REPORTING OF UKRAINE BY THE BBC - Early Day Motions* (30 October 2017).
- Exhibit AB European Roma Rights Centre, *Anti-Roma Pogroms in Ukraine: On C14 and Tolerating Terror* (12 June 2018).
- Exhibit AC US Holocaust Memorial Museum, *US Holocaust Memorial Museum Expresses Deep Concern About Anti-Romani Violence and Antisemitism in Ukraine* (14 May 2018).

- Exhibit AD Kharkiv Human Rights Group, *Neo-Nazi C14 vigilantes appear to work with Kiev police in latest "purge" of Roma* (25 October 2018).
- Exhibit AE The Washington Post, *Ukraine's ultra-right militias are challenging the government to a showdown* (15 June 2017).
- Exhibit AF The Guardian, *"They wanted to kill us": masked neo-fascists strike fear into Ukraine's Roma* (27 August 2018).
- Exhibit AG Greater Manchester Police Counter Terrorism Branch Prevent Team, Extreme Right Wing symbols, numbers and acronyms.
- Exhibit AH Bell Tower, *Rune Symbols and Meanings: Life / Man Rune* (21 July 2018).
- Exhibit AI Nash Kiev, *Ukrainian Nationalism: Freedom or Death and Preservation of Statehood*.
- Exhibit AJ Nigilist, *"C14" and "Osvytnya Assambleya": teaching bad things at the public's expense* (28 October 2017).
- Exhibit AK ADL, *1488: Symbol of Hate*.
- Exhibit AL YouTube, *Dmitriy Tsvetkov, Battalion "Kiev-2". The Confidential Materials. Part 1* (9 February 2015)
- Exhibit AM ADL, *Runa of Life: Symbol of Hate*.
- Exhibit AN ADL, *Runa Tur: Symbol of Hate*.
- Exhibit AO Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No. 6, 5 January 2018.
- Exhibit AP The Guardian, *"Precision" airstrikes kill civilians. In Raqqa, we saw the devastation for ourselves* (5 June 2018).
- Exhibit AQ Ordzhonikidze District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 22 June 2016.
- Exhibit AR Mariupol City, *Mariupol Court Adjourns Trial of Vostochny Shelling Spotter* (16 January 2018).
- Exhibit AS MediaPort, *Mariupol shelling: court finds ex-policeman guilty of adjusting fire* (23 June 2016).
- Exhibit AT Donetsk Regional Prosecutor's Office, Press release, *A sentence was passed to the former policeman who directed "Grads" of terrorists during the shelling of the neighborhood "Eastern" in Mariupol (PHOTO)* (22 June 2016)
- Exhibit AU Airwars, Report, Credibility Gap. United Kingdom civilian harm assessments for the battles of Mosul and Raqqa, 2018.

Exhibit AV

Amnesty International, *Press release, Syria: Unprecedented investigation reveals US-led coalition killed more than 1,600 civilians in Raqqa 'death trap'* (25 April 2019).

Exhibit A

Hromadske, *Militants shelled their own positions to blame it on the Ukrainian military - Operational Command "Vostok"* (19 February 2022)

(translation)

Translation

Hromadske, *Militants shelled their own positions to blame it on the Ukrainian military - Operational Command "Vostok"* (19 February 2022), available at: <https://hromadske.ua/ru/posts/boeviki-obstrelyali-svoi-zhe-pozicii-chtoby-obvinit-v-etom-ukrainskih-voennyh-otg-vostok>.

Militants shelled their own positions to blame it on the Ukrainian military - Operational Command "Vostok"

For the sake of blaming Ukrainian troops, the militants opened fire on heavy weapons at their own positions near the village of Pikuza.

This was reported by the press group of the Operational Command "Vostok".

According to them, around 4:00 a.m., the positions of Ukrainian defenders near the village of Vodyanoye began to be shelled, firing towards the village of Zaichenko. At the same time, bursts were recorded near the village of Pikuza.

The "Vostok" said that in this way the militants were trying to pass off the shelling of their positions as retaliatory fire from the Ukrainian military.

Escalation in Donbass

Over the past two days, the number of shelling by militants in Donbass has increased dramatically. Yesterday, February 18, they violated the ceasefire regime 66 times, and 52 times with weapons prohibited by the Minsk agreements. And today, on 19 February, a Ukrainian serviceman was killed in Donbass who was wounded by shrapnel as a result of shelling by the militants.

Although the militants also speak of alleged shelling by the Ukrainian armed forces, the Ukrainian side claims that it only fires when there is a threat to the lives of servicemen or civilians and does not yield to provocations.

The Russian media tried to blame the Ukrainian side for the shelling of the kindergarten, but eventually started publishing two opposite reports: first they wrote that the shelling was staged, and later that the Ukrainian military allegedly did it.

British Prime Minister Boris Johnson said that the shelling of the kindergarten in Stanytsia Luganskaya was an operation by the militants aimed at discrediting the Ukrainian armed forces and creating an excuse for aggression.

Exhibit B

MIL.IN.UA, *Russian troops shelled Olenivka with targeted artillery – General Staff of the Armed Forces of Ukraine (29 July 2022)*

Russian troops shelled Olenivka with targeted artillery - General Staff ... <https://mil.in.ua/en/news/russian-troops-shelled-olenivka-with-targeted...>



Defense industry of Ukraine# Ukraine# War with Russia# World# Military assistance# Occupants elimination



Shelling aftermath in Olenivka, Donetsk region, July 29, 2022. Photos from open sources
29 July, 2022

Russian troops shelled Olenivka with targeted artillery – General Staff of the Armed Forces of Ukraine

Azov Regiment # Donbas # Donetsk region # Occupants elimination # POW
Ukraine # War crimes # War with Russia

The General Staff reacted to the targeted artillery shelling of a correctional institution in Olenivka village of the Donetsk Region. Ukrainian prisoners of war were held there.

The attack was targeted and deliberate. The invaders also tried to accuse Ukraine of “war crimes”.

The relevant [statement](#) was made by the General Staff of the Armed Forces of Ukraine.

“The Armed forces of the Russian Federation carried out a targeted artillery shelling of a correctional institution in Olenivka village, Donetsk Region, where Ukrainian prisoners were held. With this attack the Russian invaders pursued their criminal goals to accuse Ukraine of committing “war crimes”, as well as to hide the torture and executions of prisoners carried out on the orders of the occupation “administration” and the command of the armed forces of the Russian Federation in the temporarily occupied territory of the Donetsk Region,” the General Staff reported.



Aftermath of shelling in Olenivka, Donetsk region July 29, 2022. Photo from open sources

Russian troops shelled Olenivka with targeted artillery - General Staff ... <https://mil.in.ua/en/news/russian-troops-shelled-olenivka-with-targeted...>

The consequences of the shelling are being clarified.

According to the Commander of the Missile Forces and Artillery of the Ukrainian Ground Forces, the Armed Forces of Ukraine did not launch missile or artillery strikes in the Olenivka area.

"Thanks to the high-precision weapons received from partner countries, missile and artillery troops of the Armed Forces of Ukraine deliver extremely accurate strikes only on Russian military objects" the General Staff emphasized.

It was emphasized that the Armed Forces of Ukraine fully adhere to the principles and fulfill the norms of International Humanitarian Law. It has never conducted and is not conducting shelling of civilian infrastructure, especially places where Ukrainian prisoners of war are likely to be kept.



Shelling aftermath in Olenivka, Donetsk region, July 29, 2022. Photos from open sources

The General Staff also emphasized that the invaders continue its propaganda methods of conducting information war in order to accuse the Armed Forces of Ukraine of shelling civilian infrastructure and the population, thus hiding its own insidious actions.

"Statements about the alleged shelling of civilian infrastructure and the population by the Armed Forces of Ukraine are outright lies and provocation, the responsibility of which is borne by Russia, the aggressor country, the invader, and the sponsor of terrorism," the message said.

On the morning of July 29, Russian propagandists [announced](#) the death of Ukrainian prisoners of war. They were kept in a penitentiary facility in the occupied Olenivka village of the Donetsk Region.

The Russian disinformation network is promoting a story of an alleged "attack" at the prison from the Ukrainian side. In addition to the 40 dead, propagandists claim 130 POWs are wounded.

At the time of this publication, the Russian media reports that the number of dead has increased to 53, and the number of wounded – 75 soldiers.

Russian media and Telegram channels release videos featuring dead bodies without specifying the circumstances of their deaths.

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Exhibit C

Ukrainian Pravda, Zaporizhzhia Region: *Russian troops shell their own vehicles to avoid going to front* (9 May 2022)

Zaporizhzhia Region: Russian troops shell their own vehicles to avoid...

<https://news.yahoo.com/zaporizhzhia-region-russian-troops-shell-05...>

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Zaporizhzhia Region: Russian troops shell their own vehicles to avoid going to front



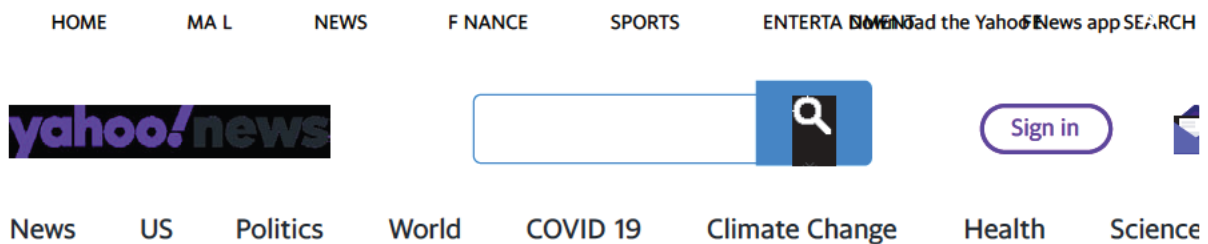
71

Ukrayinska Pravda

May 9, 2022 · 2 min read



Iryna Balachuk – Monday, 9 May 2022, 08:50



Telegram

Quote from Zaporizhzhia Military Administration:

"According to local residents, Russian troops have shelled 20 of their own vehicles in Polohy in order to avoid going to the front line; they blamed the shelling on [Ukrainian] resistance fighters in the temporarily occupied territory of Zaporizhzhia."

Details: A battalion of the Armed Forces of Ukraine in the Zaporizhzhia Region reported that Russian troops deployed Solntsepek, a multi-barrel rocket launch system, on their own positions, thereby essentially "scorching" the Russian occupiers off Ukrainian land.




According to the Zaporizhzhia Military Administration, the morale of the Russian troops remains low: they regularly consume alcohol and flee from the locations where they are supposed to carry out their military service. Russian units also complain about the ineffectiveness of their attacks on the positions of the Ukrainian Defence Forces near Huliaipole in the Zaporizhzhia Region.

The Military Administration added that on the eve of 9 May, residents of Tokmak, Polohy District, reminded the Russian occupiers that they were in Ukraine only

Zaporizhzhia Region: Russian troops shell their own vehicles to avoid...

<https://news.yahoo.com/zaporizhzhia-region-russian-troops-shell-05...>

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be planning to stage provocative actions on Victory Day, 9 May. There is a possibility that Russian troops disguised as the Armed Forces of Ukraine might attack groups of civilians, throw charges of explosives into crowds, and open fire on people and infrastructure.

In light of this tense security situation, there will be temporary restrictions on leaving the city of Zaporizhzhia; it will still be possible to enter the Region's administrative capital via evacuation corridors.

Exhibit D

District Court of The Hague, Case No. 09/748005-19, Judgment against S.N. Dubinsky,
17 November 2022

Instantie	Rechtbank Den Haag
Datum uitspraak	17-11-2022
Datum publicatie	23-12-2022
Zaaknummer	09/748005-19 English
Rechtsgebieden	Strafrecht
Bijzondere kenmerken	Eerste aanleg - meervoudig
Inhoudsindicatie	<p>In the MH17 criminal case, the court acquits one defendant and sentences three accused to life imprisonment. The judgment addresses at some length whether the prosecutor had the right to prosecute. In so doing, it addresses the matter of jurisdiction given that the crime scene is located outside the Netherlands and that the victims are of various nationalities. It also considered combatant immunity in an international armed conflict with respect to jurisdiction. Furthermore, the court discusses the fact that the summons was served without notice "rauwelijks dagvaarden" and the consequences thereof. It also addresses the fact that the Joint Investigation Team (JIT) and the Public Prosecution Service made statements about the cause of the MH17 crash and displayed the personal data and photographs of suspects at press conferences. The court also discusses the consequences of interviews, and the publication on the internet of parts of the case file in a digital application, by the Public Prosecution Service. The court assesses the "overall fairness of the trial", i.e. the right to a fair trial enshrined in Article 6 of the ECHR and finds that there were certain procedural defects in the proceedings, but that these are insufficient for the prosecution to be barred. The judgment also contains comprehensive considerations on the use of statements of anonymous and threatened witnesses as evidence, on tampering with images and intercepted material, on expert evidence and on the use of evidence from questionable sources.</p> <p>Based on the evidence, the court finds that flight MH17 was downed by a Buk missile fired from a Buk TELAR from separatist-held territory. The intent and premeditation to kill the occupants are inherent in the nature of this act. The possibility that the target was mistaken does not exonerate those responsible.</p> <p>The ranking army commander is responsible, as a functional perpetrator, for the downing of flight MH17 and the death of the 298 passengers. Owing to their direct involvement in making it possible for the weapon to be used, the court finds two of the accused to be conventional co-perpetrators. The fourth accused is acquitted as he had no direct role of his own in the criminal acts and is therefore not a co-perpetrator. This accused did, however, accept the use of the weapon and therefore also the consequences of its deployment, but because he had no power over its deployment (beschikkingsmacht), he cannot be regarded to be a</p>

functional perpetrator. In the absence of any relevant acts, the court did not find him guilty of incitement or complicity either.

In hearing the 306 claims for compensation, the applicable procedural law is Dutch civil law and the applicable substantive law is Ukrainian civil law. The merits of the claims are therefore assessed under the latter and, as a result, it is possible to compensate moral damage, including emotional damage, resulting from acts perpetrated in 2014. The court does not find awarding the fixed sums claimed for moral damage in these in absentia proceedings to be either unlawful or unjustified. The court awards over 16 million euros in damages.
Rechtspraak.nl

Vindplaatsen



Verrijkte uitspraak (<https://linkeddata.overheid.nl/document/ECLI:NL:RBDHA:2022:14036>)

Uitspraak

DISTRICT COURT OF THE HAGUE

HEARING AT THE SCHIPHOL JUDICIAL COMPLEX IN BADHOEVEDORP

Criminal Law

Three-Judge Panel

Public Prosecutor's Office No. : 09/748005-19

Date of judgment : 17 November 2022

In absentia

On the basis of the indictment and as a result of the investigation at the hearing, the District Court of The Hague rendered the following judgment in the case of the public prosecutor against the accused:

Sergey Nikolayevich DUBINSKIY,

born on 9 August 1962 in *[place of birth]*,

address (as provided by the Russian authorities): *[address]*.

Investigation name: Primo

Table of contents of judgment

1. FOREWORD	5
1.1 Introduction	5
1.2 Interpretation of evidence used in the judgment	5
1.3 Reference to evidence and the use of footnotes	6
1.4 Spelling of place names and personal names and the use of times	7
2. THE TRIAL	7
3. THE INDICTMENT	8
4. PRELIMINARY MATTERS	9
4.1 Introduction	9
4.2 Validity of the summons	9
4.3 Jurisdiction of the District Court of The Hague	10
4.4 Right of the prosecutor to prosecute	11
4.4.1 Preamble	11
4.4.2 Does the Dutch Criminal Code confer jurisdiction?	11
4.4.3 Is there a limitation on jurisdiction under international law (immunity)?	12
4.4.4 Did the prosecutor forfeit the right to prosecute?	21
4.4.5 Conclusion regarding the right of the prosecutor to prosecute	39
4.5 Grounds for suspension of the prosecution	39
5. GENERAL PRELIMINARY CONSIDERATIONS	39
5.1 Introduction	39
5.2 The criminal investigation conducted by the JIT	41
5.3 Evidence obtained from or via the SBU	42
5.4 Use of witness statements	43
5.5 Expert witnesses and scenarios	46
5.6 Intercepted conversations and transmission mast data	50
5.7 Photographic and video material	52
6. EVIDENTIARY CONSIDERATIONS	53
6.1 Position of the Prosecution	53
6.2 Assessment of the court	53
6.2.1 Introduction	53
6.2.2 Was it a Buk missile originating from Pervomaiskyi?	53
6.2.3 Specific lines of defence of counsel for Pulatov regarding the cause	72
6.2.4 Actual conduct and interpretation thereof	77
6.2.5 Legal interpretation of the actions of the accused	92
6.2.6 Final conclusion on the assessment of charges	102
7. THE JUCICIAL FINDING OF FACT	102
8. PUNISHIBILITY OF THE CRIMES PROVEN	103
9. PUNISHIBILITY OF THE ACCUSED	103
10. SENTENCING	103
10.1 Prosecution's application for sentencing	103
10.2 Decision of the court	104
10.2.1 Penalty carried by the crime	104
10.2.2 The direct consequences of deploying the Buk TELAR	104
10.2.3 Attitude of the accused	105
10.2.4 The military context and purpose of the deployment	106
10.2.5 Consideration of individual circumstances	107
10.2.6 Exceeding reasonable time?	108

[10.2.7 Disclosure of results of the investigation](#) 108

[10.2.8 Conclusion](#) 109

[11. APPLICATION FOR ARREST](#) 109

[11.1 Application for a warrant of arrest](#) 109

[11.2 Decision of the court](#) 109

[12. CLAIMS OF THE INJURED PARTIES](#) 109

[12.1 Introduction](#) 109

[12.2 Inadmissibility of injured parties' claims?](#) 111

[12.3 Leave to proceed *in absentia*](#) 111

[12.4 International jurisdiction, applicable law and admissibility under Section 51f DCCP](#) 112

[12.4.1 International jurisdiction](#) 112

[12.4.2 The law applicable to the claims](#) 113

[12.4.3 Section 51f DCCP](#) 115

[12.5 Assessment of the claims on their merits](#) 117

[12.5.1 Right to compensation for damage under Ukrainian law](#) 117

[12.5.2 Damages](#) 118

[12.5.3 Discussion of certain individual claims](#) 127

[12.5.4 Third-party payments](#) 129

[12.5.5 Conclusion](#) 130

[13. THE APPLICABLE SECTIONS OF LAW](#) 132

[14. THE DECISION](#) 133

[Appendix 1: Text of indictment](#) 136

[Appendix 2: Overview of other call participants in intercepted conversations used as evidence](#) 140

[Appendix 3: Paraphrased intercepted conversations and visual material arranged by date and time](#) 142

[Appendix 4: Decisions on each individual claim for compensation](#) 159

1 FOREWORD

1.1 Introduction

On 17 July 2014, flight MH17 crashed in Ukraine, resulting in the death of all 298 people on board. In the MH17 criminal case, the Dutch Public Prosecution Service prosecuted four persons accused of involvement in the crash of this aeroplane, namely

I.V. Girkin, S.N. Dubinskiy, O.Y. Pulatov and L.V. Kharchenko. The court has rendered simultaneous judgments in the cases of these four accused, each of whom is hereinafter referred to by his last name. This judgment relates to the accused Dubinskiy.

The judgments in the four cases are phrased as similarly as possible, both owing to their interrelated nature and in order better to inform the reader about the court's assessment of the cases of all four accused. Regarding defence arguments discussed in the judgments, the court notes the following.

As none of the accused Girkin, Dubinskiy and Kharchenko, nor counsel representing them, appeared in court, the cases of these accused were conducted in accordance with Section 280 of the Dutch Code of Criminal Procedure ('DCCP') and were therefore heard *in absentia*. This means that the cases were heard without the accused being present. Accordingly, nothing is known of the position these accused take with respect to the charges, other than what they have expressed, for instance through the media or otherwise, insofar as such material has been entered in the case file. Those cases were not defended.

Defendant Pulatov was represented by his counsel; pursuant to Section 279 DCCP, his case was heard on an

adversarial basis. His counsel mounted a defence with respect to various matters. Although, strictly speaking, these defence arguments were not presented in the cases of the accused Girkin, Dubinskiy and Kharchenko, the court will discuss them with respect to all four cases. This is because the court must answer certain questions *ex officio*, regardless of whether a defence was presented on that point. In addition, it is not inconceivable that a successful line of defence in Pulatov's case could also influence the court's deliberations and decisions in the cases of the other accused. For this reason, a discussion of those lines of defence is included in all four judgments.

1.2 Interpretation of evidence used in the judgment

The prosecution file contains several types of potential evidence. For example, there are official records of the hearings, judicial findings and decisions, official reports produced by Dutch investigating officers, expert opinions, statements made before the Dutch investigating judge, findings of and statements made to foreign investigating officers and other foreign officials, photographs, video and sound recordings, recorded and intercepted telephone conversations (hereafter: intercepted conversations or calls), web pages and their addresses and translations thereof, reports by local and international organisations, and other written documents.

The court has determined the nature of each piece of evidence used in this judgment and established that it came about and/or was added to the case file in the manner prescribed by law, except where expressly stated otherwise. The court characterises and uses the evidence concerned in the manner prescribed by law as a judicial decision, as an official report made under oath of office, as an expert report, as the court's own observation of what can be seen or heard in audiovisual material shown and played during the hearings, as a document written by a public body or official, as a document written by a public employee of a foreign State or of an international organisation, or as another written document validly related to the substance of other items of evidence.

The case file does not contain any statements by the accused within the meaning of the law. Indeed, none of the accused made a statement before a Dutch judge or before Dutch investigating officers in a way that could be characterised as a suspect interview. Accordingly, utterances made by the accused, for example in the form of an interview, comments made on social media or by telephone, or in the form of video messages presented by counsel for defendant Pulatov, which have been added to the case file, will be used by the court, should the need arise, as other documents.

Neither does the case file contain any witness or expert statements within the meaning of the law; indeed, no witnesses or experts were examined in court. Statements from witnesses and experts were recorded in official reports produced by the Dutch investigating judge and/or by Dutch investigating officers, as well as in documents from foreign investigating officers and other foreign officials. Furthermore, the court uses written opinions from experts as evidence, which thereby hold as expert reports.

1.3 Reference to evidence and the use of footnotes

In terms of the decision as to whether or not to mention certain evidence in the judgment, the court notes the following. In accordance with the law (Section 359(3) DCCP), only the judicial finding that a charge against an accused has been proven need be substantiated in the judgment with the evidence for the finding and its source. Pursuant to established case law, this is also the case when evidence is used to discuss meritorious lines of defence presented by counsel for defendant Pulatov. The court's decisions on other matters – such as preliminary matters, questions regarding the reliability or unlawfulness of evidence and seizure decisions – must be substantiated, but need not be supported by evidence. In line with the above, when setting out its considerations and decisions in this judgment, the court has only referred to evidence as it relates to the offences charged. These references to evidence are in the form of footnotes relating to the relevant considerations. The court has also placed footnotes elsewhere in this judgment, some of which concern sources that may be characterised as evidence. However, there are also footnotes which refer to open sources that need not necessarily have been included in the case file, or to literature or case law. In addition, footnotes sometimes contain additional explanation of what the court has stated in the text. The court has therefore placed footnotes in several places in the judgment, without being strictly bound by law to do so, in order to make it easier for the reader to understand the judgment on the points in question. These footnotes are particularly useful to readers who are not a party to the proceedings and do not have access to the prosecution file, enabling them to better understand the court's reasoning. Conversely, however, this means that considerations based on evidence contained in the case file are frequently included without a footnote referencing the evidence concerned; this is particularly true of the court's considerations regarding the preliminary matters. The court considers that including footnotes

referencing evidence or sources on all these points would make the judgment more difficult to read. The frequent use of footnotes would simply make the text overly long and effectively unreadable.

Footnotes always state where the piece of evidence concerned can be found in the case file as briefly as possible. When a footnote refers to specific passages in a court document, the court gives the Primo number under which that document is included (as an annex) in the case file; the case file page number is also provided, or, in the absence thereof, the page number of the court document concerned. In the case of a reference that does not concern any specific passage, the court gives only the Primo number. When referring to a court document that does not have a Primo number, the court uses the name of the court document concerned. In the case of intercepted conversations, the reference gives the date and time of the conversation. This ensures that evidence is traceable and sufficiently identifiable.

1.4 Spelling of place names and personal names and the use of times

The court specifies that this judgment uses the spelling in Latin script that is as close as possible to the Ukrainian name when referring to personal names and place names. This choice follows on from the fact that the flight MH17 disaster took place over Ukrainian territory.¹

Specifically with respect to the place names 'Pervomaiske' and 'Pervomaiskyi', the court notes that they often appear to be used interchangeably in the case file. As these two places are very close, in terms of both their pronunciation and their more or less contiguous location immediately south of Snizhne, and as the indictment refers to a place near Pervomaiskyi, the court treats this interchangeable use as irrelevant, except where otherwise indicated.

Regarding the use of times, the court specifies that the stated times refer to the local time in effect at the location in question, except where expressly stated otherwise. In such cases, the time will usually be indicated by its deviation from Coordinated Universal Time (UTC).

2 THE TRIAL

The trial took place at the following hearings:

9 and 10 March 2020 (introductory) and 23 March 2020 (decisions by the court),

8, 9, 10, 22, 23, and 26 June 2020 (case management hearings) and 3 July 2020 (decisions by the court)

31 August 2020 (case management hearing on claims by the injured parties and the right of the relatives to address the court, decisions by the court),

28 September 2020 (case management hearing),

3, 4, 5, 12 and 13 November 2020 (case management hearing); 25 November 2020 (decision in the Pulatov case),

1 February 2021 (case management hearing) and 8 February 2021 (decisions by the court),

15 and 16 April 2021 (case management hearing, application for inspection of the MH17 reconstruction, case management hearing on claims by injured parties, decisions by the court) and 22 April 2021 (decisions by the court),

21 May 2021 (case management hearing: preparation of inspection) and 26 May 2021 (inspection of the MH17 reconstruction),

7, 8, 9, 10, 17, and 24 June 2021 and 8 July 2021 (hearing on the merits)

6, 7, 9, 10, 13, 14, 16, 21, 23, and 24 September 2021 (right of the relatives to address the court)

1 November 2021 (case management hearing), 2 November 2021 (decisions by the court, case management hearing) and 8 November 2021 (right of relatives to address the court)

8 December 2021 (claims by injured parties) and 20, 21 and 22 December 2021 (prosecution's final submissions and sentencing request),

7, 9, 11, 14, 16, 18, 21, 23, 24, 25, 28, and 30 March 2022 (oral submissions by counsel for defendant Pulatov)

16, 17 and 18 May 2022 (reply by the MH17 counsel for the relatives, reply by the prosecution),

8, 9, and 10 June 2022 (rejoinder by counsel for defendant Pulatov, final word by defendant Pulatov)

22 September 2022 (resumption and immediate adjournment of the trial)2

17 November 2022 (conclusion of the trial and delivery of the judgment).

The court is cognisant of the application by the prosecutors T. Berger, W. Ferdinandusse, M. Ridderbeks and B. van Roessel (hereinafter collectively referred to as the prosecution).

Furthermore, the court is cognisant of the submissions of the MH17 counsel for the relatives in relation to the claims by the injured parties.

3 THE INDICTMENT

The text of the writ of summons is attached to this judgment as Appendix 1.

Under the first count, it is alleged that the accused, together with one or more others, or alone, intentionally caused flight MH17 to crash, causing the death of the occupants of that aeroplane. With respect to this offence, in the indictment there is a principal charge, an alternative charge, a further alternative charge and a furthest alternative charge, relating to various types of perpetration.

Under the second count, it is alleged that the accused, together with one or more others, or alone, intentionally and with or without premeditation, took the lives of the occupants of flight MH17 by firing a Buk missile at that aeroplane, causing the aeroplane to crash, and the occupants to die. With respect to this offence too, in the indictment there is a principal charge, an alternative charge, a further alternative charge and a furthest alternative charge, relating to various types of perpetration.

4 PRELIMINARY MATTERS

4.1 Introduction

In keeping with the sequence prescribed by law, the court will first go about responding to what are known as the procedural matters of Section 348 DCCP. These concern in turn the validity of the summons, the jurisdiction of the court, the right of the prosecutor to prosecute, and whether there are reasons to suspend the prosecution. The court is required to answer these questions *ex officio* in all cases, even if the defence does not raise them. As a procedural shortcoming (at any rate regarding the first three questions) could affect all the cases, in addressing these matters the court will also take into account the arguments made

by counsel for defendant Pulatov when considering the cases of the other three accused.

4.2 Validity of the summons

Pursuant to Section 261(1) DCCP, the summons must state the offence charged, specifying at approximately what time and place it is alleged to have been perpetrated. The second paragraph adds that the summons must also state the circumstances in which the offence is alleged to have been perpetrated. The charge against the accused must be clear, intelligible, sufficiently factual and not internally contradictory, as to the offence, time, and place. The importance of this provision is to ensure that, based on the indictment, the accused is aware of the charges against which he or she must defend him or herself. The charges in the indictment must be understandable to the court as well.

Although the question of whether or not a summons is valid is a procedural one, to be answered based on the text (the foundation) of the indictment itself, the court may consider the content of the case file in assessing the validity of the indictment. The court has more latitude to do this now, given that the court is addressing this question in the judgment and not on the occasion of a preliminary objection.

The prosecution has listed two offences, cumulatively, in the indictment. Both offences are segmented in the indictment, namely into the principal, alternative, further alternative, and furthest alternative variants. The indictments are entirely identical for the four accused in whose cases the court will deliver judgment.

In both the first and second count, the wording of the principal and alternative charges is virtually identical,³ the difference being that the principal charge explicitly aims for conviction based on functional perpetration or co-perpetration. As the prosecution explained, this was done in order to have the court, when considering whether the offences charged had been proven, first address whether functional perpetration or co-perpetration had been involved.

The court notes that functional perpetration basically means that although an offence is physically committed by others, the functional perpetrator bears responsibility for it and for that reason may be considered criminally culpable.

The prosecutor has rightly noted that functional perpetration of a criminal offence is not a separate form of participation. Functional perpetration is covered by the concept of perpetration in the sense of Section 47(1) of the Dutch Criminal Code (DCC). Therefore, it need not be stated explicitly in the charge.

Following on from this, the court considers that the principal and alternative charges - if proven - would yield exactly the same characterisation as regards both the definition of the offence and the form of participation. For these reasons, this format is different to a format whereby, for example, principally murder and alternatively manslaughter are charged or principally co-perpetration and alternatively perpetration. In the opinion of the court, it would therefore have been more accurate and clearer to charge the principal variant only, whereby the functional perpetration part could be cancelled if not proven.

The additional explanation provided, however, does make sufficiently clear what the prosecution intended to charge, and why the indictment was set out in this manner. For the reasons stated above, the court therefore does not find the indictment to be partially void. Giving a purely legal opinion on the manner of indictment by voiding part of the indictment would add nothing. This holds true for the cases of all the accused.

The court shall base its judicial finding of fact, however, on the premise that the principal charge comprises both functional and ordinary perpetration and co-perpetration, whereby the court considers that functional perpetration of a criminal offence should by its nature be characterised as an alternative variant. The fact of the matter is that, if the physical or other contribution of an accused is essential to perpetrating an offence, that contribution is the crux of the charge, and that should be reflected in the characterisation of the charge. The essence of functional perpetration, however, is that someone who did not personally contribute physically to an offence may in some cases still be held responsible for it. In other words, only if perpetration does not apply, can functional perpetration apply.

The writ of summons is therefore valid.

4.3 Jurisdiction of the District Court of The Hague

The court has jurisdiction to hear the MH17 criminal case. The jurisdiction of District Court of The Hague

stems from the provisions of Article 2 of the Prosecution and Trial in the Netherlands of Offences in Connection with the Downing of Malaysia Airlines Flight MH17 Act.⁴ The criminal case was not heard in the courtroom designated by order in council⁵ at the courthouse in The Hague, but rather at the Schiphol Judicial Complex in Badhoevedorp, the Netherlands. This location outside The Hague court district was designated by the Minister of Justice and Security pursuant to the provisions of Article 21b(3) of the Judiciary Organisation Act.⁶

4.4 Right of the prosecutor to prosecute

4.4.1 Preamble

The question of whether the (Dutch) prosecutor is entitled to initiate criminal proceedings, in other words has a case to bring, falls into three parts. First, whether the court has jurisdiction. In other words, whether the Dutch Criminal Code confers jurisdiction to prosecute and try the offences with which the accused are charged in the Netherlands. If it does not, the Dutch prosecutor has no right to initiate criminal proceedings. Furthermore, the right to prosecute depends on whether there are reasons, such as immunities, why international law might nonetheless limit the operation of Dutch criminal law, and finally, the question of whether the prosecutor has forfeited his right to prosecute owing to procedural errors or omissions in the way the investigation and prosecution took place, as argued by counsel for defendant Pulatov. The court discusses these three questions below.

4.4.2 Does the Dutch Criminal Code confer jurisdiction?

This question must be answered in the light of what the indictment alleges. The allegation is that flight MH17 crashed as a result of the firing of a Buk missile from a site near Pervomaiskyi in Ukraine. The allegation relates to one set of acts that cost the lives of 298 people of 17 different nationalities, including many Dutch nationals. The indictment splits this set of acts into two charges under the law. The first charge is - as indicated above - the intentional causing of an aircraft to crash resulting in the death of its 298 occupants (punishable under Section 168 DCC) and the second charge is the murder or manslaughter of 298 persons (punishable under Sections 289 and 287 DCC). Those offences are alleged to have been committed in Ukraine, which means that Ukraine, under the territoriality principle, would in any case have jurisdiction to prosecute. Yet the Netherlands has that right too.

Indeed, like the prosecution, the court finds that the charge under Section 168 DCC concerns one conduct, namely causing an aircraft to crash. As Section 5 DCC provides that Dutch criminal law is applicable to anyone who commits a crime against a Dutch citizen outside the Netherlands, and the victims of the alleged conduct of causing MH17 to crash included Dutch citizens, the court holds that the prosecutor was entitled to prosecute that offence in the Netherlands under Section 5 DCC. In doing so, the court notes that the other requirements set, of ne bis in idem and the Dutch minimum sentence of at least eight years, are also met. Therefore, the Netherlands has so-called original jurisdiction with respect to the charge under Section 168 DCC. The situation is partly different as regards the murder or manslaughter of 298 people of various nationalities. That charge involves 298 counts of intentional killing one person. The killing of that one person is the core of the conduct charged. In the case of victims who were Dutch nationals, the Dutch prosecutor had the right to prosecute under Section 5 DCC and so the Netherlands has original jurisdiction. Regarding the victims who were non-Dutch nationals, unlike the prosecutor, the court is of the opinion that the basis for jurisdiction cannot be found in Section 5 DCC simply because the cause of death of all the victims was one act. These are 298 allegations of murder or manslaughter which, while having the same cause, are independent offences. The basis for the Dutch prosecutor's right to prosecute as regards that part of the second charge can, in the court's opinion, be found in the so-called derived jurisdiction of Section 8b(1) DCC. This provides that Dutch criminal law applies to anyone the criminal prosecution of whom has been transferred to the Netherlands by a foreign State pursuant to a treaty affording the power of criminal prosecution to the Netherlands. Such a treaty was concluded between the Netherlands and Ukraine: the so-called Treaty of Tallinn.⁷ The criminal proceedings relating to flight MH17 were transferred from Ukraine to the Netherlands pursuant to the provisions of that treaty.⁸

The court, therefore, finds that derived jurisdiction was established over all the offences charged, on the basis of Section 5 and/or 8b(1) DCC, including the murder or manslaughter of the occupants of the aeroplane who were non-Dutch nationals under the second charge.

The court thus finds that, under the Dutch Criminal Code, the prosecutor has the right to proceed with prosecution.

4.4.3 Is there a limitation on jurisdiction under international law (immunity)?

4.4.3.1 Combatant immunity

The court has already considered above that the Netherlands has jurisdiction with respect to the charges under Sections 5 and 8b(1) DCC. Under Section 8d DCC, jurisdiction may nevertheless be limited by exceptions recognised in international law. As the case file indicates that the set of acts referred to in the indictment occurred in the context of a conflict, the question arises as to whether so-called combatant immunity may apply. This matter was not raised by the accused, and certainly not by defendant Pulatov. If combatant immunity does apply, however, it follows that the prosecutor does not have the right to prosecute. That might then apply to the cases of all the accused. For this reason, the court will address this issue in more detail.

Combatant immunity is an immunity relevant to the accused's possible status as a combatant in an armed conflict. Whether a person has combatant status is governed by international humanitarian law, also known as the law of war. Under international humanitarian law, persons who have combatant status are authorised to participate in hostilities and thus to conduct combat operations (combatant privilege). If these acts are performed in accordance with international humanitarian law, those persons cannot be prosecuted under criminal law for those acts, acts which in peacetime might be considered a crime. This is combatant immunity.

As indicated, combatant privilege is part of international humanitarian law. Therefore, combatant privilege - and the related combatant immunity - can only apply if international humanitarian law applies. International humanitarian law applies in the event of armed conflict.

International humanitarian law differentiates between international armed conflicts (traditionally conflicts between nations) and non-international (also called internal) armed conflicts. The provisions regulating combatant privilege apply only to international armed conflict and not to non-international armed conflict.

Therefore, the court must first determine whether an armed conflict existed at the time of the crash of flight MH17 and also whether it was international or non-international in nature. If the court finds that the conflict was non-international in nature, the accused are simply not entitled to this immunity. In this regard, the court notes that a non-international armed conflict must nevertheless be considered an international armed conflict if another country appears to be so heavily involved with the group with which a given country is fighting that the other country actually has overall control over that group. If the court finds that there was an international armed conflict, it must then ascertain whether the accused fall into the category of persons entitled to combatant privilege and, if so, whether they also meet the other conditions for it. The latter includes ascertaining whether the acts were carried out in accordance with international humanitarian law.

The court recalls expressly that the question of possible combatant immunity must be answered in the light of the facts and circumstances pertaining to the indictment period. Therefore, what is considered below refers to that period in 2014, unless expressly stated otherwise.

In order to make sense of those facts and circumstances, the court will first briefly outline the situation in that period in the area in which, according to the indictment, the offences charged occurred.

4.4.3.1.1 The situation in eastern Ukraine in July 2014

When flight MH17 crashed in eastern Ukraine on 17 July 2014, the situation in the region was far from calm. There had been conflict there since around April 2014, with fighting between the Ukrainian army on the one side and armed groups on the other. One of the main goals of those groups was to achieve some type of separation, or self-government within, the Ukrainian state, for Ukrainian territory or parts thereof. The court will refer to these groups as 'separatists', as this reflects their aims while avoiding any judgement regarding their origins or regarding the conflict itself. One such group consisted of several armed militia groups fighting under the name of the *Donetsk People's Republic, the DPR*.

Ukraine was fighting against the separatists under the name Anti-Terrorism Operation (ATO). On 11 May 2014, the separatists in the Donetsk and Luhansk oblasts in eastern Ukraine actually declared

independence, making the Donetsk People's Republic and the Luhansk People's Republic a reality for them. From that point onwards, the fighting between Ukraine and the separatists became more intense, with both sides using increasingly heavy weaponry.

Partly as a result of international pressure, a ceasefire was declared unilaterally by Ukraine on 20 June 2014, ushering in a brief period of relative calm in eastern Ukraine. The Ukrainian military resumed the ATO when that ceasefire expired on 1 July 2014. This led to fighting on two fronts: in the northeast and southeast of Ukraine. In the northeast, the Ukrainian army was able to advance successfully, and the separatists were driven southward in the first half of July 2014. Fighting in the southeast was much heavier however. Fighting there was long and fierce from the start of July, and was still ongoing on 15, 16 and 17 July 2014. This is the area where Pervomaiskyi is located, the site from which flight MH17 is alleged to have been shot down on 17 July 2014.

4.4.3.1.2 Was there an armed conflict?⁹

The court must first assess whether the conflict between the Ukrainian army and the separatists may be characterised as an armed conflict.

In the Tadić case, the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a generally accepted definition of the two types of armed conflict mentioned above:

'[...] an armed conflict exists whenever there is a resort to armed force between States [court: international armed conflict] or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State [court: non-international armed conflict].' ¹⁰

Since the accused all held positions inside the DPR and stand accused of committing the alleged actions in their capacity as holders of those positions as part of the conflict between the Donetsk People's Republic and the Ukrainian armed forces, the court will have to assess whether the conflict between the DPR - which was not a State - and the Ukrainian armed forces can be characterised as *"protracted armed violence between governmental authorities and organised armed groups."*

Duration and intensity of the violence

In order to make that determination, the court must, first of all, consider the question of whether there was ongoing armed violence of a certain intensity - in the sense of *protracted armed violence* - on the territory of Ukraine when flight MH17 crashed, and during the period prior to that. In order to answer that question, the court considers the following factors which are apparent from the case file.

From April 2014 onwards, three battle fronts developed in eastern Ukraine, together covering a considerable area. Clashes between the Ukrainian armed forces (both air and ground forces) and the separatist groups, or members thereof, occurred almost daily, ranging from shooting incidents to aerial attacks.

The parties to the conflict both used firearms, including hand-held weapons, mortars, anti-tank mines, anti-personnel mines, portable air defence systems, missile launchers, tanks, armoured vehicles and artillery systems, *inter alia* in combat. International organisations have estimated that, between mid-April and mid-July 2014, these hostilities resulted in some 1,000 casualties, including both civilian and military. Most of the civilian casualties reportedly were so-called collateral damage from fighting that took place in populated areas. Over 86,000 people, most of them women and children, were displaced and fled the region. According to international and non-international governmental and non-governmental organisations, numerous human rights violations also took place. The conflict in eastern Ukraine was a subject of repeated discussion in the UN Security Council.

Based on these factors alone, the court finds that the violence in eastern Ukraine, which began in April 2014 and was ongoing when flight MH17 crashed on 17 July 2014, lasted for such a prolonged period and was so intense that it can be said to be *protracted armed violence* between Ukrainian armed forces on the one hand and separatist groups, including the DPR, on the other.

Organisation of the DPR

The next question facing the court is whether the DPR was sufficiently well organised at that time to be described as an 'organised armed group', as the above definition requires. In answering that

question, the court considers the following factors.

The DPR was proclaimed as early as 7 April 2014 by armed individuals who were occupying the regional administrative building in Donetsk. Separatists in the Donetsk and Luhansk oblasts then declared independence on 11 May 2014 following referendums that were not recognised by Ukraine, making the DPR and the LPR a reality as far as they were concerned. Both of these republics appointed leaders and governments, and adopted their own constitution.

These constitutions set out the command structure and the assignment of duties within the organisation. They state, for example, that the Minister of Defence had direct responsibility for the armed forces at the operational level. Several militia groups, each with its own commander, operated under the banner of the Donetsk People's Republic. Interviews and intercepted telephone conversations indicate that most of these militia groups did indeed fall under the authority of the Minister of Defence, particularly as time went on, with the exception of the occasional militia group. Although it is not always clear how the different militia groups related to one another, and they did not always appear to share the exact same objectives, in the court's opinion it is possible to state in general terms that all the militia groups were using weapons to fight for independence, or a greater degree of independence, from Ukraine. It is clear that, as soon as the DPR was founded, the organisation adopted the strategy of asserting its authority over a number of cities in eastern Ukraine - including Sloviansk, Kramatorsk and Donetsk - using armed force, and of setting up headquarters in those cities, such as in the building of the Ukrainian Security Service (SBU) in Sloviansk and, later, in Donetsk.

What is more, it is clear from decisions delivered by the so-called Military Field Tribunal of the DPR that the organisation adopted martial law. On several occasions, the DPR also cooperated in establishing cease-fire agreements, which similarly indicates a certain degree of organisation and of involvement in armed violence.

The court finds that, taking all these factors together, in the period prior to and during the crash of flight MH17, the DPR was organised in such a way that it can be said to have been an organised armed group.

The fighting between the Ukrainian army and the Donetsk People's Republic can therefore be characterised as an armed conflict.

4.4.3.1.3 The nature of the armed conflict

As the court has established that, prior to and at the time of the crash of flight MH17, there was intense fighting between Ukrainian armed forces on the one hand and organised armed groups including the DPR on the other hand, the criteria for characterising the situation as a non-international armed conflict have been met.

Next, the court turns to the question of whether there is any reason to believe that the role of any other country in the conflict between the DPR and Ukraine was such that this armed conflict, which was non-international in geographical terms, can be characterised as a conflict that was in fact of an international nature (internationalised) during the period in question. This may be the case if a certain degree of involvement by another country can be established. In this case, that would refer to a significant degree of involvement by the Russian Federation. In this case - due to the position and/or role of the accused within the DPR - the issue is not whether the Russian Federation may have used violence directly against Ukraine separately from the armed conflict between the DPR and Ukraine (*direct* involvement by the Russian Federation), but rather whether the Russian Federation was involved in the DPR to such an extent that it can be characterised as having had overall control over the DPR. If the latter is the case, the non-international armed conflict between the DPR and the Ukrainian armed forces should actually be characterised as an international armed conflict and the question of combatant immunity may also arise. For that matter, in assessing whether the Russian authorities had overall control over the DPR, the court may also consider facts and circumstances that indicate direct involvement of the Russian Federation in hostilities, as will be discussed below.

In assessing the question of overall control, the court considers the following factors.

The background of members of the DPR

Several of the leaders of the DPR at the time were Russian nationals, and a number of them also had a background in the Russian armed forces. For example, the accused Girkin, at the time Minister of Defence of the DPR, is a Russian national, served in the Russian intelligence agency (FSB) and took part in the wars in Chechnya, Transnistria and Bosnia. His deputy in the DPR and 'head of intelligence' in the DPR, the accused Dubinskiy, is also a Russian national, has a background in the Russian military intelligence agency (GRU) and took part in the wars in Afghanistan, North Ossetia and Chechnya. It is not always clear, however, in what capacity the leaders within the DPR were involved in the DPR. Although several of them indicate that they were retired (reservists) in the Russian Federation and came to Ukraine independently and voluntarily, it is not clear whether this is actually the case or whether they were sent there by the authorities of the Russian Federation. Based on intercepted conversations, at least some of them appear to have had a close connection with the Russian Federation. For example, there was communication between the leaders of the DPR and Surkov, who was then the closest adviser to the Russian President Vladimir Putin, regarding appointments to several ministerial posts within the DPR. In an intercepted conversation recorded on 16 May 2014, Borodai said that the government (of the DPR) was about to be announced, that Moscow had surprised him, and that he would be appointed Prime Minister, much to the disappointment of another individual who had arrived in eastern Ukraine from Moscow. Borodai was indeed appointed Prime Minister of the DPR shortly after this intercepted conversation took place. On 15 May 2014, a conversation was intercepted between Borodai and the Chairman of the Supreme Council of the DPR regarding the appointment of a named individual to the post of Minister of the Interior; during that conversation, it was said that the candidate in question "suits Moscow" and that the "Moscow Generals" agreed. In another conversation later that day in which the same Chairman of the Supreme Council took part, he also said that the list of government posts for "the hero city" should not be made longer and that one named individual would certainly not sit on the Security Council because he had not been approved by Moscow. Furthermore, the person who at that time was Minister of Culture of the DPR stated in a witness interview that the Deputy Prime Ministers of the DPR came from Moscow and had significant influence over the functioning of the DPR.

Around the period to which the charges relate, several of the leaders of the DPR maintained ties with individuals from Russian intelligence agencies, the President's office, and Kremlin advisers. Intercepted conversations regularly contain references to contacting "Moscow". One example is a conversation between Dubinskiy and Bezler on 4 July 2014, in which Dubinskiy says that Girkin has been in touch with Moscow, and that Moscow does not want Sloviansk to be surrendered. The court also refers to a conversation that Girkin had on 10 July 2014 in which he told Dubinskiy that he was constantly on the telephone trying to get in touch with Moscow to report on the situation. Contact was maintained with various high-ranking individuals in the Russian Federation, sometimes using special communication channels ("the Glass") and secure telephones supplied by the Russian Federation. For example, Borodai, the leader of the DPR, was in almost daily contact with Surkov between 20 June 2014 and August 2014. In an interview on 16 June 2014, Borodai referred to Surkov as "our man in the Kremlin".

It is the opinion of the court that these references to "Moscow" and "the hero city" cannot be interpreted in any way other than as references to the seat of government, and are therefore understood to refer to the authorities of the Russian Federation.

Support

In their communications with senior figures within the Russian Federation, the leaders of the DPR regularly requested support such as the manpower, military equipment and requisite training. This support was indeed provided.

Statements made by representatives and reports by organisations such as NATO, the UN Security Council, the US State Department, the OSCE, and Human Rights Watch all mention the supplies and arms provided to the separatists from the Russian Federation. There are also references to convoys of military weapons which were said to have been brought across the border. This is consistent with what can be heard in intercepted conversations. For example, in one conversation intercepted on 12 June 2014, Dubinskiy says that it has become clear that Russia will provide support, including heavy weapons; in another conversation on 20 June 2014, Kharchenko tells Dubinskiy that the second convoy that came across the border is not what they were expecting; and on 15 July 2014, Girkin mentions expecting a shipment – a big thing that will be very good for "us" and which will need to be received at the border. Although intercepted conversations do not always reveal whether the weapons and supplies mentioned came from private providers or from the Russian government, the Minister of Culture of the DPR stated that Borodai forwarded requests for weapons from the Council of Ministers

of the DPR to the GRU. Following approval by the GRU, the weapons were brought into Ukraine via the "Black Zero" (by which the court understands: illegal border crossing). The court also notes that NATO repeatedly called on the Russian Federation to stop providing support and weapons to the Ukrainian separatists.

Witness statements also mention funding for the DPR provided by the Russian Federation. For example, the person who at that time was Minister of Labour and Welfare of the DPR stated that the person who arranged the funding received it with the cooperation of the Russian President's office and that the Russian Federation had been funding the DPR since at least the summer of 2014. Support coming from the Russian Federation is also mentioned in intercepted conversations. For example, in a conversation on 13 July 2014, one fighter for the DPR complained about the situation with kit and salaries, to which the response was that "they" are going to Rostov today for a shipment. The intercepted conversations do not generally mention the source of funding within the Russian Federation directly, other than to state that this was often routed via Rostov. The court concludes that this is a reference to the Russian city of Rostov.

Several witness statements mention military training programmes for DPR fighters which took place in the Russian Federation. This often involved training in Rostov (again, the Russian city). Intercepted conversations also include references to training programmes and a training camp. In one conversation that was intercepted on 2 July 2014, separatists talked about their urgent need for manpower and when the "men from the camp" will arrive, and on 3 July 2014, a fighter from the DPR said that the guys went "across the river" to train. Again, it is not always clear whether this training was provided privately or organised by or on behalf of the Russian authorities. However, one conversation by the person who at that time was Minister of Defence of the DPR, with which the DPR was cooperating, makes a clear reference to the role of the Russian GRU in this. In that conversation on 15 July 2014, the Minister was told about a training programme that was being provided for ten persons, to which the Minister replied that this should be done through the GRU. Some of the witness statements also reveal the involvement of Russian bodies in training programmes. For example, witness M58, who will be discussed later, stated that he was taken to the FSB and then to a camp in Rostov, Russia, where he received training. After that he was taken to the Donbas region.

Coordination and instructions

Of particular relevance to the question of whether there was overall control – regardless of the background of the members of the DPR and the Russian Federation's support for the DPR – is whether the Russian Federation assumed a coordinating role and issued instructions to the DPR. It is the opinion of the court that the case file contains abundant evidence for this. As indicated previously, many intercepted conversations include reports to "Moscow" or people working for "Moscow" regarding the situation on the ground, such as setbacks and successes. A number of intercepted conversations also attest to planning on the part of the authorities of the Russian Federation. For example, in a conversation intercepted on 3 July 2014, Surkov informed Borodai that Antyufeev (court: who became Deputy Prime Minister for State Security of the DPR shortly thereafter) was on his way to Borodai and that "they" will be leaving for the south on Saturday so that they will be ready for combat. Later, on 11 July 2014, Surkov told Borodai that he had spoken to those in charge of "this whole military story" and that they had indicated that they were making preparations and they were going to accelerate everything. Additionally, on 10 July 2014, a leader of the DPR called to say that he had received an order in Moscow to form the first Cossack Regiment of Novorossiia.

Intercepted conversations also mention Moscow's role in specific operations. In a conversation regarding Sloviansk intercepted on 4 July 2014, a DPR commander says there has been communication with Moscow, but that Moscow does not want Sloviansk to be surrendered. The DPR's Minister of Defence, the accused Girkin, stated in an interview given in July 2014 that this order was not followed because no concrete support was forthcoming. In a telephone conversation on 18 July 2014, two members of the DPR discussed the encirclement of a Ukrainian brigade. One of the two interlocutors stated that he had been in contact with Moscow and that Moscow had indicated that the lives of the soldiers should be spared. In a similar vein, a series of telephone calls between Borodai and a Russian number made on 21 July 2014 is noteworthy. Borodai wanted to speak to the boss, but the boss was not available. Increasingly insistently, Borodai asked if the boss could call him back because he needed advice and instructions on how to handle certain aspects of the MH17 disaster, such as the refrigerated trucks and the black box. Borodai would also like to receive talking points for a press conference. Borodai noted at that point that he assumed that "our neighbours" would want to say something about this matter. It is the court's opinion that the fact that Borodai talked about "our neighbours" and asked about "the boss", even though he himself was the highest-ranking person

within the DPR, confirms that the boss he was referring to was a representative of the authorities of the Russian Federation.

Direct participation of the Russian Federation

Reports and communications from various organisations mention shelling and artillery fire on Ukrainian territory, which is said to have been carried out from the Russian Federation. From the first half of July 2014 onwards, Russian soldiers would regularly move across the border and cross-border attacks would take place. One investigation by the *International Partnership for Human Rights* indicates that there was artillery fire on a Ukrainian encampment close to the border with the Russian Federation in early July 2014, and in an official notice issued on 16 November 2016 the Netherlands Military Intelligence and Security Service also states that, between 11 July 2014 and 17 July 2014, rocket artillery units located in Ukrainian territory close to the Russian border fired on unknown targets in Ukraine. According to the report, the vehicle tracks and traces of firing found showed that artillery installations entered Ukraine from Russian territory. Witnesses have also provided statements regarding Russian equipment manned by Russian military personnel, which crossed the border, fired shells and then returned. Intercepted conversations also confirm that such strikes took place. For example, in a conversation between two members of the DPR intercepted on 12 July 2014, the interlocutors mention that Russia had finally begun to open fire on the Ukrainian armed forces. In another conversation intercepted on 16 July 2014, two members of the DPR - namely the accused Dubinskiy and Pulatov - discuss the problems they were having because they were under fire. Pulatov indicated that Russia could let loose, to which Dubinskiy replied that he has indicated positions on the map that will be sent to Moscow. In a conversation on 17 July 2014, accused Dubinskiy said that Russia intended to fire on their positions from its side. These conversations are just a few examples of a number of similar intercepted conversations in the case file. All of this indicates not only some form of parallel direct involvement but also, and more importantly, coordinated military activities by the DPR and the Russian Federation.

To date, the Russian authorities have denied any involvement in the conflict in eastern Ukraine during the period in question. However, with respect to the foregoing, the court finds that the case file certainly shows that funding, men, training, weapons and goods were all provided to the DPR by the Russian Federation. In addition, as of mid-May 2014 at the latest, the Russian Federation had a decisive influence on appointments to several senior positions within the DPR, including those of Prime Minister and Minister of Defence. This gave the Russian authorities considerable influence over the leadership of the DPR. The fact that the Russian Federation did indeed exercise influence is apparent from the fact that the Russian authorities were involved, at times directly, in coordinating and carrying out military activities even prior to the crash of flight MH17.

In view of the above, the court concludes that the Russian Federation exercised overall control over the DPR from mid-May 2014, at least until the crash of flight MH17. This means that the armed conflict, which was non-international in geographic terms, was internationalised and was therefore an international armed conflict.

The court therefore finds that on 17 July 2014, an international armed conflict between Ukraine and the DPR was taking place on Ukrainian territory, and that the DPR was under the overall control of the Russian Federation.

4.4.3.1.4 Combatant status

Now that the conflict between Ukraine and the DPR must be viewed as an international armed conflict, the provisions of international humanitarian law governing combatant status apply. The court therefore turns to the question of whether members of the DPR can claim such status.

Member of the armed forces of the DPR - Definition of combatant under Article 43, AP I

Pursuant to the provisions of Article 43 of the first Additional Protocol to the Geneva Conventions, members of the DPR can only be considered combatants – and therefore only have had the ‘right’ to take part in hostilities – if they were members of the armed forces of one of the combatant states, in this case the Russian Federation. In this respect, the armed forces of the Russian Federation can be viewed as being all the organised armed forces, groups and units under a command that is responsible to the Russian Federation for the conduct of subordinates. Furthermore, these armed forces must be subject to an internal system of military discipline which enforces, among other things, compliance with the rules of international law. Combatant privilege can only be claimed successfully if these criteria are met.

Firstly, the court notes that the DPR was not part of the official armed forces of the Russian Federation but rather – as outlined above – was subject to overall control by the Russian Federation. However, the characterisation of overall control is not, in itself, sufficient to conclude that it was under a command that was responsible to the Russian Federation for the conduct of its subordinates. For that, the Russian Federation would also have to accept that the DPR was part of the Russian Federation and take responsibility for the conduct and actions of the fighters under the DPR's command.

The court concludes that this is not the case, because the Russian Federation has denied, and continues to deny to this day, having any control over or involvement in the DPR during that period, and the accused have also publicly denied being part of the armed forces of the Russian Federation at that time. Therefore, DPR fighters cannot be seen as part of the armed forces of the Russian Federation.

Since the DPR cannot be viewed as part of the armed forces of the Russian Federation, the members of the DPR also cannot be considered part of those armed forces. For that reason alone, then, they were not entitled to participate in hostilities and are therefore not entitled to immunity from prosecution. The court is therefore not concerned with any of the other requirements for the possible invocation of immunity, such as whether the accused complied properly with the provisions of international humanitarian law.

For the sake of completeness, the court notes that the literature argues that the criteria of Article 4(A) of the Third Geneva Convention (GC III) should also be considered when assessing whether accused are entitled to combatant privilege. The court finds that this is incorrect. That article is not concerned with combatants and their privileges and immunities, but rather with the status of prisoners of war.

4.4.3.2 Conclusion

The court concludes that there is nothing that points to the existence of any international law limitation on the jurisdictional provisions. The prosecutor, therefore, has the right to prosecute.

Since the condition set by the prosecution in its conditional application with respect to combatant immunity has not been met, that application requires no further discussion.

4.4.4 Did the prosecutor forfeit the right to prosecute?

4.4.4.1 Preamble

If procedural rules were not followed during the preliminary investigation (if procedural errors or omissions were made) and these can no longer be remedied, the court may attach consequences. A procedural defect refers to the failure to comply with written and unwritten rules of criminal procedure, including statutory and treaty provisions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Those rules exist to make effective fact finding and trial possible, while being mindful and respectful of the rights and interests of all parties involved in the criminal proceedings. These are therefore fundamental rules that go to the heart of due process. It follows from the law and the case law of the Netherlands Supreme Court that the procedural errors or omissions in question are necessarily ones made during the pre-trial investigation, including violations of standards during detection of the crime. These procedural defects must also have had a decisive influence on the course of the investigation into and/or prosecution of the accused for the offence for which he is being prosecuted.

As the rules violated may be of differing nature and impact, there will be differences in the legal consequences to be attached to the violation. In increasing degrees of gravity, the following consequences may be attached to a procedural defect: its mere observation, the reduction of a sentence, the exclusion of evidence or the barring of the prosecutor from prosecution.

When a procedural defect is raised by the defence, the court must first assess whether the facts and circumstances underlying the defence's argument have been demonstrated and constitute a procedural defect. Additionally, if a procedural defect has arisen, the court will have to make a substantiated decision as to whether and, if so, what legal consequence should be attached to the procedural defect identified. This in turn depends on the seriousness of the procedural defect, the interests of the accused that were violated as a consequence, whether a fair trial was jeopardised by the violation or whether it 'merely' constituted a breach of a rule or principle of criminal procedure

that does not directly result in an unfair trial, and whether irregularities occurred that substantially affect the reliability and accuracy of investigation results.

When considering exclusion of evidence, the court may also consider whether that legal consequence outweighs the foreseeable negative effects of the consequence and whether it does not cause unacceptable prejudice to compelling interests such as establishing the truth, punishing the perpetrator of a serious criminal offence and respecting the rights of victims and their relatives, not least in view of the positive obligations to impose effective punishment arising from the ECHR.¹¹

In general, the greater the seriousness of the procedural defect and its consequences, the graver the legal consequence the court can attach to it. It follows from Netherlands Supreme Court case law that the gravest sanction for a procedural defect, the barring of the prosecutor, can only come into play in very exceptional cases. The procedural defect will have to involve the officers tasked with the investigation or prosecution having seriously violated principles of due process, which violation, intentionally or with gross disregard for the interests of the accused, has prejudiced his right to a fair hearing of his case. It must also be an irreparable violation of the right of the accused to a fair trial that has not been or cannot be compensated for in a manner that meets the requirements of a proper and effective defence, leading to the court to conclude that "the proceedings as a whole were not fair".¹² Prosecuting is in such a case plainly unreasonable. The less far-reaching sanctions of exclusion of evidence, reduction of sentence or mere observation must always be considered by the court first, before the most far-reaching sanction of barring from prosecution can enter the picture.

Defendant Pulatov's counsel identified a large number of issues which, in the view of counsel, each in isolation, but certainly taken together, constitute such serious violations of statutory and treaty principles and principles of due process (and so are procedural defects), such that the defendant did not enjoy a fair trial. In the opinion of the defence, the prosecutor has forfeited his right to prosecute and the only proper consequence is that he be barred. The many issues raised by Pulatov's counsel are enumerated in Parts I and II of the defence's pleading notes and the submissions subsequently made in rejoinder. The arguments made involve not only a great deal of stratification, but also of conditional interconnection. Moreover, those arguments frequently refer forwards and backwards to arguments made in other places and at other times and in support of earlier and different positions. The court has therefore concisely summarised those arguments in its discussion of them.

The court distils from Netherlands Supreme Court case law that the key criterion it must apply when assessing the possible presence of procedural defects to which barring from prosecution may be attached is that of the "overall fairness of the trial" as formulated by the European Court of Human Rights (ECtHR). That overall fairness consists of two pillars that reinforce and complement each other. The first is that the court to whom the case (the indictment) is submitted for assessment examines the case and then, applying the relevant rules, openly, independently and impartially and without bias, arrives at a substantiated judgment in the interest of the accused and the other parties involved. The second pillar is that the accused, or his or her counsel on his or her behalf, has been able sufficiently to counter the evidence and the charges with whatsoever he wishes to raise against them and, to that end, has been able to conduct or commission the counter-investigations he or she desires. He must have had sufficient time and opportunity to do so. Thus, in order for there to be overall fairness to the accused, he or she must have been able to exercise the right to defend him or herself in an optimum fashion and also have the confidence that the court which is assessing his case will, following a thorough examination, arrive at a balanced and objective judgment. What constitutes overall fairness depends in part on the circumstances of the case. Overall fairness, in the opinion of the court, is not only determined by the interests of the accused; it also involves taking into account the legitimate interests of other persons involved in the criminal proceedings, *inter alia* victims, relatives and witnesses and, in addition, the public interest in the investigation and punishment of the specific crime in question. How those interests should be weighed may also change as the criminal proceedings progress. Furthermore, existing imperfections may still be remedied over the course of the proceedings.

Whether overall fairness was achieved is, in principle, something which can best be assessed in retrospect. After all, at that time it will be known whether the court properly weighed all the interests involved and assessed their weight in relation to each other in a proportionate fashion. The assessment can then include the entire trial, as well as, not insignificantly, the final decisions made by the court and how the court's choices and decisions were substantiated. When the issue of the prosecutor's right to prosecute comes into question owing alleged procedural defects, there are two points in time when the court must assess whether overall fairness has been observed, first at the

early stage in the proceedings when preliminary objections are raised, and second prior to delivering its judgment. The court necessarily is thinking ahead at these two points in time. This also means that, to some extent, the court will also have to assess its own conduct during the trial. After all, it is not only the choices made by the prosecution and the investigative services during the preliminary investigation that determine whether or not one can speak of overall fairness, but also whether and how the court approves, rejects or remedies those choices, the reasoning it uses in doing so and the way in which it accommodates the interests of all parties involved at trial.

The position of the Netherlands Supreme Court is that potential procedural defects that do not directly affect the right to a fair trial do not, in any case, meet the threshold for the potential legal consequence of barring from prosecution. Where appropriate, the court will consider whether any other, less grave, legal consequence needs to be attached to a procedural defect identified in this case. Irrespective of that, the court will still consider whether any accumulation of procedural defects that individually do not meet the threshold for barring from prosecution may collectively lead to the conclusion that the accused did not receive, or was no longer receiving, a fair trial.

4.4.4.2 Stance of the prosecution in the proceedings

Under the heading 'Stance of the prosecution in the proceedings', the accused Pulatov's defence counsel submits two main arguments that should lead to the barring of the prosecutor from the prosecution. These concern the violation of the presumption of innocence (in particular) in media statements and the 'summons without prior notice' of defendant Pulatov with all the resultant consequences for the trial.

Violation of the presumption of innocence through disclosures

Counsel of defendant Pulatov argued that almost no-one could still believe in the innocence of the defendant or his three co-accused because the Joint Investigation Team (JIT) and the Public Prosecution Service, as well as other authorities,¹³ had, repeatedly and in categorical terms, publicly given their opinion on the crimes allegedly committed regarding flight MH17 and on who the alleged culprits were. Counsel stated that at one point defendant Pulatov and his three co-accused were named as the perpetrators of these crimes and their pictures were displayed in front of the entire world's press. In doing so, the defence has repeatedly indicated, in more or less explicit terms, that this loss of the presumption of innocence must also apply to the judges in this case.

The court considers it a given that the JIT and the Public Prosecution Service expressed themselves in quite categorical terms at several press events prior to the trial about what they believe happened to flight MH17. Up until the press conference on 19 June 2019, this consisted of public statements about which weapon was used, originating from where, fired from where and by which party in the conflict. At the press conference on 19 June 2019, these statements were coupled with the names and images of the four accused in these criminal proceedings, with the clearly repeated announcement that, as suspects, these individuals would be prosecuted for the crimes. When doing so, reference was also made to the presumption of innocence. The statements at all these press events were made by senior representatives of the Public Prosecution Service and the JIT.

The court agrees with counsel for defendant Pulatov that the presumption of innocence requirement in Article 6(2) ECHR extends not only to the court, but also to other public authorities, including the Public Prosecution Service and the JIT. However, the court is of the opinion that it remains a matter of debate whether the statements made during the press conferences by senior representatives of the Public Prosecution Service and the JIT constitute a violation of the presumption of innocence under Article 6(2) ECHR. After all, even if this were the case, it does not mean that the right to a fair trial enshrined in Article 6(1) ECHR has also been violated. That would require that the court hearing the case (and all other judges who could potentially hear this criminal case) had been so influenced by these statements that they could no longer make an unbiased decision on the matter. Quite apart from the fact that this bar is set very high by the ECtHR for a panel composed exclusively of appellate judges, and that, at least in the vision of the court, no such influence has ever been assumed by the ECtHR for appellate judges, this court was aware from the outset in broad terms of what had already been stated in the media prior to trial. This was also explicitly stated by the court in its introduction on the first day of court. Over the course of the trial, counsel for defendant Pulatov repeatedly pointed out and issued warnings about all the media coverage, such that for this reason alone it may be assumed that the court was continuously aware of it. The court distanced itself from this media attention. There is therefore no objectively justifiable fear of bias on the part of the court, let alone concrete facts presented by counsel for defendant Pulatov to demonstrate such bias. Moreover, it

could only be assessed in retrospect, by another court, whether this court may have been biased, taking into account the course of events at trial, how the evidence was interpreted, the court's reasoning, and the outcome of these criminal proceedings. Therefore, any violation by the Public Prosecution Service and the JIT of Article 6(2) ECHR does not meet the threshold to bar the prosecution for violating Article 6(1) ECHR.

The foregoing also applies to statements made in the press or elsewhere by other senior public officials. The court agrees with counsel for defendant Pulatov that members of the Dutch House of Representatives and the Prime Minister of the Netherlands, among others, have expressed themselves in fairly categorical and unsubtle terms about the causes of MH17's fate. However, those statements – insofar as they pertained to this criminal case or the accused – cannot be attributed to the prosecution and, like the statements made by the prosecution and the JIT, did not contribute to or influence the court's decisions over the course of the trial or on the outcome of this case.

In a similar vein, the court further notes on this point that the contention of counsel for defendant Pulatov that counsel for the relatives adopted the JIT scenario without any critical note and thus had little regard for the presumption of innocence, can hardly be blamed on counsel for the relatives. Indeed, this refers to the commentary provided by counsel for the relatives on the claims for compensation filed by the relatives, which are only eligible for adjudication if the charges are proven. The relatives cannot be expected to conduct their own investigation into the offences to which their claims are linked. So it is only logical that they should assume that that which has been charged will be proven. Needless to say, even this position taken by counsel for the relatives gave the court no premature thoughts regarding the outcome of the case.

Communicating the full names and other personal details of the accused, combined with displaying their photographs, at a press conference broadcast globally goes beyond the type of dissemination of information that is usual for criminal cases. Irrespective of the influence this may have had on the general public and the impact that this may have had on the personal lives of the accused, these are not factors that influenced the court, nor when taken in conjunction with the aforementioned statements by the Public Prosecution Service and the JIT about the alleged circumstances surrounding the crash of flight MH17. In addition to the arguments already mentioned above, another relevant factor is that the court knows the identity of the persons to be prosecuted prior to any trial. This is in fact always the case before the start of the hearing, at which time the court is informed even further about the identity and personal details of, and personal information about, the accused than the public was at the press conference. After all, the court receives the prosecution file containing such personal information. Thus, the court is even more extensively and broadly informed about the accused than the general public. The professional judges are in no way prejudiced in their judgments by these disclosures. Therefore, the fact that in the present case this information was openly shared with the public via a press conference did not influence the court in any way, let alone lead the court to adopt a position *a priori* on what allegedly happened to flight MH17 and on the involvement or even the guilt or innocence of these particular accused. There is no indication from the manner in which the court arranged, conducted or completed the trial that the court had already adopted a particular position on the case.

However, notwithstanding the foregoing, in the view of the court, the manner chosen by the prosecution and the JIT to communicate on the fate of flight MH17 and announce the suspects in these criminal proceedings does give pause for thought. Although this method of communication and these announcements did not affect the court's objectivity, in the court's view they did contribute to shaping public opinion on this criminal case. This is partly due to the close interrelationship in this case between the statements about what allegedly happened to flight MH17 and the wording of the charges against the accused. In that sense, stating the personal details of the accused at the press conferences and showing their photographs might quite easily be considered to be a potential infringement of the right to privacy protected under Article 8 ECHR. Such an infringement is, however, permissible if it is provided for by law and is necessary in a democratic society. However, the prosecution's explanation is not one that immediately appears to satisfy the requirement of necessity, nor the proportionality and subsidiarity to be respected in that regard.

Informing the general public and relatives of the intention to prosecute is considered by the ECtHR to be an important and justifiable purpose in itself.¹⁴ The court certainly recognises this interest in a case on the scale of and with social impact of the MH17 case. In the view of the court, however, it is not readily apparent that this provision of information could not have been achieved other than through what appear to be carefully selected press events broadcast worldwide, and during which, not

only were categorical and definitive statements made by senior investigating and prosecuting authorities about what had happened to flight MH17, but personal details and photographs of the accused were also revealed. The right of the relatives, in particular, to be apprised of the outcome of the investigation, the reasons why and the circumstances under which the alleged crimes were committed, as well as the identity of the suspected perpetrators, is undeniable. However, throughout the preliminary investigation phase, the Public Prosecution Service was in a position to communicate directly with the relatives and to keep them informed of progress, without recourse to the media. The court is at a loss to explain why, when it came to announcing the initiation of prosecution, that was no longer possible or preferable, but instead it was necessary to inform them all at once. Moreover, it is unclear why informing the general public required the names and other details of the accused, let alone their photographs, to be released. After all, the only message that needed to be released to the general public at that stage was that suspects were going to be prosecuted. This could have been done with less information, such as the number of suspects and possibly their nationalities. The additional details were of no added value when it came to informing the general public, even though the caveat that they were suspects not perpetrators was stated explicitly and repeatedly, contrary to the account of counsel for defendant Pulatov, as mentioned above. The additional information concerning the suspects was of added value for the relatives, but they could have been informed of it in other ways.

At the same time, however, the court also notes that three of the four accused raised no objection to this course of action, let alone indicated which of their specific interests had allegedly been harmed. The court further notes that, more or less simultaneously with the announcement that the suspects in question were to be prosecuted, international alerts were issued for them and so they were placed on wanted lists together with the usual photographs and personal details, as was to be expected in this case. A simple internet search immediately yields the names and photographs of the four current accused. Given the huge public interest and the active attitude of the media in this case, any search by those means would have quickly revealed the identity of the accused and their details. In the opinion of the court, therefore, the eventual violation of the privacy of the accused as a direct consequence of the proactive and ample provision of information by the JIT and the Public Prosecution Service at the aforementioned press conference alone, was limited. Moreover, as that infringement was of no consequence for the fairness of the trial within the meaning of Article 6(1) ECHR and the consequences for the accused's privacy were not solely a result of this procedural error, the procedural error cannot lead to the prosecutor being barred from prosecution. The court will, however, return to this matter when addressing sentencing.

Neither is the court's opinion regarding whether the prosecutor has the right to prosecute altered by the interview in the leading Dutch newspaper NRC Handelsblad with the leader of the team of prosecutors investigating the flight MH17 disaster, which appeared a few days after the prosecution made its final submissions and sentencing request to the court. Although that interview also contains very categorical and sometimes even unnuanced statements by the team leader, which were made outside court while criminal proceedings were ongoing, in essence they are no more than a repetition of what the prosecution had said in court shortly beforehand in its final submissions and sentencing request, which could be followed and watched in its entirety on the livestream. In the opinion of the court, the repetition of those statements at that moment in a newspaper interview will have had little effect on public opinion that had not already been achieved by the prosecution's final submissions and sentencing request in court.

In the opinion of the court, however, the situation regarding the application launched on the internet by the prosecution on 18 May 2022 is different. This application, entitled The MH17 Criminal Files, "is intended to offer the next of kin and the wider public detailed and accessible information from the case file." The website reads "In this publication you can read, hear and see what evidence there is, among other, in the case file." The court has already expressed its surprise in the courtroom at the launching of this application, because of the timing and the way in which it was placed online. In relation to the preliminary matters, the court adds the following.

The way in which the application was laid out and designed meant that it was not a spontaneous instrument, but one that took a great deal of time, effort and preparation. As such, its launch was a planned action by the prosecution, and the timing of its launch must have been carefully chosen. For these reasons alone, sharing the contents of the prosecution file that was still under review by the court (and therefore also the 'property' of the court, and no longer of the prosecution) with a wide audience, in this planned manner and in part using documents from the case file, is contrary to the principles of due process. No one other than the court to which the case has been assigned can or may decide on the dissemination or sharing of the case file in any way. The prosecution should be

aware of this, which is why the only possible conclusion is that the prosecution deliberately acted in contravention of this principle. This is all the more true given that, less than two hours before this application was placed online, the court had lifted a restriction on the provision of information to the relatives, who are a party to these proceedings no less, that had been in place until that point. After the restriction was lifted, however, the explicit condition still applied that the documents were only to be used for the criminal procedural purposes for which they were intended. In that light, therefore, the application itself, and above all the timing of its launch and the inclusion of substantive documents, must be seen as being in blatant disregard of an express decision of the court. Moreover, the application lacks any qualification or any reference to the detailed arguments and positions presented by counsel for defendant Pulatov, *inter alia* regarding the probative value of and degree to which certain documents in the application might be usable by the court. The application has nothing to do with the prosecution's duty to inform the public in general, and victims and relatives in particular. After all, that duty had already been comprehensively fulfilled at the appropriate time: the hearings for the prosecution's final submissions and sentencing request. Therefore, the court cannot but view this application as an unsubtle attempt by the prosecution – what is more, outside the court – to convince the world that the prosecution's case was right. The court is therefore of the opinion that the prosecution cannot reasonably claim that the publication of this application could serve any interest protected by enforcement under criminal law, let alone that this decision was the result of a fair and reasonable balancing of interests. It was unnecessary and gravely detracts from the magisterial performance that can and must be expected of the prosecution.

Nor did the prosecution choose to publicly account at the trial for why this application was launched. In a very brief email message to the defence counsel of defendant Pulatov, who rightly requested clarification and explanation, the prosecution merely indicated that it saw no reason to go back on its decision to launch the application. The court is therefore of the opinion that the launching of this application violates the principles of due process.

Although the court is extremely displeased by this action on the part of the prosecution, which persists to this day as the application continues to be maintained, the court did not allow this to affect its unbiased and unprejudiced approach to and assessment of the prosecution file and the charges, nor did it trammel counsel for defendant Pulatov's ability to present a defence in these criminal proceedings. For this reason alone, this procedural defect does not meet the threshold of an infringement of the accused's and his co-accused's right to a fair trial that can no longer be remedied, and therefore it cannot lead to the prosecutor being barred from prosecution. The court will, however, return to this matter when addressing sentencing.

At this point in the judgment, it is sufficient to conclude that the disclosures made by the prosecution and others provide no basis for barring the prosecutor from prosecution.

"Summons without prior notice"

In summary, counsel for defendant Pulatov asserted that Pulatov did not receive a fair trial because he was summoned without notice by the Public Prosecution Service, without first having been informed of any allegation against him. The defence refers to this as "summons without prior notice", while the prosecution refers to the timing of the summons. However, both mean the same thing: issuing a writ of summons without giving advance notification of the existence of an allegation.

It is not in dispute that each of the accused in these criminal proceedings was the subject of an official document setting out allegations that long predated the time at which they could have first learned that they had been identified as suspects, namely by following the aforementioned press conference of 19 June 2019 or by reading communications from the prosecution on the matter, immediately before the start and after the end of that press conference, using the social media accounts and/or telephone numbers attributed to them. In those communications, the specific allegations against the accused were relayed for the first time, the fact that a summons would be served on them was announced and they were invited to respond to the allegations. Formally, however, the accused were not summoned until later in 2019, when the writ of summons was sent to their respective national authorities, with a request that it be served on them and a request to interview them regarding the charges contained therein. That is formally the moment at which they became aware of the allegations against them.¹⁵

Counsel for defendant Pulatov has submitted that this rather unusual method of issuing a summons did not allow the defendant to be questioned at the preliminary investigation stage, at which time his position on these matters could still have influenced the decision on whether or not to serve the

summons. Furthermore, as a consequence, the defendant was unable to have counter-investigation conducted by the investigating judge *in camera*, contrary to customary practice. Moreover, as a consequence, to the detriment of the defendant, a different framework for assessing requests for investigation was applied than would have been the case if the investigation had been conducted by the investigating judge, and, as a consequence, he was denied access to the file for longer than necessary. As the defendant was thereby deliberately excluded and remained excluded for a long period of time, the principle of equality of arms was violated, and defendant Pulatov was not given a fair trial. At the very least, the principles of due process were violated to such an extent that this should result in the prosecution being barred.

The court first states – as counsel for defendant Pulatov has also submitted – that ‘summons without prior notice’ is a power that the prosecution may use based its prosecutorial discretion, and that this method of summoning is not ‘prohibited’ or liable to sanction under the DCCP. The decision whether and how to prosecute is a discretionary matter, which lends itself only to a very limited degree to any substantive judicial review. With respect to the specific allegations made, it is clear that the prosecution did not act in contravention of any of its own guidelines or policies; after all, issuing a writ of summons is the rule in the event of offences under Section 168 DCC and Sections 287 and 289 DCC. Moreover, no commitments were made by the prosecution prior to the summons regarding investigations to be conducted first by the defence. Therefore, contrary to the examples cited by counsel for defendant Pulatov, **16** the principle of legitimate expectations was not violated. This does not alter the fact that the method of summoning in the context of the entire investigation and prosecution could, under some circumstances, constitute a procedural defect, to which legal consequences could be attached by the court pursuant to Section 359a DCCP.

It was argued by counsel for defendant Pulatov that the prosecution deliberately issued writs of summons “without prior notice” entirely for the purpose of restricting the defendant/the accused in his/their ability to proffer a defence, and that for that reason the prosecutor should be barred from prosecution. The court will discuss in greater detail below the consequences of the “summons without prior notice” for the options available to the defence, and the motives of the prosecution in opting for this form of summons, but, with reference to the considerations outlined above, the court first of all states that the court does not regard this form of summoning, as such, to be a procedural defect.

It is true that summoning the accused in this manner prior to the public hearing of the case did not allow him to have investigation of his own done in the relative privacy of the office of the investigating judge. Counsel for defendant Pulatov correctly submitted that arriving at a more balanced and complete investigation was specifically a goal the lawmakers intended to achieve by introducing the Position of the Investigating Judge (Further Measures) Act. **17** The lawmakers specifically intended to ensure greater involvement by a judge in the preliminary investigation for the purpose of establishing checks and balances, given the often conflicting interests of parties to the proceedings. However, the introduction of this law did not deprive the court hearing the case of the opportunity to conduct or commission additional investigative work, thus guaranteeing checks and balances. That is also true in this case. Counsel for defendant Pulatov was given the opportunity by the court, and took full advantage of that opportunity, to submit requests for investigation to the court with a view to responding to the results of the criminal investigation by presenting whatever it deemed necessary. The court gave counsel for defendant Pulatov every opportunity to do so and set ample deadlines for filing these requests for investigation.

Contrary to the assertions of counsel for defendant Pulatov, the court applied no other criteria in assessing the requests for investigation submitted than would have been the case if this investigation work had taken place under the direction of the investigating judge pursuant to Section 182 DCCP. In fact, even prior to the commencement of the trial, and following consultation with counsel for defendant Pulatov and the prosecution, the court explicitly determined that the defence would not have to make requests for further investigation until the June 2020 series of court hearings, which requests the court would then assess based on the necessity criterion, but in such a way that the outcome would not be substantially different from if the ‘interest of conducting a proper defence’ assessment criterion were applied. In so doing, the court explicitly referred to the principle of equality of arms, which is an integral part of the right to a fair trial. In June 2020, counsel for defendant Pulatov filed the first part of the defence’s requests for investigation. Owing to the outbreak of COVID-19 and the consequent sudden restrictions on communicating with their client, the court allowed defence counsel to file further requests for investigation at a later date. In its interlocutory decision dated 3 July 2020, the court ruled on part of the requests for investigation submitted, having applied the stated criterion, but also deferred a decision on a large part of them because, in brief, it

deemed it important in order to be able to assess them that it have knowledge of defendant Pulatov's position and insight into the remaining requests for investigation to be submitted and the justification underpinning them. At that time, defendant Pulatov had not yet commented on his stance in this trial. Depending on whether or not consultation with defendant Pulatov was required, those remaining requests could be filed in September or November 2020, respectively, according to the decision of the court. Due to the need identified by counsel for defendant Pulatov to modify and supplement its wishes and requests with regards to investigations in the light of discussions with and input from defendant Pulatov, in September 2020, the court granted the defence even more time than previously promised, and the remaining requests for investigation were not submitted until the hearing in November 2020. The court ruled on these and on the previously postponed requests on 25 November 2020, explaining that, in assessing the requests, the primary consideration had been their relevance, rather than the time the requests were filed as was customary under case law at that time. That method of assessment, which is more favourable to the defence, is in line with the criterion employed by the ECtHR in its ruling some months later in the so-called Keskin case. In respect of this point, too, the defendant's interest was not prejudiced in any way. As indicated above, a long period of time was allowed for case management in this court case, during which counsel for defendant Pulatov exercised their rights extensively and were given, and took, ample opportunity to present the defence's view on many points.

Therefore, not being involved in the preliminary investigation was at worst less practical, but, in view of the extended and indeed further prolonged pre-trial phase held by the court, during which counsel for defendant Pulatov was able to present all their requests for investigation to the court in full, as would have been the case with the investigating judge, it can hardly be considered a procedural defect that negatively affected the defence rights of the defendant.

The court also extended the opportunity to raise preliminary objections until the first day of the series of hearings held in June 2020. Ultimately, however, counsel for defendant Pulatov did not avail itself of this opportunity, rather it indicated at the hearing that day that it had decided not to raise any preliminary objection regarding combatant immunity at that time, but might raise that defence at a later date. In doing so, defence counsel explicitly forfeited the opportunity to raise preliminary objections. The court notes that many lines of defence of a potentially preliminary nature were ultimately raised during oral argument, to which the court responds in this judgment in the context of the preliminary matters. In that respect, too, therefore, counsel for defendant Pulatov was not prejudiced in any way.

Furthermore, the court fails to see how defendant Pulatov could have been disadvantaged by having to submit his requests for investigation in open court rather than in the privacy of the office of the investigating judge. The number of requests for investigation, the generous use of the opportunities to file them through to rejoinder and the manner of explaining those requests do not attest to any perceived limitation in that regard bearing on counsel for defendant Pulatov. Moreover, explaining the requests for investigation at the hearing also allowed the defence to bring its positions to the attention of the public. In addition, from the very first court day, the defence was free to request an open referral of future requests for investigation to the investigating judge for assessment, or to request that the trial be held in closed session, at least for that phase of the proceedings given the interests that the defence argued needed to be protected. Furthermore, counsel for defendant Pulatov could have commented on the use of the livestream at that stage of the court case. However, defence counsel failed to take any of these actions.

Counsel for defendant Pulatov also complained that he had not been invited for questioning until after his summons. This is in fact true of all the accused. The court notes that the prosecution did not submit a request for mutual legal assistance to the Russian Federation to question the accused prior to the summons.¹⁸ It was argued that, in light of previous statements by and responses to requests for mutual legal assistance by the Russian authorities, the likelihood of the timely execution of a request for questioning was extremely low from the outset. That argument fails to convince the court that it was therefore not worthwhile for the prosecution to make the necessary efforts to secure a proper interview. This applies all the more because just such a request, made after the summons with regard to defendant Pulatov, was executed without any problems. This meant that the accused did not have the opportunity to give their perspective on the charges against them, or on the material the prosecution had gathered in support of those charges, prior to their summons. As a consequence, the accused were unable to dissuade the prosecutor from issuing a summons. This may threaten the right not to become further entangled in criminal proceedings.

At the same time, the court also notes that, except for defendant Pulatov, the accused did not comment on this point, thereby failing to specify an interest of theirs that was allegedly affected. On 13 November 2020, defendant Pulatov complained for the first time that he had been summoned "without prior notice" and without an invitation for questioning, but at that time the argument was made only in the context of the assessment criterion to be applied to requests for investigation, and not with the conclusion that the "summons without prior notice" meant that he was unable to prevent criminal proceedings being brought against him. It was only when presenting its oral submissions later in the trial that the defence attached that inference to the failure to question him earlier. Counsel for defendant Pulatov is of course at liberty to make that argument, but it is surprising in light of the assertion that, as a consequence, the defendant was wrongly exposed to a public criminal trial where very grave charges were levied against him. After all, prevention is better than cure. The argument presented by counsel for defendant Pulatov, that complaining was futile because, after the presiding judge had set the date, and after the "summons without prior notice", the possibility of a writ of summons not being issued was purely theoretical, is incorrect. After all, the alleged interest of a proper defence in conducting preliminary investigation could have been invoked by defence counsel in a request to the prosecutor to withdraw the summons. Merely stating that this possibility was futile without attempting it is, in the opinion of the court, insufficient to show that the defendant's own position, that serious harm was suffered as a result of the prosecution's action, is valid. Moreover, the fact that the presiding judge had already set a date for the start of the trial, at the request of the prosecutor, in no way diminishes that possibility. Indeed, given its dual nature as a summons and an indictment, a writ of summons also states the date of the first hearing. In other words, before a writ of summons can be issued, that date must have been set. Therefore, for that very reason, a request for the withdrawal of a writ of summons can only be made once a date has been set.

Furthermore, the court notes that defendant Pulatov was given the opportunity to be questioned before the court proceedings began. However, at that interview, which took place under the direction of the competent authorities of the Russian Federation, in the presence of his Russian counsel, and on the advice of his Dutch lawyers, who were already assisting him at that time, defendant Pulatov stated emphatically that he was invoking his right to remain silent. Defendant Pulatov did, however, indicate that he wished to testify before a Dutch court. The way in which this could be achieved without defendant Pulatov running the risk of being taken into pre-trial detention (an interest which cannot in fact be respected in law) was discussed at length, on several occasions, in court. Nevertheless, defendant Pulatov in fact never took advantage of the opportunity to be questioned by a Dutch judge. Finally, as already touched upon above, counsel for defendant Pulatov could also have raised a preliminary objection on this point, which, if it had succeeded, might well have resulted in no further public hearing of the criminal case against counsel's client.

It must therefore be noted that defendant Pulatov did not avail himself of the opportunities offered to him. This was his own choice, and cannot be attributed to the prosecution. Just like the other accused, defendant Pulatov himself deliberately chose not to appear at trial and to rebut the charges against him as he saw fit in court, nor did he avail himself of the opportunity presented to him to be interviewed by the investigating judge. The court concludes that the defendant did not avail himself of several opportunities early on in the trial to convey his account of events thoroughly, with the opportunity to have his testimony considered as to whether the trial against him should proceed. Moreover, the court can but note that, after defendant Pulatov gave his account in the manner of his choosing, and after further investigation was conducted on that basis, the prosecutor still demanded a sentence of life imprisonment, such that it is not plausible that, even if he had been invited for questioning prior to the summons and he had already given his account at that time, this would have prompted the prosecutor to refrain from summons and prosecution.

Taken together, all this leads the court to conclude that, under these circumstances, there can be no question of a procedural defect within the meaning of 359a DCCP, as a result of which his defence was prejudiced or he could no longer receive a fair trial.

Finally, the court discusses the argument submitted by counsel for defendant Pulatov that, as a result of the "summons without prior notice", the defendant was denied access to procedural documents for longer than necessary. The court notes that the prosecution did refer to this point in reply, but did not respond to it. Arguably, reading between the lines of the positions of the prosecution that the failure to provide documents from the prosecution file in a timely manner was not so much a consequence of, but rather a reason for the "summons without prior notice". Be that as it may, it is noted that, after counsel for defendant Pulatov announced that they would be acting in this case, said counsel received the prosecution file at the same speed as the court. In other words, according to the letter of the law,

there is no question of any impediment to inspection of case documents as referred to in Section 30 DCCP. After all, said documents were provided to counsel for defendant Pulatov upon request, once it was clear to defendant Pulatov that there were charges against him,¹⁹ and there was no objection made with respect to withholding of case documents. Those documents formed the basis for the trial and the input of the defence at trial. As already indicated, counsel for defendant Pulatov was given ample time and opportunity therefor. The court found no resultant disadvantage.

Taking all of the above into account, the court concludes that there is no evidence that the prosecution could not or should not have arrived at the decision to issue a "summons without prior notice" after weighing up all interests in a reasonable fashion. After all, any disadvantages to the accused associated with the "summons without prior notice" could have been challenged by the defendant himself before the start of the trial or were remedied in the course of the court proceedings by the manner in which the court directed. Accordingly, there are no procedural defects, or such defects were remedied during the court proceedings, or remedying them was frustrated by choices made by defendant Pulatov and/or counsel for defendant Pulatov. Under these circumstances, the court concludes that there can be no question of attaching any consequence to any defects, or that the mere observation of them suffices.

There is therefore no ground in the "summons without prior notice" for barring the prosecution.

4.4.4.3 Investigation and case file

Biased approach to the investigation and prosecution file

Counsel for defendant Pulatov argues that the Public Prosecution Service did not maintain a consistently objective and critical view during the investigation into the circumstances of and those responsible for the MH17 disaster. It claims that this has resulted in the investigation and the prosecution file being biased in their approach and content (confirmation bias and tunnel vision) because they were conducted, compiled, and/or structured in a biased and leading manner. It further claims that certain matters were not, or could not, be investigated. A trial that uses, and is based on, the results of such an investigation would not meet the standards and minimum safeguards of a fair trial. According to counsel for defendant Pulatov, these procedural defects should lead to the prosecution being barred.

First of all, the court notes that it is only natural that a disaster on the scale of, and with the impact of, flight MH17 would immediately receive considerable attention and interest from the general public, the media and politicians, in part due to its location and the situation there. As long as there is no clarity about what happened, why it happened, and who is or can be held responsible for it, that interest will persist. This proves true to this day. The context and nature of the disaster have also inevitably led to the involvement of multiple domestic and foreign agencies, investigative or otherwise.

For example, in the event of an incident involving an aircraft, it is standard practice for the DSB to become involved; indeed, it is the DSB's statutory duty to investigate such incidents. Lawmakers have recognised that a Dutch Safety Board (DSB) investigation may coincide with a criminal investigation. The fact of the matter is that criminal aspects may play a role in the cause of an air disaster, resulting in an investigation pursuant to Section 132a DCCP. Lawmakers have set statutory provisions²⁰ that are to be applied in the event of such a concurrence, and there are rules in place to ensure enhanced coordination between the two organisations when they are investigating the same incident.²¹ Essentially, these provisions stipulate that the investigation carried out by the DSB must take place separately from the investigation of the Public Prosecution Service, and that, in principle, the results of the DSB investigation may not be used for purposes relating to criminal law or procedure, subject to a few exceptions. The court found no evidence that those provisions were not followed. The Public Prosecution Service conducted independent investigations, and, insofar as the (publicly available) results of the DSB investigation have been entered in the case file, the court will not consider them as evidence, or will consider them only where this is expressly permitted under the DSB Act. The court is familiar with the restrictions imposed by the DSB Act on the use of such information in a criminal case. The court itself also referred to this matter at trial, and the content of those documents was not addressed when the substance of the case file was presented in court. Insofar as inclusion of this material in the file could be considered a procedural defect, it has therefore been remedied. This observation will not have any legal consequences.

The defence's assertion that the Public Prosecution Service erred in terms of procedure because it was

guided by statements made by the SBU immediately following the crash of flight MH17 lacks factual basis. While it is true that possible causes for the flight MH17 disaster were mooted by or via the SBU, the mere fact that this occurred and/or that they were inconsistent in their conclusions cannot in any way be held against the prosecution. The prosecution conducted its own investigation, from which it drew its own conclusions, which were submitted to the court for assessment. The Public Prosecution Service provided reasons whenever it used material with potential probative value that had been provided by or via the SBU. In so doing, the prosecution explicitly considered the questionable reputation that the SBU had in 2014 according to sources, which prompted it to exercise caution and to conduct verification and validation studies.

Counsel for defendant Pulatov has asserted that, given the SBU's reputation as an investigatory body which does not take human rights and conflicts of interest seriously, even cooperating with the SBU and including material from it in the file constitute a procedural defect resulting in unfair proceedings for the accused and therefore should lead to the prosecution being barred. However, that mere assertion can in no way justify such a finding and the consequence attached to it. Even if this broadly-worded position were correct, it would be a wholly inadequate basis on which to contest the reliability of specific items of evidence in general terms. After all, even information from questionable sources can be accurate and reliable, although it requires extra caution and investigation. Nor does the mere presence of material from such a source in the file render the investigation as a whole unfit as basis for a fair trial, as argued by Pulatov's defence. After all, it is not an established fact that the witnesses in question were unable to give a statement freely, but at best a 'real possibility', to use the words of the defence. Moreover, in this sizeable file, composed of a large variety of potential items of evidence, there are, at most, a few items the reliability of which, if used in evidence, would have to be established and substantiated. Therefore, if the court makes use of evidence introduced via the SBU, it will do so with due caution, in accordance with the applicable provisions.

If and to the extent that the prosecution has used (preliminary) findings from other sources, such as the DSB investigation, information from journalists and citizen journalists, and/or suggestions made by other(s) regarding the cause of the MH17 disaster, the court has found that they have, at most, used them as a lead for a possible line of enquiry. That is not, in itself, prohibited or contrary to any principle of due process, but when it occurs it can, at best, only result in evidence in the criminal case if that evidence meets the requirements of the law and has been lawfully obtained by means of its own criminal investigation. This is an aspect addressed by the court when discussing the evidence that it has used. It cannot, however, result in any procedural defects to which consequences are attached.

The court sees the assertions of confirmation bias and tunnel vision made by counsel for defendant Pulatov in the same light. The court understands that the assertions relate to the prosecution, but apparently also to the court. The substantiation of those assertions is - largely - the same as that provided for those defence arguments discussed previously with respect to Article 6(1) ECHR. For this reason alone, these assertions fail to hold water. These assertions also fail to appreciate the responsibility the court has with respect to how it reaches decisions in the cases before it and how it justifies those decisions. Therefore, on this point too, the court finds no procedural defect that gives rise to any legal consequence.

Limitations of the investigation and systematic opposition to requests by the defence

Citing "limitations of investigation at the scene and counter-investigations" and "systematic resistance to requests made by the defence", counsel for defendant Pulatov has asserted that there was a failure to investigate many matters that should have been investigated, due to the passage of time and the situation at the scene, or due to deliberate choices made by the prosecution, or as a result of court decisions following a negative reaction from the prosecution on the matters in question.

With respect to those matters that could not be investigated due to, *inter alia*, the circumstances on the ground or the passage of time, the court maintains that this can hardly be regarded as a procedural defect. One, in this case, the JIT and the prosecution, cannot do the impossible and cannot be blamed for not doing it either, particularly since a procedural defect presupposes an active and deliberate act or omission. Moreover, matters which have not been investigated cannot yield evidence that the accused perpetrated the charged offences. For that reason, therefore, this does not constitute a procedural defect, let alone grounds for barring the prosecution.

If matters that could have been investigated were not investigated, the court is of the opinion that this is only of importance if those are matters that have a bearing on the questions that must be answered by the court. In those cases where requests for investigation of the matters have been

submitted to the court, the court has already made a reasoned decision on them. In making its reasoned decision and assessing the requests for relevance, the court considered the accused's interest in due process. Given that the court has made its decision, at this point in the proceedings it is not relevant what the prosecution's position was on those requests for investigation. Indeed, where necessary, the court gave equal consideration to the position of the prosecution and of the defence in arriving at its reasoned decision. The prosecution's position on matters submitted to the court for consideration can, therefore, hardly be regarded as a procedural defect. For the same reason, the same is true of the court's decision not to honour requests for investigation. That being said, the requests for investigation that were denied may leave room for the conclusion that there is insufficient or insufficiently compelling evidence in support of the charges, or parts thereof. However, this cannot be construed as a procedural defect either, rather it will be reflected in the assessment of evidence.

Composition of the prosecution file

With regard to the composition of the prosecution file, counsel for defendant Pulatov continues to doubt whether the file is complete; in other words, whether all relevant documents have been included in the prosecution file. This matter was raised on several occasions during the court proceedings, and consequently the court addressed it several times. This means that, strictly speaking, this is not a matter pertaining to the investigation that precedes the trial. However, because failure to include relevant documents in the prosecution file - the contents of which are known to the prosecution - may constitute an infringement of the principle of *equality of arms*, it is possible that this amounts to a procedural defect that has, or had, a decisive influence on the fair course of the subsequent prosecution of the accused for the offence in question. Therefore, in the opinion of the court, the alleged failure to include all relevant documents in the prosecution file falls within the scope of Section 359a DCCP.

Regarding the composition of the prosecution file, the court stated in court that the prosecution file should include all documents that could reasonably be of importance to any decision to be made by the court.

Once it had become apparent to the court that the prosecution had interpreted the applicable criterion too narrowly, for which there is no basis in the law, it brought this to the attention of the prosecution and requested a reassessment.²² This resulted in further documents being designated by the prosecution as "potentially relevant", and these were therefore provided (subject to restrictions) to the court and added (or not added, as appropriate) to the prosecution file by the court. In that reassessment, however, the prosecution also identified a number of documents that it did not itself consider relevant, but, by briefly describing the content thereof, allowed the court to decide whether it considered them relevant to any decision to be made by the court so that they could then be added to the case file. A week later, the prosecution again provided several documents to the court with the comment that, in light of a new and broad reassessment by the prosecution, the court might find them "potentially relevant" to any decision to be made. From the course of events described above, the court concludes that, even after it had been explicitly asked to do so by the court, the prosecution failed to conclude itself that certain documents were relevant and therefore needed to be added to the prosecution file, as it should have, but rather disputed the relevance of the documents, or, at most, deemed them to be "potentially relevant" and then left the decision to the court. This does not really attest to the application of the correct criterion for determining the relevance of documents for inclusion in the prosecution file. The court therefore understands the suspicions still harboured by defence counsel on this point.

At the same time, the court also considers that the question of what is relevant requires more by way of answer than merely stating that the investigation file may contain exculpatory information, and that the assessment of relevance depends partly on the position taken by the defendant on aspects of the charges against him. Where no such position has been taken or has not been adequately elaborated, and no further questions can be put, the relevance of a particular document is more difficult to assess. Indeed, relevance may depend in part by, for example, on a possible line of defence that may be presented or a request for investigation to be submitted. For the most part, no such clear positions were advanced by the defence before that point in the proceedings when it presented its case. Therefore, they could not be taken into account when determining whether specific documents were relevant or not. In addition, it is a fact that counsel for defendant Pulatov inspected, or received copies of, numerous documents from the investigation file, at its request. Counsel for defendant Pulatov only cited a small number of those documents when presenting its case and requested inclusion of still fewer in the prosecution file. The court infers from this that, of the very many documents considered potentially relevant by the defence, hardly any were relevant enough to result

in (a request for) their inclusion in the prosecution file. Evidently, the relevance of most of these many documents was, therefore, not apparent to the defence either. With regard to the documents provided for inclusion by the prosecution earlier, the court rules that any procedural defect that had occurred due to their not being added at the prosecution's own initiative earlier, was remedied during the trial. In light of this and in view of the considerable size of the prosecution file, the court is confident that the prosecution file now contains the documents that it should contain in order for the court to be able to answer the questions set out in Sections 348 and 350 DCCP properly. This leads the court to find that no procedural defect such as that argued by the defence exists, or exists any longer having been remedied, and that therefore no legal consequence need be attached to it.

With regard to the refusal to permit inspection of the investigation file, the court merely observes that the repeated deployment of this argument, which the court has previously rejected, with reasons, is based on a continued failure to recognise that the law provides for no right on the part of the accused to inspect the prosecution's investigation file. The mere assertion by counsel for defendant Pulatov that no statutory basis is necessary does not persuade the court to alter its thinking on this point. As described above, it is the responsibility of the prosecutor to include all relevant documents from the (preliminary) investigation in the prosecution file, and thus provide these to the accused, but not to allow the defence to inspect all the results of that investigation as well. Nor is this in keeping with the different nature of the tasks undertaken by the defence and the prosecution. It is the broader investigation that has given rise to the prosecution file, based on which specific suspicions against these accused emerged, leading to the framing of charges against them. These charges are the focus of the trial conducted by the court; the trial is limited to these charges and the rights to defence relate to them. This is also consistent with the principle already formulated by the court in previous decisions, that an accused does not have an unconditional right to repeat the investigation conducted under the direction of the prosecution. Given the situation described above, the court finds that there are no procedural defects in this regard.

All of the aforementioned, taken together, leads the court to the conclusion that, with regard to the investigation and the prosecution file, there is no, or is no longer, any procedural defect; therefore, there is no reason to bar the prosecution.

4.4.4.4 Witnesses and the right to examine

Counsel for defendant Pulatov asserts that, compared with the very large number of witnesses and expert witnesses that contributed to this complex and lengthy investigation, the very limited number of defence requests for investigation granted by the court restricted the defendant's ability to exercise his right of defend himself so severely that it violated the principle of a fair trial enshrined in Article 6 ECHR. The defence also argues that limitations placed by the investigating judge on its right to examine the witnesses and expert witnesses who it was authorised to question and the way in which those interviews were organised can be characterised as procedural errors. Errors which make it impossible to speak of a fair trial and which should therefore lead to a bar on the prosecution.

With respect to the argument regarding the number of requests for investigation granted by the court, the court merely notes that that argument can be better characterised as an appeal against the court's decisions on those requests for investigation. Such an argument therefore does not lend itself to assessment of its merits by this court.

With regard to the restrictions applied to the interviews approved and conducted, the court sees no basis for the conclusion that more restrictions were applied by the investigating judge than necessary to protect the statutory interests that were served. In this respect, the court refers to the reasons given by the investigating judge for imposing those restrictions in each case.

For the sake of completeness, the court considers that with respect to the rejected requests for investigation, it is premature to conclude that the legal proceedings were not fair. More important is the question of whether the court will use specific statements as evidence, and, if so, how those statements relate to the other material used as evidence. Where the court wishes to use witness and expert witness interviews in explaining the reasons for its assessment of the evidence, it will apply the criterion prescribed by the ECtHR and refer to this when giving its reasoning. For that reason alone, no procedural defect can be found here.

4.4.4.5 Accumulation of defects identified and the *fair trial* criterion with respect to preliminary matters

Finally, as indicated in the preamble to this part of the preliminary matters, the court will consider whether an accumulation of the procedural defects identified above, which do not individually meet the threshold for a bar in themselves, could collectively lead to the conclusion that the trial has not been fair. The reason for this is the assertion by counsel for defendant Pulatov that, for the reasons outlined, it has found itself side-lined and excluded, in an exceptional manner, from the proceedings as a whole, i.e. the investigation and trial. According to the defence, this is a flagrant violation of the right to a fair trial.

The court's response to that argument is that it follows from the foregoing that, in the court's opinion, most of the points identified by the defence as procedural defects are not, or are no longer, procedural defects. The matters that can be regarded as procedural defects and have not been remedied are the fact that the prosecution and the JIT, at a press conference that was screened worldwide, described quite categorically what they alleged had happened to flight MH17 and made allegations about the close involvement of the then suspects in that, then subsequently named the suspects explicitly and showed their photographs; and launching an application that includes documents from the file and explains (according to the prosecution) "what happened to flight MH17, and who was responsible for it". Not only that, but did so while the case was still ongoing and the file could only be inspected by a limited group of people and even then solely for purposes relevant to the criminal proceedings.

On the question of whether the accumulation of these defects found by the court should lead to the conclusion that the trial is no longer fair, the court answers in the negative. Prosecution of the case is thus plainly not unreasonable. The fact of the matter is that the court was not swayed by these defects and neither was the defence's ability to present its case curtailed as a consequence of them. The interests of the accused that were at stake are privacy interests, as protected by Article 8 ECHR. With regard to those interests, the court considers that, given the terrible events that gave rise to the charges against the accused and the exceptionally large number of direct victims - which resulted in an even larger number of victims' relatives - a case like this would inevitably attract widespread media attention. All the suspects would therefore probably have been the subject of intense media attention sooner or later in any case. All things considered, the severity of the defects found, considered together and in light of the massive scale of the investigation and the importance of the case, is not such as to justify barring the prosecutor from prosecuting.

Thus, even considering the accumulation of the defects found, the court finds no reason to bar the prosecution.

4.4.5 Conclusion regarding the right of the prosecutor to prosecute

An exhaustive consideration of the questions raised regarding jurisdiction, the limitations of jurisdiction under international law and whether the right to prosecute has been forfeited leads the court to the conclusion that there are no impediments to the prosecutor proceeding with criminal proceedings.

The prosecutor, therefore, has the right to prosecute.

Any additional or other arguments put forward by the defence do not change this conclusion.

4.5 **Grounds for suspension of the prosecution**

There are no grounds to suspend the prosecution.

5 GENERAL PRELIMINARY CONSIDERATIONS

5.1 Introduction

The crash of flight MH17 in eastern Ukraine prompted investigations by several agencies into its cause. These investigations took place under difficult circumstances; an armed conflict was ongoing in the area where the aeroplane had crashed. As the 298 victims were from different countries, these countries combined their efforts to conduct a joint investigation. That led to the establishment of a Joint Investigation

Team (JIT): an international investigation team comprising members from the Netherlands, Ukraine, Australia, Belgium, and Malaysia.

In addition, the Dutch Safety Board (DSB) independently investigated the cause of the disaster. A final report was presented by the DSB in October 2015, setting out its conclusions on the cause of the crash of flight MH17 and making recommendations to prevent a similar incident in the future. Those recommendations concern overflight of conflict zones. Similarly, the purpose of the DSB's investigations is to investigate the cause of a disaster, without considering guilt or innocence, in order to prevent future recurrences.

Criminal cases are different: the court must assess the charges against the accused based on the relevant contents of the case file and with due regard for Dutch criminal law and procedure, and must do so independently and separately from the DSB conclusions regarding what caused flight MH17 to crash.

The basis for that assessment is the prosecution file as submitted to the court by the prosecution. The prosecution file contains the results of the criminal investigation as conducted by the JIT, under the responsibility of the Public Prosecution Service. When the prosecution file was discussed during the trial, the court underlined repeatedly that it had discussed the results and findings

of the JIT investigation, without expressing an opinion on them. This is not the case in this judgment: herein, the court gives an assessment of those results and findings. In that assessment, a distinction can be made between, on the one hand, the question to be answered by the court as to the events leading up to the crash of flight MH17, and, on the other, the question of who was responsible for it - specifically whether one or more of the accused may be culpable under the law.

In the introduction to its oral arguments, counsel for defendant Pulatov spoke about uncovering the truth, and, by asking rhetorical questions, at least suggested that there had been no scope for determining the true facts in this criminal case. In this regard, counsel for defendant Pulatov has, *inter alia*, argued that establishing the truth by means of a criminal investigation necessarily "implies a reduction of reality" and that these criminal proceedings are being conducted in a blinkered fashion. It was argued that little or no investigation - by the defence - was permitted into scenarios other than the main scenario that flight MH17 was downed by a Buk missile. It has also been argued that the composition of the prosecution file is the preserve of the prosecution, that the 'investigation file' contains additional information relevant to establishing the truth, but that that information now remains outside the criminal proceedings. It was also indicated that issues regarding the prosecution's main scenario remained unresolved.

Firstly, the court notes that one of the fundamental purposes of criminal proceedings is to establish the material facts of the case - to uncover the truth of the alleged matter. Another is to assess the extent to which the facts established constitute conduct deserving of punishment. Therefore, establishing the material truth logically precedes assessing whether any conduct of the accused warrants punishment. The fact that the court is bound by the rules of criminal law and procedure, such as the aforementioned constraints of the indictment, in determining the material truth of the matter, i.e. establishing the facts, does not mean that a trial does not involve fact finding, or that the truth as established at trial is different from the factual truth. On the contrary, criminal proceedings are structured in such a way that fact finding, in fact takes place with the help of scientific rules and other such mechanisms. In other words, the process of establishing the material truth in criminal proceedings is not substantially different from material fact finding elsewhere.

However, the following caveat applies. If the evidence does not convincingly prove that the allegations against the accused in the indictment actually hold true, the subsisting uncertainty about what happened will always be interpreted in the accused's favour and may lead to acquittal. In such an instance, the court need not determine what did happen. Conversely, for the court to find that the charge can be proven, there is no requirement for the role and identity of everyone involved to be established; it suffices that it is established that the role of the accused corresponds to that charged.

5.2 The criminal investigation conducted by the JIT

The investigation that forms the basis for this criminal case was conducted by the JIT. Counsel for defendant Pulatov has argued that this, combined with the fact that it was not possible to work safely in the crash area because of the armed conflict, affected the gathering of evidence: the Dutch Public Prosecution Service did not have the requisite 'freedom' to conduct a reliable and conclusive investigation.

While the criminal investigation into the crash of flight MH17 has been repeatedly described as unique given

the nature, scope, and duration of the investigation, establishing a JIT in cooperation with foreign judicial authorities to investigate allegations with an international component is not. A JIT enables countries to coordinate and cooperate on their investigations and exchange information and evidence. The arrangements for establishing a JIT, for cooperation, and for the exercise of powers are laid down in a JIT agreement.²³ With regard to investigative powers specifically, the JIT agreement governing the MH17 investigation states that, while acknowledging the sovereignty of the parties, JIT members have the right to take part in each other's investigations within the limits of applicable domestic law.²⁴ That, as counsel for the defendant Pulatov stated with regard to the JIT that "*no arrangements have therefore been made to allow Dutch investigating officers to carry out investigative activities on Ukrainian territory entirely independently and autonomously from, for example, the SBU*". However, this fact is not surprising, given that, pursuant to Section 5.2.2 DCCP²⁵, which concerns the exercise of investigative powers in the Netherlands in respect of a JIT, foreign officials are not authorised to conduct investigations in the Netherlands either, unless provided for by or pursuant to law. Foreign investigators have no independent investigative powers in the Netherlands and may not conduct official acts in their own capacity. There is no reason why this should be any different for Dutch investigators in the context of this investigation in Ukraine.

The structure and *modus operandi* of the JIT have not restricted, but rather facilitated and thus actually expanded investigative opportunities. The fact that there was an armed conflict in the crash area did restrict the investigation, as the prosecution has repeatedly stated. As a result, a number of matters could not be investigated, or could not be investigated at the desired time. However, the consequence of this is that evidence that could have been collected might not have been collected, or not fully collected. Regarding the argument put forward by counsel for defendant Pulatov that this has adversely affected its client's defence because potentially exculpatory evidence could not be collected due to these impediments, the court considers that it is impossible to pass judgement on the incriminating or exculpatory nature of evidence that has not been collected. The court's task is to assess whether or not the evidence that has been collected proves the scenario in the indictment legally and beyond doubt. The court can rule to that effect only if the evidence gathered is so conclusive that other scenarios - and thus the existence of exculpatory evidence - can be reasonably ruled out. The court will assess whether that is the case in this judgment.

5.3 Evidence obtained from or via the SBU

Since a substantial part of the criminal investigation took place on Ukrainian territory, it is only logical that the SBU, the Ukrainian investigative authority, was involved. In this connection, counsel for defendant Pulatov argued that, in conducting that investigation, the Public Prosecution Service was largely dependent on the SBU for the collection of evidence, despite the fact that that body serves Ukraine's national interest and has a questionable reputation. The SBU's conduct shortly after the disaster - when, on three occasions, it presented conflicting launch sites from which a Buk missile had allegedly been launched, and, after two days, made intercepted conversations publicly available online and on its own website - also gives counsel for defendant Pulatov pause for thought. In short, counsel for defendant Pulatov argues that cooperation with and dependence on the SBU compromised the quality and reliability of the investigation and that this should not be overlooked when assessing the evidence. According to the defence, one cannot unreservedly trust that the sources of evidence obtained from or via the SBU are true or complete.

The prosecution asserts that the limitations outlined by counsel for defendant Pulatov regarding the investigation and the SBU's involvement in it have been recognised and stated by the prosecution. The prosecution has argued that the evidence in this case was scrutinised even more 'rigorously' than in other criminal investigations because the various parties to the conflict have, or may have, interests in the outcome of the investigation. According to the prosecution, in this investigation more caution was exercised in respect of evidence from Ukraine than would be customary in international cooperation on criminal matters, in that the evidence was always validated.

With regard to material obtained from abroad that could serve as evidence, including material obtained from or via the SBU, the court considers that the principle of legitimate expectations applies.²⁶ This means that the manner in which that material was collected and came about is deemed to be in accordance with the applicable rules and regulations in the country in question, and, therefore, barring serious indications to the contrary, can be considered reliable. The court must ensure that the manner in which evidence obtained from abroad is used does not prejudice the right to a fair trial under Article 6(1) ECHR. Following these principles, the court sees no reason to exclude out of hand material obtained from or via the SBU from evidence solely for this reason. That being said, if necessary, it will explain, per type of evidence, any possible contraindications that have caused it to consider more closely the degree to which the material in question may serve as evidence.

The evidence in the case file consists of official investigation reports, results of forensic analysis, visual

material such as photographs and videos, radar data and satellite images, recorded intercepted conversations and the associated metadata, data on the locations of pinged transmission masts, witness statements, and reports and statements by expert witnesses. A significant part of this evidence was (initially) obtained from the SBU or handed over to/reached the JIT via the SBU. The court will have to establish the reliability, authenticity, completeness, and veracity of such evidence when using it in evidence. The court will do so by first considering various types of evidence in general terms. Only in a few instances does the court find it necessary to go beyond its general assessment of the evidence to discuss specific considerations regarding particular evidence.

5.4 Use of witness statements

Statements by witnesses²⁷ that are in writing and made during the preliminary investigation – i.e. not when the trial is taking place in the presence of the defence – may be used in evidence, provided that the rights of the defence have been respected. These defence rights are enshrined in the Dutch Code of Criminal Procedure and derive *inter alia* from Article 6 ECHR.²⁸

The accused is entitled to a fair and public hearing of his criminal case. The right to examine incriminating and exculpatory witnesses is a significant part of this. However, most importantly, the defence must make a timely and sufficiently substantiated request for a witness to be called. If the defence fails to do so and the earlier statement(s) (given in the absence of the defence) are used as evidence, in principle, there is no violation of Article 6 ECHR.²⁹

In line with case law of the ECtHR, the Netherlands Supreme Court³⁰ has, since the Keskin judgment,³¹ taken as its starting point that it must be assumed that the defence has an interest in a prosecution witness (incriminating witness) being called, and that therefore the court should not require the defence to justify its interest further. However, the defence must make the request in order for a witness to be examined. In those cases, greater scrutiny is given to whether a right to examine a witness can and should be realised. In addition, the ECtHR's judgment in the Keskin case underscores the importance of the judge first verifying whether the proceedings as a whole fulfil the right to a fair trial guaranteed by Article 6 ECHR, before finding a charge proven based in part on the statement of a witness who was not examined. However, it does not follow from the ECtHR's judgment that the right to examine a witness implies that a defence request to examine a witness who has made an incriminating statement is always allowable. Account may need to be taken of whether a witness will appear in court within a foreseeable period of time, or whether there are well-founded reasons to believe that the health or welfare of the witness will be jeopardised by giving evidence in court and that the prevention of this danger outweighs the interest of examining the witness in court. Furthermore, Article 6 ECHR does not prevent the court from rejecting the request if calling a witness is "manifestly irrelevant or redundant", because questioning the witness (anew) is of no importance for or adds no value to the case being made. This is the case, for example, in instances when the facts and circumstances to be explored further by questioning a witness have already been established beyond reasonable doubt by other findings of the criminal investigation.³²

The Netherlands Supreme Court sets stricter requirements when it comes to experts and investigators who conducted technical investigations. As their role is distinct from that of a witness or eyewitness, a request by the defence to question them on a statement or report they have made which is incriminating for the accused needs to be substantiated, in particular as regards the parts disputed by the defence, and as regards why questioning, and not another method of review, is necessary.³³

The following applies with regard to the use of witness statements in particular. If the accused does not contest a statement made during the preliminary investigation and has waived his right to question the witness, that statement may be used as evidence. Furthermore, use of that statement does not violate the rights of the defence provided the defence has had the opportunity, at some time, to question the witness, for instance by means of the investigating judge interviewing the witness in the presence of the defence, or by the witness being examined in court.

It can happen – and this situation also applies in this criminal case – that there has been no opportunity, or no real opportunity, for examination, and that this is not due to a failure of the judicial authorities. This includes the case where a witness died before they could be questioned. Or if the witness invokes the right of non-disclosure during questioning and refuses to give answers. However, this does not automatically mean that such witness statements are not or no longer useful as evidence. Despite this handicap for the defence, the trial as a whole can still be fair if the witness statements in question are used in evidence. The ECtHR has devised a roadmap to indicate the circumstances under which this may be the case. Foremost here is whether there was a good reason for not being able to question the witness.³⁴

If there was a good reason, then consideration should be given to whether the conviction rested solely or to a decisive extent on the statement(s) of the witness in question. The issue here is whether the witness's statement(s) are so important that they are likely to have been decisive for the outcome of the case. Whether that is the case depends largely on the strength of the corroborating or other evidence. The main question here is whether, on the matter disputed by the accused, that evidence supports the statement(s) of the witness who was not examined.**35**

If the statement(s) of the witness who was not examined prove decisive for the conviction (in the aforementioned sense of "solely or to a decisive extent"), it is important whether the defence was offered adequate compensation for the lack of a proper and effective opportunity for questioning. The form of the compensation depends on the circumstances of the case.

This roadmap is also relevant in the case of an anonymous witness who was not examined **36**. According to the ECtHR, from the perspective of the defence, such a witness may be equated to an anonymous witness who has been threatened or protected.**37** In that case, the roadmap is preceded by the question of whether there was good reason to conceal the identity of the witness.

If a witness statement is ultimately used in evidence subject to the stipulations mentioned above, then the general requirement is that the statement must also be reliable. In addition to that general requirement, if the court wishes to use as evidence a statement made to the investigating judge by a protected or threatened witness,**38** pursuant to the Code of Criminal Procedure, the court must provide additional substantiation in the judgment of why such a statement was considered reliable.**39** Furthermore, a statement made by a protected or threatened witness may only be used in evidence if that person was questioned by the investigating judge as a protected or threatened witness and if the charge ultimately proven, for which the statement was used as evidence, concerns a crime eligible for pre-trial detention and which constitutes a serious breach of the rule of law.**40** Regarding these additional requirements, the court notes that, in the case in hand, the court only used as evidence statements of witnesses who were questioned by the investigating judge as protected or threatened witnesses. Furthermore, the court notes that the offences alleged against each of the accused and ruled upon in this judgment (i.e. intentionally causing an aircraft to crash and murder or manslaughter) are serious crimes, for which, in light of the alleged circumstances, long prison sentences or life imprisonment may be imposed. In the court's view, the required serious breach of the rule of law is evident from their very nature and the magnitude of their impact on society as a whole.

Where the judgment cites the statement(s) of a protected or threatened witness as evidence, the court will specifically address the reliability of that testimony. The court finds that the judgment in this case meets the third requirement set by law and by the ECtHR, that a judicial finding of fact may not be based exclusively or to a decisive extent on evidence that is anonymous or considered as anonymous. It does so because, on the one hand, the witness statements used as evidence in this judgment come from witnesses, including protected and threatened witnesses, who are sufficiently identifiable as individuals and who could be and were questioned by defendant Pulatov and his counsel, and, on the other hand, because the court does not rely on just one piece of evidence in any of its considerations, and so it does not use the witness statement of just one witness, anonymised or otherwise.

In the end, in assessing the charges in this criminal case, the court used only a small number of witness statements as evidence. This is because the case file contains sufficient other evidence which at its core and by its nature is more objective, such as technical and forensic documents whose reliability has been verified. A number of witness statements were used as supplements. When it comes to witness evidence, especially in a case such as this where the crime investigated occurred not only during, but also in the context of, an armed conflict, cautious handling of witness statements is required. The events often concern incidents that took place quite some time in the past and in circumstances that were sometimes traumatic for the witness. It is also possible that witnesses have become aware of reports in the conventional and social media regarding the cause of the event and/or have spoken with others about what happened, both of which may influence their memory. Furthermore, it cannot be ruled out that the sympathy a witness may have for one of the parties to the conflict may also have coloured his perceptions or statements. It is not uncommon in such cases for there to be a multitude of witness statements that are inconsistent with one another, as is the case in this instance. So too in this case. Therefore, in principle, the court attaches greater weight to a witness with respect to whom it can be said that there are circumstances that make that witness carry special weight, for example, because he/she claims to have been in the vicinity of the alleged launch site on 17 July 2014, or who appears to be making incriminating statements about himself/herself, or who appears to be making statements in rebuttal to supposed/alleged political or military sympathies. The question of whether the witness's testimony can be corroborated using other types of evidence is also a consideration.

5.5 Expert witnesses and scenarios

The court first and foremost states that in this judgment, the terms 'expert' and 'expert witness' do not refer to persons who are knowledgeable about certain matters, but rather to persons who were questioned by the investigating judge to determine not only whether they have sufficient subject matter expertise, but also whether they are committed to integrity, independence and impartiality, after which they were officially appointed as experts by the investigating judge. These persons are therefore expert witnesses within the meaning of Section 227 *et seq.* DCCP.

With regard to the Almaz-Antey representative, who was questioned by the investigating judge, the investigating judge determined that he had sufficient subject matter expertise to be able to testify on the subjects on which he and others were questioned. The investigating judge questioned him as an expert witness. However, he was not appointed as an expert witness by the investigating judge. During the interviews – following extensive discussion on the subject between the prosecution and counsel for defendant Pulatov – the investigating judge explicitly left it to the court to determine the independence and impartiality of this Almaz-Antey representative and the probative value that can be attributed to his statement. The court will return to this later, but notes at this point that the following considerations regarding experts relate only to experts *appointed* by the investigating judge.

Expert witnesses in this sense are also distinct from the investigating officers, who conduct 'technical' investigation during the preliminary investigation. The following fall under technical investigation: enquiries in the pre-trial phase (such as the preliminary investigation), analysis and interpretation based on standard and reproducible research, investigations carried out by an investigatory body and analysis on the subjects/objects listed exhaustively in Appendix 3 of the Designation of Technical Investigation. These investigating officers need not be appointed by the investigating judge. Employees of the Australian Federal Police (AFP), an investigatory body, fall into this category. Their findings may be used in evidence as other written documents, as mentioned above. Dutch investigating officers record their findings in official reports which may be used in evidence.

Reports drafted by expert witnesses are entered in the case file in the name of the expert witness or expert witnesses involved. The identity of the expert witnesses is therefore known. Some expert witnesses were also questioned by the investigating judge during the criminal investigation, with some of them being referred to by a number instead of their name in the relevant official report. Their names are known to the investigating judge, the prosecution and counsel for defendant Pulatov, but these numbers were assigned to them after they were interviewed as expert witnesses at the request of parties to the proceedings. Therefore, the provisions of Sections 344a and 360 DCCP, the rules regarding the use of anonymous and threatened witnesses, do not apply to them.

Counsel for defendant Pulatov has argued with respect to many persons designated as expert witnesses in this case that they cannot necessarily be considered experts on the subject on which they have reported, or that in any event they do not have knowledge of and experience with the specific subject matter at issue in this investigation: the crash of a Boeing-aeroplane from, and under conditions prevailing at, an altitude of ten kilometres, by detonation of a Buk-type surface-to-air missile, in which one of several warhead types, each with its own specific features, may have been mounted. According to counsel for defendant Pulatov, this either detracts from the value of their findings or renders those findings entirely unsuitable for use as evidence.

At this point in the judgment, the court first notes in general terms that expert opinions contained in this case file, as mentioned above, were prepared by persons appointed as experts by the investigating judge. These persons are either listed in the Netherlands Register of Judicial Experts (NRGD), which includes only persons whose expertise in a field has previously been determined according to specific standards, or, prior to their appointment, their expertise in the field in which a report from them was requested has been determined by the investigating judge further to enquiries. This system and method of appointment are in themselves a guarantee that the reporting person has the requisite expertise. After all, for inclusion in the NRGD, quality requirements for each area of expertise must be met, and bounds and circumscriptions have been set for each area of expertise within which the person in question is considered an expert. When a person who is not listed in the NRGD as an expert in a particular field of expertise is appointed by the investigating judge, the reasons for this are provided and substantiated in the appointment of that expert witness. Moreover, all expert witnesses so appointed produced their reports according to the standards set out in the NRGD Code of Conduct, by which not only NRGD-registered experts, but all experts appointed in a criminal case, are bound.⁴¹ Those standards cover integrity, independence and impartiality, but also require the expert witness to remain within the limits of the remit given to him and within his area of

expertise. For that reason alone, the mere fact that an expert witness has no experience with a specific case is no reason to doubt his expertise in that particular instance. After all, an expert witness examines and reports based on his knowledge and expertise in a specific field and what the latest science in that field tells him, which are considerably broader than a specific case. Moreover, no single person (whether appointed as an expert in this criminal case or not) has or even can have any experience at all with shooting down a civil aircraft at an altitude of ten kilometres with a Buk-type surface-to-air missile, simply because this specific situation has never occurred before and somewhat similar incidents have not given rise to an extensive criminal investigation, or because the results of investigations that did take place are not or not widely available. Therefore, this in no way affects the expertise of the expert witnesses reporting in this case. The court further finds that there is no evidence that the expert opinions contained in the case file were not created or prepared according to the standards in the NRGD Code of Conduct. On the contrary, in the reports, the expert witnesses concerned indicate the limits of their expertise and of the research they conducted, and they report within the parameters of the remit entrusted to them. Moreover, counsel for defendant Pulatov had the opportunity to question at length the expert witnesses interviewed by the investigating judge at its request, including about their expertise and the foundation of that expertise. Thus, in the court's opinion, there is no reason to doubt either the expertise of the persons thus appointed by the investigating judge or the value of the reports prepared by them in general.

Nor can such doubt arise purely from the fact that many of the expert witnesses producing reports in this case work for the Netherlands Forensic Institute (NFI), somewhat disparagingly referred to by counsel for defendant Pulatov as "the prosecution's official supplier". Although the NFI receives its assignments from various government agencies – and thus not just the Public Prosecution Service – this does not make the institute an organisation that performs and reports what its commissioning bodies command it to do. In any case, the organisational and financial embedding of the institute under the Ministry of Justice and Security is not indicative of this. The NFI is an institute that is organisationally and financially independent of its commissioning bodies. Moreover, the NFI's duties and methods of operation are subject to safeguards. Indeed, the NFI's core task as formulated in the NFI Regulation on Remits⁴² is "to conduct independent forensic case investigation... and to report on it... with a view to establishing the truth". That document also covers the method of funding, which extends beyond a single (governmental) organisation. All expert witnesses working at the NFI also work according to the NRGD Code of Conduct described above. In addition, the NFI is an internationally-renowned institute, and the ultimate assessment of the reliability of its reports in criminal cases falls to independent courts. The court is of the opinion that there are no indications, either in the case file or that have emerged at trial, that give rise to the slightest suspicion that the investigation work performed by expert witnesses from the NFI does not meet the requirements imposed with respect to expertise, independence, objectivity, reliability and meticulousness.

Even more important than the independence of the NFI mentioned above, is that there has been nothing to indicate that the prosecution has an interest in any particular outcome of the analysis conducted by the NFI. In no way has it been demonstrated that the Public Prosecution Service or any other Dutch authority has any interest in any particular outcome to the investigations other than the truth. While much has been suggested on this point, both within and outside the confines of this criminal case, what interest that would be and what evidence there is for it has not been specified. In these circumstances, therefore, the court does not see how or why the NFI might have been directed by the Public Prosecution Service.

However, as is the case in any criminal case, it can nonetheless happen that something specific may emerge that could detract from the reliability of a prepared report, for example, caused by confirmation bias as a result of the expert witness being provided with leading information at the outset, or multiple consecutive reports being prepared by the same expert witness in the same case. The court does not consider the sentence "*According to Ukrainian government sources, the aircraft was hit by a Buk missile system,*" that appeared in each investigation enquiry form as background information, to amount to providing a leading starting point. First, this is because the content of this sentence is simply correct; after all, that was exactly what the Ukrainian authorities were claiming shortly after the crash of MH17 and what had already been widely proclaimed in the media, and thus it will not have been unknown to the expert witnesses in any case. An even more compelling reason is that there is nothing that indicates *a priori* that the expert witnesses aligned the conclusions of their reports on that information. The inclusion of this sentence in the reports as background information can equally be regarded as an indication of the openness with which the reports in question were prepared according to standards set forth in the NRGD Code of Conduct.

Confirmation bias, which is a possibility when the same expert witness preparing several successive reports in the same case, which has happened in this case, cannot of course simply be ruled out, but rather needs to be appraised in the light of the report itself, and in conjunction with the other evidence. Conclusions in reports may indeed be prompted by such a process, but may just as easily be the logical consequence of

simply being correct. As this can be determined in part using the other information contained in the case file, the court will weigh the reports in relation to that other information.

Based on those considerations, the court finds no grounds for the pre-emptive collective disregarding of all expert opinions prepared by expert witnesses from the NFI which have been entered in the case file. This is equally true of the IDFO report dated 6 September 2017. According to counsel for defendant Pulatov, this report was not prepared in accordance with the instructions in the NFI's specialist supplement Interdisciplinary Forensic Investigation. The court notes, however, that in a written response to questions from counsel for defendant Pulatov, the author of this report stated that it was a summary report and that an interdisciplinary forensic report – to which the above specialist supplement refers – was not requested.

Moreover, it is true to say that no criminal investigation takes place in a vacuum.

The prosecution has stated several times that there were concrete indications early in the investigation that flight MH17 might have been shot down using a Buk missile. This included information shared on the internet and social media immediately after the crash of flight MH17, as well as information shared and/or made available by relevant authorities. According to the prosecution, those indications were gradually confirmed by further investigation and those findings led to certain choices being made in the investigation. The JIT then arrived at a 'main scenario', namely that flight MH17 was brought down by the launching of a Buk missile from a farm field near Pervomaiskyi. In its further investigation, the investigation team focused on this scenario. However, other possible facts and circumstances that could have led to the crash of flight MH17 were also investigated (the 'alternative scenarios').

It was argued by the defence that the focus on the main scenario meant that no equivalent investigation was done into alternative scenarios.

First, the court considers that 'continuing to investigate' based on indications that exist after an event has occurred is not the same as focusing unilaterally on a 'main scenario'. In a criminal case, however, the use of the term 'main scenario' in relation to the term 'alternative scenarios' causes confusion: an alternative scenario in a criminal case is "a statement by the accused, in which he outlines a different 'scenario' that fits the evidence". In this case, however, the 'alternative scenarios' are not concerned with a scenario or explanation provided by an accused, but with investigating and excluding possible other causes for the crash of flight MH17. Those possibilities were investigated.

Based on that investigation, the prosecution has ruled out the possibility that there was an accident (such as mechanical failure of the aeroplane or human error), that there was an explosive on board, that there was an air-to-air attack or that there was an attack from the ground with a weapon other than a Buk missile. In this criminal case, the court must assess whether the main scenario identified by the prosecution is proven, in the sense that the court must determine whether there is sufficient, legal and conclusive evidence of the body of facts charged. If this is not the case, and other scenarios are still sufficiently plausible, the court must acquit. However, if the main scenario is proven legally and beyond doubt, other scenarios are thereby necessarily ruled out.

5.6 Intercepted conversations and transmission mast data

Intercepted conversations

The JIT obtained from and through the Ukrainian Security Service a large amount of intercepted telephone calls and associated telecom traffic and transmission mast data. The majority of this telecom information was collected by the Ukrainian Security Service in and around 2014 as part of the aforementioned ATO, which involved recording telephone communications of a large number of individuals. As the purpose of the ATO was to investigate and identify potential terrorist actions committed by, among others, separatists against the Ukrainian state in the context of the above-mentioned armed conflict, this logically involved the recording and logging of telecom information of individuals who could be considered enemies, or potential enemies, of the state. Counsel for defendant Pulatov has repeatedly expressed surprise and doubt about the fact that the case file does not contain telecom information from the Ukrainian military. However, that is entirely logical, considering the purpose for which that data was recorded and logged. After all, it seems unlikely that Ukraine would intercept and record telecom information from its own military.

In order to scrutinise the quality and integrity of the telecom material received from Ukraine, Dutch members of the investigation team primarily compared the intercepted conversations contained in the case

file with each other and cross-referenced them with respect to contact details in the historical telecom traffic data (telephone numbers, IMEI numbers, transmission mast locations and metadata). This process did not uncover any unexplained discrepancies, leading to the conclusion that the quality and integrity of the intercepted material is comparable to that of similar material in criminal investigations in the Netherlands.⁴³ The court therefore does not see any reason to consider the telecommunications material received from Ukraine as unreliable.

In addition, the authenticity of the material obtained was verified; in other words, a check was performed to verify that the material had not been manipulated in any way. To that end, the data of the intercepted conversations received from the SBU was examined to see if it deviated from the data obtained from Ukrainian telecom providers through the SBU. This was not found to be the case.⁴⁴ In addition, the content of many intercepted conversations contained in the case file was compared with open source information, such as media publications and video footage on social media and news reports, and with information from various individuals, including suspects. In the case of several conversations, it was determined that the content of those conversations corresponded with information found in open sources, or with what the persons (participating in those conversations) had said.⁴⁵ Furthermore, verification was conducted to establish whether information in the historical data of intercepted conversations conducted from Ukraine with individuals located abroad corresponded with the same kind of data from abroad. This was done by comparing it with information obtained from Poland, Spain, and Belgium, and by comparing it with historical data from the Netherlands. That verification exercise identified similarities in date, time and phone numbers in several conversations conducted between Ukraine and the foreign country in question.⁴⁶ Network measurements conducted in eastern Ukraine also aided the investigation into the authenticity of intercepted conversations. These network measurements made it possible to determine the locations of transmission masts and the directions in which the antennas mounted on them can be pinged at a number of specific locations relevant to the evidence in this criminal case.⁴⁷ That information was then compared with the information concerning transmission masts and the antennas mounted on them that appears on the printed lists and files of intercepted conversations provided by the Ukrainian telecom providers. In all cases, locations specified in official records were checked by reporting officers against the data from the providers.⁴⁸

Furthermore, it is also important to note that, in order to assess the authenticity of intercepted conversations and their content, a large number of those conversations were translated by sworn interpreters from Russian into English, and then again from the source language into Dutch, in order to identify any differences in translation. The court found no significant differences in translation relevant to the evidence.

Finally, fourteen intercepted conversations attributed to defendant Pulatov were examined specifically for tampering. Experts from the Lithuanian Forensic Expertise Centre in Vilnius examined whether those fourteen conversations contained any evidence of editing. After subjecting those intercepted conversations to various types of examination, the experts concluded that there was no evidence to suggest that the examined audio recordings had been edited.⁴⁹

Although none of the aforementioned investigations encompassed all of the intercepted conversations in the case file, but only a selection/sample of them, the court is of the opinion that, when taken together, the various ways in which the authenticity of the intercepted conversations in the case file has been verified suffice to determine that the intercepted conversations in the case file do not reveal any evidence of tampering whatsoever. Therefore, in the opinion of the court, they can be considered authentic and reliable, and, for that reason, they can be used as evidence. Moreover, the allegations of manipulated intercepted conversations made by individuals have only been made in general terms and – with the exception of one comment by defendant Pulatov in a letter from his lawyers – have been made outside the case. Furthermore, none of the accused has specified the type of alleged tampering or which intercepted conversation or conversations are concerned. In addition, the court also notes that it does not consider content and location data of intercepted conversations in isolation when assessing the evidence, but rather considers it in relation to and in conjunction with other evidence in each instance.

Transmission mast data

In addition to what has already been considered above with respect to the transmission mast data contained in the case file, the court notes the following about that data.

Defendant Pulatov's counsel correctly argued, referring to the report submitted by a telecom expert retained by them⁵⁰, that, generally speaking, transmission mast data does not indicate the exact location of a phone emitting a signal, but rather an area around the mast being pinged. What exact area that is depends on the location of the mast, the directions covered by the antennas mounted on it, the strength of the

signals transmitted, and the landscape features of the surrounding area. These factors also determine the range, or reach, of the mast. Therefore, determining a phone's exact location based purely on the location of the mast being pinged is not straightforward. However, the court finds that successive pings over time to masts are of considerable probative value when determining a route travelled by a telephone. For although the exact location of a communicating phone relative to a specific mast may not necessarily be known, successive pings to masts – whose locations are known – give a strong indication of the phone's movement, the direction in which it is moving, and the times at which it is moving. In assessing the evidence, the court paid particular attention to routes travelled as indicated by transmission mast data, not to possible specific locations where a caller might be. Regarding the latter, the court points to that which it noted above: transmission mast data combined with the content of recorded conversations or text messages does, however, make it entirely possible to determine with the requisite degree of certainty where a specific user was located at the time of the intercepted call. By way of example, the court cites the intercepted conversation of 17 July 2014 at 12:51.⁵¹ In the conversation, one speaker states that they are at the Furshet in Snizhne, and that they are able to see the other speaker. The phones that were used pinged masts located in the vicinity of the Furshet; the range of those masts covered the Furshet.⁵² This combination of data means that there is sufficient evidence to show that both speakers were at that specific location at that time, despite the fact that the mast data may imply a greater range and thus, by itself, does not prove that the phones used were present at that specific location.

Incidentally, the court notes that the transmission mast data contained in the case file regarding defendant Pulatov matches what he himself states in his video statement regarding his whereabouts on 17 July 2014.

5.7 Photographic and video material

The case file also contains a large amount of photographic and video material, obtained through the SBU, or from witnesses, and/or retrieved from the internet. This material was scrutinised for genuineness and authenticity, but also with regard to the time and place at which the events that can be seen and heard on the material occurred. In a number of cases, the maker of the visual material or other persons who were present during the recording of the images, or were involved in the dissemination thereof, were questioned as witnesses. Furthermore, where possible, the recording equipment was examined by the Netherlands Forensic Institute. In cases where the prosecution deemed it appropriate, the material was also examined for evidence of tampering. An expert from the Royal Netherlands Meteorological Institute (KNMI) examined the footage and, based on shadows, light and cloud cover, assessed whether the weather conditions in the photo or video footage correspond to the weather at the location at which the photo or footage was said to have been taken or recorded on the specified date, and the approximate time at which the photo or video must have been taken or recorded.

In addition, the court instructed the investigating judge to have further expert analysis done, *inter alia* on a video of a self-propelled Buk TELAR in Snizhne and a photograph of a Buk TELAR on a trailer in Donetsk. This analysis was done by Swedish forensic experts, who found no evidence of tampering.⁵³

6 EVIDENTIARY CONSIDERATIONS

6.1 Position of the Prosecution

In essence, the prosecution called for the accused to be found guilty of the two principal charges as functional co-perpetrators. In the alternative, according to the prosecution, the court might find them guilty of the two alternative charges as (ordinary) co-perpetrators. In support of that position, the prosecution argues that the authenticity and reliability of all available evidence have been established. It follows from that evidence that a Buk missile was launched using a Buk TELAR, from a farm field near Pervomaiskiy. The said missile, that was deployed as part of the conflict being waged by the accused, struck flight MH17, causing the aircraft to crash, resulting in the death of all its occupants. Although the accused themselves did not fire this missile, each of them contributed to its firing by initiating and organising the deployment of the said Buk missile as a closely collaborating group of perpetrators whose purpose included shooting down aircraft. They carried out these actions as part of their leading military roles within the DPR; Girkin and Dubinskiy as senior officials operating remotely, Pulatov and Kharchenko as coordinators and commanders on the ground 'in the field'. Together, the accused were in full control of the deployment of the Buk TELAR. The accused thus each contributed to the firing of the missile, necessarily with deadly consequence as its outcome. As the accused deployed and used others to carry out their premeditated criminal plan and passively, but also in part actively, contributed to its execution themselves, they can be held responsible as

functional (co-)perpetrators, or in the alternative as co-perpetrators, for the crash of flight MH17 and for the murder of the occupants of the aeroplane. Should it not be possible to prove these legal variants, the prosecution adopts the position that the contribution by each of the accused can be characterised, as per the further or furthest alternative charges, as co-perpetration of incitement or co-perpetration of complicity.

6.2 Assessment of the court

6.2.1 Introduction

Firstly, the court finds it legally and conclusively proven that on 17 July 2014, flight MH17 crashed in Ukraine, more specifically in the Donetsk oblast, killing the 298 occupants of this aircraft, 283 passengers and 15 crew members, of whom the names are set out in an annex to the indictment (Appendix 1). It is not and has not been disputed that flight MH17 crashed at that time and in that place and that none of the 298 occupants survived this crash.⁵⁴

The court further finds it legally and conclusively proven that flight MH17 was downed by a Buk missile launched using a Buk TELAR from a farm field near Pervomaiskyi. To that end, the court considers that there is an abundance of evidence that - especially when considered together and in context - justifies this conclusion. Similarly, there are no sufficiently convincing grounds to reasonably doubt this conclusion. The court arrives at this conclusion on the basis of the following considerations.

6.2.2 Was it a Buk missile originating from Pervomaiskyi?

6.2.2.1 Photographs of the inversion trail

Flight MH17 crashed in eastern Ukraine at 16:20 on 17 July 2014. At 19:23 - about three hours after the crash of flight MH17 - a photograph of a vertical smoke trail was posted on the Twitter account 'WowihaY', together with the suggestion that the trail originated from the missile that had downed MH17.⁵⁵ The person who posted the photograph on Twitter supplied the contact details of the creator of the photograph. This person was questioned (under his own name) as a witness and stated that he had taken two photographs from the balcony at his home in Torez after hearing two loud bangs, at 16:25 on 17 July 2014. Shortly afterwards, his statement continued, he went to the roof of his apartment building and also took photographs of the plume of smoke coming from the direction of the town of Hrabove (court: one of the crash sites).⁵⁶ The creator of the photographs stated that he had sent the original digital photographs to a friend, who posted the photograph online. The said friend contacted the Ukrainian authorities and the SBU subsequently approached the witness. On 20 July 2014, the witness surrendered the camera and the memory card to the SBU and kept copies of the photographs.⁵⁷ On 12 August 2014, the camera and memory card were seized by the investigation team.⁵⁸

Counsel for defendant Pulatov argued that the photographs should be excluded from evidence because they may have been manipulated. In support of this, it was argued that the creator of the photographs has Ukrainian sympathies, his friend who posted the photographs online and received the original photographs has ties to the ATO, and the camera and memory card were in the possession of the SBU before being handed over to the investigation team.

The court once again considers that although having sympathies for one of the parties to the conflict and the fact that information was submitted via the SBU does not exclude evidence, it is grounds for caution. Specifically with regard to the photographs of the inversion trail therefore, the court notes the following. Not only were the creator of the photographs, together with his wife, traced and questioned about when and where the photographs were taken and what happened to them, but also the camera, memory card and the photographs themselves were examined in a variety of ways by various agencies that have no interest in the outcome of the investigation. This examination related not only to what could allegedly be seen on the photograph, but also where and when the photograph was taken, and whether the image in the photograph could have been edited. These findings confirm the statements of the creator of the photographs, as demonstrated by the following.

The photographs and the camera/memory card used to take them and on which they were stored, were examined by the NFI. The NFI sees no indications that the image on the photographs in question was manipulated. According to the NFI, any alteration to the original image would be reflected in the format in which it is stored (it would change from NEF to for example jpeg) or in the NEF numbers of the photographs (the amended file receives a new NEF number), and this is not the case with the files on the seized camera/memory card. The NFI is not aware of any software that permits the targeted

modification of the image content of NEF files. Although bytes can be inserted, deleted or overwritten, this is haphazard in nature and would be expected to result in a clearly observable disruption in the image, which has not been observed.**59** In the court's opinion, this satisfactorily proves that the image itself was not manipulated. In this context, counsel for defendant Pulatov also referred to the statement of a witness who was at the scene and who allegedly observed that there were no electricity cables hanging at the location where the photographs were taken, while they can be seen on the photograph that is not zoomed in. However, the court considers this to be incorrect. The witness in question in fact specifically confirmed that he saw the cables hanging near the balcony.**60**

To verify the metadata of the two photographs of the smoke trail, the KNMI conducted investigations into the time at which the photographs were taken. According to the metadata, the two photographs were taken at 16:25 (consistent with the statement from the witness), seven seconds apart. The KNMI was able to verify this time *inter alia* by comparing the photographs of the smoke cloud near the crash site taken shortly thereafter, from the roof, with a video recording of this smoke cloud, the starting time of which could be determined.**61** The court sees no reason to doubt the results of this investigation.

With reference to the comments of the KNMI regarding the nature of the trail (visible close to the horizon, vertically oriented, more highly developed near the horizon)**62**, the court concludes that the trail on the photographs is indeed an inversion trail and not a cloud or vapour trail from an aircraft. Given its shape and colour, the court sees no reason to assume that it could also be the result of the burning of a farm field, as argued by counsel for defendant Pulatov. On the contrary, the straight white striation combined with the grey cloud near the ground corresponds to the inversion trail appearing on photographs of the launch of a Buk missile.**63**

On the basis of the investigation, in which, by drawing in features of the landscape recognisable on the photograph, on a satellite image of the surrounding area, it was possible to ascertain information about both the place where the photograph was taken and the direction from which the inversion trail originates, the court concludes that the photographs were indeed taken in Torez in a southeasterly direction, and that the inversion trail roughly originates from the direction of Pervomaiskyi.**64** In view of the fact that the trail on the photograph is aiming straight up, it can be concluded that what the witness has stated in this regard, that the missile appeared to go straight over his residence, is correct. These conclusions, combined with the time at which the photographs were taken and assuming the position of MH17 at the time the aircraft disappeared from the radar**65**, justify the opinion that these photographs show the inversion trail of a missile launched from the direction of Pervomaiskyi in the direction of MH17 at around the time that MH17 crashed. In view of the above, and since the creator of the photograph that was posted on Twitter under his own name has been questioned as a witness, the court does not consider it necessary to interview as a witness the user of the Twitter account 'WowihaY' as conditionally requested by counsel for defendant Pulatov. Accordingly, the court denies this request.

The court considers that an internet search conducted by the investigation team in 2016 for photographs taken in the town of Snizhne revealed two other photographs of a smoke trail. The photographic files were uploaded to a website with the upload date 17 July 2014 and have 17 July 2014 15:22:23+02:00 and 15:22:33+02:00 as their 'File Modification Date'.**66** In an email message, the uploader indicated that he discovered the photographs on a web (page) of Snezhnyanskiy news on 17 July 2014.**67** According to the KNMI, the trail of cloud is exactly the same in structure and colour as the trail in the photograph from Torez. The cloud pattern on the photographs is also identical.**68** The landscape features visible on the photograph place the photographer in a building in the centre of Snizhne**69** and suggest that the inversion trail originated from a southerly direction.**70** Here too, the inversion trail leads in the direction of MH17's last observed position.**71** In the court's opinion, based on the similarities in shape, direction, stated time and direction of origin of the smoke trail, it may be assumed that these images feature the same inversion trail as seen in the aforementioned photograph from Torez. The fact that these photographs were taken separately, were quickly uploaded and were acquired by the investigation team at entirely different times and in entirely different ways mutually validates the authenticity of the images. The fact that the creator of the photographs from Snizhne has not been identified in no way detracts from this.

The court considers that the photographs from Torez and Snizhne each individually suggest only one direction for the origin of the inversion trail, but viewed in combination and taking into account the slope of the landscape**72**, the lines indicating the direction intersect each other slightly west of Pervomaiskyi.

The aforementioned photographs of the inversion trail - in particular the photograph from Torez - are therefore an important source of evidence for the actual launching of a missile in the direction of MH17 shortly before it crashed, and for the location from which it was launched. These conclusions - based on the photographs - are further supported by many other pieces of evidence. The court will address that evidence below.

6.2.2.2 Statements of witness M58

Witness M58 is a key eyewitness. Although counsel for defendant Pulatov has argued that the testimony of this witness is unreliable and should not be used in evidence, the court does not agree. The court will first give a brief account of the central thrust of witness M58's statement, after which it will provide reasons as to why his statement is reliable and may be used in evidence.

Witness M58 stated that he was part of the reconnaissance group under the command of the accused Kharchenko⁷³ and that on the afternoon when MH17 was downed, he was at a checkpoint near an intersection on the road between Snizhne and Marynivka.⁷⁴ It can be concluded from the location where witness M58 marked the intersection on a satellite image⁷⁵ combined with the drawings he made of the intersection⁷⁶, and his statements regarding that intersection⁷⁷, that the intersection in question is the intersection with checkpoint on the T0522 road, just to the west of Pervomaiskyi.⁷⁸ The T0522 is also known as Gagarina Street.⁷⁹ At some point in that afternoon, he was standing in a field next to this intersection. It follows from the drawing he made of this intersection that this is the field in the northwestern corner of the intersection. He was standing near the tent (or tents) that had been erected in that field and heard something driving along the unpaved road in the field to the south of the field where he was positioned.⁸⁰ He described the sound as that of the caterpillar tracks of a tank.⁸¹ A short time later he heard a loud explosion and saw a missile zigzagging and leaving a trail of smoke.⁸² He saw how the missile flew towards the aircraft and the aircraft fell from the sky after the missile exploded. When he subsequently walked towards the intersection and looked into the adjacent field, he observed a Buk TELAR that was short of one missile. Subsequently, the Buk passed him at the intersection.⁸³ The court understands that wherever witness M58 speaks of a Buk he is referring to a Buk TELAR, since a Buk missile can only be (independently) fired by a Buk TELAR. The court considers that the field in which witness M58 states he saw the Buk TELAR standing short of one missile, is precisely the area where the smoke trail in the photographs from Torez and Snizhne discussed above originated.

Counsel for defendant Pulatov - citing among others a report by a forensic psychologist - argues that the testimony of witness M58 may not be used in evidence. In his report, this forensic psychologist analysed the various statements made by witness M58 and identified a large number of shortcomings in the way the statements came about, and identified contradictions in the statements as such, leading him to the conclusion that they are not reliable statements. Like the prosecution, the court finds that these examples of alleged deficiencies are so often based on an incorrect representation or misreading of the statements as such or of the circumstances under which these statements were made, that the court disregards the conclusions drawn in the report. This does not alter the fact that, in part in response to the line of defence presented by counsel for defendant Pulatov, but above all because of the requirements governing the use of evidence, the court must form for itself a view of the reliability of witness M58 and his statements. In doing so, the court will take into account what is known about his background, the manner in which he reported to the investigation team, the manner in which his statements were taken, any inconsistencies and peculiarities in his statements, and the extent to which his statements are corroborated by other public and non-public information in the case file.

The court considers that witness M58 reported directly to the JIT on 18 September 2018, with an initial email. In this email, he let it be known that he was a witness to how Boeing MH17 was downed. In the summer of 2014, he was in Ukraine with a group of like-minded people fighting alongside the insurgents. They were staying near the village of Snezhnoe. There was a checkpoint there. It later emerged that there was a Buk where they were and that MH17 was downed using that Buk.⁸⁴ Witness M58 stated his willingness to make a statement in his own name, which he did. He was questioned on a total of twelve occasions, including twice by the investigating judge.

Witness M58's statements were examined by the investigation team for reliability, resulting in an official validation report.⁸⁵ In that report, a large number of facts or circumstances referred to by witness M58 were checked, mainly relating to his presence in that area and at the intersection near Pervomaiskyi on 17 July 2014, and attempts were made to validate those facts.

In his statements, witness M58 referred to a number of events, people and places which could be verified using open sources. These include, for example, his testimony about a bus accident on his outward journey between St. Petersburg and Moscow⁸⁶, about the name of the person who welcomed them on their arrival in Donetsk, namely Gubarev⁸⁷, and about the camp in Rostov on Don, in Russia, where he stayed prior to his departure for Ukraine.⁸⁸ His statements on these matters could be verified using open sources. Nonetheless, counsel for defendant Pulatov rightly noted that the possibility of verification using open sources limits the value of the verification, as the witness could also have looked up this information.

The court therefore considers more convincing the information provided by witness M58 himself during questioning, which can be corroborated on the basis of investigation results that are not or have not been made public. In this context, the court points to the recovered messages on the VK account from June/July 2014, which witness M58 posted under his own name in a discussion group, discussing his imminent departure. These messages were read to him by those questioning him and he was asked whether he recognised the messages. It is notable that witness M58 expressed doubts because he could not place some of the content of the posts. It subsequently emerged that he had been mistakenly presented with a part that did not originate from his posts: precisely the part he was unable to place.⁸⁹ Not only does this come across convincingly because he would only be able to point out the inaccuracy in the presented messages if they originated from him, but also because it illustrates he does not allow words to be put in his mouth and does not wish to substantiate his account with things he cannot remember. These posts therefore seem to confirm that he is certainly who he says he is, that he was sympathetic to the DPR and was intending to leave for Ukraine. The photographs submitted by witness M58 substantiate that he was indeed in Donetsk in mid-2014.⁹⁰ Moreover, witness M58 describes the building in Donetsk where they were stationed and points out the building on the map. The questions posed about these matters were open-ended. The information witness M58 provides about this building is *inter alia* confirmed in an intercepted conversation between the accused Kharchenko and another DPR fighter, in which directions are given to find the institute on Boidukova Street in Donetsk.⁹¹ The court considers that this did involve very specific information about the building and that the verifying intercepted conversations were not made public.

Finally, witness M58 also mentions a number of specific facts and circumstances of which he could only be aware if he actually belonged to Kharchenko's army unit and was in the field near Pervomaiskyi on 17 July 2014. For example, before Kharchenko's name was made public as a suspect, he had already testified about Kharchenko/Krot. Witness M58 stated that Krot was the commander of his reconnaissance unit and he also mentioned the names of many other individuals in Kharchenko's unit, such as Dikson and Ryazan.⁹² This information is confirmed by other investigative findings in the case file and had not been made public at the time he made statements on this. Finally, a chat message⁹³ between witness M58 and Ryazan dated 25 April 2015 was discovered, which confirms they knew each other.

Witness M58 initially only described the launch site and only later testified that the said intersection was near Pervomaiskyi. In line with counsel for defendant Pulatov, the court notes that witness M58 did not spontaneously state that it was an intersection near Pervomaiskyi, but that he in fact only stated such after the reporting officer had mentioned the name of the village. Nonetheless, witness M58 had himself already drawn the intersection (appendices) and had already described it in detail (paved/unpaved road, rows of trees, road blocks, tent(s), trenches, surroundings) and, at the start of his first interview, in response to an open-ended question, had indicated that it was a checkpoint below Snizhne, in the area where they were located at the time.⁹⁴ In this case, the court considers it especially important that the said drawing and the said description and placement precisely match the intersection near Pervomaiskyi. The court does not see why the fact that he was presented with the place name Pervomaiskyi would still be significant under these circumstances, especially since it is not in dispute that this name had already been made public at various press conferences. If witness M58 had himself mentioned the name Pervomaiskyi, without encouragement, he could have been accused of mentioning it only because he had already heard it at a press conference. It could equally be argued that the fact that he himself does not mention the name confirms that he only wished to testify about what he himself could remember, and was attempting to avoid filling in gaps with information that came to him by other means. Whatever the case, more important than the name of the intersection is the fact that he mentioned and drew details that had not yet been shown or mentioned at the press conference, nor that could have become apparent from other openly accessible sources. In this context, the court paid particular attention to the following parts of his statement.

Witness M58 describes plants growing that resemble burdock. A photograph on one soldier's social media account that appears to have been taken in the field in question confirms the presence of this type of plant (a spear thistle resembling burdock is visible on it). Although it is a common flower in European meadows and roadsides, and thus not particularly unique, it is very specific information.**95**

In this regard, the court finds witness M58's statements regarding the tents set up by the troops in the field to be more convincing. During the interview on 30 April 2019, witness M58 mentions that they set up two tents. Later in that same interview, and in subsequent interviews, he expresses his doubt about whether it was one or two tents. Eventually, he indicated that it was one tent. Witness M58 also looked up a photograph of the type of tent.**96** The tent on this photograph is very similar to a tent visible at the intersection in the 2015 ARD report, albeit that that tent is at a different location.**97** A satellite image of the intersection in question near Pervomaiskyi, taken on 20 July 2014, shows pale 'round' patches at the spot where according to witness M58 the tent or tents were located. Those patches are not visible on a satellite image dated 16 July 2014. **98** The court considers that the inner circle of these two patches resembles the almost square shape of the tent on the photograph sent by witness M58. The dark border around this inner circle, in combination with the white border around it matches the phenomenon of a pathway around the guy lines. No information had yet been announced about the round patches, such that this information is information that witness M58 could only have known if he had actually been there. The fact that he inconsistently refers to one or two tents and the fact that he was mistaken about the precise location of the entrance to the tent in no way detracts from this.

The court considers that so many parts of witness M58's statement regarding his participation in the fighting on the side of the DPR can be verified, also according to information not shared, that the court sees no reason to doubt his statements in this regard. The same applies to his presence at the intersection in question on the day that MH17 crashed. Nonetheless, this does not mean that there is still no reason to doubt the substance of his account.

In line with counsel for defendant Pulatov, the court notes that throughout his various interviews, witness M58 made inconsistent statements about precisely what happened at the intersection that afternoon, for example in respect to the time at which the missile was allegedly fired, the precise spot where witness M58 was standing at that time, where the Buk TELAR was positioned in the field when he allegedly saw it from the intersection, and how high the aeroplane was flying when it was struck. Moreover, he stated that he saw the missile detonate next to the cockpit and that the weather was clear. This is notable, and it remains uncertain whether he was actually able to observe it so precisely given the distance and partial cloud cover at the time.

The possibility exists that witness M58 was at the scene that afternoon, but observed nothing at all that indicates the launching of a Buk missile from the farm field in question, and decided to make a deceitful statement about it. This could possibly explain the aforementioned inconsistencies and the more notable elements of his statements.

However, after examining the interviews and the manner in which contact with witness M58 took place, the court finds no indications for assuming such deceit. Firstly, it is not possible to see what interest he would have in doing so. At the time, witness M58 belonged to the separatists and was fighting at their side. In his statements, he still expresses his sympathy for the DPR and still stands up for them in his interviews. Moreover, it appears that he thought he was finished after sending the first email and would not hear anything more about it. It was only when it became clear that he would be facing many more interviews that he said he was willing to do so by name if he were protected. In order to obtain that protection, he had to give up his entire life as he knew it, so it is highly questionable whether he has benefited. In addition, if someone intends to lie about something so important, it seems obvious that that lie would be better prepared and his testimony would be far 'tighter' and more consistent. At the very least, for example, the date would have been checked for accuracy.

But even assuming witness M58's sincerity and good intentions, the court is still faced with the question of whether the aforementioned inconsistencies in his statement detract from the evidentiary value of the substance of his account, namely that he heard the Buk missile being launched from the field next to him, at the intersection near Pervomaiskyi, that he saw it fly out and how it struck MH17, after which MH17 crashed.

The court notes that in subsequent interviews, witness M58 often revisited matters to which he had

testified in previous statements. In doing so, he indicated that he was no longer able to remember certain things well and corrected himself. The court considers that such behaviour and the resultant inconsistencies in his statements may be the result of witness M58's wishing to give his account as honestly as possible, by not inventing things that he does not in fact remember and, even after making a statement, continuing to try and check whether what he has said is indeed true. Given the passage of time between the events and the interviews, and the hectic period about which witness M58 testifies, the court considers a certain degree of uncertainty about details which, at the time they occurred, he was unaware would be significant, to be normal. The said inconsistencies regarding the time, his exact location, the exact distance between the Buk TELAR and the intersection, and how high the aeroplane was flying are precisely details that fall into this category. On the one hand, this means that the evidentiary value of the statement with regard to such details will not be great, but on the other hand, that the inconsistencies do not detract from the statement when it comes to observations that by their nature must have made a far deeper impact, such as the actual firing of a Buk missile, the joy about striking a military aircraft, and the turning of that joy into dismay when it shortly thereafter emerged that not a military aircraft but a passenger aircraft was struck. Indeed, witness M58 does not hesitate for a moment as regards these impressive aspects.

When it comes to the question whether witness M58 could actually have seen that the missile detonated to the left of the cockpit, the court considers it not unlikely that based on what he subsequently saw during press conferences, witness M58 filled in the fact that the Buk missile detonated to the left of the cockpit, and that he actually stored this as a memory. However, the likelihood of filling in such a detail - to which no probative value can be assigned as a consequence - does not equate to the likelihood that witness M58 may also have imagined the substance of his statement. It is inconceivable that such an impressive event could be imagined.

In the opinion of the court, therefore, witness M58's statement - as summarised above - is reliable.

In addition, it is submitted by counsel for defendant Pulatov that the use of witness M58's statements represents a violation of Article 6 ECHR because the defence had insufficient opportunity to cross-examine the witness. However, the court is of the opinion that the use of witness M58's statements does not violate Article 6 ECHR. Counsel for defendant Pulatov requested an opportunity to question the witness, which request was granted. The questioning before the investigating judge took place over several days, during which counsel for defendant Pulatov and the prosecution were able to ask extensive questions, all of which were also answered by the witness. For security reasons, the interview was organised in such a way that counsel for defendant Pulatov and the prosecution were seated in different rooms from the witness, which rooms were connected by video link without sound. The replies first passed through a second investigating judge sitting in a third room, who did have an audio link to both other rooms. Witness M58's appearance was disguised with beard and glasses. The court considers that such concealment can hardly be seen as an inadmissible restriction, if only because there will be many witnesses who wear glasses and/or beards and who can hardly be required to remove their beards and glasses before an interview, so that their facial expression can be better observed. Moreover, the identity of the witness was clearly known to counsel for defendant Pulatov; only his current appearance was concealed. The fact that the answers of the witness to the questions from counsel for defendant Pulatov and the prosecution were not always fully communicated to counsel for defendant Pulatov and the prosecution may be considered a limitation. Here - as with the written record of his previous interviews - sections were omitted if they contained information that could jeopardise the witness' safety. While it raises a limitation, this redaction of his answers was deemed necessary by the investigating judge, on each occasion, in view of the compelling interest of the witness' safety. Furthermore, the prosecution was also unable to take cognisance of this information, such that it did not limit counsel for defendant Pulatov only. In addition, at the end of the interview that lasted several days, counsel for defendant Pulatov indicated that it had been able to ask all its questions. Finally, the court considers that the statement of this witness is neither 'sole' nor 'decisive' in the total evidence structure as discussed below, which consists *inter alia* of validated photographs, videos, intercepted conversations and expert opinions. Under these circumstances, the court does not consider the use of witness M58's statements to violate Article 6 ECHR.

6.2.2.3 Satellite images

The court considers that analysis of the satellite images of the farm field also supports the conclusion that the farm field indicated by witness M58 was the launch site. A comparison between the satellite image taken on 16 July 2014 and those taken on 20 and 21 July 2014 shows that multiple changes

took place between 16 July 2014 and 20 July 2014 which may indicate that a missile was fired in the intervening time.

In this regard, the court first refers to the most eye-catching dark-coloured triangular section in the northwest corner of the field.⁹⁹ The journalist who partially saw and filmed that part of the field on 22 July 2014 spoke of burn marks.¹⁰⁰ The outbreak of fire following the firing of a Buk missile is a consequence described by experts in the case file.¹⁰¹ Firing causes a flame jet, which – depending on the surroundings – can cause a fire.

Another change that is shown by the satellite images to have occurred between 16 July and 20/21 July 2014 relates to the tracks running from the paved road along the unpaved path along the north side of the field, especially the tracks running down the middle of the unpaved path into the discoloured section of the field. The tracks leading into the field are more than three metres wide, just like those of a Buk TELAR.¹⁰² The tracks are in the corner of the dark-coloured triangular section of the field indicated by the KNMI as the most likely section of the field for the launch based on the wind direction.¹⁰³ The circumstance that several fields in the area may have been burned, either in whole or in part, in the weeks before and after the disaster does not negate the fact that, between 16 and 20 July 2014, something caused a fire at that spot in the field and that this fits with the launch of a Buk missile and thus with the statement provided by witness M58 and the photographs of the inversion trail. In addition, the tracks are at the location that forms the highest and most strategic point in the area from which to fire a Buk missile, in exactly the southwestern and western direction from which the separatists expected the air strikes, as the court will discuss below.

Therefore, witness M58's testimony – supported by satellite images – confirms not only that the inversion trail visible in the aforementioned photos is from a missile actually fired at MH17 and that it was fired from a farm field near Pervomaiskyi, but also that the missile fired was a Buk missile fired from a Buk TELAR and that this Buk missile, in fact, downed MH17.

6.2.2.4 Intercepted telephone conversations, transmission mast data and videos

Regarding the use of intercepted conversations and transmission mast data, the court first states that it will discuss at length the basis for linking individuals to particular telephone numbers later in this judgment, when discussing the possible specific involvement of the various accused. That is also the part of the judgment (Appendix 3) which contains a discussion of the visual material and the authenticity analysis conducted on that material, and which provides the location of those items in the case file. At this point in the judgment, it is only relevant to consider precisely what was discussed by separatists by telephone, which movements the transmission mast data reveals and what can be seen in visual material, and not so much to consider who is talking; the court therefore regards that a reference to the relevant part of the judgment where that link is made sufficient at this stage.

The court considers that the fact that, in several intercepted telephone conversations between separatists on the morning of 17 July 2014, the arrival of a Buk, and that this should go to 'Pervomaiske'¹⁰⁴ is discussed, provides very convincing evidence that this field near Pervomaiskyi was the launch site and that the missile launched was a Buk. The court has already given due consideration in this judgment to how the authenticity of these conversations was established. In addition, the picture sketched in the conversations about where a Buk was coming from and where it was supposed to go is confirmed by the historical transmission mast data of the telephones of the people who, according to the intercepted data, had been assigned the various tasks.

Between the evening of 16 July 2014 and the morning of 17 July 2014, the telephones of those ordered to collect equipment at the border with the Russian Federation did in fact ping transmission masts that covered the route from Donetsk to the border with the Russian Federation and back again.¹⁰⁵ The telephone of the person tasked with escorting a Buk from Donetsk to 'Pervomaiske' in fact pinged successive transmission masts on the route from Donetsk via Snizhne to Pervomaiskyi in the morning and early afternoon of 17 July 2014.¹⁰⁶ The times at which the telephones pinged the various transmission masts are not the only evidence which aligns with the content of the intercepted conversations of that person at that time;¹⁰⁷ in several cases, a Buk TELAR was also captured on camera at a time that fits on the route to just outside Pervomaiskyi. In this regard, the court refers to the photograph taken on Illich Avenue in Donetsk, the video recorded at the Motel roundabout in Donetsk, the video at Makiivka, the video in Zuhres and the photograph in Torez, each of which shows a Buk TELAR being transported in the direction of Snizhne on the same specific¹⁰⁸ Volvo flatbed trailer with a white cab. The images from Donetsk clearly show that Buk TELAR carrying green Buk

missiles with a white head. The video at Makiivka shows that there were four missiles at that time. The photo and video of a Buk TELAR travelling south from Snizhne towards Pervomaiskyi show a Buk TELAR which is not being transported on a flatbed trailer, but which is driving independently at that time. According to an officer of the Dutch Royal Air Force, this circumstance indicates that that Buk TELAR was not far from its intended deployment site.¹⁰⁹ At the time when this video was recorded, that Buk TELAR was only a few kilometres from the field in question near Pervomaiskyi.

Defendant Pulatov's counsel did not argue that the footage referenced here had been manipulated. Nevertheless, these images – as with the content of the intercepted telephone conversations and the historical transmission mast data – were also verified to the extent possible with respect to location and timing, and examined for authenticity. Again, no evidence of tampering was found.

The fact that a Buk missile was indeed fired is also confirmed in the telephone conversations that took place in the late afternoon and evening of 17 July 2014, in which this was stated in as many words. For example, at 16:48, less than half an hour after MH17 had crashed, Kharchenko reported to Dubinskiy that they had already downed one Sushka. In a telephone conversation at 18:44, Pulatov told Kharchenko that Kharchenko should tell 'that one' that the Sushka we hit had just downed a Chinese passenger aeroplane. At 19:54 a conversation took place between Dubinskiy and Girkin, in which Dubinskiy told Girkin that Pulatov had just told him that the Sushka had shot down the Boeing, and wanted to strike again, but was then shot down by their people with a Buk.¹¹⁰ The court considers, as Girkin himself pointed out during this conversation, that this scenario put forward by Dubinskiy and Pulatov is completely implausible, if only because no Sushka was shot down that day. Moreover, both Ukrainian and Russian radar images show that no Sushka or other fighter plane was flying in the airspace in question. Rather, what should be inferred from these telephone conversations is that the Buk missile was actually fired and shot something out of the sky. Initially, it was apparently assumed that the aircraft struck was a Sushka, but when it turned out to be a large civilian aircraft the scenario described above was disseminated.

The video recorded in Luhansk in the early morning of 18 July 2014¹¹¹ also confirms that a Buk missile was in fact fired from this Buk TELAR. The video shows a flatbed trailer with the same features, carrying a Buk TELAR from which one missile is missing. It has been neither claimed nor shown that the footage in this video has been manipulated. The location where the video was recorded was extensively researched based on landscape features.¹¹² In the court's opinion, it can be established that this video was in fact recorded in Luhansk on 18 July 2014 around the time of 04:50 shown in the metadata, and that it is the same Buk TELAR that had been transported in the previous day and taken to Pervomaiskyi.

To this end, the court first notes that the KNMI – assuming the video was made on 18 July 2014 – determined the time at which the video must have been recorded to be between 04:03 and 04:42 local time.¹¹³ Although this is close to the time shown in the metadata, it is not sufficient to confirm that the footage shows the same Buk TELAR, nor that it concerns the early morning of 18 July 2014. However, this has been convincingly confirmed by numerous intercepted telephone calls, (associated) transmission mast data and witness S21's statement. Indeed, these sources reveal that several members of the DPR were involved in removing the Buk TELAR used to shoot down flight MH17 to the Russian Federation shortly after the disaster, and that the same Buk TELAR was actually in Luhansk on this outbound route on 18 July 2014 between 04:30 and 05:00: the time when the metadata shows that the video was recorded. For example, in a telephone conversation on 17 July 2014 at 20:30, Girkin ordered Dubinskiy to arrange for the removal of the damaged tank; 'the box' that Kharchenko was guarding had to be evacuated to the border with the province.¹¹⁴ Then, in a telephone call at 20:32, Dubinskiy relayed this order to Kharchenko and said that a flatbed trailer would come for the 'box'.¹¹⁵ At 23:14, Kharchenko was finally ordered by Dubinskiy to go to Krasnyj Luch and wait there for escorts who had just left from Luhansk and who would wait at that intersection.¹¹⁶ At 23:32, Kharchenko reported to Dubinskiy that his men had left and gave Dubinskiy the number of a senior among the escorts, Leshy, so that he could be contacted.¹¹⁷ The court finds that these conversations, and the terms 'damaged tank', 'box' and 'it' therein, refer to the Buk TELAR. In this regard, the court refers to the discussion below on interpretation of intercepted conversations.

Witness S21, call sign 'Leshy', is one of the people whom Kharchenko tasked with the removal. Witness S21 provided a statement about the progress of the first part of the journey. He stated that the Buk TELAR had been driven into Snizhne on a trailer with a white cab and was to be taken from Snizhne to Krasnyj Luch, where escorting would be handed over to others. S21 states that the plan for handing over the escorting of the Buk TELAR then changed and he travelled with the Buk TELAR as

far as Debaltseve, after which the crew continued travelling with the trailer itself towards Luhansk. They knew the way from there.**118** This statement is corroborated both by the content of several intercepted conversations on S21's phone and by the transmission mast data**119**, in which the route driven by S21 can be traced from Snizhne via Krasnyj Luch to Debaltseve. Although S21 did not comment on the further route towards the border with the Russian Federation, he did state that the crew wanted to follow the familiar route. The court considers that the route from Debaltseve via Luhansk corresponds to the route very likely to have been taken the day before on the outward journey. The following evidence confirms that this route was followed on the return journey. In a conversation between Bibliothekar and Dubinskiy, Bibliothekar said he had removed 'the box' and that it was now there, in that area. A minute later, Dubinskiy called Girkin and told him that Bibliothekar had personally taken it there. The court understands this to mean that the Buk TELAR had been taken across the border into the Russian Federation.**120** Bibliothekar's telephone pinged several transmission masts on the route between Debaltseve and Luhansk that night, placing the telephone – and thus also the Buk TELAR – in Luhansk at 04:51, after which the telephone continued moving eastwards.**121** The court has established that the Buk TELAR that was in Pervomaiskiy that night, at that time, was travelling in that direction through Luhansk and thus can be seen in this video. This Buk TELAR was captured in various kinds of visual material on the morning of 17 July 2014 as it made its way to Pervomaiskiy.**122** A simple comparison of the number of missiles on the Buk TELAR shows that one missile was missing that night, after the disaster,**123** a missile that had still been present that morning, before the disaster.**124** The court also sees this as confirmation that a missile was indeed fired by this Buk TELAR.

6.2.2.5 Detection of Buk components or Buk warhead components in pieces of wreckage and bodies

Finally, the court also bases the evidence and its finding that a Buk missile was actually fired at MH17 and that it was that missile which actually took down the aeroplane on the findings of the NFI and the Royal Military Academy (RMA). In its assessment, the court also considered the observations made by the AFP as part of its preliminary technical investigation. The observations made by specialists as part of the preliminary technical investigation do not qualify as expert evidence within the meaning of the law; however, the observations described by these employees and to which the court refers are observations which can be made without specific expertise. Moreover, these observations were also made by the court itself on images shown at the hearing. Consequently, the court sees no reason why these observations should not be included in its assessment.

Many fragments found at or near the crash site that may have originated from a weapon were examined. In its assessment, however, the court only took into account findings regarding those fragments that are either obviously related to the cause of the disaster because they were found in the bodies of victims or were embedded in pieces of wreckage, or are of some value in identifying the type of weapon used due to their surface characteristics and/or their metallurgical composition.

SIN AAHJ9117NL: bow-tie-shaped destructive element

In the body of one of the crew members in the cockpit, one specific object was found, among others. This is the object referred to as SIN number AAHJ9117NL, weighing 5.72 grams.**125** Although one side of the object appears to be deformed, the court agrees with the NFI's**126** identification that this object has a clear – though incomplete – bow-tie shape. In particular, the symmetrical notch in the centre of one side and the relative depth of that notch, combined with the reflected undulation and protruding point on the opposite side which is particularly visible in the photo of the reverse side**127**, provide the basis for this visual identification. This shape corresponds to the shape of the bow-tie-shaped destructive elements that are used solely in the (new) 9N314M warhead, which is used only in a Buk series 9M38 missile (model 9M38 or 9M38M1).**128** The court finds it inconceivable that the object found in the body was originally a square destructive element from an (old) 9N314 warhead that was deformed upon entering the aircraft. This would mean assuming that, in its trajectory, the destructive element had, after detonation but before it entered the crew member's body, been struck on both opposite sides in exactly the same place. This is inconceivable, if only because the fuselage of the aircraft was the only barrier between the warhead and the crew member's body; consequently, there were not multiple similar barriers that the destructive element could have struck. Furthermore, none of the destructive elements found in the bodies or in the pieces of wreckage weighed over 8.1 grams.**129** The 9N314M warhead contains three types of destructive elements: filler elements of 2.1 grams, square elements of 2.35 grams, and bow-tie-shaped elements of 8.1 grams.**130** In a type 9N314 warhead, the same square elements of 2.35 grams are found, but also block-shaped elements of 10.5 grams.**131** If a 9N314 warhead had been used, one would expect to find destructive elements weighing more than 8.1 grams.

A metallurgic comparison of this destructive element was carried out with other destructive elements found in the bodies and pieces of wreckage from MH17, and with bow-tie-shaped destructive elements from six reference 9N314M warheads. This research shows that the bow-tie-shaped destructive element is indistinguishable (or barely distinguishable), in metallurgical terms, from the composition of other destructive elements that were originally bow-tie shaped recovered from the bodies and pieces of wreckage (destructive elements found that weigh more than the square fragments from a 9N314M warhead), and that the composition of those destructive elements is indistinguishable (or barely distinguishable) from bow-tie-shaped destructive elements from any of the reference 9N314M warheads.**132** Contrary to arguments presented by Pulatov's defence, a comparison of the composition of the various destructive elements found does not make it possible to establish whether one or more fragmentation heads was involved. The expert witness from the NFI points to studies on six reference warheads, in which destructive elements of one warhead were compared in terms of their metallurgical composition and showed a similar range of variation to that observed among the destructive elements found.**133** Therefore, the variation observed in no way warrants the conclusion that two warheads must have been involved.

Defendant Pulatov's counsel has argued that the object found cannot be the unique bow-tie-shaped type of destructive element because it is too light for that. In this regard, defence counsel points to studies by Almaz-Antey, the manufacturer of the Buk (or its legal successor), which are said to show that the weight loss of a destructive element that is still recognisable as bow-tie shaped after detonation is only 3-10%, and thus 0.81 grams at most, and that bow-tie-shaped destructive elements that no longer have a recognisable bow-tie shape after impact can lose up to 21-52% of weight.**134** Defendant Pulatov's counsel has pointed out that these findings by Almaz-Antey are recorded in numerous photographs of target plates and the target aircraft that appear in Almaz-Antey's Field Test report, as well as the results of numerous tests documented in reports, carried out throughout the period in which the Buk missile was being developed and manufactured.

The court takes into account that several arena tests were conducted with a 9N314M warhead as part of the criminal investigation in order to investigate the operation of a Buk missile. This involved several agencies, including the Belgian RMA. An expert opinion provided by the RMA shows that in an arena test involving a full missile with a 9N314M warhead, many light destructive elements (less than 0.5 grams) were found after detonation. The reason for this, according to the RMA, is the break-up of the primary (warhead) destructive elements.**135** It was also observed that some bow-tie-shaped destructive elements**136** exhibited a significant decrease in weight after detonation (weight before detonation was 8.1 grams and after detonation between 2.5 and 8 grams).**137** Consequently, the results of these tests show that it is quite possible that the destructive element with SIN number AAHJ9117NL weighing 5.72 grams**138** was originally a bow-tie-shaped destructive element.

As regards whether the court should see grounds in Almaz-Antey's conclusions to doubt the aforementioned conclusions of the RMA, the court considers the following. The court holds that Almaz-Antey's substantive expertise on the subject cannot reasonably be at issue, since, as the designer and manufacturer, it will unquestionably be familiar with the characteristics of its product. Nevertheless, Almaz-Antey cannot be seen as an independent and impartial expert in this case. First of all, Almaz-Antey is a state-owned company, affiliated with the authorities of the Russian Federation. Although, as already discussed, some links between an organisation and an authority need not call the independence and impartiality of that organisation into question, in the present case this is indeed so. The authorities of the Russian Federation, to which Almaz-Antey is affiliated, have - as the court has found above - wrongly denied any involvement in the conflict in eastern Ukraine. In addition, they have denied any involvement in the MH17 disaster. In the context of that denial, the authorities of the Russian Federation have repeatedly presented evidence that sought to show that the Ukrainian authorities, rather than the authorities of the Russian Federation, were responsible for the MH17 disaster. On several occasions, however, this so-called evidence was found to have been falsified or there were evident traces of manipulation. For that reason alone, Almaz-Antey's affiliation with these authorities detracts from its independence and impartiality and, as such, also from its cogency. It should also be noted that Almaz-Antey itself has an interest in the outcome of the investigation on the points that it reports on. After all, sanctions were imposed on Almaz-Antey by the European Union (EU) in connection with the MH17 disaster. At its press conference on 2 June 2015, Almaz-Antey explained at length how it intended to demonstrate that it had nothing to do with the disaster and that the sanctions were unjustified, by presenting the results of its own investigation at that press conference. This underlines the company's own interest in the outcome of the investigation that it conducted, and thus its lack of objectivity.

However, the court considers that the findings and conclusions of experts in the field who are non-independent or non-objective are not without merit for that reason alone. It is quite possible that the findings and conclusions of such experts in the field are indeed correct. However, in order to convince the court of the accuracy of its findings, Almaz-Antey, or rather its representative, would have to substantiate its findings in a manner that is fully clear, transparent, logical, and verifiable. Almaz-Antey's conclusions are substantiated only by assertions and references to its own experience and research. Consequently, the court sees insufficient reason to doubt the results of the arena tests that were clearly explained and analysed by the expert witness from the RMA appointed by the investigating judge.

With regard to the reports by an American agency submitted by counsel for defendant Pulatov, the court finds that the reports drawn up by this agency do not change the above. Quite apart from the fact that these are unsigned reports, meaning that it is unclear who exactly wrote which report and what expertise the author may have, the court notes that the author - with regard to investigation into the weapon - does nothing more than repeat the conclusions of Almaz-Antey based on the assumptions and findings provided by Almaz-Antey, without any further substantiation or research of his or her own. Consequently, these reports provide little added value.

The above considerations with regard to the weight of the bow-tie-shaped destructive element also apply to the fact that no, or hardly any, bow-tie-shaped puncture holes were observed in the fuselage of MH17. Almaz-Antey and, subsequently, the U.S. agency consulted by defendant Pulatov's counsel, argue that the fact that no bow-tie-shaped puncture holes were found in MH17's fuselage means that MH17 could not have been struck by a Buk missile with a 9N314M warhead. To support this conclusion, reference is made to a static test conducted by Almaz-Antey, in which it detonated a 9N314M warhead to the left of the cockpit of an Ilyushin 86 (IL86) which is similar to a Boeing. Many bow-tie-shaped holes could be observed in the skin of the IL86 afterwards, which were not observed in MH17. However, the court considers that — quite apart from the question of whether, contrary to the RMA's expert witness's statement, **139** no bow-tie-shaped holes can in fact be observed on the wreckage of MH17 — it is impossible to see how the outcome of a static arena test on witness plates or on a stationary IL86 compares to the dynamic situation at an altitude of ten kilometres with regard to the shape of the puncture holes. As pointed out by the expert witness from the RMA, conditions in a dynamic situation at an altitude of ten kilometres (temperature, cabin pressure, and above all velocity vectors) are so fundamentally different that this may explain the absence of bow-tie-shaped holes. The court considers it highly plausible that, even if a bow-tie-shaped destructive element were to strike the skin of the aircraft with the bow-tie side flat, the particularly high forward velocity of the missile alone (over 3,000 km/hour), **140** the even higher speed of the destructive elements as a result of detonation, and the velocity of the aircraft in the opposite direction (915 km/hour) **141** mean, empirically, that there can be little or no question of an equally perpendicular puncture in the skin of the aircraft leaving behind a recognisable bow-tie shape.

Nor is it a plausible argument that it cannot have been a 9N314M warhead, since the tests conducted by Almaz-Antey lead one inescapably to the conclusion that many more bow-tie-shaped destructive elements would in that case have been recovered. Once more, the court repeats its above considerations regarding the value of Almaz-Antey's assertions and refers to the findings of the NFI and the RMA, which refer to the break-up of primary destructive elements into smaller parts observed during the arena test carried out by the JIT, and which also indicate that another seventeen destructive elements were found that may have originally been bow-tie shaped, as indicated by their shape **142** or composition **143** and weight (between 2.5 and 5.76 grams). **144** The deformation and weight reduction are the consequence of dynamic detonation at high altitude. **145** In addition, many destructive elements did not strike the aircraft and many of the destructive elements that did strike the aircraft may have been lost because not every piece of wreckage was recovered, and those pieces of wreckage that were recovered were transported, which may also have resulted in the loss of destructive elements. **146**

Therefore, the court finds that the destructive element found in the crew member's body is indeed a bow-tie destructive element, unique to the 9N314M warhead solely used in a 9M38-series Buk missile, and does so based on the aforementioned findings regarding the surface characteristics and metallurgy, considered collectively and in relation to one another. On this basis alone, the possibility that MH17 was shot down by another weapon can be ruled out. Nonetheless, the court will discuss two more fragments that point in the same direction, which strengthens the above conclusion still further.

SIN AAHZ3650NL (green lump from groove)

A second fragment of interest was found in the groove of the left cockpit window. It is a green lump which could only be detached notably by grinding off pieces of the frame.¹⁴⁷ The AFP examined the surface characteristics of the lump, such as its colour, shape, milling, coarse machining, and fine machining¹⁴⁸, and, after comparing it with reference missiles of type 9M38 and 9M38M1, concluded that the lump matches the base plate of both of these types of Buk missile. The court has no doubt that the green lump is part of such a base plate, in view of the many surface similarities that the court also observed for itself in the photographs of this fragment¹⁴⁹. The court considers it to be out of the question that these could also be similar launcher fragments from a different weapon as suggested by the expert witness from Almaz-Antey. Firstly, because the expert witness from the RMA stated, based on research on many missile systems, that connector plates are unique items in a missile system, since they are unique to the interface that exists between a specific missile and a specific platform.¹⁵⁰ Secondly, because research was conducted into the metallurgical composition of the green lump, which showed that it is indistinguishable from the material from which the base plates of the two reference Buk missiles (9M38 and 9M38M1) are made.¹⁵¹

As such, the court considers that the green lump has significant identifying value.

SIN AAGK3338NL (lump from frame)

The same also applies to the final fragment to be discussed by the court in this context, which is a piece of metal found coiled and wedged into a truss in the frame.¹⁵² The AFP also examined the surface characteristics of this piece of metal, such as its shape, markings, and traces¹⁵³; after comparing it with reference missiles of type 9M38 and 9M38M1, the AFP concluded that the piece is a visual match with the slide plate of both these Buk missiles. The metallurgical examination yielded the same result as the examination of the green lump from the groove; this means that the composition of this lump matches that of a 9M38 missile as well as that of a 9M38M1 missile.¹⁵⁴ This dynamically embedded lump is also unique to a Buk weapon system, according to the RMA expert.¹⁵⁵ The court therefore also attributes significant identifying value to this fragment.

And so it is that (at least) three objects have been found that necessarily originated from the weapon that struck MH17, that all these objects — based on their surface characteristics, and certainly in view of their metallurgical composition and in connection with each other — identify the weapon as a Buk missile from the 9M38 series and that none of these objects which relate to the cause of the disaster are indicative of a weapon other than a Buk missile. In light of this, the court finds that these items of evidence, alongside the testimony of M58, are highly convincing regarding whether MH17 was in fact struck by a Buk missile of the 9M38 series, which was carrying a 9N314M warhead.

The fact that traces of the substance PETN were found on some pieces of wreckage that were not, or could not have been left by the Buk missile does not provide any reason to doubt this conclusion. Indeed, given that, unlike the fragments embedded in bodies or the wreckage, no direct relationship can be established between that substance and the explosion that struck the aircraft, there are many reasons why it may have been present.

6.2.2.6 Interim conclusion regarding the cause of the crash of flight MH17

In view of all the above, the court finds lawful and conclusive evidence that a Buk TELAR was present in the farm field near Pervomaiskyi on 17 July 2014, and that it was an operational Buk TELAR, which also fired a missile in the direction of MH17 that consequently downed flight MH17 and caused it to crash. The court finds that each of the aforementioned sources (the photos from Torez and Snizhne, the statements by M58, the satellite images, the intercepted conversations and transmission mast data, the photos and videos of a Buk TELAR on 17 and 18 July 2014, and the findings with regard to the fragments in the bodies, the objects in the frame and the groove of the aircraft, also based on the examination results from the NFI and the RMA) constitutes strong evidence in and of itself in support of the conclusion that MH17 was, in fact, struck by a Buk missile. However, considered collectively and in relation to one another, the court finds that this conclusion is established beyond reasonable doubt.

Following on from all of the above, the court further notes that the suggestion (advanced by a number of the accused, and by third parties outside the courtroom) that all of the abovementioned pieces of evidence were manipulated ignores the fact that what is at issue here is not a single photograph, video, or intercepted conversation, but a multitude of different types of evidence that in many cases were readily available. The court deems it inconceivable that such a quantity of evidence of different types could have been fabricated so quickly, effectively and consistently without leaving a single trace.

Indeed, the evidence has been thoroughly scrutinised on behalf of both the prosecution and the court by various experts, from various disciplines, from many different countries, who have no involvement in the conflict and no interest in the outcome of the investigation, and no trace of manipulation has been found.

6.2.3 Specific lines of defence of counsel for Pulatov regarding the cause

The court understands the other line of defence put forward by counsel for defendant Pulatov regarding the cause of the MH17 crash to be as follows: the defence argues that the farm field near Pervomaiskyi could not have been the launch site because it was unsuitable for firing a Buk missile in the direction of MH17 on account of the row of tall trees on its northern side. The defence has also argued that expert evidence shows that any Buk missile must have been fired from the area around Zaroshchenske, or at least that this remains a possibility as many lines of investigation have not been pursued. Furthermore, counsel for defendant Pulatov, citing a report by an American investigation agency, put forward what it considers to be a much more plausible scenario. The court will deliberate on these explicitly substantiated positions below.

The farm field was unsuitable

According to the statement of specialists in the field of air defence weapons, a site must meet certain requirements for the deployment of a Buk TELAR; not any site will suffice. The court considers that the north side of the field – slightly to the left of the middle of the field – meets these requirements. For instance, the ground is accessible, secured by a separatist checkpoint and free of high-voltage cables. Furthermore, the field is at the highest elevation in a five-kilometre radius and barely visible due to the rows of trees. In addition, the row of trees on the north side of the field near Pervomaiskyi provides direct cover.¹⁵⁶ As previously explained, it is therefore a suitable site to position a Buk TELAR if a target is expected from a westerly or southwesterly direction. However, MH17 was approaching from a west-northwesterly direction.

Counsel for defendant Pulatov – citing the statement of witness RC02, who has experience in the deployment of a Buk weapon system – submitted that a Buk TELAR should be positioned at least 100 to 150 metres away from woods and bushes, so the row of trees on the north side of the field would have obstructed the launch of a Buk missile in the direction of MH17.

The court considers that witness G9462, an officer of the Dutch Royal Air Force, was shown a satellite photo of the farm field in question and explained that the row of trees on the north side need not be an obstacle if there is at least 20 metres between the row of trees measuring about eight to ten metres in height and the launch site, provided the target is at an altitude of more than 3,300 metres.¹⁵⁷ Witness RC02 also indicated that the distance depended on the angle of the missile and the need to avoid hitting the woods and bushes.¹⁵⁸ As witness G9462 was presented with a very concrete picture of the situation on the ground, in combination with the data on MH17, rather than seeing a contradiction between the statements of witnesses RC02 and G9462, the court considers that witness G9462's statement contains more specific details. Based on these more specific details, the court considers that in the summer of 2015 the trees were estimated to be about 12 metres tall, which very probably means that in July 2014 the trees were already taller than the eight to ten metres assumed by witness G9462. The court holds, however, that it can be inferred from the aforementioned statement by witness G9462 that this does not mean that it was impossible to launch a Buk missile from the field in question towards MH17. After all, the decisive factor is whether the signals from the radar to the target are obstructed by the row of trees, and that depends on the altitude of the target and the distance between the radar on the Buk TELAR and the row of trees. A proportional increase in the distance from the row of trees (24 to 30 metres instead of 20 metres) will, therefore, compensate for the additional height of the trees (12 metres instead of eight to ten metres). As the highest and, therefore, most suitable location in the field – measuring perpendicularly – is 45 metres from the row of trees, that was a possibility. Moreover, the field and, by extension, the row of trees in the northwest corner of the field (the direction from which MH17 approached) is more than 2.5 metres lower than the middle of the field.¹⁵⁹ More importantly, however, the court considers the fact that MH17 was not flying just above 3,300 metres, but at an altitude of over ten kilometres. Therefore, the row of trees would not necessarily have interfered with signals from the radar to MH17.

Counsel for defendant Pulatov has cast doubt on witness G9462's statement, arguing that he is not an expert on the Buk weapon system. Although this witness – unlike RC02 – does not have personal experience of deploying a Buk TELAR and also states that he is not familiar with its 'buttons and details', in his long career at, among others, NATO as coordinator of the Air Tasking Order, he has also studied the Buk TELAR at strategic and tactical levels. This involves knowing how the enemy deploys

the weapon systems, which is relevant for assessing this point. His detailed statement also attests to this knowledge. Unlike counsel for defendant Pulatov, the court is therefore of the opinion that, given this experience, witness G9462 is well placed to assess whether – and, if so, under what conditions – the farm field in question near Pervomaiskyi could have been used for the deployment of a Buk TELAR in this specific situation.

Was the missile actually fired from Zaroshchenske?

Counsel for defendant Pulatov has argued that Almaz-Antey's findings show that, if MH17 were shot down by a Buk missile, it must have been fired from an area 24 kilometres west of Pervomaiskyi. Based on the pattern of damage on the wreckage of MH17, Almaz-Antey calculated the area from which the Buk missile must have been fired to cause the pattern of damage observed.

Almaz-Antey concluded that it must have been fired from an area near Zaroshchenske. According to counsel for defendant Pulatov, Almaz-Antey's findings therefore show that the Buk missile could not have been fired from a farm field near Pervomaiskyi.

First, the court notes that – in view of all the evidence already discussed above that demonstrates, legally and beyond doubt, that the Buk missile was fired from a farm field near Pervomaiskyi – casting reasonable doubt on this conclusion can only be achieved by providing highly convincing reasons.

Counsel for defendant Pulatov refers to Almaz-Antey's reports and the explanations thereof provided by one of Almaz-Antey's experts on the subject to the investigating judge. In this respect, the court reiterates what it has already considered above with regard to Almaz-Antey's lack of independence and objectivity and the implications this has in terms of the cogency of its reports and findings and those of its representative. No value can be attached to its findings unless they are verifiable and its reasoning absolutely clear, transparent and reproducible. The court finds that it does not itself have the specific expertise required to assess whether Almaz-Antey's findings meet this requirement; It considers the independent experts from the Netherlands Aerospace Centre (NLR) and the RMA who were interviewed by the investigating judge – also with reference to the previously discussed expertise of the expert witnesses appointed by the investigating judge – certainly capable of doing so. The court notes that, quite apart from the fact that both of these bodies rule out, on the basis of their own calculations, that the launch area could be near Zaroshchenske, the expert witnesses of the NLR and the RMA agree that the calculations of Almaz-Antey are not transparent on this point. As the NLR puts it, Almaz-Antey primarily comments extensively on other reports, providing occasional conclusions of its own, but these conclusions are not supported by a methodology that the NLR can agree with. The RMA's expert witness indicates that Almaz-Antey does not provide any transparency as to how the quality of the similarities between simulated and actual damage was measured.**160** Almaz-Antey's findings therefore comprise a great many positions and conclusions, for which no reproducible substantiation is provided. Moreover, in the court's opinion, these are fundamental matters that go to the heart of the calculations. The court notes that, when the investigating judge asked about this – and clearly did not request an overview of alleged results, but an explanation as to how the results were obtained –, Almaz-Antey's expert referred to classified computer software that could possibly be inspected by making an appointment to visit the company's premises (in the Russian Federation) to do so.**161** However legitimate the possible reasons for classifying such information may be, reporting in this way is not clear, transparent or reproducible. For that reason alone, therefore, the reports and findings of Almaz-Antey and its expert witness lack the required cogency.

The American agency also referred to the calculated launch area. This report criticises the findings of the NLR and the RMA, and, in a reference to the findings and reference data of Almaz-Antey, without any substantiating argument, it avers that the conclusions of Almaz-Antey are correct. The report by the American agency also fails to clarify why the reference data, findings and conclusions of Almaz-Antey are allegedly correct and, as a consequence, still fails to lend the necessary cogency to the statements made by Almaz-Antey.

Could the missile actually have been fired from Zaroshchenske?

Counsel for defendant Pulatov has argued that insufficient investigations were carried out into the possibility that the Buk missile was fired by the Ukrainian army, from the area around Zaroshchenske. According to defence counsel, the investigation team missed a great many opportunities to investigate this and other scenarios, and, for this reason, it cannot be concluded that the crash must have been caused by a Buk missile fired from a farm field near Pervomaiskyi.

The court considers that the downing of MH17 was not a covert crime that was only discovered after a

considerable period of time, but that MH17 was shot out of the sky in broad daylight at an altitude of over ten kilometres. In view of the public nature and the tremendous shock caused almost immediately by the visible consequences of the crash of the aeroplane, it is eminently a crime in which it can be expected that myriad tactical evidence regarding the possible course of events would surface very quickly. The fact that this also occurred in this case is therefore no reason for suspicion. The court also considers it to be self-evident, and in no way indicative of tunnel vision, that the JIT carried out further investigations based on these indications, especially as the JIT did indeed investigate many other scenarios besides the main scenario. For example, it investigated whether MH17 might have been shot down by a fighter jet.¹⁶² However, this scenario has been discarded for a number of compelling reasons. In particular, the court considers the fact that, according to the cockpit voice recorder, just before the recording failed, not a word is said about an attacking fighter jet flying nearby; nor do the radar images – Ukrainian radar images and Russian images – show a fighter jet flying near MH17. Therefore, other scenarios were indeed investigated and reasonably ruled out. However, irrespective of whether the opportunities available to investigate any such other scenarios were fully exhausted, the fact remains that, as has been explained above, the findings of all the investigations convincingly substantiate the facts described in the indictment and thus already exclude the scenario put forward by counsel for defendant Pulatov and other scenarios. Indeed, if lawful and convincing evidence irrefutably and conclusively demonstrates that MH17 was downed by a Buk missile, fired from a farm field near Pervomaiskyi, then this already excludes any other scenario – including the scenario that the crash was caused by a Buk missile fired from the area around Zaroshchenske. It is, therefore, unnecessary to exhaustively follow up other lines of inquiry. The question as to who had control of Zaroshchenske is in any case irrelevant, given that four individuals, and not one of the parties to the conflict, are on trial in this case.

Does an alternative scenario fit the evidence?

Counsel for defendant Pulatov has argued that, even if one accepts the evidence in the case file, the way is still open for the possibility of another scenario. According to counsel, there is another credible and not implausible interpretation which does not conflict with the evidence, but which is incompatible with finding the charges proven, such that – despite the evidence – there should be an acquittal. To support the aforementioned argument, counsel for defendant Pulatov submitted a report by the aforementioned American agency, in which it formulated an alternative scenario that the agency considers more plausible than the main scenario. To summarise, the American agency considers it completely implausible that the well-trained, professional crew of a Buk TELAR could have mistaken MH17 for a fighter jet. After all, MH17 was flying at high altitude, in one direction and at a constant speed, and had also been flying in a known civil aerial corridor (L980) over Ukraine for some time. The American agency considers it more plausible that a Ukrainian Buk TELAR must have fired a Buk missile from an area slightly to the east of Zaroshchenske, aimed at an Air India aeroplane that had just crossed the border with the Russian Federation, travelling from the east. Indeed, this aeroplane was unidentified on the radar for a brief moment. In that instant, the Ukrainian military could have assumed, based on the radar images, that it was a Russian fighter jet posing a threat and passed on the information about it to the Buk TELAR. Then, when the aeroplane was identified on the radar a little later as an Air India civil aeroplane, the information had already been passed on to the Buk TELAR and, in all the commotion, nothing was done with the subsequent identification. As the court understands it, this was the scenario suggested. After the Buk missile was launched towards the Air India aeroplane and after the Buk missile had switched to the on-board radar, this radar would have looked for the nearest and largest metal object to ‘lock on’ to: MH17 approaching from the west. This scenario is referred to by counsel for defendant Pulatov as the ‘lock-on, lock-over’ scenario.

The court first points out that this scenario is already refuted by the previously discussed evidence and, as such, is not an alternative scenario that does not contradict the evidence. For that reason, it requires no further deliberation. For the sake of completeness, however, the court notes the following.

The scenario described by the American agency similarly implies that the well-trained and professional Buk TELAR crew selected a large aeroplane flying at high altitude through a known aerial corridor as a target. Regardless of whether this scenario sounds much more logical due to a brief moment in which it was not possible to identify the aircraft conclusively, more importantly, this scenario is technically impossible and therefore completely implausible.

Referring to the Buk TELAR technical manual¹⁶³ and other documents, in the case file it is explained how a Buk missile is launched from a Buk TELAR operating alone (Standard Operating Procedure¹⁶⁴).

When a Buk TELAR is deployed, its radar scans and visualises a 120-degree area. The radar has a range of between 85 and 100 kilometres. Once a target is known, the Buk TELAR’s radar detects it

within this area by emitting signals that are reflected by the object and picked up again by the radar. The altitude, speed, distance and course parameter of the object can then be read in the Buk TELAR. The commander then gives the order to track the target, reducing the radar angle from 120 to ten degrees, thereby continuously emitting signals to the target. The Buk TELAR operators point the instruments towards the target, and the Buk TELAR's lock-on buttons are engaged. The target is then tracked automatically, and an interception point – the point where the missile will intercept the target – is calculated. The launch pad is directed towards the interception point. The commander checks the target's parameters, such as distance, azimuth and speed, as well as the overall functioning of the Buk TELAR. The missiles are put into target mode. The missile's gyroscope is activated and loaded with the object's flight data. The flight path to the object is also transmitted to the missile. Three seconds before the target comes within shooting distance of the Buk TELAR, the computer issues a 'target in launch area' signal and the target illuminator – the radar that guides the missile to the target – is activated. The commander then executes the firing procedure. A missile cannot be launched until all of the conditions are met; that includes being within firing distance of the calculated interception point.

After firing, the missile's on-board receiver is activated after 1.2 seconds. After a while, the missile's radar head receives the echo from the target. Until then, the missile continues to receive target data from the Buk TELAR via a secure radio link. Once the missile's on-board receiver receives the echo of the Buk TELAR signal reflected by the object, the computer inside the missile verifies the flight path and, if necessary, calculates an adjustment accordingly. The missile then flies towards the reflecting object and detonates in its vicinity. If, before such time, the illumination signal from the Buk TELAR is suspended or the TELAR turret is turned away from the target, the missile will no longer receive reflected signals and will self-destruct within two to four seconds.

The brief description, provided above, of the way in which a Buk missile is fired from a Buk TELAR establishes that the alternative scenario put forward by counsel for defendant Pulatov is impossible. The fact that, at the time MH17 was struck, the Air India aeroplane was flying well out of range of a possible Buk TELAR positioned at Zaroshchenske is not in dispute. The American agency responded to this observation by pointing out that 'the fog of war' must be taken into account and that a decision may have been made to fire the missile pre-emptively in the hope of changing the aeroplane's course or else being able to strike it with one of the other three missiles. The court does not quite see how a Buk missile's proximity detonator would go off if there were no aeroplane in the vicinity and how the crew or pilot of an aeroplane would therefore be prompted to change course. Regardless of that, however, the court considers that this scenario is impossible simply because a Buk missile cannot be fired if the calculated interception point is not within range.

Moreover, the functioning of the echoes excludes the possibility that the on-board receiver on the Buk missile could have picked up the signal of the MH17 in flight. After all, the radar of the Buk TELAR would have constantly transmitted signals at an angle of ten degrees, to the east, towards the Air India aircraft, the alleged original target. Therefore, these signals could not possibly have been reflected back by MH17, which was approaching from a completely different direction, and would have been picked up as an echo by the Buk missile's on-board receiver. Moreover, it is unclear why the missile in the American agency's scenario did not simply pick up Air India's echo; if it had not been picked up, for whatever reason, then the missile would have destroyed itself within seconds and would not have been able to lock on to MH17.

The court concludes from the statements made by expert witnesses RC02 and G9081 that a 'lock-on, lock-over' can only occur in the event of high levels of traffic in the radar zone and another aeroplane flying in that zone at the same speed and azimuth and at a slightly higher altitude (a few hundred metres at most) than the pre-programmed object, so that the Buk missile's on-board receiver might mistake that new object for the original one. Not only was MH17 flying nowhere near the radar angle as described above, it was also approaching from the opposite direction and was flying at an altitude three kilometres lower than the Air India aeroplane. Therefore, it would have been impossible for the Buk missile to have mistaken MH17 for its original pre-programmed target, assuming it could have been fired at all and could have detected a signal from MH17.

The court further doubts whether a Buk missile – launched in an easterly direction – possesses sufficient manoeuvrability that it would be capable, in flight, of completing the U-turn that would have been necessary to strike MH17. However, in view of all the above, the court considers it unnecessary to investigate this possibility.

On balance, the court cannot help but conclude that the authors of the American report who presented this implausible scenario as likely have succumbed to a form of reasoning towards a foregone conclusion. This seems to be in line with the aforementioned repetition of the reference data and findings of Almaz-Antey, without criticism, in the reports on the weapon used and the launch area and, in the opinion of the court, this gravely detracts from the credibility and thus the cogency of the reports issued by this agency.

In view of the aforementioned lack of credibility and cogency, the court deems it irrelevant and therefore unnecessary to interview the authors of the report attached to the American agency or to put further questions to them in writing, and therefore rejects this conditional request by counsel for defendant Pulatov.

6.2.4 Actual conduct and interpretation thereof

6.2.4.1 Introduction

The court has previously found proven legally and conclusively that flight MH17 was shot down on 17 July 2014 by a Buk missile fired from a Buk TELAR positioned in a farm field near Pervomaiskyi, and that flight MH17 crashed as a consequence, resulting in the death of the 298 occupants of the aeroplane.

Furthermore, it has already been established in the context of jurisdiction that in the opinion of the court there was at that time an internationalised and international armed conflict between Ukraine and the DPR, which was under the 'overall control' of the Russian Federation. This conflict was taking place in the Donetsk and Luhansk oblasts. Below, the court will address this situation first and in particular that in the Donetsk oblast. After all, the Buk missile was fired at flight MH17 from that oblast. Regarding the question of who is responsible for firing that missile with all the ensuing consequences, the circumstances under which it happened need to be described. In those circumstances certain choices were made that led the Buk missile to be fired at flight MH17. These choices are described, because they are relevant for assessing the conduct of the accused. The next matter to be addressed is which conduct on the part of the accused and others is relevant in that context in relation to the charges.

6.2.4.2 Situation in eastern Ukraine in July 2014¹⁶⁵

From around April 2014, in the context of the ATO, the Ukrainian military fought the separatists who were seeking greater independence in eastern Ukraine. On 11 May 2014, separatists in the Donetsk and Luhansk oblasts declared independence following referendums that were not recognised by Ukraine. In doing so, the DPR and the LPR became a reality in their eyes. Both republics appointed leaders and formed governments and introduced their own constitutions. Fighting between Ukraine and the separatists subsequently intensified, including a large-scale offensive by Ukrainian armed forces in northeastern and southeastern Ukraine from 19 June 2014 onwards. Reports of those battles mention that both sides used increasingly heavy weapons. Several Ukrainian military fighter and transport aircraft and helicopters were shot down in the process as well. Due in part to international pressure, Ukraine declared a unilateral ceasefire on 20 June 2014, ushering in a period of relative calm in eastern Ukraine. On 30 June 2014, the ceasefire ended.

After the ceasefire ended, Ukraine resumed the ATO on 1 July 2014. This resulted in fighting on two fronts: in northeastern and southeastern Ukraine. In the northeast, in and around the cities of Sloviansk, Kostiantynivka, and Kramatorsk, the Ukrainian army advanced. In the first half of July 2014, the separatists were driven out of the Sloviansk area southwards, in the direction of the city of Donetsk.¹⁶⁶

In the southeast, near the town of Snizhne, the Ukrainian army tried to retake the strategically important Savur-Mohyla hill from the separatists and to prevent the separatists from opening and keeping open a corridor from Snizhne into Russian territory. This was far more difficult than in the northeast, however, and from early July 2014 it led to protracted heavy fighting in the area of Savur-Mohyla and Snizhne, which was still ongoing on 15, 16 and 17 July 2014. This is also the area where Pervomaiskyi is located and from where flight MH17 was shot down on 17 July 2014.

The southeast / Snizhne and Savur-Mohyla area; specific need for air defence

The separatists maintained their positions relatively well at Savur-Mohyla and Snizhne and the

surrounding area until mid-July 2014. Heavy fighting did occur, however, in the area of Savur-Mohyla and around the villages of Dmytrivka, Marynivka, and Stepanivka, south of Snizhne.**167** Around 15 July 2014, the separatists launched an offensive from Snizhne with the objective of opening up a corridor towards the south, heading to the Russian border. On 15 July 2014, Stepanivka was taken by the separatists. One day later, on 16 July 2014, the separatists launched an offensive in the direction of Marynivka, and there was heavy fighting around Tarany. As a consequence of this fighting, on 16 July 2014, the villages of Tarany, Marynivka and three elevations south of Stepanivka and Marynivka fell to the separatists. On 17 July 2014, these battles continued.

So although the separatists were able to maintain their positions and expand slightly, they suffered increasing losses due to continuous Ukrainian aerial bombing. This also made it increasingly difficult for them to maintain the corridor achieved with great difficulty from Snizhne toward the Ukrainian-Russian border. Although the separatists had shot down several (low-flying) Ukrainian helicopters and aircraft since June 2014, Ukrainian aerial superiority was great, perhaps too great. The separatists found it almost impossible to provide a military response to those air strikes, as they lacked their own air force and equipment to attack the airborne equipment of the Ukrainian armed forces. The separatists had only one Strela-10 (with an altitude range of 3,400 metres), one ZU (ZUshka)-23 (with an altitude range of 2,500 metres), and Manpads (shoulder-fired missiles with an altitude range depending on the type of up to about 3,500 metres).

6.2.4.3 Role and position in the DPR of the accused and their telephone numbers

The activities of the four accused in this criminal case are specifically addressed below. This is based largely on the content of recorded and intercepted telephone conversations and relates closely to their position and role in the indicted period. Accordingly, the court will describe first what roles and positions the four accused held during that period, and which telephone numbers have been attributed to them.

The accused Girkin is a Russian citizen and used the call sign, alias Igor Strelkov (in telephone conversations); he was further referred to as Perviy/Pervyi ('the first'), Strelok, Igor Ivanovich, and comrade Colonel.**168** Based on voice recognition, as well as on mentions of his name, and because he himself acknowledges having made certain telephone calls, the court finds that Girkin could be reached on the telephone numbers ending in -1558, -8454 and -7501 and may therefore be considered a regular user of those numbers.**169** Girkin served in the Russian armed forces in several wars. He then continued his career with the FSB (Russia's Federal Security Service), until he retired in March 2013. He then worked as head of security for a private company, until he went to Crimea around 20 February 2014. Girkin was a security consultant there to Sergey Aksenov, the head of government of the Republic of Crimea (proclaimed shortly thereafter). He did this until early April 2014.**170** Girkin has mentioned that at Aksenov's request,**171** but entirely at his own initiative and of his own free will,**172** he went to the city of Sloviansk in eastern Ukraine in the night of 12-13 April 2014, with a group of volunteers he had gathered from local insurgents.**173** In late April 2014, Girkin was introduced as Commander of the Donbas People's Militia,**174** which is the assembly of armed units in the Donetsk region, the DPR, which then came under Girkin's command. On 16 May 2014, Girkin was presented as Defence Minister and Supreme Commander of the People's Army of the DPR. In that position, he was responsible for coordinating the activities and directing combat operations of People's Army troops and assembling the staff and apparatus of the DPR Ministry of Defence. Girkin held that position until 12 August 2014 and left for the Russian Federation on 15 August 2014.**175**

The accused Dubinskiy is a Russian national.**176** Based on voice recognition combined with information from the internet, and on a witness statement,**177** the court considers the accused Dubinskiy to be the user of the telephone numbers ending in -3401 and -1582. Conversations that Dubinskiy conducted via those telephone numbers have revealed that he also calls himself Khmuryi, (Sergey) Nikolayevich, Colonel Petrovskiy, commander of the DPR Intelligence Service, and Deputy Minister of Defence.**178** In 2014, Dubinskiy was Head of the DPR intelligence service and DPR Deputy Defence Minister, i.e. Girkin's deputy.**179** Based on interviews, it may be inferred that Dubinskiy served in the Soviet and Russian military for 30 years, retired in April 2014 and became a reservist. Subsequently, following contact over the telephone with Girkin, Dubinsky went to Sloviansk, where he became the DPR deputy military commander. He set up an intelligence and reconnaissance service and reported to Girkin. In January 2015, Dubinskiy left the Donbas to return to Russia, coming back to the Donbas shortly thereafter.**180**

Defendant Pulatov, also a Russian national,**181** has mentioned that in 2014 he was involved in the

armed conflict on DPR territory in Ukraine, and that one of his call signs was Giurza.**182** That call sign is also used in the telephone numbers ending in -2511 and -2177, and in part because of the combination of that call sign with the names Oleg and Yuldashevich in calls placed via those numbers, voice comparison, and information on the internet, it may be determined that defendant Pulatov used those numbers up until and including the summer of 2014.**183** In his video statement, Pulatov has also confirmed that he used multiple telephone numbers, including a number ending in -511.**184** Commenting on several calls to that telephone number, he has said that he used the number ending in -2511 in the DPR in 2014 and could always be reached on that number.**185** The court considers that the conclusion drawn by the NFI having examined the conversations also confirms that twelve conversations, used as evidence hereafter, were conducted via that number by Pulatov. Indeed, the NFI found that the probability of the results of its analysis being observed was ten to one hundred times greater in the case of the one-speaker hypothesis, than in the multiple-speaker hypothesis.**186** Furthermore, at the instruction of the court, forensic experts in Lithuania checked the authenticity of the audio files of these telephone conversations. Those experts concluded, based on examining those intercepted conversations in various ways, that no traces of editing had been identified in the audio recordings reviewed. This is additional confirmation of the accuracy of the authenticity check on the intercepted conversations referred to earlier in this judgment.

Defendant Pulatov has also mentioned that he is a specialist in tactical military intelligence, pursued advanced military training, and was a soldier in the Soviet and Russian armed forces until August 2008. He retired on 30 July 2008. After the events in Odessa, he left Kyiv for eastern Ukraine on 12 April 2014 as a retiree and joined the DPR people's militia there.**187** As of May 2014, he received his orders from only two people, to whom he reported as well: militia commander Girkin and head of the intelligence unit Dubinskiy.**188** Pulatov further stated that in the intelligence unit he was tasked with providing armed and logistic support, and that in the period from 16 to 18 July 2014, he and units under his command conducted reconnaissance in the Stepanivka and Marynivka area, south of Snizhne. He also set up security on site following the crash of flight MH17. Pulatov has said that in the afternoon of 17 July 2014, he was involved mainly in positioning newly received tanks and with communication between those tanks and the units.**189**

Accused Kharchenko, a Ukrainian national,**190** goes by the names and aliases Krot, Leonid and Lionia, as becomes apparent from combining data available on Kharchenko from his criminal record, the mortgage registry and an information report from the Ukrainian SBU, together with telephone calls recorded from the telephone numbers ending in -7518 and -5197.**191** In those calls, the person placing the call uses these names and states them when providing his personal information. In addition, voice recognition has been carried out.**192** The court therefore identifies the accused Kharchenko as user of those telephone numbers. In conversations via those telephone numbers, accused Kharchenko indicates that he is the military commander of Kostiantynivka, of the Separate Reconnaissance Battalion of Khmury's unit.**193** Confirmation that Kharchenko held that role and position appears in an interview published on 11 April 2015, in which the person interviewed states that his first combat mission was in May in the DPR Intelligence Unit set up by Dubinskiy on 20 May (in each case the court understands: 2014) established Intelligence Unit of the DPR.**194** The person interviewed introduces himself as Leonid Vladimirovich Kharchenko. According to the reporting officer, he resembles the man in the photo from Kharchenko's criminal record, and, according to a reporting officer proficient in Russian,**195** his voice also sounds similar to that of the user of the telephone number ending in -7518.**196** On 5 July 2014, the separatists were driven out of Sloviansk, Kramatorsk and Kostiantynivka and headed to Donetsk. An intercepted conversation from 6 July 2014 between Dubinskiy and Kharchenko indicates that Kharchenko was placed under Dubinskiy's command at that point.**197** The accused Kharchenko also mentions in the aforementioned interview that he fought with his men in many places, including Dmytrivka and Marynivka.**198**

Based on the above considerations, viewed together and in relation to each other, the court is of the opinion not only that the accused used the aforementioned telephone numbers attributed to them in each case, but also that they took part in the calls conducted via those telephone numbers, unless indicated otherwise. In addition, the court notes that all intercepted conversations used as evidence that the court attributes to the accused took place via the telephone numbers listed above.

6.2.4.4 Actual conduct of the accused in the period 8 June 2014 to 18 July 2014

Introduction

The intercepted conversations are essential in determining exactly what the accused did in the period

around the launching of the Buk missile and the crash of flight MH17. Below, the court will interpret the said intercepted conversations by evaluating the content of the intercepted conversations themselves and the evidence already presented above, in combination with other evidence and against the background of the armed conflict. The said other evidence includes mainly visual material (photographs and videos) and transmission mast data. It also includes the so-called historical telecom traffic from which communication with telephones present in the vicinity of specific locations can be derived. For the sake of the readability of this judgment, the court has therefore included the intercepted conversations used in evidence, in paraphrased form, combined chronologically with visual material, in an appendix to this judgment (Appendix 3). The said appendix is part of this judgment and also contains the source of the original, not paraphrased intercepted conversations. On the basis of this material, the actual actions of the call participants are interpreted. Conclusions will then be drawn on that basis, about the role of the accused in relation to the charges.

Listing and naming of (other) call participants

The intercepted conversations are not only between the accused, but also between other individuals. The court notes that many of those other individuals have also been identified. Separate official records of findings have been prepared on each occasion, explaining on the basis of which information and which findings a telephone number is linked to a specific individual. In that connection, the court considers that their identification was convincingly made in part on the basis of intercepted conversations attributed to them and, vice versa, by establishing that they are the user of the telephone numbers used to make the calls in question. Because these other individuals are 'merely' the counter-callers for the four accused, or the conversations between them contribute only indirectly to the evidence concerning the role and actual conduct of the accused, for the sake of brevity regarding them, the court will simply refer to the official records compiled with a view to identification in the footnotes. The court also assumes the - otherwise undisputed - authenticity of these intercepted conversations, i.e., those in which none of the accused participated, based on the methods for analysing reliability and authenticity already referred to in this judgment.

The names of the other call participants and their call signs, as well as their sources in the case file, are included in Appendix 2 to this judgment, which forms an integral part of this judgment, for reasons of readability and protection. The court has also specified their place and position in the DPR and/or relative to the four accused in the period briefly preceding and on 17 July 2014.199

In as much as the accused are referred to by their aliases in the intercepted conversations, the court has included their real names in rendering the intercepted conversations for the sake of readability. Other call participants are referred to by their call sign and persons whose identities remained unknown in the investigation are referred to in the intercepted conversations as person unknown, possibly followed by their call sign. However, this does not apply to public persons who are already easily identifiable for that reason. Because the conversations are conducted with the accused, all 'members' of the DPR, and/or the conversations refer mostly to hostilities, the court assumes that they too belonged to the DPR, whether or not as fighters or in some other position, including of authority.

Other topics in the intercepted conversations

The case file contains numerous intercepted telephone conversations conducted between many different individuals over a longer period of time prior to and also after the crash of MH17. Given the indictment, this judgment focuses on the flight MH17 disaster and therefore contains parts of the case file that relate to that event. However, the court considers it important here to point out that the MH17 disaster took place in the context of an armed conflict. That conflict meant that in that period there were more matters relevant to that conflict that demanded the attention of individuals involved. This is reflected in the intercepted conversations. These intercepted conversations were gathered after the fact, i.e. after the fate of MH17 became known, and examined for relevance to the criminal investigation into the MH17 crash. This means that, with the knowledge of today, certain intercepted conversations are of less or no relevance to these criminal proceedings. They are, however, indicative of what the separatists were doing in their daily activities in the context of the armed conflict. It thus follows from the intercepted conversations that there were many contacts between DPR fighters and LPR fighters, that those fighters knew each other, and that they also did each other favours in each other's conflict. It also follows from the intercepted conversations that the LPR was also in the process of obtaining Buk installations, that they had in fact succeeded in doing so around 17 July 2014, but that problems had arisen with the delivered Buk. However, those attempts are separate from the efforts regarding the Buk at issue in these criminal proceedings. The case file further contains numerous intercepted conversations about and incidents involving threats and/or death threats

towards Bezler, against which he wished to take action, and around 17 July 2014, there is much talk of DPR fighters threatening to attack other DPR fighters, with mediation by persons (also) associated with the flight MH17 disaster. Finally, there are intercepted conversations referring to deliveries of urgently needed goods between individuals from the Donbas and from the Russian Federation, whose identity has remained unknown. The court refers to these other subjects of conversation from the intercepted conversations because these too explain why the crash of flight MH17 did not receive the permanent and full attention of the separatists. After all, they also had to wage their conflict with the Ukrainian army, even after flight MH17 had crashed.

Explanation of wording

Not all matters are discussed openly in the intercepted conversations; the separatists knew their conversations were being intercepted by the Ukrainian authorities. This was also asserted by defendant Pulatov. At various points, the intercepted conversations contain words that are evidently aimed to obfuscate and therefore require further interpretation. The court provides this interpretation in the section below entitled 'Interpretation of intercepted conversations and visual material in the context of the other evidence'. In general, it became clear to the court that terms such as "box," "toy" and "damaged tank" refer to a Buk TELAR, and that "rhinos", "heavy ones", "iron things" and "spitters" refer to tanks and other forms of ground artillery. The meaning of words such as "there" and "here" can usually be deduced from the context of the conversation and, assuming that the intercepted conversations were conducted by DPR fighters and supporters, "we" refers to DPR fighters, and "they" usually refers to the Ukrainian armed forces they regard as enemies. Other terms in the intercepted conversations have been similarly interpreted by the court and incorporated into the following.

Interpretation of intercepted conversations and visual material in the context of the other evidence

The intercepted conversations and visual material, viewed in the context of the aforementioned evidence, lead the court to conclude that after a period of ceasefire, fighting between the separatists and the Ukrainian army resumed in late June - early July 2014, and that the separatists were suffering from the bombing and shelling by the Ukrainian army. On 8 June 2014, by which time he had been active in eastern Ukraine, operating from Sloviansk, for about eight weeks, Girkin reports this fact in a conversation with Aksenov, the Prime Minister of the Republic of Crimea who requested Girkin become actively involved in the conflict in eastern Ukraine. Girkin mentions to Aksenov the need for military support from the Russian side, in order to achieve success in the conflict against Ukraine. This includes air defence weapons, including systems with a longer range than Manpads. Girkin wants the desired military equipment to be supplied accompanied by trained crew, because the DPR has no time for training. Aksenov is working on the request, and assistance and coordination from Russia appear to be forthcoming. On 5 July 2014, together with his troops, Girkin withdraws from Sloviansk and relocates to Donetsk, where he sets up his headquarters. Dubinskiy and Kharchenko also establish headquarters in Donetsk.

At those headquarters, on 6 July 2014, in the presence of Pulatov, Dubinskiy instructs that a corridor be created, a passage, between Snizhne and the Russian border to the south of Snizhne. Dubinskiy also points out the area on the map. In connection with the instruction, Pulatov has to depart for Snizhne that same evening, with person unknown Piton and a group of his troops, to travel onwards from there to Dmytrivka. Once there, they must conduct additional advance reconnaissance of four areas of high ground there. On 7 July 2014, Pulatov and person unknown Piton return to Dubinskiy to report on their findings.

On 15 July 2014, Girkin is working from Donetsk to organise equipment for the conflict in and around Snizhne and in that connection is consulting with and issuing commands to his logistics unit. These consultations also refer to a large item of weaponry that has to be collected from the border with the Russian Federation. In the afternoon, Dubinskiy is instructed to come to Girkin for new instructions. Dubinskiy passes that instruction to Pulatov and Kharchenko, who subsequently gather equipment and troops, who set off for Snizhne in the evening in full combat gear and fully refuelled. The mission includes tanks. Pulatov is coordinator of this mission and of all armed forces dispatched to and still to be transported to the Snizhne area. Kharchenko consults with Pulatov on the status of the transport operation, commands his own men and attempts to solve logistical problems in consultation with Dubinskiy. Girkin receives a call from Kharchenko when not everyone offers full cooperation in carrying out Girkin's instructions. Around midnight, Kharchenko reports to Pulatov that he has reached Snizhne, with his convoy. Pulatov says that further plans will be drawn up and orders given in Snizhne. Clearly, this all relates to the corridor and keeping it open.

Girkin is kept abreast of the status of the corridor, as demonstrated when on 16 July 2014, within hours of arriving in Snizhne with his military convoy that night, Kharchenko reports to Girkin, at Pulatov's behest, that Pulatov has driven the tanks to their location. Later that morning, Girkin also pays an inspection visit himself, together with his boss and political superior Borodai. He tells the media present about the status of the fighting taking place there against the Ukrainian army: the Ukrainian army has launched an attack on Marynivka, but the separatists were able to prevent the Ukrainian troops from reaching each other. Girkin also reports that three areas of high ground and a village have been occupied by the DPR fighters, but that they are unable to reach the border with the Russian Federation because the Ukrainians are too strong there.

It is also clear from the intercepted conversations that the fighting is arduous; enemy positions cannot be broken through, and the Ukrainians are carrying out air strikes with Sushkas, and continuous artillery fire by the Ukrainians has led to many deaths and injuries on the side of the DPR. Dubinskiy, Pulatov and Kharchenko refer to these events in their conversations during the course of the day, in which Dubinskiy is kept abreast by Pulatov and Kharchenko of the development of the fighting, and the losses of men and equipment. Kharchenko and Pulatov also keep each other informed of losses and of their own strategic positions and those of other DPR fighters in the area with whom they are in contact. Pulatov issues orders to Kharchenko and other DPR fighters. Girkin is kept informed by Dubinskiy of the status of the fighting, and in consultation with Girkin, Dubinskiy also issues the necessary strategic orders from Donetsk. Despite heavy losses Kharchenko is suffering due to artillery fire, Pulatov instructs Kharchenko that he must maintain his position, but following consultation with Girkin, Dubinskiy will send troops under Cap and Tor to relieve and reinforce Kharchenko; Kharchenko and Pulatov can then come to Donetsk. Girkin then also actually orders Cap to go to Stepanivka and Marynivka. In the conflict against Ukrainian artillery, which is causing so much trouble to the DPR fighters, Dubinskiy has marked on the map where the Ukrainian artillery is located, and instructs Girkin to pass on that information to Moscow so that Russia can carry out bombardments. Girkin also takes decisions about the relocation and withdrawal of units. Dubinskiy is the person who consults on these matters with Girkin.

The DPR fighters can do nothing against the Sushkas: although two Sushkas are downed by them that day with their Manpads, for the most part the Sushkas fly too high to strike them with the means available to the DPR. Especially because the Strela is also broken. The Strela is due to be removed for repair in the coming night (the night of 16-17 July 2014), Pulatov reports to Dubinskiy. For that reason, Pulatov has no need for tanks, but for decent anti-aircraft defence, he informs Dubinskiy. Dubinskiy then expresses the wish to DPR fighter Sanych to receive a Buk, which he could then send to the corridor that morning, otherwise the prospects do not look good. Dubinskiy tells Pulatov that if he receives delivery of a Buk M that night, then it will be sent directly to Pulatov and that the said Buk M is their only hope. In light of the difficult course of the conflict, caused by heavy artillery fire and air strikes, and Dubinskiy's and Pulatov's complaints about the situation, the wish to have a Buk M must be seen as an expression of the desire to have access to a larger and more powerful weapon in order to be able to defend themselves against the constant Ukrainian (air) attacks. A Buk M would be very suitable for that purpose.

In the meantime, Dubinskiy is also communicating with his logistics man Bibliothekar: in the afternoon, Dubinskiy asks him if he will be leaving today; Bibliothekar is still waiting for a phone call. When he goes, he can take the car Dubinskiy was using yesterday, and pick up another one from Kharchenko. Later that evening, Bibliothekar is at Kharchenko's headquarters and asks Dubinskiy which car he can take. Dubinskiy is nearby, because he drops in to see Bibliothekar.

The morning of 17 July 2014 starts shortly after midnight with the warning from Girkin to his commander in Snizhne, Cap, that they need to reinforce their positions because Ukraine is going to shell them heavily. A short time later that night, after Dubinskiy informs the commander of the Vostok battalion that he has suffered many deaths from Sushkas deployed from an altitude of five kilometres, but that his problems are solved because a Buk is due to arrive that night, Vostok tanks and men are offered to him for the priority task of keeping the corridor open. Girkin orders Dubinskiy to accept that offer and in the morning issues the order to reposition the Vostok tanks. Dubinskiy carries out that order later that morning, and also requests that ten men and three tanks be sent to the corridor, to Cap and Tor in Stepanivka and Marynivka because of the difficult situation there. At around seven o'clock that morning, Pulatov is very angry with Kharchenko because he does not understand how orders are given: Pulatov received one order and then Kharchenko received another order, that bypasses Pulatov, while he, Pulatov, had been placed in charge. Following a telephone call from Tor, Girkin reports to Borodai that they have been defeated on high ground, with just three survivors out

of thirty men. Borodai thinks that's 'fucking shit' and Girkin wants Borodai to come to Donetsk.

Then around nine o'clock in the morning, a single Buk M is delivered to Donetsk by Bibliothekar, on a trailer. The Buk comes from the Russian Federation and, on Dubinskiy's orders, travels directly to Pulatov in the corridor, where it will solve the problems of bombardment by high-flying Sushkas. Kharchenko receives the instruction from Dubinskiy to escort the Buk, to position it in the vicinity of Pervomaiske and to guard it there with his men. Dubinskiy says that Pulatov will also travel there. Immediately thereafter, Pulatov is informed by Dubinskiy that Kharchenko is on his way to him with a Buk M and that three tanks for Cap will also be arriving. Dubinskiy orders Pulatov to wait for Kharchenko, and then travel with him and all his men to the vicinity of Pervomaiske and position the Buk there, and guard it. Pulatov is tasked by Dubinskiy with organising everything relating to the tanks and the Buk. Pulatov will do that, but he will also keep the corridor clear. He had already heard about the arrival of the tanks, from Girkin. Initially, Dubinskiy arranges with everyone else involved for the Buk to travel in a convoy which also includes the three tanks and crew offered by Vostok, but because it takes too long for the Buk and the tanks to meet up at the agreed location near the Motel roundabout on the direct road from Donetsk to Snizhne, the tanks already leave, escorted by Sanych and Dushman. Kharchenko follows a little later with the Buk convoy. Dubinskiy agrees all this by telephone with Bibliothekar, Kharchenko and Sanych who are involved in the transport operations, and with Pulatov who is in the corridor. In that contact, Pulatov requests Dubinskiy to have the Russian Federation bomb the Ukrainians who have sneaked out of Hryhorivka. Even before Kharchenko arrives in Snizhne, where he meets Pulatov, he orders his own men to travel to Pervomaiske.

Girkin had been in contact with Tor that morning. Tor brought Girkin up to date on the numbers of dead, wounded and broken down tanks, and was informed by Girkin that Pulatov is in charge, until he hands over command to Cap. Girkin passes on several more orders for Tor, explaining that tanks are on their way for Tor and that he has given Pulatov orders to deploy the available means. It is noteworthy that Girkin does not mention a Buk TELAR, even in veiled terms.

The convoy of the Buk TELAR is not only discussed in intercepted conversations, but can also be seen on visual material that thus supports the content of the intercepted conversations. On that visual material, in a logical time sequence and order of sites captured on the images, a Volvo is shown, with a trailer on which is a Buk TELAR with white-headed missiles under camouflage netting. This convoy moves from a junction on Illicha Avenue in Donetsk, via the Motel roundabout on the Makiivka Highway, past the Avtotransportna to Makiivka and then on to Zuhres and Torez, in the direction of Snizhne. There is also visual material of the convoy travelling separately, via (approximately) the same route, containing three tanks from Vostok.²⁰⁰ The content of the intercepted conversations is also supported by the historical data referred to earlier in this judgment from telephones along the inbound, arrival, transit, arrival and outbound route of the Buk TELAR.

At around quarter to one that afternoon, Kharchenko arrives at the Furshet in Snizhne, with his convoy including the Buk TELAR on a trailer. Just before that, he calls Pulatov to tell him he is almost there; Pulatov is also on his way to the Furshet. At the Furshet, Kharchenko meets Pulatov. A short time later, a photograph and a video show the Buk TELAR driving independently through Snizhne, on Gagarina Street, towards Pervomaiske/Pervomaiskyi. Also on this road is the farm field which the court considers legally and conclusively proven to be the site from which the Buk missile which downed the MH17 was launched.

While the Buk TELAR is *en route* from the Furshet to Pervomaiskyi, Pulatov makes three unsuccessful attempts to call a telephone number ending in -6335. In the court's opinion, it is sufficiently established that this is the number of a crew member of the Buk TELAR. This follows from the fact that at the moment Pulatov calls this number, the called telephone communicates with a transmission mast on Gagarina Street in Snizhne, and at that precise moment, according to intercepted conversations and the aforementioned video footage, a Buk TELAR is driving under its own power along Gagarina Street in Snizhne towards Pervomaiskyi. This fact, in combination with the fact that historical telecom traffic of that evening shows that - after Kharchenko has requested him to contact the crew of the Buk TELAR because a crew member has been left behind at the launch site - Pulatov made four calls to this number within ten minutes or so,²⁰¹ convincingly demonstrates in the opinion of the court that this must have been the number on which a crew member of the Buk TELAR could be reached. All the more so since this number was only in use on 17 July 2014.

Also around that time, Kharchenko calls Zmey, who is instructed by Kharchenko to place the Buk TELAR in the bushes further into the field there and to guard it until Kharchenko returns with Ryazan.

He will pick up Ryazan at the Furshet in Snizhne.

That afternoon, when Girkin is briefed by Tor on the current battle positions of himself and Cap and on the losses suffered, and Girkin uses that opportunity to issue more orders to Tor, Tor also tells him that he has just seen Pulatov passing by with three Vostok tanks. When Dushman tells another DPR fighter that the Ukrainians were bombing yesterday from above four thousand metres, so they could not be downed by Manpads and that they will now be firing at Ukrainian fighter jets with Buk missiles, flight MH17 had crashed just two minutes previously. Fifteen minutes after the crash, two unknown persons talk about men from Snizhne having shot down an aeroplane fifteen minutes previously (court: therefore at 16:20) which crashed near Hrabove. They can only be referring to flight MH17. However, at around ten to five, Kharchenko reports to Dubinskiy that they have shot down a Sushka, from Pervomaiske. Dubinskiy instructs Kharchenko's men to continue to protect and guard the Buk TELAR, and then Kharchenko and Pulatov may come to Donetsk. Kharchenko next reports to Dubinskiy that the Buk is out of range of artillery fire. At around quarter to six that afternoon, a DPR fighter reports to Dubinskiy that he is on his way to remove the black boxes from an aeroplane that had been shot down and that if necessary, he will give the boxes to Dubinskiy. Dubinskiy tells him that his men have also just downed a Sushka above Savur-Mohyla and are now looking for the black boxes. He says the Buk M they received this morning makes a real difference. Here Dubinskiy very explicitly links the shooting down of an aeroplane to the Buk M the DPR received that morning. What is clear is that, at that moment, he appears not yet to have made the connection between flight MH17 downed shortly before and the aeroplane shot down by his men with their Buk M.

From the intercepted conversations in the late afternoon and early evening following the crash of MH17, it becomes even clearer that the deployment of the Buk TELAR was successful; an aeroplane was brought down. However, it follows from the conversations that it takes some time before Girkin and Dubinskiy learn that it is a passenger aeroplane that has crashed. Only two hours after MH17 crashed does an individual whose identity remains unknown tell Dubinskiy about a crashed Boeing, but Dubinskiy says he knows nothing about it. At around that same time, Girkin is informed by a DPR fighter that the downed aeroplane is allegedly a Boeing. Very shortly thereafter, the account emerges in the intercepted conversations that the MH17 was allegedly hit by a Sushka. When at around quarter to eight Kharchenko tells Pulatov that the DPR's Buk TELAR has been moved, Pulatov relays the account that his men saw how MH17 was shot down by a Sushka and that immediately afterwards, the DPR shot down the said Sushka with the Buk TELAR. Kharchenko is told to pass this on to Girkin. This same account is also told by Pulatov to Koreets and later in the evening also to Dubinskiy, who immediately passes it on to Girkin. However, Girkin appears not to believe the account, and tells Dubinskiy that he must settle it neatly. Dubinskiy also apparently doubts the account, because he then asks Kharchenko whether it was not in fact the DPR men who shot down MH17. Kharchenko then repeats that it was the Sushka that did it, and that the said Sushka was then downed by the DPR's Buk. In the meantime, however, other DPR fighters had told each other by telephone that Girkin's fighters had shot down a passenger aeroplane with a Buk, but that it was accidental. It can be concluded from the conversations of DPR fighters that it was not the Ukrainians who shot down the aeroplane, as the Russian media would like us to believe.

As already indicated above, immediately following the crash of MH17, attention was focused on securing the Buk TELAR, but that changes after several hours, and orders are given to remove the Buk TELAR. All these conversations take place after the conversations about which aeroplane was shot down by the Buk TELAR of the DPR fighters. As he is too busy because of the crash of MH17, at half past eight, Girkin instructs Dubinskiy to evacuate the Buk TELAR and to remove it to the border between the DPR and the LPR, where it will be picked up. The court deduces from this that before issuing this instruction, Girkin must have been in contact with the LPR, which is shown to be the case later that evening. Dubinskiy immediately makes a start on carrying out this instruction and notifies Kharchenko that the Buk TELAR must be taken to the regional border and that a trailer will be provided for that purpose. When Kharchenko sets to work and wishes to pick up the Buk TELAR at the checkpoint, he hears from his subordinate that the Buk TELAR has already left for Snizhne under its own power. A short time later, it emerges that one of the crew members has been left behind at the checkpoint. Kharchenko instructs his subordinate to take the crew member to the Furshet and asks Pulatov to seek contact on this matter with the other crew members of the Buk TELAR. However, these attempts are unsuccessful. It follows from the further intercepted conversations that evening that Dubinskiy directs Kharchenko in carrying out the instruction to remove the Buk TELAR, but seeks to consult with Girkin when things do not go as planned. Girkin also asks Dubinskiy about the state of affairs regarding the removal operation. When a little after 11 o'clock in the evening, the Buk TELAR is ready to be actually removed, Dubinskiy says that Kharchenko can leave it to his men. He does inform

Kharchenko where the Buk TELAR will be taken over by men from Luhansk. Leshy, the convoy escort, must contact the men from Luhansk on this matter, and Dubinskiy himself is provided with Leshy's telephone number. The LPR Minister of Defence at the same time issues the instruction to meet the Buk convoy, to take it over and escort it to the Russian border near Severniy, where it will be met. By then it is almost midnight.

During the night and early morning of 18 July 2014, there is much telephone traffic about the removal of the Buk TELAR. The calls take place between the persons responsible for the removal, men of the DPR and the LPR, who are in contact with each other, and also with the two crew members present, but also at the level of the Ministers of Defence of the DPR and the LPR. In that process, a misunderstanding arises about the escorting of the Buk TELAR from the border between the DPR and the LPR, up to the agreed end point: the border with the Russian Federation at Severniy. Girkin becomes very angry at Dubinskiy, and instructs him to sort it out. Dubinskiy attempts to get this done via Kharchenko. However, the misunderstanding is not solved overnight, as the telephones prove unreachable. In the early morning it becomes clear that, under the escort of Bibliothekar, the Buk TELAR has been taken to the Russian border and has arrived there. Only when that becomes clear are Dubinskiy and Girkin at ease. At the end of the morning, Dubinskiy also announces that last night and tonight, his men have found two black boxes from MH17.

Position of defendant Pulatov regarding the presence of a Buk TELAR

In his video message dated 16 February 2020²⁰², defendant Pulatov first submitted that he was not aware of the presence of Buk missiles in the DPR on or around 17 July 2014, furthermore that he had not spoken to anyone about the matter on 16, 17 and 18 July 2014, and that there were no Buk systems at all in the area where his reconnaissance units were operating. Anyone with any understanding of military operations would immediately recognise that it would be idiotic, because there was nothing in that region worth protecting with a weapon like a Buk TELAR. In his explanation in the video recording of 22 October 2020, Pulatov repeated that there was no Buk present, and that intercepted conversations in which the word Buk is used were intended to mislead the enemy, or at least are open to multiple interpretations.²⁰³ At oral argument, counsel for defendant Pulatov argued additionally that even if there was a Buk, it was not a working Buk but an out-of-order unit, the only purpose of which was to deter and that the explicit mention of a Buk in telephone conversations was also merely intended only to deter and mislead. It was then argued that if it were in fact a working Buk, it need not have been fired, but was only intended and used to deter the enemy, and finally, that if there was in fact a working Buk that was used, defendant Pulatov had no knowledge of it, let alone that he knew that the working Buk would be deployed and fired, and that he therefore had no part in it.

The court considers each of these assertions - over time, some partly, if not varying then at the very least not consistent - to be entirely implausible. The layered lines of defence that relate to these assertions, are therefore rejected. In this matter, the court considers that each of the assertions, if not intrinsically contradictory, is contradicted by the content of the evidence presented above, and thus is amply disproved by that evidence. After all, on the basis of ample evidence, the court has already determined that a Buk TELAR with missiles was present, that it was travelling in the direction of Pervomaiskyi, and that the said Buk TELAR did actually launch a Buk missile from a farm field in Pervomaiskyi, which missile downed MH17. In other words, there were no misleading phone conversations.

All that remains is the suggestion made by the defence that defendant Pulatov may not have been aware that there was an operational Buk TELAR that would actually be deployed and that he *thought* that it was a matter of deception. The court sees so much evidence in the inconsistency of his statement itself, in combination with the content of the intercepted conversations, that this suggestion is far from the truth, that it rejects this line of defence.

When it comes to Pulatov's own statement that wherever reference is made to the presence of a Buk, this is an alleged attempt to deceive the enemy listening in, the court considers that the plausibility of this suggestion is undermined by inner contradictions. After all, if it truly were the case that no reasonable soldier would believe that a Buk TELAR would be delivered and would be deployed at that location in that conflict, why would an enemy listening in, who is also militarily trained, be impressed and consequently believe that there was indeed a Buk and not see through the deception? Therefore, according to Pulatov, this form of deception would be so transparent that the court does not understand why Pulatov would believe that the spreading of this kind of deception would have any chance of success.

Another indication that Pulatov knew very well that it was not a deception is that he himself saw the Buk TELAR at the Furshet. After all, Kharchenko had received the instruction to escort the Buk TELAR on that day. Dubinskiy had already informed Pulatov that Kharchenko would be bringing him a Buk M. It then follows from the intercepted conversations that Kharchenko and Pulatov did actually meet there, and that the Buk TELAR was also there. Under these circumstances, it is entirely implausible that he would not have seen the Buk TELAR there, especially since he attempted to contact the crew on several occasions by telephone, after the meeting at the Furshet.

Finally, the submission that Pulatov truly believed that the conversations about a Buk were mere deception cannot be reconciled with his reaction to the events after the fact. None of his conversations reveal any surprise about the presence of a Buk missile, which was also launched in the middle of 'his' operation corridor. On the contrary, he reports to his superior that his men in the field allegedly saw their Buk shoot down a Sushka: in other words, their Buk was fired and shot something down.

Superfluously, the court notes that it deduces from the intercepted conversation at 23:27 on 17 July 2014, contrary to defendant Pulatov's submission, that the Strela actually broke down on 16 July 2014, and that the said notification was also not misleading information. It is after all confirmed in that conversation, to the commander of the DPR anti-aircraft unit, that the Strela is under repair, which is in line with the notification by defendant Pulatov to accused Dubinskiy on 16 July 2014 that the broken Strela will be taken away for repair that night. There is no evidence that the DPR had more than one Strela on or around 17 July 2014, information provided, in fact, by defendant Pulatov. Whatever the case, with regard to these proceedings, the court considers it irrelevant whether or not the Strela was broken, and whether defendant Pulatov was holding or believed that he was holding misleading telephone conversations about a Strela. After all, it was not the Strela that downed MH17.

Conclusion regarding the actual conduct of the accused

The court concludes from the foregoing that in the night of 16 to 17 July 2014, DPR fighters delivered a Buk TELAR from the Russian Federation. The need for anti-aircraft artillery of this kind had long been felt, and following heavy fighting on 16 July 2014, whereby the DPR suffered heavy losses without being able to effectively defend itself, the system was more than welcome. The Buk TELAR that was delivered in the night and early morning was therefore sent on, immediately following its receipt in the morning of 17 July 2014, to the front line on the corridor between Snizhne and the border with the Russian Federation to the south of Snizhne, and in the afternoon of 17 July 2014 was deployed in the area occupied by the DPR near Pervomaiskiy in their fight against the Ukrainian army. As a consequence of that deployment, not a Sushka, but flight MH17 was downed and the 298 occupants of that flight were killed. After it became clear that this disaster had been caused by the deployment of the Buk TELAR, the said weapon was rapidly returned to the Russian Federation, in the expectation of preventing an international outcry.

The evidence shows that the actual arrival of the Buk TELAR was initiated by the accused Dubinskiy and that the transport of the Buk TELAR from the Russian Federation to and from the launch site was organised and supervised under his direct command, whereby he issued instructions to his subordinates and was kept up to date by them with respect to the progress of the transportation and the results of the deployment of the Buk TELAR. The accused Kharchenko, who for the most part actually provided and arranged the escort for the Buk TELAR, fulfilled a direct and active role. Kharchenko, for example, ensured that the Buk TELAR was escorted to the eventual launch site, and that it was guarded and protected there. He did this together with his men, to whom he also issued instructions and who were accountable to him. He kept defendant Pulatov informed of the status of the operation. Pulatov knew of the arrival and presence of the Buk TELAR. He had been informed of this by Dubinskiy and he met accused Kharchenko, who on the morning of 17 July 2014 was escorting the Buk TELAR, at the Furshet in Snizhne, where he must have seen the Buk TELAR. The Buk TELAR was deployed in the context of the fighting that took place on 17 July 2014 and on the preceding days, to the south of Snizhne in the area identified as the corridor. It was defendant Pulatov who, on the instruction of accused Dubinskiy to establish this corridor, had conducted advance reconnaissance, and who fulfilled a coordinating task in expanding and defending the corridor to the desired goal: a direct passage from DPR territory to the Russian Federation. On 17 July 2014, defendant Pulatov was hard at work in carrying out his responsibilities relating to the said corridor. Accused Girkin, finally, as Minister of Defence, was the military commander and leader of the DPR in the months leading up to, on and after 17 July 2014, and as such was responsible for the build up and deployment of the military arsenal and for the deployment of the DPR fighters. He gave direction and leadership to the conflict against the Ukrainian army, consulted on these matters with his commanders in the field, and issued them concrete strategic instructions, held discussions with his 'colleagues' from the LPR and

with those responsible in Moscow, and also called in the assistance of Moscow. However, the evidence does not show that accused Girkin was aware of the arrival, presence and deployment of the Buk TELAR, prior to the crash of flight MH17.

In the conflict between the DPR and the Ukrainian army, accused Dubinskiy was therefore the commander in charge, accused Kharchenko an executive commander, defendant Pulatov an executive and local coordinating commander and accused Girkin bore overall military responsibility.

6.2.5 Legal interpretation of the actions of the accused

6.2.5.1 Introduction

In this judgment, the court has arrived at conclusions about the actions of the accused in the deployment of the Buk TELAR and its use for the firing of a Buk missile on 17 July 2014, from a farm field near Pervomaiskyi. In other words, what was their actual contribution to what happened? In the indictment, this contribution is characterised in different ways, with several variants of perpetration being charged: principally, functional perpetration or co-perpetration, and in the alternative, perpetration or co-perpetration, further in the alternative perpetration or co-perpetration of incitement and in the furthest alternative as perpetration or co-perpetration of complicity. On the basis of the evidence and findings of fact presented above with respect to the conduct of the accused Girkin, Dubinskiy, Pulatov and Kharchenko, the court must answer the question of whether any of the aforementioned perpetration variants listed in the indictment under the first and second count can be found proven. Given the compound (segmented) mode of indictment, the court will first assess the principal variant each time.

International law doctrine

In that regard, the court first of all considers that the prosecution takes the position that the accused were, together (and with others), part of a close-knit, collaborating group of perpetrators that repeatedly shot down aircraft and that, for that reason alone, each of the accused, as a member of this group, bears (functional) criminal responsibility for the downing of MH17, evidently irrespective of their concrete contribution to the downing of MH17 or their position in the hierarchy. As the prosecution did not charge the accused with participation in a criminal organisation, the prosecution appears to have based itself on elements of various forms of participation (*joint criminal enterprise (JCE)*) and/or *direct/indirect (co)perpetration* and/or *superior or command responsibility*) developed in the jurisprudence of international tribunals for its interpretation of functional perpetration, all of which exhibit one or more characteristics of the Dutch doctrine of functional perpetration. However, the court considers that - quite apart from the question of whether such broad criminal responsibility indeed follows sufficiently unambiguously from the jurisprudence of the international tribunals - such an interpretation would be justified only if it were also in line with the Supreme Court's interpretation of the doctrine of functional perpetration, to which the requirements of power of disposition and acceptance are central. However, that is not the case.

In addition, the court does not see sufficient evidence in the case file to support the contention that the accused formed a close-knit, collaborating group of perpetrators focused on, among other things, organising and perpetrating violence against Ukrainian military aircraft. It is true that all four accused belonged to the military branch of the DPR and regularly cooperated in their fight against the Ukrainian army, but in the court's opinion, that collaboration, when it came to shooting down aeroplanes and helicopters, was not as close as the prosecution claims. Indeed, it does not follow from the case file, with respect to the various incidents surrounding the downing of aircraft, that the four accused were involved in each of them or predominantly so. In many cases, the only thing that can be deduced from the case file is that Ukrainian aircraft were (probably) shot at or downed by DPR or LPR fighters, without it being clear which specific combat units or individuals were involved. In addition, those incidents were too spread out in time and not sufficiently linked to concrete actions of the four accused for the conclusion to be drawn that precisely these four accused, other than because of their involvement in the DPR, were so closely involved in systematically shooting down of aircraft that it can be concluded that the four of them were working together for that purpose or were part of a close-knit, collaborating group of perpetrators.

6.2.5.2 Assessment frameworks

To answer the question whether the principal charges under the first and second count in each case can be proven, the court will first briefly consider some general assessment frameworks that play a role in the legal variants charged, namely those of functional perpetration (being a functional

perpetrator), co-perpetration and functional participation.

Functional perpetration

The crux of functional perpetration is that a person who does not physically commit a criminal offence, but instead does so through one or more others, is still punishable as a perpetrator because the circumstances of the offence show that he bears responsibility for that action. The action of the actual perpetrator is then imputed to that other person, because by society's standards it is reasonable to hold that other person criminally liable for it. The application of this perpetration variant, i.e. where one natural person is held responsible for the actions of another natural person, requires that the offences charged also be capable of being committed functionally. The court finds that the offences of causing an aircraft to crash, likely endangering lives, and of killing persons, can be committed functionally.

Next, it must be considered whether those actual acts of causing a crash and killing can also be imputed to the accused. Such attribution, according to the Supreme Court, requires, in principle, that the accused "had the power to decide whether or not the actions would occur" (i.e. did the accused have control over the act(s) committed by the physical perpetrator(s) and could he intervene therein?) and that such or similar actions "were or were wont to be accepted by the accused as evidenced by the actual course of events" (i.e. whether the accused approved or habitually approved of such actions). That (habitual) acceptance includes (habitually) letting it happen, or not exercising the care that could reasonably be required of the accused with a view to preventing it. In short, therefore, for the actions to be imputed to the accused, there must be power of disposition and acceptance.

Co-perpetration

For co-perpetration to be proven, there must be sufficiently close and deliberate collaboration with one or more others, whereby the emphasis is more on the cooperation and less on the question of who carried out which actual acts. The court must determine that the accused's intellectual and/or material contribution was of sufficient weight. In assessing whether there is co-perpetration, the judge may take into account (among other things) the intensity of the collaboration, the division of tasks among perpetrators, their role in the preparation, execution or completion of the crime, the importance of the role of the accused, their presence at key moments and their failure to withdraw at an appropriate time. When the accused's contribution is not made during the perpetration of the criminal offence in the form of joint perpetration, but rather in the form of various actions before and/or during and/or after the criminal offence, the evidence must show how that contribution was of sufficient weight. **204** In the event that the accused's contribution at its core does not consist of joint perpetration, but of actions that tend to be associated with complicity, the assumption of co-perpetration requires further justification.

Functional participation

Functional participation can be said to have occurred if both the requirements of functional perpetration and the requirements of the concrete form of participation (e.g. co-perpetration) are met. For example, a director who allows a subordinate, with his consent or at his direction, to co-perpetrate or incite an offence.

6.2.5.3 Assessment of the actions of the four accused

By applying these assessment frameworks to the previously established actions of the accused, one arrives at the considerations below on whether a perpetration variant contained in the indictment under the first or second count can be proven.

Why was MH17 downed: intent, unlawfulness and premeditation

The court notes - along with the prosecution and counsel for defendant Pulatov - that the actions of the crew of the Buk TELAR when launching the Buk missile at MH17 cannot be established on the basis of the case file. The case file also fails to identify who gave the instruction to launch a missile, and why that order was given.

The court has found that the Buk missile was fired from a farm field near Pervomaiskyi and that that area was under the control of the DPR at the time. The Buk TELAR was deployed in the DPR's fight against the Ukrainian armed forces, to bring down Ukrainian military aircraft. Indeed, DPR forces were suffering greatly from air strikes by Ukrainian military aircraft.

In what is known as the target acquisition process that precedes the firing of a weapon such as a Buk TELAR, a target is identified in order to achieve a certain effect. The target is then checked, and a decision is made whether or not to fire a missile. These steps and decisions are not only related to the technical functioning of a weapon system such as a Buk TELAR, but are also prescribed for participating in hostilities, according to international humanitarian law (the law of war). Consideration must also be given to whether the deployment of the weapon will or can result in damage to unintended objects or victims. This may lead to the decision to abandon or abort deployment of the weapon, for example, if it is recognised that the target is in fact a civil aircraft.

The case file contains no information about what occurred in the Buk TELAR just before the Buk missile was fired. Therefore, the court cannot determine whether a civil aircraft was deliberately shot at or whether the missile was fired in the assumption that MH17 was a military aircraft. However, the court can determine the following.

A Buk weapon system is primarily intended to be used to shoot down (enemy) aircraft. The death of enemy occupants may also be an intended purpose of shooting down the aircraft, but it need not be. Due to the enormous destructive power of the weapon and its effects, which effects the court itself observed during its inspection of the reconstruction, and the weapon's great altitude range, the likelihood of those on board the aircraft surviving the attack is nil, and anyone deploying a specialised, expensive weapon such as a Buk TELAR is aware of this. Operating a Buk TELAR requires a well-trained crew. Furthermore, the weapon cannot be casually deployed. Deployment demands the necessary preparation, including designation of and transport to a location where the weapon can be used. Making the system ready and the actual firing of a missile follow a set procedure, described previously. It is precisely this extensive preparation, consisting of many steps, that leads to the conclusion that the opportunity existed to think about and consider the intended act. The court finds it plausible that that opportunity was indeed used.

This means that the firing of a Buk missile is neither accidental nor does it happen on a whim. Instead, it is very deliberate and well-considered, according to a set method of operation (prescribed by technical requirements). Therefore, in the court's opinion, it can be said that there was intent and a certain deliberation concerning the firing of the missile at the target in question, and that the nature of the weapon and the purpose of its use mean that it is clear what the consequences of the intended firing would be, namely, the destruction and crashing of the aircraft and, in all probability, the death of all those on board.

Bringing down this aeroplane, which was flying at an altitude of ten kilometres, in this way, in the opinion of the court, automatically would lead to the death of all those on board. Legally speaking, this means that the intention of the crew of the Buk TELAR was to take the lives of those on board of this aircraft and that this was done with premeditation. There is no evidence of any indication to the contrary to which more weight should be given. Also, the intention of the crew was to cause this aircraft to crash by firing a Buk missile, although this was likely to endanger the lives of the occupants of said aircraft, as a result of which 298 people died. The crew was in no way justified in shooting down aircraft, meaning the unlawfulness of that action is a given.

Since the deployment of a Buk TELAR in this context was aimed at downing one or more aircraft with all that this entails, it must be assumed that the aforementioned intent and premeditation were present not only on the part of those who fired the missile, but also on the part of anyone who contributed to making the deployment of this weapon possible. As previously considered, there is no indication that those who played a role in enabling the deployment of this weapon assumed that the weapon would not actually be deployed. That they contributed to that deployment with the intention that it would bring down a military aircraft and not a civil aircraft does not change this, as will be explained below.

Mistake scenario

Before the court addresses the question of whether these charges can be proven with regard to the accused, the court will consider whether the possibility or even likelihood that it was thought that the aircraft that was shot down was a military aircraft, and that there was no intention to strike a civil aircraft (*error in objecto/persona*), is of any significance in assessing intent in this criminal case.

First and foremost, the court considers it completely implausible that a civil aircraft was deliberately downed. Not only because it is impossible to see what purpose that would have served, but also because neither the case file nor the trial provide any indication of this. On the contrary, the

statement of M58, who was present in the field, and the telephone reactions following the downing of MH17 rather show that those involved initially thought that they had succeeded in shooting down a Ukrainian military aircraft. A mistake being made is something the court does find plausible, especially in a situation where only a Buk TELAR operating independently is being used and no other aircraft are flying nearby with which the target can be compared. Therefore, the court will proceed on the assumption that it was believed a military aircraft was being downed.

In a situation where the wrong target is mistakenly impacted in the execution of a crime, case law of the Netherlands Supreme Court, among others²⁰⁵, holds the physical perpetrator of the crime responsible without prejudice. The reasoning here is that in the crime of murder, the intent is to kill another person with premeditation, and if it turns out afterwards that not the intended person, but another person was killed, the definition of the offence is still met, namely that another person was intentionally killed. In the court's view, this also applies to intentionally and unlawfully causing an aircraft to crash. If in retrospect it turns out that a different type of aircraft than the intended type was shot down, the definition of the offence is still met. The fact of the matter is that, in the absence of combatant privilege, killing a soldier warrants punishment as much as killing a civilian, and shooting down a military aircraft warrants punishment as much as shooting down a civil aircraft. Further, if the intention was to shoot down an aeroplane that should not have been shot down and an aeroplane was shot down that should not have been shot down, then, at the very least, the substantial likelihood of killing people who also should not have been killed was accepted. In the eyes of the law, there is no difference between the two aircraft, nor the status of those on board. Therefore, the mistake does not negate the intent or premeditation.

In a situation such as the present one, in which the accused is not the one who physically committed the offence himself, because he did not himself press the button - and thus did not himself commit the mistake - the reasoning seems to be more nuanced. The case law of the lower courts also holds this remote participant, such as the person having given the orders, responsible for the mistake if they knowingly accepted the substantial likelihood that the mistake could be made by the physical perpetrator.²⁰⁶ Thus, conditional intent seems to be required here. Upon closer examination of this case law, the court notes that in each of these cases, this conditional intent was assumed and the accused found guilty. In substantiating conditional intent, however, those cases referred to circumstances that actually implied a much lower threshold than conditional intent. Rather, it seems that criminal responsibility of the remote participant stands if it can be concluded that he did not make every effort to prevent the mistake. In all of the case law from lower courts on this subject, circumstances are described that would normally be considered, at best, to be less serious wrongdoing that might have had some risk-increasing effect. Nonetheless, these circumstances were cited as guiding considerations for assuming conditional intent for the mistake, thus upholding the criminal responsibility of the remote participant. None of those cases has been quashed by the Netherlands Supreme Court. Since these cases were upheld without any reasons given on this point, it is not clear whether this is due to the fact that the Netherlands Supreme Court endorses setting the requirement of conditional intent for the mistake (based on such less serious charges regarding the mistake), or whether the Supreme Court, while disapproving of any additional requirements being imposed, nevertheless saw no reason to quash the judgment because in each case, the remote perpetrator was found guilty.

In the court's opinion, it is incorrect to impose the requirement of conditional intent or a different degree of culpability in the case of a remote participant - unlike in the case of a physical perpetrator - when determining whether a mistake made by the physical perpetrator can be imputed to this remote participant. After all, it is equally true that these remote participants knowingly played a role in a crime. The fact that the execution of that crime mistakenly involved the wrong victim should not absolve the participant of responsibility any more than the physical perpetrator. In concrete terms, those who have played a criminally culpable role in the deployment of a Buk TELAR with the purpose of shooting down a military aircraft (a similarly proscribed act) are therefore responsible for the consequences of that unlawful deployment for that reason alone, even if the crew of the Buk TELAR mistakenly shot down a civil aircraft instead of a military aircraft in the execution of that crime.

In addition, the court holds that, even if the jurisprudence of the Netherlands Supreme Court should be understood to mean that a court must indeed ascertain whether there are reasons to believe that there was conditional intent on the part of the remote participant with respect to the mistake, this does not impede this court in declaring the charges proven in the present case. In this regard, the court notes first that the accused themselves have not argued any circumstances on the basis of which it should be concluded that they took all possible precautions to avoid any error. The mere fact

that the Buk TELAR was ordered including a crew is totally insufficient for this purpose. The accused knew a particularly high-range anti-aircraft weapon was being deployed in a situation where there was still frequent civil air traffic. Their knowledge of civil air traffic is evident from intercepted conversations and, moreover, was very easy to obtain, from spotters, radars or the internet. In such a situation, it is crucial that every effort be made to enable the crew of the Buk TELAR to identify the correct target. Despite this, only an independently operating Buk TELAR - without TAR²⁰⁷ - was deployed in a chaotic situation close to the battle front; therefore, the great risks involved were apparently accepted.

Assessment of the actual conduct of the accused and others

To this end, the court has established the facts and circumstances regarding the transport and deployment of the Buk TELAR on 17 July 2014. In the preceding days, fighting between the DPR and Ukrainian armed forces was fierce. As stated, the court assumes that the Buk TELAR was intended to be used in that fighting, for the benefit of the DPR. What did the accused contribute to this, and what conclusions does the court draw?

The Buk TELAR crew members, as those who actually fired the missile, can each be considered the perpetrator or co-perpetrator of firing the Buk missile. They actually committed the offences charged in deliberate and close cooperation. The question the court has to answer is whether what was charged in this case can be found proven with respect to the four accused.

If the accused made a substantial direct contribution to the eventual firing of the Buk missile, then criminal liability for that action and its consequences comes into play. This is the case even if they bear more remote, and thus rather indirect, responsibility for the Buk missile being fired.

It is a given that a Buk missile can only be fired if the Buk TELAR required to do that is also available. Moreover, that Buk TELAR must be positioned in a place suitable for firing. A Buk TELAR can fire multiple missiles and be deployed at different times and locations, that is, over a somewhat longer period of time. Precisely because of the (strategic) value of a Buk TELAR, it is important that on its journey to and from the appropriate firing site, that Buk TELAR be escorted past checkpoints, and at the firing site itself be guarded and secured against enemy attack. Therefore, escorting and guarding the Buk TELAR *en route* to and at the appropriate location is a crucial task, which, in the court's view, makes the person responsible for that a substantial contributor to the overall deployment of the Buk TELAR as such. Firing a Buk TELAR also requires a trained crew, which must be available at the planned launch site. So arranging this is also crucial to the deployment of the Buk TELAR. The court deems all of these factors to be substantial contributions to the realisation of the ultimate goal: firing a Buk missile at a designated or selected target. The person who contributes to these factors being fulfilled, thereby, in the court's view, makes such a substantial and material contribution to the eventual firing of a missile from the said Buk TELAR that that person can be considered a co-perpetrator.

Contributing to this is the fact that the evidence shows that this particular Buk TELAR was deployed in the fight that the DPR was waging against the Ukrainian military authorities, and indeed, this Buk TELAR was used to fire a missile from an area held by the separatists in combat to establish a corridor that was of great importance to those separatists (and their battle). Indeed, the corridor connected the part of the Donbas that the separatists already controlled to the Russian Federation, providing a direct and short supply route for equipment to the occupied Donbas area. In light of the DPR's objective of achieving greater independence from Ukraine, by force if necessary, whereby control and authority had already been taken (in part of) the Donbas, the Buk TELAR was an essential weapon to achieve that goal, given Ukraine's military air superiority in the conflict on the days around 17 July 2014, specifically in the area around Snizhne. Thus, all actions related to obtaining and deploying the said Buk TELAR contributed towards the realisation of the DPR's goal. As a result, it can be stated that the Buk TELAR, regardless of who concretely had authority and command over its deployment and regardless of the specific instructions given to its crew, was for the use and benefit of the DPR. In short, the Buk TELAR was deployed for the DPR's struggle and served that purpose in any case.

The court must answer the question of whether the proven conduct of the accused was such that it constitutes conventional co-perpetration or - the principal charge of the prosecution - that although the accused did not personally commit the offence in a physical sense, he can be held responsible for it - jointly with others or severally. The answer to that question cannot be given in general terms, but requires an assessment of the concrete acts of the accused considered individually as well as in connection with each other.

Kharchenko had been instructed by his hierarchical superior Dubinskiy to transport, to escort and to guard the Buk TELAR, until it reached its eventual launch site at Pervomaiskyi. Kharchenko carried out that instruction and, in implementing those tasks, among other things, he issued orders and instructions to his subordinates. He also subsequently informed Dubinskiy of the successful deployment of the Buk TELAR and of the fact that it had been secured. In addition, once again at Dubinskiy's behest, he organised the removal of the TELAR.

The court views Kharchenko as a cooperating foreman in essential actions that contributed to the actual firing of the Buk missile. His efforts and involvement in advance, and also in the return of the Buk TELAR to the Russian Federation, represent substantial contributions to the eventual deployment of the Buk TELAR at the launch site. In so far as Kharchenko himself contributed to the execution, he did so in close and deliberate cooperation with others involved in the deployment, including the crew. As such, Kharchenko must be viewed as a co-perpetrator of the offences charged under the first and second count.

However, in both a factual and a legal sense, he is also criminally responsible for his subordinates' contribution to the deployment of the Buk TELAR. After all, he was not only aware of the plans regarding the deployment of the Buk TELAR, but also instructed his subordinates to make a substantial contribution to that deployment, specifically consisting of escorting the Buk TELAR, guarding the Buk TELAR at the field, and subsequently removing it. Thus there was also the control and acceptance required for functional perpetration. However, the court does not need to draw a legal conclusion on whether Kharchenko should also be characterised as a functional perpetrator, as the prosecution has argued and explicitly substantiated. With reference to the earlier comments on the validity of the summons, the court reiterates that the functional perpetration of a criminal offence must by its nature be considered an alternative variant. After all, the crux of the accusation levied against Kharchenko is that he himself, by escorting the Buk TELAR to and guarding it at the launch site and organising its removal, made a substantial contribution to the deployment of the Buk TELAR, with disastrous consequences. For that reason, the court declares the principal charge of co-perpetration under the first and second counts to be proven with respect to Kharchenko.

Dubinskiy, the ranking military commander within the DPR, fulfilled an initiating and organising role in the transport of the Buk TELAR from the Russian Federation in the night and early morning of 16 to 17 July 2014, and a directing role on 17 July 2014 as the party who ordered the transport to and guarding of the Buk TELAR at the launch site. He left the actual implementation of these tasks to his subordinates, to whom he issued the necessary orders and in respect of whom he was therefore in a position of authority as their superior. The court considers these actions to be of such essential and substantive importance for the execution of the offence that these actions can be characterised as co-perpetration. In doing so, Dubinskiy worked closely and deliberately with Kharchenko and the crew. These actions are furthermore confirmed by Dubinskiy's actions in the removal of the Buk TELAR following its use. In respect of Dubinskiy, therefore, the principal charges under the first and second count as co-perpetrator can be legally and conclusively proven.

At the operational level, Girkin was the DPR's ranking military commander, and as such had (final) responsibility for the deployment of military equipment in and for the DPR. Intercepted conversations reveal that Girkin maintained very regular contacts with Moscow concerning equipment and concerning obtaining practical military support, including anti-aircraft weapons with trained specialists on 8 June 2014, with a view to holding eastern Ukraine. This can have had no other purpose than to deploy these systems in the battle being waged by the DPR. It is apparent from the case file that this is also what happened. Under Girkin's authority as ranking military commander, much fighting took place, resulting in loss of life and injuries, and material damage. This included firing on aircraft and helicopters, which on numerous occasions resulted in their crashing.

Although highly plausible given his position, the evidence does not show that Girkin was aware of the availability of a Buk TELAR on 17 July 2014, before it was fired. Nevertheless, Girkin was and continued to be kept abreast of the current situation regarding the fighting around the corridor, and he issued orders in that connection. For example, he issued instructions for the supply and movement of tanks and determined who was in command. However, Girkin made no reference by telephone to a Buk or its deployment. As ranking military commander, Girkin was in a position to decide whether or not a Buk TELAR should be deployed. That authority followed from his position as Minister of Defence, the hierarchical superior to Dubinskiy and Kharchenko, and is also reflected by the telephone conversations held by Girkin, once it became clear that the deployment of the Buk TELAR had gone wrong. At that point, Girkin became actively involved in the return of the Buk TELAR to the Russian Federation, issued the necessary orders and maintained telephone contact on the matter to ensure

that he was informed that his orders had in fact been carried out. Furthermore, conducting the armed conflict was an important means, and was indeed specifically the primary means employed under the authority of Girkin as ranking military commander, for achieving the objectives of the DPR. For that reason, the court finds that Girkin had the power to decide on the deployment of the Buk TELAR on 17 July 2014 (power of disposition). In the armed conflict, which had been going on for some time under Girkin's operational command, all possible military means were used to defeat the enemy. That included bringing down aircraft with the available means. That the deployment of military means had led to loss of life was a fact of which Girkin was of course also fully aware. This is certainly also the case in respect of the deployment of anti-aircraft artillery to down aircraft; something which had already occurred on numerous occasions prior to 17 July 2014. As the case file contains no evidence that Girkin was aware of the availability of a Buk TELAR on 17 July 2014, it cannot be said that Girkin actually accepted its deployment. However, given his earlier request for reliable anti-aircraft artillery, the fact that Girkin was aware of the deployment of military equipment with which various aircraft had already been downed, resulting in loss of life, and never took action to stop it - quite the contrary - and the fact that on and around 17 July 2014, Girkin was actively involved in the military operation in and around the corridor, it can certainly be said that Girkin would have accepted a deployment such as that of the Buk TELAR on 17 July 2014, resulting in loss of life. That is also apparent from his actions after the event: instead of denouncing the deployment, he actively worked to make the evidence disappear as quickly as possible in order to prevent the outcry he apparently expected. For that reason, the court finds it legally and conclusively proven that Girkin was in a position to decide (dispose) on the deployment and use of the Buk TELAR and that he accepted it, including all its consequences. Therefore, Girkin - unlike Dubinskiy and Kharchenko - can be regarded as a functional perpetrator of these co-perpetrated offences. However, in respect of him, this results in the same finding, namely that the principal charges under the first and second count as co-perpetrator can be declared legally and conclusively proven.

In the indicted period, Pulatov was area commander in the wider Snizhne area. In that area, he commanded men and was tasked with establishing and maintaining the previously mentioned corridor. The court notes that the said corridor was important for maintaining and reinforcing the DPR's position in the Donbas area. Seen in that context, as coordinator, Pulatov fulfilled a very important position and role in that part of the Donbas. It follows from information compiled from the aforementioned intercepted conversations that, on 17 July 2014, the broader task of managing the corridor at least involved taking delivery and strategically deploying a number of tanks supplied by the Vostok battalion, and taking delivery of and deploying the Buk TELAR. In the morning of 17 July 2014, Dubinskiy informed Pulatov that Kharchenko would provide Pulatov with a Buk TELAR, and Dubinskiy instructed Pulatov where the weapon system should be installed and to coordinate all these activities. Shortly before, Dubinskiy had issued similar instructions to Kharchenko, when he told him to travel to Pervomaiske with the Buk TELAR and that it was his task to escort and guard the Buk TELAR. The case file shows that after receiving this instruction from Dubinskiy, Kharchenko did actually set off for Snizhne, with the Buk TELAR, where he agreed to meet Pulatov at the Furshet.

It follows from the intercepted conversations that in the early afternoon of 17 July 2014, a meeting did take place between Kharchenko and Pulatov at the Furshet in Snizhne, at the moment Kharchenko arrived there with the convoy that included the Buk TELAR. However, it cannot be determined from the case file what happened or what was said at the Furshet. It is certain that following this meeting, Kharchenko simply continued carrying out the instruction he had already received from Dubinskiy. The court is therefore unable to conclude that Kharchenko continued his journey toward Pervomaiskyi at Pulatov's behest. After all, he had already been issued with this instruction by Dubinskiy, the superior of both Kharchenko and Pulatov. It is, however, certain that Pulatov did not stop Kharchenko from continuing to carry out his instructions.

Shortly following that meeting at the Furshet, Pulatov called and was called by a phone number that can be attributed to the crew of the Buk TELAR. However, no contact was established. It is also noteworthy in this regard, as the prosecution (only) argued in reply, that shortly after those unsuccessful contacts with Pulatov around the time the Buk TELAR arrived at the farm field near Pervomaiskyi, this phone number made contact with *14th*, someone from the DPR's military intelligence department. Half an hour later, this *14th* heard from a plane spotter that no guests were expected, even though they were waiting for them. Unlike the prosecution, the court does not see this as evidence of an active or even crucial involvement by Pulatov in the execution of the instruction issued by Dubinskiy. After all, the telephone connection between Pulatov and the crew was not made, and (nonetheless) the instruction continued to be carried out. Therefore, the (failed) contacts can have had no decisive influence on the carrying out of the instruction, or at least no such decisive

influence can be determined. In the opinion of the court, the relationship between Pulatov and plane spotters suggested by the prosecution with reference to, among other things, these telephone contacts, is highly speculative and in no way justifies the conclusion drawn by the prosecution that Pulatov was the linchpin between the intelligence branch of the DPR on the one hand and the crew of the Buk TELAR on the other. Quite apart from the fact that the conversations between Pulatov and the crew did not come about, there are no intercepted conversations in the case file that show that the crew of the Buk TELAR received a warning from (one of) the spotters from this intelligence branch around the time of the crash, nor are there any intercepted conversations from which it can be inferred that Pulatov coordinated the positioning, guarding or deployment of the Buk TELAR in any way. The basis for this line of reasoning is therefore considered to be so thin by the court that it does not find that these calls demand explanation by Pulatov. Furthermore, it is sufficiently certain that Pulatov was not in the vicinity of the launch site at or around the time the Buk TELAR actually fired its missile.

Therefore, the court does not find it legally and conclusively proven that defendant Pulatov made any (physical) contribution to the deployment of the Buk TELAR. What remains is the question of whether defendant Pulatov, like the accused Girkin, should be considered a functional co-perpetrator.

In that context, the court finds it proven that defendant Pulatov was aware of the deployment of the Buk TELAR in the operation for which he was designated coordinator. Moreover, there is no evidence anywhere that Pulatov objected to the arrival and deployment of the Buk TELAR from the moment he knew that it was available to the separatists and that it was to be deployed in the operation around the corridor. For that reason, in the opinion of the court, it can be concluded that Pulatov accepted the deployment of the said Buk TELAR.

As to the existence of the power to decide or command (dispose) the deployment of the said Buk TELAR, the court concludes that Pulatov had received the specific order from Dubinskiy to remain in the vicinity of Pervomaiske to guard the Buk TELAR that was *en route* towards him and to organise all related matters. However, as mentioned, the instruction to escort the Buk TELAR to Pervomaiske and to guard it had also been issued to Kharchenko, by Dubinskiy, shortly before. Kharchenko actually carried out this instruction; he escorted the transport convoy from Donetsk via Snizhne to Pervomaiskyi and organised the guard on arrival. Therefore, not only is there no evidence whatsoever that Pulatov's intervention contributed in any way to carrying out the instructions as issued to Kharchenko by Dubinskiy, but also there is no indication that he could have changed the situation. Irrespective of the precise hierarchical relationship between Pulatov and Kharchenko on 17 July 2014, and whether Pulatov was in general able to issue orders to Kharchenko, there is nothing to suggest that Pulatov had the authority to alter or withdraw an order issued, in this case, directly to Kharchenko by Dubinskiy. His coordinating role in the military operation around the corridor does not place him above Dubinskiy. The court therefore finds that the power of disposition required for functional perpetration was lacking in relation to defendant Pulatov.

In brief, in the court's view, there is no evidence that Pulatov himself made any actual contribution to the deployment of the Buk TELAR, and Pulatov bears no criminal responsibility for the contribution of others to this deployment. This means that not only is there no functional perpetration, perpetration or co-perpetration, the principal charge, but none of the other perpetration variants charged apply either. The finding therefore is that Pulatov must be acquitted of each of the charged variants of both offences.

6.2.6 Final conclusion on the assessment of charges

In view of the above, the court finds it proven that the accused Girkin, Dubinskiy and Kharchenko intentionally (and unlawfully) (functionally) co-perpetrated the offences charged principally under the first and second count, and in the case of the offence charged principally under the second count, also acted with the premeditation required for murder. That finding is not altered by the fact that the accused may not have wanted to shoot down a civil airliner, nor that 298 innocent civilians be killed as a result.

7 THE JUCICIAL FINDING OF FACT

With respect to the accused Dubinskiy, the court finds that it has been lawfully and conclusively proven that:

1. Principal charge

on 17 July 2014, in Ukraine (in the Donetsk oblast) he, together and in association with others, intentionally and unlawfully, caused an aeroplane (namely flight MH17) to crash, by firing a Buk missile by means of a Buk TELAR (near Pervomaiskyi), although this was likely to endanger the lives of the occupants of said aeroplane (of whom the 298 names are set out in the annex to the indictment²⁰⁸) and said occupants were killed as a result;

2. Principal charge

on 17 July 2014 in Ukraine (in the Donetsk oblast) he, together and in association with others, intentionally and with premeditation, took the lives of the occupants of an aeroplane (namely flight MH17) (of whom the 298 names are set out in the annex to the indictment²⁰⁹), by using a Buk TELAR to fire a Buk missile at that aeroplane (near Pervomaiskyi), which caused the aeroplane to crash and said occupants to die.

8 PUNISHIBILITY OF THE CRIMES PROVEN

The crimes proven are punishable under the law because no facts or circumstances have been demonstrated which exclude the offences from punishment.

Regarding the provisions on concurrence of criminal offences, the court notes the following. The tenor of the charges proven under the first and second count does not differ substantially, as protecting the lives of persons from attacks on aircraft is not fundamentally different from the protection of human life as such. Therefore, in the court's opinion, the proven conduct relates to a coherent body of facts, occurring at the same time and place, so that the accused can essentially be reproached for one continuous act. This means that these two proven offences arose from the same act. In this particular case, both proven offences are subject to the same sentencing, namely life imprisonment or a limited term of imprisonment of up to 30 years.

The second proven offence is a consequence offence that resulted in the death of 298 people. This offence is also a multiple criminal offence, namely one committed many times.

The court will therefore consider Sections 55 (concurrence of offences arising from the same act) and 57 DCC (concurrence of offences arising from multiple acts) in determining the punishment. The charges proven equate to the offences set out in the operative paragraphs of this judgment.

9 PUNISHIBILITY OF THE ACCUSED

The accused faces punishment because no facts or circumstances have been demonstrated which exclude his criminal liability.

10 SENTENCING

10.1 Prosecution's application for sentencing

The position of the prosecution is that the accused must be sentenced to life imprisonment. To this end, the following has been argued (in brief).

The accused Girkin, Dubinskiy and Kharchenko, as persons holding leading positions within the organisation of the DPR and part of an armed group, jointly supervised the deployment of a Buk missile system for their own armed conflict on 17 July 2014, with which flight MH17 was shot down. They initiated, organised and carried out that violence through others. In the eyes of the law, the accused were civilians who had no right to commit any form of violence, against any target, civil or military. The consequences caused by the accused are extraordinarily grave. Not only have the lives of 298 people been taken under horrific circumstances, but the lives of countless relatives of those people have been scarred forever. Furthermore, because of them, the people living in the vicinity of the crash area were confronted with the awful consequences of the crash of MH17 and the death of its occupants. The accused created an international shockwave that resounds to this day. There is no evidence that the accused gave any thought to the particular danger they were creating for civil aviation by deploying a Buk missile system.

The prosecution pointed out that there are no examples of similar cases in Dutch case law. Moreover, the facts in the present case are incomparable to those in other cases on which international criminal bodies have ruled, so there is no reference to be found there either with respect to the sentence to be imposed. However, the Lockerbie case and a fairly similar case from Ukraine do offer some reference as to the sentence to be imposed. Given the planning, the great violence and atrocity, the far-reaching consequences for the relatives, the serious violation of the rule of law and the fact that there were 298 victims, only the imposition of a life sentence is appropriate and justified. The prosecution has stated that ECtHR case law does not impede this.

The prosecution sees no reason to seek a lesser sentence in the different roles of the accused, the accused's stance with respect to these proceedings or his personal circumstances. Finally, even the fact that the 'reasonable time' requirement within the meaning of Article 6 ECHR was violated is not a reason to reduce the sentence, leaving aside the fact that this is not possible when imposing a life sentence.

10.2 Decision of the court

10.2.1 Penalty carried by the crime

The court has found the two charges proven. For both offences, the Dutch Criminal Code provides that either a limited term of imprisonment of 30 years or a life sentence may be imposed. However, since two offences arose from the same act, the maximum punishment to be imposed in this case is a limited term of imprisonment of 30 years or a life sentence.

In determining the sentence, beyond the gravity of the offences which is clear from the maximum sentences referred to above, the court will look at the gravity of the consequences of those offences. These two factors determine, to a very large extent, whether a limited term of imprisonment is sufficient and appropriate punishment, or whether life imprisonment should be applied. Next, the court will assess whether there are factors which bear on the weight of the sentence to be imposed, be they aggravating or mitigating. These include such matters as the intent, the mindset of the accused, his personal circumstances, his specific role, position, and place in the hierarchy at the time the offences were committed. Finally, the court will comment on whether these proceedings were conducted within a reasonable time and on the consequences of the procedural error made by the prosecution in launching an application on the internet.

10.2.2 The direct consequences of deploying the Buk TELAR

Firstly, the court wishes to state that persons other than the accused in this criminal case may be reproached for the fact that the separatists deployed and used a Buk weapon system. The fact of the matter is that the weapon had to be provided before it could be deployed. It had to be transported, secured and guarded and the deployment itself must have been planned and implemented. It is the view of the court that anyone who played a role in this bears, at least, moral responsibility for the consequences of deploying such a weapon, which by its very nature is capable of causing the total destruction observed during the inspection of the reconstruction. Moreover, for so many, it did in fact destroy everything.

First and foremost, of course, are the 298 people, men, women and children who died. In an instant, without warning, their lives, and those of their loved ones seated next to them, were cruelly ended. No one knows what those final moments were like, but inevitably terrible images come to mind. In

that single moment, these people were robbed of their life and future. The accounts of the relatives make it abundantly clear that the victims had been enjoying full lives. Their lives were far from over, indeed some had barely begun, and their futures could have held so much. The future was brutally stolen from them.

That destruction also had a severe impact on the lives of the relatives. The many statements by relatives - in writing or given at the hearing - have made poignantly clear how much the victims are still missed in the lives of those left behind. It was made clear to the court, with great effect, just how completely different those relatives' lives were after the MH17 disaster: clearly, there was life before the disaster and life after it, as several relatives mentioned. The court considers it impossible for anyone to comprehend how it was for the relatives to receive the message that their loved ones had died as a result of MH17 being downed and how it was for them to have to continue on afterwards. The consequences for many relatives have proven to be unimaginably great. In some cases, they have lost several children, grandchildren, parents, grandparents, brothers, sisters and other members of the family. At a stroke, their life has been changed in a terrible way; a situation that persists to this day and will continue for ever. A number of relatives are experiencing physical and lasting psychological effects and in some cases changes in work, education or career as a result. In addition, in some instances there have been major financial implications. All of these aspects came to the fore when the relatives exercised their right to address the court and when the claims for compensation were dealt with. The court will address the claims for compensation more broadly later, but these aspects play an important role in determining the sentence to be imposed.

The court also wishes to refer to the impact that the crash has had on the local people of eastern Ukraine. They, too, were confronted with the awful consequences of the downing of MH17 on 17 July 2014. Wreckage and people fell from the sky, in some cases literally through the roof of their homes. It took days and sometimes weeks before recovery and repatriation of the victims and wreckage began. This too must have been appalling for them.

To the day of this judgment, no one has come forward to clarify who is or are responsible for this tragedy. Neither the results of all the technical investigations into the cause of the MH17 crash, nor the criminal investigation nor the comprehensive trial that was livestreamed and attracted attention worldwide have prompted anyone to explain and take responsibility. Uncertainty about the cause of and the reasons for this catastrophe therefore persists. This is a source of frustration to the relatives that, according to the accounts of some, truly stymies their healing process.

Therefore, the court will consider these facts and circumstances very seriously in determining an appropriate sentence.

10.2.3 Attitude of the accused

Once it became clear what had happened on 17 July 2014, and the accused became aware that a civil aeroplane had been downed resulting in hundreds of deaths, including those of dozens of children, all three accused became actively engaged in transporting the Buk TELAR back to the territory of the Russian Federation, from where it had arrived earlier that day. This was done to conceal what had happened and the involvement of the DPR separatists with the support of the Russian Federation; such an international scandal had to be avoided at all costs. The behaviour of the accused in the wake of the downing of MH17 casts their acts in a further negative light and is an aggravating factor with respect to the weight of the sentence to be imposed.

The court also takes into account that none of the accused have come forward to the JIT to make a statement, in which they could have cast light on what actually happened. However, far from the courtroom, they have made statements about this criminal case and about the fact that they were charged, but have denied being involved in any way.

Girkin has repeatedly and somewhat suggestively claimed that the DPR fighters did not participate in the downing of flight MH17. Beyond that he remains silent on the matter. He has, however, made very hurtful comments about the occupants of the aeroplane, comments that were close to being disrespectful.

Dubinskiy has said on a number of occasions that he was not involved in the MH17 flight crash. He rejects all involvement out of hand and casts doubt on the investigation and its results by making baseless statements about the manipulation of intercepted telephone calls and non-existent witnesses. That is in stark contradiction to the determinations which the court has made in its judgment based on the evidence available.

Kharchenko has stated that there was no Buk TELAR located in the relevant area, nor did he ever see it. In so doing, he too rejects any involvement out of hand. This position too stands in stark contradiction to the many facts and circumstances ascertained by the court.

The court considers the stance and behaviour of the accused, who only react or dare to react from afar, to be divorced from reality and therefore disrespectful and unnecessarily hurtful to the relatives. This can, therefore, in no way have a positive effect on the weight of the sentence to be imposed.

10.2.4 The military context and purpose of the deployment

The crash of flight MH17, a civil aeroplane, sparked worldwide outrage and disapproval. The investigation that followed yielded a great deal of information about the DPR's conflict, about the participants in that conflict and about the developments of that conflict over time. This ultimately led the court to establish in this judgment the facts and circumstances that preceded the downing of flight MH17 and the context in which it occurred.

The court recognises that all those established facts and circumstances quickly risk being coloured in hindsight precisely by the tendency to see them in light of the downing of MH17. Had the deployment of that Buk TELAR on that day and at that time resulted in the downing of a military aircraft resulting in the death of its occupants, it would be appraised and appreciated differently from that perspective.

Although the question of why flight MH17 was downed cannot be answered based on the trial, the court has previously indicated that it assumes that it was the intention of the accused to bring down a military aircraft.

Therefore, although the accused entirely deliberately contributed to the intentional downing of an aeroplane in the knowledge that those on board would die, a military aeroplane does not as a rule have 298 persons on board. Although the downing of a military aircraft was also prohibited, and therefore their intentions cannot exonerate them in any way, the court cannot ignore the fact that, in the context of the combat waged, the downing of a military aircraft would indeed have been of a different order to shooting down a civil aeroplane and deliberately killing 298 men, women and children with no connection to the conflict. Although the intention does not lessen the gravity of the event, it does go to the degree of culpability.

In the opinion of the court, the consequences of the crime are so grave, and the attitude of the accused with respect to what happened is so reprehensible, that - despite the fact that they did not intend to shoot down a civil aircraft - a limited prison sentence cannot, in principle, suffice. Notwithstanding, the court will assess below whether there are personal circumstances that might modify this opinion with respect to one or more of the accused.

10.2.5 Consideration of individual circumstances

The court notes that the three accused were hitherto unknown to the justice system in the Netherlands. The case file contains information on judicial documentation from the judicial authorities of Ukraine regarding Kharchenko, but due to the nature and age of that case, it does not affect the sentencing in this criminal case. Furthermore, the trial did not reveal any personal facts and/or circumstances that the court should take into account when sentencing, either to the benefit or disadvantage of the accused.

However, the court does see reason in decisions regarding sentencing by international tribunals to consider the role and position of the accused when determining an appropriate sentence. In such cases, the court sees that the greater the role of the convicted person and the higher the position of a convicted person in the hierarchy of an organisation, the higher the sentences imposed by tribunals. The duration of custodial sentences may be lower in the case of persons who, although criminally liable, carried out their actions within a chain of command and were more or less obliged to carry out those orders. Therefore, the court will consider the various roles of the accused, their position within the DPR and the latitude they had to influence the use and deployment of the Buk TELAR.

As Minister of Defence, Girkin had the highest rank in operational terms in the armed combat, and as such was responsible for his men. Although it cannot be established that he was aware of the deployment of this specific Buk TELAR, it can be established that he approved and supported such anti-aircraft defence practices that took place under his responsibility. As commander, Dubinskiy can also be seen as the coordinator of and cooperating foreman in all activities related to the supply,

transportation, deployment and removal of the weapon. He therefore not only held a high hierarchical position, just below Girkin, but also played a major role in, and thus contributed significantly to, perpetration of the crime. The accused Kharchenko is the one who, by carrying out the orders he received from his commander, Dubinskiy, was most directly involved in the actual perpetration of the proven offences, but also gave orders in turn to his subordinates in this regard. He therefore was part of the middle level of the hierarchy.

The court finds that Dubinskiy's high hierarchical position and the considerable coordinating role he played in having the Buk TELAR retrieved from the Russian border in the early morning of 17 July 2014, and in its direct deployment that same day, as a result of which flight MH17 was brought down, as well as his role in the removal of the Buk TELAR, can only be punished with life imprisonment.

The court considered whether the fact that it could not be established that Girkin had any prior knowledge of the deployment of this specific Buk TELAR, let alone demonstrably made any concrete contribution to it, means that a (maximum) limited prison sentence would suffice for him. However, the court is of the opinion that a limited prison sentence would not do justice to the responsibility that Girkin bore, as Minister of Defence and commander of the armed forces of the DPR, for the deployment of weapons in the conflict. After all, with respect to this specific deployment, it is certain that Girkin not only accepted such deployments, but even facilitated them thanks to his contacts with the Russian Federation. In addition, once he realised the consequences of the crash of flight MH17, he directly intervened in the return of the Buk TELAR to the Russian Federation and took action to facilitate it.

The court considered this aspect too with respect to Kharchenko, who held a lower hierarchical position and performed his duties under the orders of his superior, Dubinskiy. However, here too, the court is of the opinion that a limited prison sentence would not do justice to his direct and active involvement in the deployment throughout the operation. After all, it was he who, along with his men, ensured that the Buk TELAR and crew arrived at the launch site and that the Buk TELAR was guarded there and, under his direct direction, was removed that same evening and night, along with the crew. His lower hierarchical position, therefore, does not counter-balance the above considerations such that a limited prison sentence might suffice. The offences are too grave and his role too great for that to be the case. This means that the court will also sentence Kharchenko to life imprisonment.

10.2.6 Exceeding reasonable time?

Then there remains the question of whether a reasonable period of time has been exceeded. In fact, there is no fixed timeframe *per se*, but rather the time concerned needs to be seen in the light of the nature of the case and the way in which the participants in the proceedings have played their roles. The court notes that on 19 June 2019, the prosecution announced that it would prosecute four individuals. The criminal trial opened on 9 March 2020, and comes to an end before this court today. Although the cases of three of the accused were tried *in absentia*, the proceedings in those cases unfolded alongside those of defendant Pulatov, owing to the close interrelationship in the substance of the matter. That case was heard in adversarial proceedings, as he was represented at the hearing by his counsel. These criminal proceedings were thus conducted simultaneously over nearly seventy days in court and were the sequel to a lengthy and extensive investigation. Partly because of the size of the case file, the court gave counsel for defendant Pulatov, at its request, time and space to prepare and conduct its defence adequately. Therefore, there has been no unnecessary time spent in court or delay. The court holds that, given the interrelated nature of the cases and the expeditious handling of these criminal proceedings, they were conducted within a reasonable time and that therefore that is not a factor in setting the sentence.

10.2.7 Disclosure of results of the investigation

Finally, the court recalls what it stated when it addressed the preliminary matters with regard to the prosecution announcing the suspects names and personal details and displaying their photographs at a press conference, as well as posting an application on the internet. When addressing this, the court indicated that it would return to the question of the consequences to be attached to the violations identified when it came to determine the sentence. In considering this question, the court takes into account the extent to which the accused claims that these procedural errors have been detrimental to his interests.

Counsel for defendant Pulatov has explained at length that and how these disclosures have been detrimental to the defendant's interests. This was discussed when the preliminary matters were addressed. However, now that defendant Pulatov has been acquitted, no punishment will be imposed

in his case, and so the procedural errors will not lead to consequences.

With regard to the accused Girkin, Dubinskiy and Kharchenko, the court considers that they - unlike defendant Pulatov - have not indicated that their interests have been harmed, let alone explained what interests, specifically, might have been harmed. Under these circumstances, the court sees no reason to attribute such weight to these procedural errors made in their cases also, that a limited prison sentence rather than life imprisonment should nonetheless be applied. In the current circumstances, the consequences of these violations do not sufficiently weigh up against the gravity of the proven crimes.

10.2.8 Conclusion

The court finds the crimes proven so grave and the consequences so great that it concurs with the prosecution that, in this case, only the longest prison term possible is a fitting sentence for what the accused have done, causing so much suffering to the many victims and their relatives. The court realises that imposing this sentence cannot take away the grief, but it expresses the hope that the fact that the matter of guilt or innocence has now, exactly eight years and four months after the disaster, been determined can provide some comfort to the relatives.

All the above leads the court to sentence the accused to life imprisonment.

11 APPLICATION FOR ARREST

11.1 Application for a warrant of arrest

The prosecution has requested that a warrant of arrest be issued for the accused, stating that, in the event of conviction and the imposition of a lengthy prison sentence by the court, it is imperative for public safety that the accused be deprived of his liberty immediately.

11.2 Decision of the court

The court sentences the accused for serious offences which carry a statutory term of imprisonment of twelve years or more and which constitute a serious violation of Dutch and international rule of law. In this regard, the court refers to the contents of the statements made by the victims' relatives when exercising their right to address the court, as well as those of the victim impact statements submitted in writing, which make plain the profound consequences and the intense and deep emotions still felt. It also refers to the great and continued interest in and coverage of the hearing of this case by the national and international media. Under these circumstances, a failure to issue an arrest warrant would not be understood by society. In view of this, the court finds that it is imperative for public safety that the convicted person be deprived of his liberty without delay.

Given the gravity of the crimes proven and the sentence imposed, as well as the fact that there were grounds for pre-trial detention, the court will order a warrant for the arrest of the convicted person. That decision has been rendered in a separate order.

12 CLAIMS OF THE INJURED PARTIES

12.1 Introduction

The court is considering a total of 306 claims for compensation from the relatives of the victims of the proven crimes. These claims are directed at the accused in this case. 304 such claims have been filed on behalf of the relatives by members of counsel for the relatives. The claims filed by counsel for the relatives all seek compensation for pain and suffering (*'moral damages'*) only. This compensation for pain and suffering is claimed due to the psychological distress caused by the sudden, gruesome death of their family members and the other dramatic consequences of those deaths, such as the onset of psychological

disorders, incapacitation for work, the (grave) disruption of family relationships and having to face regular, unexpected and distressing media coverage of the disaster. The court will return to this distress in detail below.

The two claims not filed by counsel for the relatives relate not only to compensation for pain and suffering for the loss of the claimants' daughter, but also compensation for material harm, namely compensation for the loss of her laptop and compensation for the cost of the journey made to the crash site in the summer of 2014.

The claims of the injured parties are civil claims that are being assessed within the framework of criminal proceedings: substantively under civil law, and procedurally, in principle, according to the relevant provisions of the Dutch Code of Criminal Procedure.

The assessment of the claims of the injured parties can be broken down into a number of elements:

I. Since the claims are also directed against the accused Girkin, Dubinskiy and Kharchenko, who did not appear in court, the first decision to be made is whether the leave to proceed *in absentia* granted with respect to their cases (under criminal law) also applies to the claims of the injured parties; in other words, whether the court may assess these claims despite the fact that the accused did not appear during the trial and therefore did not present any defence.

The court finds that the claims against the said three accused may be heard *in absentia*.

Insofar as claims are directed against defendant Pulatov, who did appear in court, they will be heard adversarially; counsel for defendant Pulatov presented a line of defence on behalf of Pulatov against the claims, or at least argued their inadmissibility. Since defendant Pulatov has been acquitted of all the charges, the injured parties have no standing with respect to defendant Pulatov, and the court will not proceed with any further discussion of those claims in this case. The court will proceed with the discussion of the claims with respect to the accused Girkin, Dubinskiy and Kharchenko.

II. Since flight MH17 was shot down over Ukrainian territory and from Ukrainian territory, the victims were of various nationalities and the accused, as co-perpetrators, are domiciled in the Russian Federation or in Ukraine, this civil law component of the proceedings too has an unmistakably international character. This raises the question of whether the Dutch court has (international) jurisdiction; in other words whether the Dutch court may admit and rule on these claims, which relate to an unlawful act committed outside the legal sphere of Dutch courts by non-Dutch nationals. This international aspect also raises the question of under which country's civil (substantive) law the claims should be assessed.

The court concludes that it has international jurisdiction to hear and rule on these claims, and that that substantive assessment should be carried out under Ukrainian civil law.

Following on from that, the court finds that compensation for pain and suffering ('*moral damages*') can be claimed by and granted to relatives under Ukrainian civil law, despite the fact that in 2014, under Dutch civil law, no possibility existed to claim for 'emotional damages' (which falls under *moral damage* under Ukrainian law). The provisions of Section 51f DCCP do not prevent the awarding of compensation for pain and suffering under Ukrainian law, including insofar as compensation for pain and suffering includes emotional damage.

III. The substantive assessment of the claims will result in the claims for compensation for pain and suffering being awarded in their entirety with respect to the accused Girkin, Dubinskiy and Kharchenko, while the claims for compensation of material harm mentioned above will be awarded in part.

12.2 Inadmissibility of injured parties' claims?

At the hearing of 22 April 2021, in the case of defendant Pulatov - in response to a line of defence advanced in that regard by his defence counsel - the court ruled that there was no evident inadmissibility of the injured parties due to a disproportionate burden on the criminal case. No circumstances that should lead to a different conclusion in the cases of Girkin, Dubinskiy and Kharchenko have come to light, so the court reiterates its finding that hearing the claims of the injured parties does not impose any disproportionate burden on the criminal proceedings.

12.3 Leave to proceed *in absentia*

At the beginning of the trial of the accused Girkin, Dubinskiy and Kharchenko, the court granted leave (under criminal law) to proceed *in absentia* under Article 280(1) DCCP. The court finds that its leave to proceed *in absentia* also covers the claims of the injured parties. This is because the court finds that the

(notification) formality laid down in Article 51g(2) DCCP has been fulfilled with respect to the claims of the injured parties. The Public Prosecution Service already referred to the possibilities open to injured parties in the (annexes to the) writ of summons. The prosecution has also done this on subsequent occasions. On 9 September 2021, for example, the prosecution included a similar notification in its request to the Russian Federation for legal assistance in the service of an act of summons at the last known addresses of Girkin and Dubinskiy, and in its request to Ukraine of the same date for legal assistance in the service of an act of summons at the last known address of Kharchenko.

Like counsel for the relatives, the court finds that separate leave (under civil-law) to proceed *in absentia* is not required with respect to the claims of the injured parties. After all, the Dutch Code of Criminal Procedure has its own notification formalities, so the application of civil law formalities by analogy is not appropriate. Nor does the legislative history provide any basis for such application by analogy.

In its clarification ruling on the injured party claims of 28 May 2019²¹⁰, the Netherlands Supreme Court ruled that, among other things, Section 139 of the Dutch Code of Civil Procedure (DCCivP) is of specific relevance when hearing an injured party's claim, but the court understands this ruling of the Netherlands Supreme Court to mean that Section 139 DCCivP is of specific relevance only insofar as it provides a criterion for deciding whether an injured party's claim can be awarded through proceedings *in absentia*, and, if so, specifically up to what amount it can be awarded (only insofar as the criminal court does not consider the claim 'unlawful or unfounded'), but not to deem that the time periods and formalities for service under civil law laid down in Sections 45-66 DCCivP referred to in that section apply *mutatis mutandis*.

Finally, it is also important to note that proceedings *in absentia* do not violate the right to a fair trial enshrined in Article 6 ECHR. The court must assume that the accused who did not appear have knowingly refrained from taking part in these legal proceedings, even though - if they specifically did not wish to appear themselves - they could have been represented by counsel, as was defendant Pulatov. This has also been communicated to them, as evidenced by the acts of summons just referred to, for example.

12.4 International jurisdiction, applicable law and admissibility under Section 51f DCCP

12.4.1 International jurisdiction

Previously, in addressing the preliminary matters, the court held that Dutch criminal law is applicable to the criminal cases against the accused under Articles 5 and 8b(1) DCC. In that context, it was also found that the accused are not entitled to invoke combatant immunity under international law.

Since the criminal case against the accused is therefore being conducted according to the provisions of Dutch criminal law, Section 51f, DCCP also applies in this case; in short, this section allows the injured party to join its (civil) claim to the criminal proceedings.

The question arises whether the applicability of Dutch criminal law also gives the court (international) jurisdiction to hear and rule on the relatives' civil claims. Indeed, this cannot directly be assumed to be the case. If the relatives had submitted their claim to a Dutch civil court, that court would have had to decline jurisdiction, as the expert for counsel for the relatives has also acknowledged. Indeed, in civil disputes, the international law norm - that the court of the defendant's domicile has jurisdiction in principle (subject to exceptions) - applies. Therefore the question is whether the jurisdiction of this court - which, after all, is not the court of the domicile of the accused - to hear the civil claims is generally acceptable by the standards of international law. The importance of this question lies in the following. If the claims for compensation to be awarded in this judgment are to be enforced abroad (for example, if there is property there for which recourse is available), the local court will most likely ask the same question when deciding whether to allow this. An affirmative answer to this question will most likely be the condition (or one of the conditions) set by that court for granting any such permission.

The court agrees with counsel for the relatives and the prosecution that the said (international) jurisdiction arises from the applicability of Dutch criminal law, and in particular the provisions of Section 51f DCCP. The decisive consideration here is that this jurisdiction must be considered generally acceptable by the standards of international law. The question is not whether this is the case in the countries concerned, but whether it is generally accepted internationally. To support its finding that such general international acceptance exists, the court points to the provisions of Article 7(3) of Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of decisions in civil and commercial cases (Brussels I

bis) and Article 5(4) of the predecessor to that Regulation (Brussels I), which was still applicable on 17 July 2014, both of which read as follows: "*A person domiciled in the territory of a Member State may be sued in another Member State: [...] as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.*" On the basis of these provisions, the court infers that, outside the Netherlands also, jurisdiction over a criminal case confers jurisdiction with respect to the civil claims of injured parties (if, as is the case in the Netherlands, domestic law allows for joinder of civil claims in criminal proceedings) and that this basis for jurisdiction is therefore generally acceptable by international standards. Incidentally, this principle does not apply only within the EU. Under the Lugano Conventions²¹¹, the same principle also applies in a number of non-EU countries, including Switzerland.

Civil proceedings before other courts?

Prior to this criminal case, a number of relatives who filed an injured party's claim filed a civil suit against (Malaysia Airlines and) Girkin in the United States District Court in the Northern District of Illinois.²¹² By means of now final judgments by default on 20 December 2017 and 18 July 2018, the claims for compensation for material and moral damage were partially granted and an amount was awarded in *punitive damages*.

Since these American judgments were made before the claims of the injured parties were filed in this criminal case, there is no question of *lis pendens*²¹³. Indeed, there are no other legal proceedings pending between the relatives and the accused Girkin in other countries concurrent with the present case. Furthermore, as will be shown below, neither does the court reach any contrary opinion. Since the accused Girkin did not further invoke any exclusive effect from the American judgments that would require the court to refrain from a (partially overlapping) ruling - Dutch civil procedural law incorporates *res judicata* from earlier judgments in this respect - the American judgments play no role in the considerations of this court for that reason alone. One exception to the latter is the self-evident fact that the relatives concerned obviously may not seek to recover damages for the same harm twice (under both this judgment and the American judgments) from any assets belonging to the accused Girkin. That is an enforcement issue, however.

The court has found no other relevant legal proceedings between relatives who have filed claims in this criminal case on the one hand and the accused on the other, with respect to MH17. On behalf of the relatives, counsel for the relatives has also stated that there are no such other legal proceedings.

The considerations outlined above lead to the conclusion that this court has jurisdiction to hear and rule on the claims of the injured parties.

12.4.2 The law applicable to the claims

The question that must now be answered is under which (substantive) civil law the claims should be assessed. The court agrees with counsel for the relatives and the prosecution that this should be done under Ukrainian civil law.

The question of which law is applicable to the claims of the injured parties (regarding unlawful acts) should be answered on the basis of the provisions of the so-called Rome II Regulation.²¹⁴ With effect from 11 January 2009, the Rome II Regulation is applicable in all EU Member States (except Denmark), and therefore also in the Netherlands. Rome II has a universal formal scope, meaning that it also applies to cases brought before Dutch courts involving an unlawful act that was committed outside the EU.

Article 4(1) Rome II provides the general rule for determining the law that is applicable: the law applicable to an unlawful act is the law of the country in which the harm occurs (*lex loci damni*), regardless of the country in which the event that gave rise to that harm occurs, and regardless of the countries in which the indirect consequences of that event occur. In the case of MH17, this general rule points to Ukrainian law. Indeed, the death of the victims should be considered in law as direct harm arising from the unlawful act. By contrast, the extraordinary distress that these deaths caused to the relatives in particular, and the moral damage caused as a result, must be viewed as the "*indirect consequences of the event.*" The court derives this from the (authoritative) ruling of the Court of Justice of the EU of 10 December 2015 (C-350/14, ECLI:EU:C:2015:802), which states that Article 4(1), Rome II "*must be interpreted as meaning that the damage arising from the death of a person in such an accident, which occurred in the Member State of the court seized, sustained by close relatives of the deceased who reside in another Member State, must be regarded as 'damage' or*

as 'indirect consequences' of that accident, within the meaning of that provision."

The court has considered whether an alternative to the general rule could apply in this case, so that the court could apply the Dutch civil law that it usually applies, for example. More specifically, the court considered whether the alternative set out in Article 4(3) Rome II may be applicable: "*Where it is clear from all the circumstances of the case that the unlawful act is manifestly more closely connected with a country other than that indicated on the basis of the general rule, the law of that other country shall apply.*" It follows from this that this alternative could only be applied if there were not only a close connection with the Netherlands, but also that that connection was also clearly stronger than the connection with Ukraine. In other words, there must be a closer connection.

It is true that the vast majority of the victims were Dutch nationals and that flight MH17 took off from Schiphol Airport; however, that, in the court's view, does not establish a closer connection. The court agrees with (the experts of) counsel for the relatives that there is namely also a clear connection to Ukraine. Indeed, the location of the crash - unlike, for example, a crash that occurs due to a technical defect - was not accidental or random, but was directly related to the armed conflict occurring on Ukrainian territory. Furthermore, any potential connection to the jurisdiction of Dutch courts is by definition not relevant, or at least to a significantly lesser degree, with respect to the claims of non-Dutch relatives or non-Dutch victims. This is important because a closer connection must be established with respect to each individual claim, including when settling claims in disasters such as MH17. **215** Therefore, even if a closer connection could be established with respect to the Dutch relatives, this would not automatically apply to the non-Dutch relatives and the claims of the latter would still have to be assessed under Ukrainian law, possibly leading to different outcomes than under Dutch law. Applying Ukrainian law to all claims thus serves the internal coherence of the decisions made in relation to this case.

12.4.3 Section 51f DCCP

The court agrees with counsel for the relatives and the prosecution that Section 51f DCCP does not preclude the injured parties from having standing with respect to claims that include a significant component of emotional damages.

Section 51f(2) DCCP (old) refers to Section 6:108(1 & 2) of the Dutch Civil Code (DCivC), as it applied on 17 July 2014. That section states, in brief, that the relatives can (only) claim for lost earnings and for cost of recovery of the body, from the liable party. Under Dutch civil law, unlike Ukrainian civil law, the relatives were not entitled to compensation for emotional damage in 2014. A subsequent amendment to the aforementioned Section 6:108 DCivC (with the addition, among other things, of (new) third and fourth paragraphs) changed this: now, under Dutch civil law, the relatives of persons who died on or after 1 January 2019, are entitled to compensation for emotional damage.

In the context of the amendment of Section 6:108 DCivC, Section 51f DCCP was also amended. In brief, that paragraph has been expanded to include a reference to claims for emotional damages by relatives.

Regarding the transitional law that applies with respect to these new paragraphs, the parliamentary documents include the following, insofar as these are relevant:

"A distinction must be made between claims for compensation for emotional damage [and] the expansion of the possibility of joinder in criminal proceedings [...] Claims for compensation for emotional damage are new in the DCivC. When this bill becomes law, no claim will arise if the offences required by the new law for this purpose took place before the enactment of this legislation (see Article 69(d) of the Transition Act concerning the New DCivC). This provision provides legal certainty: the perpetrator will not be confronted with new claims [...]. In expanding the possibility of joinder in criminal proceedings, a distinction is made between claims for compensation for emotional damage and claims for compensation for transferred loss. Claims pertaining to emotional damage arise after the new law comes into force. Only then can a relative join criminal proceedings in respect of such claims. No separate provisions of transitional law for criminal proceedings are necessary. Unlike claims for compensation for emotional damage, the possibility for claims for compensation for transferred loss exists already under the current DCivC. No special transitional legal provisions have been made concerning the possibility for relatives to join proceedings with respect to these claims. This means that this part of the new law will take immediate effect. A third party will be able to join criminal proceedings already pending when the new law comes into effect with respect to claims for

transferred loss." **216**

The starting point for the court is that Section 51f DCCP regulates which persons may file which types of claims in criminal proceedings. The court agrees with the interpretation of counsel for the relatives regarding the immediate entry into force of Section 51f(2) DCCP, and that the lawmakers intended to expand the number of types of damages for which relatives can claim in criminal proceedings to include emotional damage and so-called transferred loss (not otherwise relevant in this case), and to do so with effect from 1 January 2019.

As the passage cited from the parliamentary documents makes clear, the lawmakers apparently made an unconscious assumption that Dutch civil law (always) applies to those claims. This is understandable, because it is very rare for foreign civil law to be applied in criminal proceedings. As discussed above, under Dutch civil law, a relative is only entitled to compensation for emotional damage if the death of the relative occurred on or after 1 January 2019. Unsurprisingly, the parliamentary documents referred to take as their premise that such claims for emotional damages can only be filed in criminal proceedings if the relevant claim arose on or after 1 January 2019. Indeed, a direct link is made between the date from which such a claim can arise and the possibility of joinder in the criminal proceedings; in other words, a manifestly non-existent claim (because the law had not yet made any provision for it) cannot be admitted in criminal proceedings. However, it cannot be inferred from the parliamentary documents that the lawmakers also intended to prevent claims for emotional damages that arose before 1 January 2019 based on the applicability of foreign civil law from being filed in criminal proceedings on or after 1 January 2019. Nor is it likely that this was the intention of the lawmakers, given their approach to transferred loss: lawmakers saw no issue with claims for transferred loss that arose before 1 January 2019 being filed in criminal proceedings on or after 1 January 2019. Furthermore, the admissibility of claims for emotional damages in this case is not at odds with the legal certainty intended in the aforementioned quotation from the parliamentary history – quite the contrary, because the right of relatives to emotional damages already existed under the applicable Ukrainian law on 17 July 2014.

The prosecution takes the position that admissibility can only be assumed under the first paragraph of Section 51f DCCP, and not the second paragraph. The prosecution believes that paragraph 2.4.7 of the Netherlands Supreme Court's aforementioned clarification ruling regarding injured party's claims (*"With regard to the transitional law, it is clear from the legislative history that this expansion only has an impact with respect to events causing harm that take place after the entry into force of this legislative amendment on 1 January 2019."*) precludes admissibility under the terms of the second paragraph. In this clarification ruling, however, "this expansion" refers back to the extension of Dutch civil law mentioned in the preceding paragraph 2.4.6, and not to the expansion of the possibility of claiming for emotional damages in criminal proceedings under Section 51f(2) DCCP.

Finally, the court, unlike the prosecution, finds that admissibility cannot be based on the first paragraph of Section 51f DCCP. If relatives (even before 1 January 2019) could base the admissibility of their claim for emotional damages as 'direct damages' on the first paragraph, it is hard to see what the function of the second paragraph is (or was), and why this second paragraph was amended even more recently with the aim of making such claims possible in criminal proceedings. The court holds that the first paragraph of Section 51f DCCP governs the possibilities for joinder for direct victims and that the second paragraph of the section governs the possibilities for (indirectly-affected) relatives. The Netherlands Supreme Court's ruling that so-called nervous-shock claims can be brought in criminal proceedings on the basis of the first paragraph **217** therefore also makes sense in this regard; a person who has suffered a nervous-shock injury has (also) suffered directly on account of being directly confronted with, for example, a shocking criminal offence with fatal consequences, and therefore does not claim these damages on the (sole) ground that he or she is a relative. Therefore, the court, unlike the prosecution, sees no reason to deem claims for emotional damages also admissible under the terms of the first paragraph of Section 51f DCCP, by analogy with the aforementioned opinion of the Netherlands Supreme Court regarding nervous shock injury. Independently, of course, it may be the case that the injured parties' claims in this case are also partially admissible under paragraph 1, insofar as they include an element of nervous shock injury (compare Netherlands Supreme Court, 28 June 2022, ECLI:NL:HR:2022:958).

The court has also looked into whether the two relatives who filed claims for material damages, but not through counsel for the relatives, have standing. To the extent that those relatives filed the claim concerning their deceased daughter's lost laptop computer in their capacity as heirs, the court is obliged to declare that these relatives do not have standing with respect to that claim, as it appears

from the report by DLA Piper that under Ukrainian law (Section 1177 UkCivC) claims for damages cannot be inherited. However, even if these injured parties who filed the claim in the capacity of relatives, the court is of the opinion that - as will become clear below under the heading 'Damages' - Ukrainian law does not offer any possibility to relatives for compensation for that type of material harm, meaning that the injured parties do not have standing for that part of their claim for that reason either. For the same reasons, the latter also applies to the request for an order for the return of the laptop filed in the alternative.

The injured parties do have standing with respect to the rest of their material-damage claim, which pertains to the travel costs to the crash site as part of the costs for their 'private funeral', since this damage falls under Section 51f(2) DCCP and Ukrainian law provides relatives with the possibility of claiming for 'burial (ritual) costs'.

12.5 Assessment of the claims on their merits

12.5.1 Right to compensation for damage under Ukrainian law

Counsel for the relatives filed several legal expert opinions in the case, addressing the question of when compensation for damage can be claimed under Ukrainian civil law. It has neither been asserted, nor is there any evidence, that there is any reason to doubt the expertise of the authors of those reports and therefore their content. The court also notes that the content has not been refuted. The content of those reports therefore forms the basis for the court's deliberations.

From these expert reports, the court infers that, under Ukrainian civil law, a right to compensation for damage exists if there is harm, an unlawful act, a causal relationship between the unlawful act and the harm and, finally, culpability. The unlawful act may consist of a (proven) criminal offence (see Section 1177(1) of the Ukrainian Civil Code (UkCivC)). A criminal conviction can serve as the basis for a decision under civil law on unlawfulness and culpability. Another feature of Ukrainian civil law is so-called joint and several liability: in short, the possibility for several persons (convicted under criminal law) to be held liable for the same total damages (see Sections 541 and 543 UkCivC). Group liability within the meaning of Section 1190 of the UkCivC arises from, and is limited to, the extent of the common intent. Furthermore, the harm must have been caused in association. This is the case when each respondent has performed at least one act, these acts being connected (they need not be performed simultaneously). In this regard, Ukrainian legal practice assumes the following: *"Persons whose actions were united by a common criminal intent, and the damage caused by them as a result of their joint actions, are jointly and severally liable for damages. When a crime is committed by several persons, they are jointly and severally liable for the damage inflicted within the episodes of the crime in which their joint participation has been established."***218**

(Joint) unlawful/criminal negligence can also constitute grounds for (group) liability.

Since the accused Girkin, Dubinskiy and Kharchenko will be sentenced as (functional) co-perpetrators of the acts that caused harm, both unlawfulness and culpability under Ukrainian civil law are given. There is no doubt that the unlawful act carried out by the accused is causally related to the material and moral damages claimed by the relatives. Therefore, it only remains for the court to consider whether the nature and extent of the damages claimed are allowable under Ukrainian law.

12.5.2 Damages

Regarding the material damages that have been claimed, the court notes that, under Ukrainian law, relatives can claim pecuniary damages, consisting of "burial (ritual) costs and future income".

Pursuant to Sections 23(2) and 1167 UkCivC, it is also possible under Ukrainian civil law to claim compensation for moral damage caused to relatives. This involves compensation for "emotional distress suffered in connection with unlawful behaviour against members of his/her family or close relatives", also referred to as "mental suffering and distress".

Eligibility of claimants

The relatives entitled to compensation for moral damage are the spouses, registered partners, parents/adoptive parents and children/adoptive children of the deceased, as well as persons (including stepchildren) with whom the deceased cohabited, shared a common household and had reciprocal rights and obligations.

Same-sex partners

The expert reports presented by counsel for the relatives show that under Ukrainian law, unlike opposite-sex partners and spouses, same-sex partners and spouses are excluded from claiming moral damages in connection with the death of a partner. Ukrainian law does not consider that same-sex married partners fall within the category of spouse. Unlike opposite-sex cohabiting partners, neither can same-sex cohabiting partners and spouses claim such compensation on the grounds of maintaining a shared household.

One of the relatives who filed a claim was married to and cohabiting with a victim of the same sex before the disaster. Regarding this claim, pursuant to Article 26 Rome II the court decides that the exclusion under Ukrainian law mentioned above will not be applied, as this conflicts with Dutch public policy. Indeed, the exclusion violates Article 1 of Protocol No. 12 of the ECHR (General prohibition of discrimination) as regards the fact that it is impossible for this relative to claim moral damages on the basis of a shared household. **219** Although this article does not create an obligation to make marriage available to same-sex partners, it does create an obligation not to make unjustified distinctions between same-sex and opposite-sex partners and spouses. The court will therefore not exclude the relative in question, but rather, as would be the case under Dutch law, the court will treat the relative in the same way as those who lost a spouse of the opposite sex.

Siblings

In Ukrainian civil law, just as in Dutch civil law, siblings who did not live with the deceased (on a long-term basis) are not entitled to compensation. For this reason, counsel for the relatives filed no such claims in this criminal case. At the hearings, the court observed that many siblings were greatly pained by their ineligibility to claim compensation and felt this to be very unjust. Counsel for the relatives referred to the fact that scientific research conducted in the months following the MH17 disaster showed that there was no difference between the severity of psychosocial complaints experienced by siblings and those experienced by, for example, parents and children. It is also a fact – and the victim impact statements made this very clear at trial – that the lives of siblings were radically changed by the disaster. These changes were caused not only by grief over the loss of their sibling, but also by their new or more intensive role – obviously taken on with love but also of necessity – in caring for their sibling’s children or caring for their own parents since the disaster. This new or more intensive role also means they are even more intensely confronted with the grief of these children and parents. The siblings have requested that the court bring their position as outlined above and, as the court understands it, their position under Dutch law in particular, to the attention of Dutch lawmakers in this judgment. The court supports the call from the relatives that the position of siblings who did not live, or no longer lived, with the victim be explicitly taken into account in the anticipated evaluation of the law regarding emotional damages, in view of the fact that the hardship clause included in that law will only provide relief to this category of relatives in a small number of cases. **220**

Factors in estimating damages

The following circumstances should always be taken into account when estimating moral damages under Ukrainian law:

- the nature of the unlawful act;
- the severity of the physical and emotional distress;
- the extent and duration of the negative effects of that distress;
- the degree of guilt of the person(s) who caused the harm;
- the impact on the health of the immediate victim of the unlawful act (with death of a victim falling into the highest category of severity); and
- the severity of the changes imposed on daily life and employment relationships.

Taken in the round, moral damages should be estimated based on all circumstances and on the principles of reasonableness, balance and fairness. Neither the country of residence of the victim or relative nor his or her nationality play any role in the estimation of material or moral damages.

The court has taken note of the statements made by the injured parties when exercising their right to address the court and also of the statements made by injured parties in the form of a written victim impact statement. Together with his co-perpetrators, the accused bears responsibility for abruptly ending the lives of 298 victims, and in doing so he has caused irreversible and irreparable distress to the relatives of those victims.

These statements made clear to the court the role the victims played in their family, in their extended family, in their neighbourhood, at school or at the gym, at work or in their circle of friends. They also showed how terribly the victims are still missed in the lives of those left behind. The content of those statements, and the frank and personal way in which they were made or written, made a deep impression on the court. When considering the matter below, it is impossible for the court to do full justice to the many facets of the distress explained and described by the injured parties. By way of illustration – and without wishing to detract from the content of other spoken or written statements made when exercising the right to address the court – the court will quote from statements made by some injured parties. **221**

Based on the commentaries in their claims for compensation, the court finds that the injured parties suffered direct moral damages as a result of the actions of the accused. The relevant claims have been sufficiently substantiated. Based on that substantiation, the court infers the following.

Regarding the nature and substance of the moral damage suffered

On 17 July 2014, the injured parties were suddenly confronted with the death of their loved ones as a result of the flight MH17 disaster. After initial uncertainty as to whether their loved ones were indeed on board this flight and, if so, whether they had survived the crash, within days it became definitively clear to the injured parties that all 298 people on board had died as a result of the downing of flight MH17. It is unbearable for the injured parties that they must live with lingering uncertainty about what took place in the final moments on the aeroplane and to what extent their loved ones were aware of their fate.

It is the court's opinion that it goes without saying that the death of the victims in this sudden and terrible way in itself caused intense grief and was traumatic for the injured parties. The death of a member of their family is something that affects the injured parties every day and is something which they must learn to live. This is evident, for example, in the following descriptions:

An injured party who lost his three young daughters (aged seven, ten and twelve at the time of the disaster) described the following, among other things, when exercising his right to address the court (excerpt):

"(...) On 17 July 2014, my daughters disappeared from my life forever. Ripped from my life, with no goodbye, no hug, no warning. (...) Father's Day is a horrible day for me. Before the crash, my daughters would always give me lovely gifts. And breakfast in bed. And three big hugs and kisses (...) But I am a father without children. A childless father. Father's Day has become one of the most terrible days of the year. For seven years now. And for every year to come. (...) As I said before, since the disaster my life has stood still. I no longer have a future with my daughters. Only memories of my daughters. (...)"

An injured party who lost her father wrote in her written victim impact statement:

"(...) And I use the word "would've" because my dad isn't here and he's not going to be there to watch me walk down the stage in a cap and gown. But the worst part of this story is the undeniable fact that my father should be here today and should be there when I graduate college. He didn't die of natural causes like a health problem or because of an accident. He died because his plane was shot down, my father died because he was murdered. And because of that, he won't be at my brother or I's graduation, he won't be at our weddings and he won't be keeping my mom company into old age. Every single day, my family and I live through the question 'What if he was still here?' and I can't even begin explaining to you how emotionally draining and painful that is. (...)"

Counsel for the relatives relayed that many of the injured parties suffer – to varying degrees – from persistent complex bereavement disorder (PCBD), post-traumatic stress disorder (PTSD) and/or depression. To substantiate the existence of psychological symptoms among the injured parties, counsel for the relatives referred to reports it filed regarding studies conducted into the psychological impact of the flight MH17 disaster on the relatives. These studies show that it is very likely that such symptoms significantly hamper the daily lives of those who suffer from them. Furthermore, individuals with PCBD are shown to be at increased risk of PTSD and depression following repeated confrontation with the trauma, for example due to constant media attention. The studies also show that having to bury or cremate a loved one's remains multiple times can create a sense of unreality in relatives, as if the event never happened, even though they are well aware that their loved one is no longer alive. Researchers have referred to this as 'a sense of unrealness'. This can perpetuate or even exacerbate

PCBD. The court notes that reference is made to psychological symptoms in various statements made by the injured parties. In some cases, these symptoms have led or contributed to a full or partial incapacitation for work. This is evident, for example, in the following descriptions:

An injured party who lost her husband gave the following description of her psychological symptoms when she addressed the court (excerpt):

"(...) Losing my beloved husband (...) has shattered my very existence and has left me with a number of long-term psychological issues. (...) I'm scared of forming bonds and relationships with people for fear of something devastating happening to them. I am afraid of the world; knowing that evil and war can affect any of us at any time. (...) I now live with depression, anxiety and I have been formally diagnosed with post-traumatic stress disorder (PTSD). I am on a number of different medications for these conditions, but none of it helps. My head is never quiet. I no longer enjoy life experiences. I can't even concentrate on reading a book. (...) Living with PTSD has stopped me from being able to work. (...) I am completely broken emotionally and psychologically. Simple things can trigger the trauma that I experience. My panic attacks can happen at any time without warning. Leaving the house fills me with dread. I don't know who I might see or if I'll encounter a situation that I can't cope with. (...)"

When addressing the court, an injured party who lost her husband described her psychological symptoms as follows (excerpt):

"(...) My health has suffered enormously due to the ongoing stress, anxiety, depression, shock and lack of sleep. I still experience muscle aches, jaw and teeth grinding, headaches, skin rashes, and long-term cortisol effects to my body. At first, I lost weight but then gained a lot with the shock sending me into early menopause and that has played havoc with my hormones. I battle with feelings of fear, anger and guilt and I have been diagnosed with long-term grief and PTSD. I've had many years of psychological and physical therapy to keep me moving but I find continuing with counselling difficult as no matter how much I talk about it; [court: victim's name] will not be coming back. I battle through the steps of grief, but anger overwhelms me as there just seems no reason or justification for this senseless act that has destroyed so many lives and futures. My doctor has kept a close eye on me, and I've tried to battle on without taking anti-depressants. I still suffer horrific nightmares where I repeatedly see [court: victim's name] flying out the window into the plane engine. (...)"

With regard to the existence of psychological symptoms among the injured parties, the court considers that, under Ukrainian law, medical substantiation is not a prerequisite for assuming emotional distress (moral damage).

Further, it is the opinion of the court in this case that there are other circumstances that should be considered when determining the amount of moral damages. According to the DLA Piper opinion filed by counsel for the relatives, those circumstances are in line with the factors that can be taken into account under Ukrainian law when determining moral damages.

One circumstance concerns the inaccessibility of the disaster site, not only to injured parties wishing to visit the place where their loved ones had died, but also to emergency workers. Flight MH17 came down in a conflict zone and emergency workers were denied access to the disaster site in that zone. This seriously hampered efforts to recover the victims and their belongings. The bodies of the victims lay exposed in the fields, open to the elements, for days, and in some cases for weeks or even months. Given the size of the disaster area, it was a long time before the victims' remains could be taken to a mortuary and identified. All this led to great uncertainty for the injured parties, who could do nothing but wait helplessly to see if their loved ones and their belongings would be recovered and then repatriated. Having to wait to hear whether a loved one had been found also delayed the grieving process.

Several statements made by injured parties also make plain that initially they were living with unimaginable uncertainty as to whether their loved ones would be recovered and, if so, whether the bodies were still intact. It was later found that in many cases only a single bone fragment or remains of some other type were recovered. This is evident, for example, in the following descriptions:

An injured party who lost his father described this when exercising his right to address the court:

"(...) The aftermath of this event and everything we had to deal with also seems endless and hard to comprehend: (...)

The news in September that 20% of the vast area had been searched and that people didn't think it would be necessary to search the rest. They didn't think it was likely that any more bodies and/or luggage would be there – That was painful to hear because Dad hadn't been identified yet. (...)

The [Dutch day of] National Remembrance on 10 November – We'd been in limbo for months and we still hadn't got my father back. (...)

The disappointing news in November was that there were no more viable DNA profiles in Hilversum. So it still hadn't been possible to identify Dad and it wasn't clear when people could travel to the area again because winter was coming. (...)

That was six months later, but we were still living in total uncertainty. Uncertainty about whether my father would be found. Uncertainty about exactly what had happened. January 2015, the news that set us free: my father had been identified. We were able to make preparations for his memorial. That was scheduled for Friday 24 April 2015. (...)"

An injured party who lost his parents said the following when exercising his right to address the court:

"(...) The police had a number of inhumane conversations with us, regarding the next steps and things that you would think you would never have to consider. Firstly, the identification of the bodies - matching enough DNA to make sure that they have identified the right person. Asking whether we wanted to be notified whether they had just identified only one parent, knowing full well that the trauma of this event it was a strong possibility that they might not identify them at all. Telling us that there was a possibility that our parents won't be fully intact, meaning they might only identify a body part, an arm or a leg. Conversations that you never want to hear about your parents, the people that you love, the people that loved you. I will never forget those conversations and how talking about the trauma of your parents' bodies just became the new normal and also trying not to think about the bodies lying all over a field in Ukraine. It was a long 5 weeks until they got identified and repatriated, the longest 5 weeks of my life. (...)"

An injured party who lost her father and his partner said this when exercising her right to address the court:

"(...) And then, one morning in late November 2014, I get home and there are family liaison officers sitting at my table. (...) And yes, they had the message I'd waited so long to hear. My father had been identified. From a two-centimetre piece of bone, from his hand. That was all. It felt crazy. They'd found my father, a man who was almost two metres tall, based on something so small. Still, I was happy for a moment. I did immediately wonder, and hope that [court: victim's name] would now be found quickly too. It wasn't right that my father was here and [court: victim's name] was still there. They should be together. A few days later, [court: victim's name] was identified, from a small piece of bone. At least they'd both been found and, to my mind, they were both here. Over the next few months I got more phone calls as more pieces of my father were identified. (...)"

In fact, in the case of two victims – for whom relatives have come forward as injured parties – neither the bodies nor parts of them were ever recovered. It is also true that most of the remains that could be repatriated were unrecognisable and highly degraded, so that several injured parties were confronted with these remains when paying their last respects to their loved ones. Some of the remains were so degraded that it was no longer even possible to pay those last respects. This formed a barrier to the coping process.

In the same vein, the court also points out that, for several injured parties, more remains of their loved ones continued to be found over a period of time, so that they were process repeatedly confronted with these remains and – in some cases for those who so wished – another cremation, funeral or burial in a grave had to be arranged.

An injured party who lost several loved ones said the following in his written victim impact statement:

"(...) We suffered intense aftershocks as we received identification messages about all four children 16 times over a 19-month period That means the police tell you 16 times that the children, son, daughter-in-law and two grandchildren had died in the disaster, because remains of them had been found. Indescribably gruesome to hear that all together 220 little bits of all 4 children had been found in 16 times. (...)"

An injured party who lost his son said the following when exercising his right to address the court:

"(...) A week after the downing of the MH17, I was summoned to the police station (...) to provide DNA samples so that the authorities could identify his remains. He was the first victim to be identified because his passport was found intact in one of his trousers' pockets. His funeral was on the 7th August, 2014, and we were advised not to view his body before we buried him, because it was badly damaged. Weeks and months later, we were still being visited by the police (family detectives/Rechercheurs), to inform us about various items of his luggage, and parts of his remains that were still being found or identified by DNA analysis. This felt like a never-ending story of pain and emotional suffering. It was like re-living, the horrible trauma, of his death once more, whenever these visits took place. (...)"

Another aspect concerns the fact that, from the very beginning, the injured parties were confronted with intense and continuous media coverage of the flight MH17 disaster. It was almost impossible to escape news coverage of the disaster, some of it contradictory, accompanied by shocking photos or video footage of parts of the burning wreckage, the deceased victims and victims' possessions scattered around the area where pieces of flight MH17 came down. They also found it hard to ignore photographs and posts on social media. Moreover, some relatives were approached by media organisations – either online or through people who knew them – with requests to tell their stories. All this meant, and continues to mean, that relatives were faced with the disaster and its consequences time and again. This is evident, for example, in the following descriptions:

An injured party who lost his father describes the following in his written victim impact statement:

"(...) I formed a picture in my mind of the event and how my father felt on the plane and at the moment the plane hit the ground. I made that picture based on what I saw on television. I found the images extremely traumatising. (...) I don't want to be constantly confronted with MH17 and the death of my father without warning. That's not really possible (...) The images are still in my head and when I'm confronted with MH17 they appear more intensely. (...) I've had help from a psychotherapist for the traumatising images, as well as for other things. (...)"

An injured party who lost his daughter, two grandchildren and son-in-law describes the following in his written victim impact statement:

"(...) It's really bad that television coverage of MH17 always includes pictures of the field where the victims came down. Then I'm upset again for days. And I get dreams, where I see them falling. (...)"

An injured party who lost her parents describes the following in her written victim impact statement:

"(...) My loss has become public property. I get asked all the time on social media to do an interview. I've run out of fingers to count the requests. And it seems like my phone number is no longer private. That makes me think of the media as a nuisance. Why can't I decide for myself to go to the media? Why do they keep coming to me/us? Why can't my grief be my own and why should I have to share it? (...)"

Finally, the explanatory notes to the claims submitted by the injured parties also show that the accused's stance in these proceedings increased the distress of the relatives. In addition to denying any involvement in the MH17 disaster, disclosing little and failing to cooperate with the investigation, they made negative statements regarding the MH17 disaster and circumstances surrounding the disaster on a number of occasions.

For example, Girkin called on the armed forces of the Donetsk People's Republic to hand in the victims' personal belongings to DNR headquarters by 23 July 2014 and said that valuables would be sent to the 'DNR Defence Fund'. He further suggested that some of MH17's passengers were already dead before the crash and blamed Ukraine for the downing of MH17. A number of suspects contributed to the suggestion that had been circulated that MH17 was first shot down by another aircraft, which the separatists then fired at. None of the defendants have distanced themselves from those manufactured alternative accounts of the flight MH17 disaster, nor have they done anything to disclose the true course of events that led to the victims' deaths. All this has increased both the distress of the injured parties and their sense of injustice. The perpetrators have given no recognition to the injured parties, as they have not taken responsibility for the consequences of the disaster.

In summary, the court considers that – although they did not intend to kill these people – the

deliberate actions of the accused and his co-perpetrators, as proven, resulted in the deaths of 298 victims, which is the most serious consequence of committing an unlawful act. The injured parties were suddenly faced with the death of one or more of their loved ones as a result of this action. As a result, they suffer – to a greater or lesser extent – from (serious) psychological symptoms. On the one hand, these symptoms are the result of the death of their loved one(s), and on the other they are caused by the other circumstances described above which have, among other things, exacerbated the distress and (psychological) disorders already inflicted. The court infers from the substantiation provided that the injured parties have been facing these consequences since 17 July 2014, and that for many the consequences remain undiminished to this day. Some aspects may have faded somewhat into the background, and now, in 2022, some injured parties will be further along the path to recovery than others, but on balance it can be concluded that the injured parties – all of whom to a certain extent faced the same circumstances after the flight MH17 disaster – still experience all or some of the grave negative effects described above. They will all have to live with a painful loss and the effects of that loss.

Regarding the determination of the amount of compensation for moral damage

First of all, the court notes that the distress described by the injured parties cannot in any way be expressed in monetary terms, but that the court is obliged to do so.

Counsel for the relatives have stated and substantiated the harm suffered by the injured parties, as also evidenced above. With respect to the (psychological) damages claimed, counsel for the relatives has chosen fixed, lump-sum amounts for each deceased loved one, with the amounts varying according to the family relationship and connection to the victim. According to the submissions made by counsel for the relatives, it would be justifiable to award higher amounts to the spouse, life partner or parent of a victim, as well as to children who lived with a victim as a family group. Counsel for the relatives has argued that, in the case of these relatives, such a close relationship may be assumed that a higher amount is appropriate compared to the amount for other relatives who are part of the group of rightful claimants. The choice was made to divide relatives into three categories; the persons in:

- Category I (spouses/registered partners²²² and life partners, children²²³ and parents or guardians²²⁴ who were living with the victim on 17 July 2014) claim €50,000;
- Category II (non-cohabiting children²²⁵ or parents²²⁶) claim a sum of €45,000;
- Category III (sibling²²⁷, grandparent or grandchild, aunt or uncle, nephew or niece and family-in-law living as a family on 17 July 2014) claim a sum of €40,000.

The court notes that these alleged damages have not been disputed by or on behalf of the accused Girkin, Dubinskiy or Kharchenko. In view of this, the court need only assess whether the claims can be awarded in their entirety or whether they appear to the court to be unlawful or unfounded.

For that assessment – as discussed above – the relevant comparison when it comes to awarding moral damages is with Ukrainian law and thus Ukrainian practice. For this reason, the court does not concur with the prosecution's argument that the Dutch Emotional Damage Compensation Decree should form the basis for assessing the moral damages claimed and then, based on the special circumstances, that the amounts mentioned therein should be increased to between €30,000 and €40,000, and thus that a lower amount of damages should be awarded than has been claimed. However, the court considers that, apart from the fact that the Dutch principles aim to provide compensation for a narrower concept of damage than the moral damage specified under Ukrainian law, the court sees no reason to seek alignment with Dutch principles when the application of Ukrainian law calls for alignment with Ukrainian practice instead.

Counsel for the relatives referred to several Ukrainian rulings which involved the death of loved ones as the consequence of a criminal offence and in which the relatives were awarded an amount as compensation for moral damage with respect to those circumstances. The court did not find in these rulings any compelling basis for determining the amount of moral damages to be compensated, but the rulings do show that survivors were awarded an amount of moral damages ranging from over €37,000 to over €109,000 in each case.

In view of this practice and the serious consequences for the injured parties described above, as well as the other special circumstances also described above, that must be taken into account when determining the amount of moral damages – which the accused could have foreseen – the amounts claimed do not appear to the court to be in any way unlawful or unfounded, as the amounts claimed

provide for reasonable, balanced and fair compensation as defined in Ukrainian civil law.

The court has taken into account the fact that not all elements of the distress described above are equally relevant to all injured parties, but the court nevertheless finds that the distress of each injured party justifies the amount to be awarded. Even in those cases where it cannot be ascertained from the individual commentaries and in which, for example, no victim impact statement is available, the serious consequences for the injured parties are obvious and justify awarding of the claim. Therefore, the court finds that the claims can be awarded in their entirety.

This means that, for the three categories of injured parties (relatives) mentioned above, the court considers the following sums to be allowable:

- the persons in **Category I**: a sum of **€50,000** each, per deceased victim;
- the persons in **Category II**: a sum of **€45,000** each, per deceased victim;
- the persons in **Category III**: a sum of **€40,000** each, per deceased victim.

12.5.3 Discussion of certain individual claims

12.5.3.1 Preamble

As the claims are henceforth only before the court in the cases of the accused tried *in absentia*, who have not contested them or their substantiation, the court will conduct a limited assessment of whether the claims are indeed lawful and have merit and will only assess whether the party submitting the claim has adequately substantiated that he or she falls in one of the categories of rightful claimants and therefore has standing. To this end, in practical terms, the court requires *prima facie* evidence of kinship and – where applicable – cohabitation with the deceased person in connection with whom moral damages are claimed. The court sees justification for this limited *ex officio* assessment, despite the absence of any response from the accused, in the fact that this is a matter of admissibility. Insofar as evidence does not relate to the standing of the injured party but rather, for example, to the amount of the compensation claimed (i.e., not whether the injured party belongs to the group of rightful claimants, but rather to which category (I, II or III) used by counsel for the relatives), the court will rely on what has been asserted in this respect by the injured party and not refuted by the accused, unless the contrary is manifestly apparent from the evidence provided. In so doing, the court is conducting the assessment for *in absentia* cases laid down in Section 139 DCCivP, which, pursuant to previously cited case law, also applies when assessing claims by injured parties in criminal cases.

On that basis and further, the assessment conducted by the court is based on the following premises:

- minor children are considered to live with (each of) their parents, even if the parents are divorced;
- to the extent that cohabitation is relevant to standing, the court assumes such cohabitation if records supplied with respect to the months preceding or following 17 July 2014 show the same address.

Subject to the above, based on the documents provided by counsel for the relatives, for the vast majority of relatives it can be established without question that they are rightful claimants as relatives in the categories set out above. These claims therefore require no further discussion and will be awarded as claimed.

Certain individual cases still require some separate discussion, as there is room for doubt regarding standing of an injured party.²²⁸ Furthermore, the claims of two injured parties who did not file their claims through counsel for the relatives require further discussion. This is due to the fact that, unlike the injured parties who filed their claims through counsel for the relatives, these parties are also claiming material damages.

12.5.3.2 Claims by injured parties not filed through counsel for the relatives

First, the two claims not filed by counsel for the relatives and which also seek compensation for material damage will be discussed separately. Specifically, these concern compensation (to the extent still relevant, since it has now been established that the injured parties do not have standing with respect to their claim concerning the laptop) for:

- material damage/transferred loss (each to receive half) of €12,473.16 (various expenses incurred, including travel and accommodation costs related to a visit to the crash site in Ukraine and telephone costs);
- their immaterial damage/moral damage: a total of €40,000;

- their total emotional loss: a total of €40,000.

The injured parties explained that they each suffered half of the material damages claimed and each claim €40,000 in moral damages.

The court notes at the outset that the injured parties should each have filed a written criminal injuries compensation form separately, but that the written commentary provided by the injured parties indicates that, in summary, such a filing was too emotionally taxing. In view of this, and in view of what was stated in the introductory comments above, the court views the criminal injuries compensation form submitted as two submitted claims, whereby each injured party has submitted a claim for compensation of €46,236.58, consisting of €6,236.58 in material damages and € 40,000 in moral damages.

As stated earlier, the court finds that, under Ukrainian law, the injured parties fall within the group of persons entitled to claim compensation.

In this particular case, the court considers that the travel and lodging expenses claimed for visiting the crash site (by way of a 'private funeral') are for 'burial (ritual) costs' which are allowable under Ukrainian law. This part of the claim will be awarded, as the court also considers that this part of the claim does not appear to be unfounded or unlawful. In addition, many other relatives have indicated that they would have liked to travel to the site of the MH17 crash, but that this was not possible given the security situation there, and that this factor has made the grieving process more difficult for them. This circumstance therefore constitutes a component of the moral damages which they have claimed. These two relatives were apparently able to make the trip. The court can easily envisage that they wished to make that journey as part of the grieving process, as a way to pay their last respects. The fact that these relatives are claiming a lower amount of moral damages than the other relatives may be a reflection of the fact that this visit actually helped them and, as such, alleviated their distress.

The court considered the 'factors in estimating damages' set out above in estimating the amount for moral damages claimed and found the claims to be allowable in full.

Accordingly, these claims will be awarded in each case at the sum of €46,236.58.

12.5.3.3 Individual claims filed by counsel for the relatives

Next, the court discusses certain individual claims filed by counsel for the relatives (and which thus concern moral damages only).

The claim of injured party A2.57

The court notes that, although the evidence submitted does not show that the injured party was registered at the same address as the deceased victim (her grandson) or his family either on or shortly before 17 July 2014, the statements submitted do show that she lived with that family for an average of eight months per year. The documents also show that she not only lived with the family for most of the year, but was also significantly involved in the family's daily life and also contributed financially. It is the court's view that these circumstances, especially as they have not been disputed, can be characterised as cohabitation for the purpose of assessing the admissibility of this claim. Unlike the prosecution, the court considers that the injured party is entitled to compensation in line with the amount established above for persons in Category III.

The claim of injured party A5.36

The court finds that the injured party has filed sufficient evidence in these proceedings to show that the deceased was his stepfather. The court views the certificate of marriage of his biological parents, as well as his proof of identity which sufficiently shows that he is indeed a son of the aforementioned biological father as their surnames match, as *prima facie* evidence of the biological connection between him and his mother. The certificate of his mother's marriage to the deceased, combined with his being a minor child on 17 July 2014, constitutes *prima facie* evidence that he lived with the deceased, his stepfather. The court considers this to be sufficient substantiation in the absence of dispute. In the case of this injured party, compensation will therefore be awarded under Category I.

12.5.4 Third-party payments

The court has considered the question of how to deal with payments from third parties to relatives who have filed a claim. These include payments from insurance companies and payments to relatives made by the airline, Malaysia Airlines (MAS), or by the Malaysian company Petroliam Nasional Berhad (Petronas). The answer to this question could be relevant for estimating damages: if damage has already been compensated in full or in part by a third party, is it justified to award the same compensation again at the expense of the accused? Reasoning further, if, for example, an insurance company has already paid out all or part of the compensation claimed to the relatives, is it not possible that the insurer may recover the sum of the payment from the accused? In the latter case, if the accused also had to pay compensation directly to relatives on the basis of this judgment, they would have been sued twice for the same damage.

The court therefore requested that counsel for the relatives clarify the amount and nature of payments made by third parties to the relatives who have filed a claim and, more specifically, to clarify payments that relate to compensation for moral damages. Counsel for the relatives provided this clarification and explained why, according to the relatives, these payments should not affect the estimation of damages. The prosecution did not take a different position on this matter.

The court will not take account of third-party payments in estimating the moral damages claimed, and will therefore not deduct these amounts from the lump-sum amounts to be awarded. First, the report prepared by DLA Piper (as it was then) shows that there is no basis for off-setting third-party payments in Ukrainian civil law, with the exception of payments from the liability insurer of the perpetrator of the harm. The payments made to the relatives were not, however, made by an insurer of the accused.

In addition, the payments to the relatives cannot be considered compensation for moral damage.

The payments from MAS, which were made pursuant to its obligations under the Montreal Convention, are not earmarked: the amounts paid out are lump sums and it was not specified which type of harm they were intended to redress. In addition, the written statement from the director of MAS shows that, in short, the amounts expressly do not concern the harm for which the perpetrators are liable.

It has also been established that the amounts which relatives have received from Petronas should be considered as gifts expressing solidarity and sympathy. Therefore, these amounts cannot be considered compensation for moral damage.

With regard to the insurance payments made to the relatives, counsel for the relatives explained, and this was not contested, on the basis of a presentation on insurance law and the submission of statements by theoretical and practising experts from the national and international insurance industry, that, in the case of MH17, payments were made only for material damage under general insurance policies and non-earmarked sums under a fixed-sum insurance policy. Therefore, the court assumes that no insurance payments have been made to compensate moral damage.

The court concludes that third-party payments will not be offset against the amounts of compensation to be awarded to the relatives in this case.

As it has been established that the payments from third parties do not relate to the moral damages to be awarded in these proceedings, a situation can no longer arise in which the accused are sued for the same material or moral damage both by the relatives and by these third parties on the basis of recourse or subrogation. The court need not therefore make any provision for such a situation.

12.5.5 Conclusion

Summary of the finding on claims

The claims of the two injured parties that were not filed by counsel for the relatives (whose names are stated in Appendix 4.7) will each be partially awarded in the amount of €46,236.58. As regards the extra sum claimed in each case (€1,500), the injured parties do not have standing with respect to their claim.

All other claims will be awarded in full.

This means that the court will order the accused to pay compensation to the injured parties totalling **€16,707,473.16**.

The decision on each individual claim submitted by counsel for the relatives will be presented in Excel overviews attached to this judgment (numbered Appendices 4.1 to 4.6, with each appendix corresponding to a member of counsel for the relatives).

Statutory interest

All injured parties claimed statutory interest on the amounts they claimed. From the expert reports on Ukrainian law filed by counsel for the relatives, the court infers that an order to pay statutory interest is possible and that the interest is applicable starting on the date on which the order to pay it is final. Accordingly, statutory interest will be added to the claims, to the extent that they are allowed, from the date specified above.

Cost order

With respect to the claims awarded, the accused will be ordered to pay the costs incurred by the injured parties with respect to those claims up to the date of this judgment. To date, the court estimates these costs at nil. Furthermore, the accused is ordered to pay the costs yet to be incurred for enforcement.

Compensation order

The accused is being convicted for the proven offences and he is therefore liable to the injured parties whose claims have been upheld, in full or in part, for the harm which they suffered owing to those offences. The court will impose on the accused the obligation to pay to the State the amount awarded per claim for each claim awarded above. The court will also determine that statutory interest will apply to this payment obligation from the date on which the order to that effect is final, for the benefit of the injured parties.

The court determines that full or partial payment of the amounts due to the injured parties shall void the payment obligation to the State to that extent, and that full or partial payment of the amounts due to the State shall void the payment obligations to the injured parties to that extent.

Committal for failure to comply

Pursuant to Sections 36f(5) and 60a DCCP, when imposing a compensation order it may be stipulated that coercive detention is imposed in the event of failure to pay and to obtain recovery. The duration of the coercive detention in this case shall not exceed one year (360 days).**229** The court imposes the compensation order with respect to 306 claims. If the court were to follow the LOVS orientation points for the application of coercive detention, then a single compensation order of between €40,000 and €50,000 could result in the imposition of between 235 days and 285 days of coercive detention; in the case of 306 compensation orders being issued, the coercive detention would then far exceed the maximum duration. In view of the large number of claims, and in order to avoid complications in enforcement by the Public Prosecution Service, the court determines that one day of coercive detention will be imposed per compensation order to be awarded. The imposition of coercive detention does not void the payment obligation.

Awarding jointly and severally

The court has judged that the accused committed the proven offences together with others. Since the accused and his co-perpetrators committed an unlawful act together and the harm was caused in association, they are jointly and severally liable to the injured parties for the harm in its totality. Accordingly, the court imposes the aforementioned order for the payment of compensation, order for the payment obligation to the State and order for the payment of costs jointly and severally in each case.

13 THE APPLICABLE SECTIONS OF LAW

The sentence and orders to be imposed are based on Sections 36f, 47, 55, 57, 168 and 289 of the Dutch Criminal Code.

These provisions have been applied as they applied in law at the time the proven crimes took place, or at the time of this judgment.

14 THE DECISION

The court:

finds that it has been legally and conclusively proven that the accused is guilty of the principal charges under the first and second count, as found proven in chapter 7 above, and that the proven charges are characterised as follows:

two offences arising from the same act:

first principal charge

co-perpetration of, intentionally and unlawfully, causing an aircraft to crash, although this was likely to endanger another person's life and the act resulted in a person's death;

second principal charge

co-perpetration of murder, committed multiple times;

finds the charges proven and to the accused punishable for them;

finds the other or further charges against the accused not proven and acquits the accused thereof;

sentences the accused to:

life imprisonment;

with respect to the 304 injured parties represented by counsel for the relatives

awards **all claims** for compensation of the injured parties in full, up to the amount specified in Appendices 4.1 to 4.6 to this judgment for each individual claim, and orders the accused jointly and severally to pay those amounts, plus the claimed statutory interest thereon from the date this judgment becomes final until the day this claim is paid, to these injured parties;

with respect to the two injured parties not represented by counsel for the relatives

awards the claims for compensation of the injured parties - as named in Appendix 4.7 - in part, each up to an amount of **€46,236.58** and orders the accused jointly and severally to pay this amount, plus in each instance the claimed statutory interest thereon from the date this judgment becomes final until the day this claim is paid, to those injured parties;

determines that for the rest (an amount of €1,500 for the lost laptop), these injured parties have no standing with respect to their claim for compensation;

joint and several liability

determines, with respect to each of the aforementioned claims that have been awarded, in each instance, that if one of the co-perpetrators has paid part or all of the awarded compensation to the injured party, the accused is no longer obligated to pay or settle that part;

cost order against the accused

also orders the accused jointly and severally to pay the legal costs of all injured parties, estimated at nil, and the costs still to be incurred for the purposes of enforcement;

imposition of the compensation order

imposes on the accused, with respect to each of the **claims awarded** above, jointly and severally, the obligation to pay to the State the amount set forth in Appendices 4.1 through 4.6 attached to this judgment, for each individual claim, plus in each instance the statutory interest thereon, from the date this judgment becomes final until the day these amounts are paid, for the benefit of those injured parties;

imposes on the accused, with respect to each of the two claims awarded - as named in Appendix 4.7 - jointly and severally, the obligation to pay to the State the sum of **€46,236.58**, plus in each instance the statutory interest thereon, from the date this judgment becomes final until the day this amount is paid, for the benefit of the injured parties;

provides that if the amounts due for the claims awarded above are not paid in full or cannot be recovered, coercive detention may be applied for each of those claims for the duration of **1 (one) day**; such coercive detention will not extinguish the payment obligations imposed above;

determines with respect to each of the **claims awarded** above in each instance that full or partial payment of the amount due to the injured party shall extinguish the State's obligation to pay to that extent, and that full or partial payment of the amount due to the State shall extinguish the obligation to pay the injured party to that extent;

application for arrest

orders the arrest of the convicted person (this decision has been drawn up separately).

This judgment was delivered by
Mr H. Steenhuis, presiding judge,
Mr D.A.C. Koster, judge,
Ms C.I.H. Kerstens-Fockens, judge,
in the presence of Ms M. Sepmeijer-Kovacevic and Mr J. Biljard, clerks of the court,

and pronounced in open court on 17 November 2022.

Appendix 1: Text of indictment

1 (Causing an aircraft to crash)

Principal charge (functional perpetration or co-perpetration)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast) he, together and in association with one or more others, or alone, as functional perpetrator or co-perpetrator, intentionally and unlawfully, caused an aeroplane (namely flight MH17) to crash, by firing a Buk missile by means of a Buk TELAR (near Pervomaiskyi), although this was likely to endanger the lives of the occupants of said aeroplane (of whom the 298 names are set out in the annex to this indictment) and said occupants were killed as a result;

(Sections 168 and 47 of the Dutch Criminal Code)

Alternative charge (co-perpetration)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast) he, together and in association with one or more others, intentionally and unlawfully, caused an aeroplane (namely flight MH17) to crash, by firing a Buk missile by means of a Buk TELAR (near Pervomaiskyi), although this was likely to endanger the lives of the occupants of said aeroplane (of whom the 298 names are set out in the annex to this indictment) and said occupants were killed as a result;

(Sections 168 and 47 of the Dutch Criminal Code)

Further alternative charge (co-perpetration of incitement)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast), one or more others, together and in association, or alone, intentionally and unlawfully, caused an aeroplane (namely flight MH17) to crash, by firing a Buk missile by means of a Buk TELAR (near Pervomaiskyi), although this was likely to endanger the lives of the occupants of said aeroplane (of whom the 298 names are set out in the annex to this indictment) and said occupants were killed as a result;

which offence the accused incited intentionally, together and in association with one or more others, or alone, in or around the period of 8 June 2014 to 17 July 2014, in Ukraine (and the Russian Federation), by abuse of authority and/or providing opportunity, means and/or information, (using his or their position of authority) by:

- requesting and/or ordering provision of a (Russian) air defence system (with crew), or having this or these

requested and/or ordered,

- announcing the need for air defence in support of the armed conflict of the Donetsk People's Republic (around Stepanivka and Marynivka) to the commander or commanders and/or crew of said Buk TELAR, or by having this need announced,

- announcing a suitable site or launch site to the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR, or by having this announced,

- providing the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR with a telephone with a Ukrainian telephone number, or by having it or them provided with said telephone, in order to be able to communicate effectively with other persons involved,

- by transporting and/or escorting said Buk TELAR and/or the crew of said vehicle on the route or part thereof to the launch site near the town of Pervomaiskyi, or by having this or these transported and/or escorted,

and/or

- by guarding and/or hiding said Buk TELAR, or by having it guarded and/or hidden;

(Sections 168 and 47 of the Dutch Criminal Code)

Furthest alternative charge (co-perpetration of complicity)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast), one or more others, together and in association, or alone, intentionally and unlawfully, caused an aeroplane (namely flight MH17) to crash, by firing a Buk missile by means of a Buk TELAR (near Pervomaiskyi), although this was likely to endanger the lives of the occupants of said aeroplane (of whom the 298 names are set out in the annex to this indictment) and said occupants were killed as a result;

to this end and/or in committing said offence, the accused, together and in association with one or more others, or alone, intentionally provided, in or around the period of 8 June 2014 to 17 July 2014, in Ukraine (in Donetsk oblast), opportunity and/or means and/or information and/or intentionally assisted in its commission by:

- announcing the need for air defence in support of the armed conflict of the Donetsk People's Republic (around Stepanivka and Marynivka) to the commander or commanders and/or crew of said Buk TELAR, or by having this need announced,

- announcing a suitable site or launch site to the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR, or by having this announced,

- providing the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR with a telephone with a Ukrainian telephone number, or by having it or them provided with said telephone, in order to be able to communicate effectively with other persons involved,

- by transporting and/or escorting said Buk TELAR and/or the crew of said vehicle on the route or part thereof to the launch site near the town of Pervomaiskyi, or by having this or these transported and/or escorted,

and/or

- by guarding and/or hiding said Buk TELAR, or by having it guarded and/or hidden;

2 (Murder/Manslaughter)

Principal charge (functional perpetration or co-perpetration)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast) he, together and in association with one or more others, or alone, as a functional perpetrator or co-perpetrator, intentionally (and with premeditation), took the lives of the occupants of an aeroplane (namely flight MH17) (of whom the 298 names are set out in the annex to this indictment), by using a Buk TELAR to fire a Buk missile at that aeroplane (near Pervomaiskyi), which caused said aeroplane to crash and said occupants to die;

(Sections 289, 287, and 47 of the Dutch Criminal Code)

Alternative charge (co-perpetration)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast) he, together and in association with one or more others, intentionally (and with premeditation), took the lives of the occupants of an aeroplane (namely flight MH17) (of whom the 298 names are set out in the annex to this indictment), by using a Buk TELAR to fire a Buk missile at that aeroplane (near Pervomaiskyi), which caused said aeroplane to crash and said occupants to die;

(Sections 289, 287, and 47 of the Dutch Criminal Code)

Further alternative charge (co-perpetration of incitement)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast), together and in association with one or more others, or alone, intentionally (and with premeditation), took the lives of the occupants of an aeroplane (namely flight MH17) (of whom the 298 names are set out in the annex to this indictment), by using a Buk TELAR to fire a Buk missile at that aeroplane (near Pervomaiskyi), which caused said aeroplane to crash and said occupants to die;

which offence the accused incited intentionally, together and in association with one or more others, or alone, in or around the period of 8 June 2014 to 17 July 2014, in Ukraine (and the Russian Federation), by abuse of authority and/or providing opportunity, means and/or information, (using his or their position of authority) by:

- requesting and/or ordering provision of a (Russian) air defence system (with crew), or having this or these requested and/or ordered,

- announcing the need for air defence in support of the armed conflict of the Donetsk People's Republic (around Stepanivka and Marynivka) to the commander or commanders and/or crew of said Buk TELAR, or by having this need announced,

- announcing a suitable site or launch site to the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR, or by having this announced,

- providing the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR with a telephone with a Ukrainian telephone number, or by having it or them provided with said telephone, in order to be able to communicate effectively with other persons involved,

- by transporting and/or escorting said Buk TELAR and/or the crew of said vehicle on the route or part thereof to the launch site near the town of Pervomaiskyi, or by having this or these transported and/or escorted,

and/or

- by guarding and/or hiding said Buk TELAR, or by having it guarded and/or hidden;

(Sections 289, 287, and 47 of the Dutch Criminal Code)

Furthest alternative charge (co-perpetration of complicity)

on or around 17 July 2014, in Ukraine (in the Donetsk oblast), together and in association with one or more others, or alone, intentionally (and with premeditation), took the lives of the occupants of an aeroplane (namely flight MH17) (of whom the 298 names are set out in the annex to this indictment), by using a Buk TELAR to fire a Buk missile at that aeroplane (near Pervomaiskyi), which caused said aeroplane to crash and said occupants to die;

to this end and/or in committing said offence, the accused, together and in association with one or more others, or alone, intentionally provided, in or around the period of 8 June 2014 to 17 July 2014, in Ukraine (in Donetsk oblast), opportunity and/or means and/or information and/or intentionally assisted in its commission by:

- announcing the need for air defence in support of the armed conflict of the Donetsk People's Republic (around Stepanivka and Marynivka) to the commander or commanders and/or crew of said Buk TELAR, or by having this need announced,

- announcing a suitable site or launch site to the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR, or by having this announced,

- providing the crew and/or escort or escorts and/or transporter or transporters of said Buk TELAR with a telephone with a Ukrainian telephone number, or by having it or them provided with said telephone, in order to be able to communicate effectively with other persons involved,

- by transporting and/or escorting said Buk TELAR and/or the crew of said vehicle on the route or part thereof to the launch site near the town of Pervomaiskyi, or by having this or these transported and/or escorted,

and/or

- by guarding and/or hiding said Buk TELAR, or by having it guarded and/or hidden.

(Sections 289, 287, 47 and 48 of the Dutch Criminal Code)

APPENDIX


[the names of the 298 victims are not included here for privacy reasons]


Appendix 2: Overview of other call participants in intercepted conversations used as evidence

These other call participants, unlike the accused, are referred to by their call sign in the paraphrased intercepted conversations, and persons whose identities remained unknown in the investigation are referred to in the intercepted conversations as person unknown, possibly followed by their call sign. The court has chosen not to anonymise the names of persons in public office and those who have themselves explicitly come out publicly.


The following persons are involved:


- ☐ [*[Name 1]*, aka Grek: DPR fighter under Commander Bezler.[230](#)
- ☐ Aksenov, Sergei Valeryevich: Prime Minister of Crimea annexed by Russia.[231](#)
- ☐ [*[Name 2]*, aka Nos: commander of the DPR police force.[232](#)
- ☐ [*[Name 3]*, aka Tor: commander in the DPR.[233](#)
- ☐ Bezler, Igor Nikolayevich: DPR commander in Horlivka and Makiivka.[234](#)
- ☐ Borodai, Alexander Yurevich: Prime Minister of the DPR.[235](#)
- ☐ [*[Name 4]*, aka Boks: DPR fighter and Head of the Anti-Corruption Department.[236](#)
- ☐ [*[Name 5]*: Deputy Minister of Defence and LPR commander.[237](#)
- ☐ [*[Name 6]*, aka Bibliothekar: Logistics unit of the DPR.[238](#)
- ☐ [*[Name 7]*, aka 14th: associate of the head of the DPR's military intelligence department.[239](#)
- ☐ [*[Name 8]*, aka Ryazan: commander of a DPR reconnaissance platoon.[240](#)
- ☐ Gubarev, Pavel Yurevich: governor of the DPR.[241](#)
- ☐ [*[Name 9]*, aka Skif: commander of the Vostok battalion.[242](#)
- ☐ [*[Name 10]*, aka Mirash: DPR fighter.[243](#)
- ☐ [*[Name 11]*, aka Ataman: DPR fighter, leader of a Cossack group in Snizhne.[244](#)
- ☐ [*[Name 12]*, aka Koba: fighter with the Vostok battalion.[245](#)
- ☐ Plotnitskiy, Ihor Venedyktovych: LPR Minister of Defence.[246](#)
- ☐ [*[Name 13]*, aka Botsman: DPR fighter and replacement for Bezler.[247](#)
- ☐ [*[Name 14]*, aka Dushman: deputy commander of the Vostok battalion.[248](#)
- ☐ S21, aka Leshyi/Leshy: DPR fighter.[249](#)


 [*Name 15*], aka (San) Sanych: deputy commander of the Vostok battalion and Deputy Prime Minister for the DPR Ministry of Economy. [250](#)


 [*Name 16*], aka Zmey: commander and DPR intelligence officer. [251](#)


 [*Name 17*], aka Siniy: commander and chief of staff of the DPR. [252](#)


 [*Name 18*], aka Prapor: DPR battalion commander. [253](#)


 [*Name 19*], aka Mongol: DPR commander. [254](#)


 Surkov, Vladislav: Assistant to President Putin of the Russian Federation. [255](#)


 [*Name 20*], aka Koreets: anti-aircraft defence commander. [256](#)

 [*Name 21*], aka Cap: DPR commander in Snizhne. [257](#)

 [*Name 22*]: Commander of a DPR logistics unit and Bibliothekar's commander. [258](#)

 [*Name 23*], aka Dikson: commander of a platoon under Kharchenko. [259](#)

 [*Name 24*]: commander of the Oplot battalion and commander of Donetsk. [260](#)

 [*Name 25*], aka Taiga: man who has access to information about flights from various airports. [261](#)

Appendix 3: Paraphrased intercepted conversations and visual material arranged by date and time

Paraphrased below are the intercepted conversations used by the court as evidence, in order of date and time, in conjunction with other evidence used by the court. This mainly concerns visual material that the court included in the overview of intercepted conversations in chronological order. In addition, this concerns historical telecom traffic that can be used to determine connections with phones present in the vicinity of specific locations.

Intercepted phone calls made on 8 June 2014

11:30: [262](#) Girkin calls Aksenov's replacement and asks him to Arelay to the Prime-Minister that we will be crushed if we do not get large-scale support. If the request for assistance from the Russian side is not resolved, it will not be possible to hold the east. Decent air defence systems are needed because Manpads are no longer satisfactory. And we need all this, including specialists - specialists who are already trained -, because we don't have time to train them anymore.

11:46: [263](#) Girkin is called back by Aksenov. Aksenov says he is aware of the situation and has informed others. He is awaiting a response and has another meeting that evening about the support needed. After the meeting, he will contact Girkin again. He also says that a general coordination centre for this situation has been set up, and a person has been appointed to coordinate this situation. The necessary documents for support are being prepared.

Intercepted phone calls made on 6 and 7 July 2014

16:48: [264](#) Dubinskiy says Pulatov is coming to Shchorsa now, to the IUD, with person unknown Piton. Dubinskiy has an urgent task for them. They must leave tonight, and Dubinskiy will tell them where they will be positioned, and he will even show them.

17:13: [265](#) Pulatov tells Dubinskiy that they are in the URD, but that he doesn't remember where Dubinskiy is. They have to go to the third floor; Pulatov is on his way. After Dubinskiy says, come in, come in, the recorded conversation continues. Presumably this is a pocket call. About five people are present, including Dubinskiy,

Pulatov and person unknown Piton. Something is placed on the table. Dubinskiy mentions the border with the Russian Federation, the border with the Luhansk region and the place Dmytrivka and says: our immediate task, the task is - we set up a corridor from here to here. In the evening, you must (inaudible) which of person unknown Piton's men you take with you. You will go to Snizhne, to Commander Prapor. He will position you near Dmytrivka. His chief of staff signed this mess. The task is to carry out additional reconnaissance of these areas of high ground. These four areas of high ground and here.

13:31:**266** Pulatov reports to Dubinskiy that 'we' are coming back. Dubinskiy tells them to come home, to our base. Pulatov's task with the highest priority is to convey the information.

Intercepted phone calls made on 15 July 2014

13:25:**267** Girkin's assistant calls [Name 22] and asks him to contact Girkin because a group of men came to see them and now they are in an "abso-fucking-lutely bad mood". [Name 22] asks if Bibliothekar has arrived yet, but the assistant does not know.

13:29:**268**[Name 22] calls Girkin's assistant and says he can't get hold of Girkin and that the assistant should tell Girkin that they got four nosed ones, three Gvozdikas and an APC/80th, but that the belt on one broke when they still had 50 kilometres to go. They are going to replace the belt and then move on. The assistant will pass it on to Girkin now.

13:42:**269** Girkin asks [Name 24] if a shipment could be escorted from that location at 21:00 today. The shipment must be taken receipt of at the border; it's a big thing that's very good and necessary for us. [Name 24] will let Girkin know in 40 minutes.

13:57:**270** Girkin orders Dubinskiy to come to him immediately because he has an urgent assignment for Dubinskiy.

14:36:**271** Dubinskiy tells Pulatov that Pulatov must come to the SBU building to receive a new assignment. Because it's not good at all.

14:37:**272** Kharchenko is called by Dubinskiy who says Kharchenko should come to him at the General Staff at the SBU to receive a new, important assignment.

15:23:**273** Kharchenko tells person unknown Tankist that everyone must come to the General Staff urgently, that all recruits must be fully armed and all vehicles refuelled. In short: everything and everyone in full combat gear because we are preparing for marching.

16:17:**274** Kharchenko calls Pulatov and asks what time they should be ready to leave. Pulatov wants to form up and issue orders starting at 19:00.

16:29:**275** Kharchenko calls Dubinskiy. Kharchenko needs two empty URAL trucks for the duration of the operation. Dubinskiy tells him that he can pick up one from Koreets on Dubinskiy's orders; there is no second one. Dubinskiy also asks Kharchenko to let Pulatov know that everything is ready.

17:56:**276** Kharchenko discusses with Girkin's assistant that this arsehole won't give him fuel while he is about to set off for marching. Kharchenko wants the assistant to call this person, tell him that Girkin is the one who set up this task and why he should give Kharchenko the fuel he needs.

19:37:**277** Kharchenko calls Pulatov and says he is still at the base. Pulatov says they are already there and already 'forming up' and that Kharchenko should come to 'Illicha' (street). Pulatov says they are driving slowly and Kharchenko will catch up with them. Oplot's heavy ones are not there yet.

20:27:**278** Pulatov informs Kharchenko that he is still waiting for these ones; not everyone is there yet. Kharchenko is already on his way. They agree to drive to Khartsyzk and wait for each other there.

21:16:**279** Kharchenko tells Pulatov that he is just driving into Khartsyzk; Pulatov is still on his way.

22:54.:**280**[Name 24] calls [Name 10] and says Giurza "is like a coordinator of all forces that have been dragged and are being dragged there." [Name 10] tells [Name 24] to come to Snizhne quickly to plan everything; "OK" says [Name 24].

23:29:**281** Kharchenko informs Pulatov that he is in Snizhne. Pulatov says to go to Prapor and report that the main forces are coming. They will arrange it with everyone at the key point.

Intercepted phone calls made on 16 July 2014

04:37:**282** Kharchenko has to report to Girkin on Pulatov's behalf that Pulatov has driven the boxes to the first landmark. Pulatov also reports that he is going back.

07:34:**283** Dubinskiy asks Pulatov how the war is going. Pulatov says they were unable to break through enemy positions because of too many reinforcements and long-range shelling.

11:18 - 11:51: Together with Borodai, Girkin is at a location that is 3.53 kilometres as the crow flies from the launch site (a location located near Marynivka between the front line and the launch site).**284** At this location, he gives an interview to Life-news, recounting developments at the front: *"We launched an attack on Marinovka. We tried to cut the corridor connecting the southern enemy group with their main units in half, but we didn't quite manage it. We took three hills and a village, but we did not succeed in getting to the border itself; they are too strong here."* **285**

11:43:**286** Person unknown Belarus tells Ataman that a Sushka is circling. It is flying very high, and it is impossible to reach it. The Sushka has just fired, but person unknown Belarus does not know exactly where to; he thinks towards Marynivka. Can Ataman check with his contact in Marynivka?

11:50:**287** Koreets calls person unknown Vega and asks if he saw that Sushka: *"It fucking hit Savur-Mohyla from a very high altitude"*.

12:14:**288** Dubinskiy tells Nos that Dubinskiy's troops are being prevented from reaching higher ground by howitzers on three sides. There is heavy fighting going on there. Kharchenko, Tor and person unknown Piton are there, and so is our mutual friend, to see how things are going.

13:16:**289** Kharchenko reports to Dubinskiy that he is in Marynivka, that they are under fire and that he has already lost 30% of his men to artillery. Others are also being wiped out. Dubinskiy will call Girkin now, but cannot promise anything.

13:22:**290** Koreets calls Pulatov and tells him that he has ZU-23 anti-aircraft artillery with crew with him. Pulatov orders him to advance to Stepanivka with it.

13:26:**291** Pulatov calls Kharchenko and asks him if he is organising the defence. Kharchenko says there is no question of mounting a defence with the number of wounded he has; more than half of his men. Kharchenko's men are being shot like bitches by air strikes (Sushka) and mortars. Kharchenko has no means of digging in and the Strela is out of action.

13:33:**292** Kharchenko calls Pulatov and tells him that Tor's people arrived and went to the high ground. Pulatov tells Kharchenko to tell Tor to occupy the high ground and bring the tanks there.

13:39:**293** Kharchenko is called by Pulatov who tells him he has to relay the number of dead and wounded to Pulatov so that he is aware of the situation on the ground there. Also, despite everything, Kharchenko must maintain the defence and the captured line.

15:28:**294** Koreets calls Pulatov and says he is in Stepanivka. "*Now what?*" he asks. Pulatov tells him to stay there and watch the sky, "*There's some motherfucker flying out there.*"

16:23:**295** Dubinskiy calls Bibliothekar and asks if he is going to leave today. Dubinskiy tells him he can take yesterday's car and get another one from Kharchenko. Bibliothekar is still waiting for a phone call.

17:11:**296** Dubinskiy asks Kharchenko how the fight is going. Kharchenko says he is holding firm in Marynivka on Pulatov's orders and that they are under constant fire. Dubinskiy will wait for Girkin to return and will ask him to issue an order for Kharchenko to withdraw from Marynivka. Kharchenko is losing a lot of men and equipment.

17:52:**297** Girkin orders Cap to go to Stepanivka and Marynivka with his troops as reinforcement for the reconnaissance battalion.

17:54:**298** Kharchenko gets a call from Pulatov. Kharchenko reports to Pulatov how many people have been put out of action. Kharchenko reveals that there are ten times '200' and that it is not yet known how many of the '300' there are. Pulatov expects Kharchenko to provide more precise figures because they need to know what needs to be discussed with senior staff.

18:12:**299** Pulatov reports to Dubinskiy on losses of personnel and equipment, including Kharchenko's, as a result of the aerial attack and artillery fire from Hryhorivka and Kozhevnia. Our air defence, the Strela, is out of action and will be taken away overnight for repair. Dubinskiy wants to send three tanks, but Pulatov needs long-

range artillery and good anti-aircraft defence because an aircraft was 'working' at high altitude and was inaccessible to almost all the systems. Dubinskiy has mapped the targets from which artillery will be fired and Girkin is sending them to Moscow now. Russia should just take them out. The eastern side of Marynivka is not really relevant at the moment; no one will go from there to Pervomaiskiy or to Snizhne.

18:43:**300** Dubinskiy tells Kharchenko that the only thing he has been able to do for Kharchenko is that two of Cap's companies will go to Marynivka and the areas of high ground to relieve Kharchenko. Tor is going to Stepanivka. Kharchenko should then keep one assault company on stand-by in Stepanivka and leave for home with the reconnaissance company and the second assault company.

18:55:**301** Mongol reports to Dubinskiy that they have mostly destroyed the radar at the airport, but not completely yet. Dubinskiy says his men are suffering heavy losses due to bombing from an altitude of seven kilometres, but they did take Marynivka and have surrounded the corridor. Pulatov cleared one area of high ground.

19:09:**302** Sanych reports to Dubinskiy that the Ukrainians are bringing heavy equipment, including Grads, from Alekseyevka towards Hryhorivka. Dubinskiy says the Ukrainians are going to Hryhorivka and assembling troops to break through, because we blocked them at the cauldron. Dubinskiy was there himself, and we took Marynivka and the higher ground. Sushkas were deployed from an altitude of five or six kilometres. The most important thing now is to strike those two batteries in Hryhorivka. Dubinskiy tells Sanych that they can still do something against Grads, but if the Sushkas attack in the morning... Dubinskiy says that if he can manage to get a Buk to send there in the morning, that will be good, but if he can't, then it will really suck. Dubinskiy says he plans to go there himself.

19:13:**303** Dubinskiy tells Kharchenko to take back the APCs and the dead and wounded. Dubinskiy reiterates that Kharchenko should keep an assault company on stand-by in Stepanivka and leave for home with a reconnaissance company and an assault company, but not until Cap arrives.

19:48:**304** Gubarev reports to Dubinskiy about additional equipment he has and asks where that equipment should go. Dubinskiy says he wants to discuss that tomorrow, as he is fighting now and is leaving to go there now. If additional men come, they should go to Tor as reinforcement.

19:57:**305** Bibliothekar asks Dubinskiy which vehicle he needs to pick up at Kharchenko's location. Bibliothekar is there now; Dubinskiy replies that he is coming out, wait.

20:06:**306** Sanych says he has been told that what Dubinskiy was talking about earlier should be sent to where Dubinskiy's men are in two 'units'. Dubinskiy agrees that they should arrive today and that he wants to send them there right away. Dubinskiy speaks again of high altitude aerial attacks that happened when he had already left.

20:11:**307** Dubinskiy tells Pulatov that two of Cap's companies are now on their way to replace Kharchenko in Marynivka. Tor is going to Stepanivka. Kharchenko is going to Stepanivka to be on stand-by. Kharchenko has been ordered to go home tomorrow and so Pulatov will too. Dubinskiy says that if a Buk M is brought here tonight, it will go straight to Pulatov. That Buk is our only hope, we can't do anything else, right?

20:45:**308** Siniy asks where Dubinskiy is. Dubinskiy says he is in Donetsk. Girkin is there, at his. Siniy needs weapons because he is about to leave for Marynivka; Dubinskiy will pass that on to Girkin.

20:49:**309** Pulatov reports to Dubinskiy that our air defence brought down a Sushka with a Manpad. Dubinskiy tells Pulatov that 'our boys' are coming to him, including two of Cap's companies. Pulatov says he will accommodate them, and that he has two more out-of-order boxes and the out-of-order 10 to be removed from here. Dubinskiy says they have just decided that they will wait and see for another 24 hours, and otherwise Pulatov will have to send everyone back. If Cap is there, he should take full command. Pulatov will then do the general things and observe remotely.

20:57:**310** Pulatov says he reported it incorrectly. "*Did I say it was shot with a 'ZUshka', or did I say with 'Strela'? It was in fact shot with a 'ZUshka'.*"

22:02:**311** Person unknown Belarus is speaking with two other fighters. Our men here shot down two Sushkas in one day.

Intercepted phone calls and visual material on the morning of 17 July 2014

00:12:**312** Girkin gets feedback from Cap by phone, telling him that the enemy will rain tonnes of metal on them tomorrow. They need to strengthen their positions.

00:17:**313** Skif offers Dubinskiy support to hold the area, as Dubinskiy's task is now the priority. Dubinskiy says that the moment the Sushkas were deployed from an altitude of five kilometres, he immediately lost a number of men. Dubinskiy says that a Buk will arrive tonight and all problems will be solved then. If Dubinskiy wants manpower and equipment from Skif, including four tanks, he should pass that on to Sanych.

00:26:**314** Dubinskiy tells Girkin that Skif, kind of out of the blue, offered the support of three tanks and about a hundred men. Girkin says he ordered that three broken tanks be evacuated; these could then be deployed in their place. Girkin tells Dubinskiy that he himself must issue the order for the movement of Skif's tanks at eight o'clock in the morning. Both men also wonder where they are going to find commanders anyway.

07:05:**315** Pulatov asks Kharchenko where he is. Kharchenko says he is in Donetsk because Dubinskiy called him and told him to go, because Cap had arrived. Kharchenko should have warned Pulatov that he was going, because Pulatov had been told yesterday to be ready to go back with Kharchenko today. Pulatov says he does not understand how orders are given; first he was designated as leader, but then Kharchenko was given another order, bypassing Pulatov. Why do they need me here as a man in charge, Pulatov wonders. Pulatov tells Kharchenko to report to Dubinskiy because Pulatov is still here with everyone. Pulatov will figure out for himself what is going on here. Kharchenko adds that 30% was wounded yesterday.

08:23:**316** Tor tells the assistant to report to Girkin that they have been defeated at high ground 172.9 and that the high ground has been taken by the enemy. Three out of 30 people survived.

08:27:**317** Girkin reports to Borodai that high ground 172.9 has been completely crushed. Three of the 30 men survived, and the high ground was abandoned. "*Oh, fucking shit,*" Borodai responds. Girkin asks Borodai to come here.

08:38:**318** Dubinskiy calls Sanych and asks him to send three tanks and ten or so men as cover because of the difficult situation there. They have to go to Stepanivka and will be positioned by Dubinskiy's men, in Marynivka and so on. Sanych will pass it on to Skif.

09:08:**319** Bibliothekar tells Dubinskiy that he has arrived in Donetsk with the Buk M on a truck and with a crew. He asks Dubinskiy where he has to unload and hide it. Dubinskiy says it doesn't need to be hidden anywhere; it will go there directly. Prior to this conversation, Bibliothekar can be heard saying to others: *"Guys, ... We need to slow down, get in the left lane, completely in the left lane"*.

Donetsk photo.**320** This photo shows a Buk TELAR on a red flatbed trailer, taken at 78 Illicha Avenue in Donetsk.**321** According to the KNMI, the weather pattern in the photo corresponds to that of 17 July 2014, and, assuming that date, the photo was taken between 08:48 and 09:32.**322** According to the NFI and the National Forensic Centre of the Swedish Police, the photo shows no signs of tampering.**323**

09:20:**324** Kharchenko reports to Dubinskiy that he is home, here at the SBU, that Cap has replaced him and that he has left a company in Stepanivka as Dubinskiy had said. Dubinskiy is also at the SBU, with Girkin. Then Kharchenko will come up in a moment.

09:22:**325** Dubinskiy asks Bibliothekar if he has one or two with him. Bibliothekar says he has one with him. It had crossed the line by itself and had now been mounted on a trailer. Dubinskiy tells Bibliothekar that it will go together with tanks from Vostok.

09:23:**326** Dubinskiy tells Sanych that his Buk M is going with him and asks where it can be included in the convoy. Sanych says behind 'Motel'.

09:24:**327** Dubinskiy tells Bibliothekar to turn around to where three of Vostok's tanks are located between Motel and Makiivka. Bibliothekar must ride there in convoy together with these tanks.

09:31:**328** Pulatov asks Dubinskiy to have the 'eastern neighbour' take a look at the group of pigs that has crept east from Hryhorivka. The eastern neighbours should then give them hell. Dubinskiy tells Pulatov that Kharchenko will now bring a Buk M to him. The Buk should be installed in the vicinity of Pervomaiske. Three tanks with guards are also coming from Vostok.

09:51:**329** Sanych tells Dubinskiy they are ready and waiting for Dubinskiy's unit. Dubinskiy says Kharchenko will go with Sanych. Sanych's men are going to Stepanivka, and Kharchenko knows where the Buk has to go. Dubinskiy tells Dushman to escort Sanych's men to Stepanivka, to Tor and Cap. Dushman knows Tor and Cap. So then Sanych does not have to wait for Dubinskiy's people; Kharchenko will escort it himself.

09:53:**330** Bibliothekar asks Dubinskiy if he should turn around and go after them, to which Dubinskiy asks if he was not called by Kharchenko. He was not. Dubinskiy tells Bibliothekar to go back to the Motel ring. Kharchenko will pick him up there and escort him there.

09:54:**331** Dubinskiy tells Kharchenko that thing will be behind the Motel ring; you know what I mean. Kharchenko should call/consult Bibliothekar. Kharchenko should bring the people he needs for the escort, and when he gets near Pervomaiske, he should settle in the area and get his people there. His job is then to be on stand-by and guard that thing he is now going to escort. Pulatov will be coming there, too. Dubinskiy will stay in contact.

09:55:**332** Dubinskiy tells Pulatov to tell Cap and the others that three rhinos from Vostok are on their way. Pulatov gathered that, because he just spoke to Girkin. Dubinskiy says Pulatov should wait for Kharchenko, who

is escorting the Buk M. Pulatov understands the 'wooden language'. Then Pulatov, Kharchenko and all our people should stay in the Pervomaiske/Pervomaiskyi area. *"Your task is to guard this Buk and organise all of this."* Pulatov does still need to send someone to meet the rhinos. Pulatov will take care of all this now, but first he needs to get his spitters to their positions. At the same time he is also keeping the corridor free here for unimpeded delivery to Tor.

10:01:**333** Girkin is called by Tor who updates Girkin on the dead and the wounded and broken tanks, who tells him that Cap has arrived and asks who is in charge; Cap or Pulatov? Girkin indicates that Cap is responsible for the defence and that Pulatov is in charge until he hands over to Cap. Girkin tells Tor to deploy artillery against the enemy on the hills, because that is where they are firing from. Tor confirms that they are already in the process of implementing the order issued by Girkin. Pulatov has already received all the orders from Girkin; he will have to try to switch something there. Girkin concludes by indicating that there will be tanks joining Tor and his men today, in support.

10:04:**334** Kharchenko is called by Dushman and informs him that he will be at Motel in 40 minutes. Because he feels that will take too long, Dushman says he will leave already and that Kharchenko will catch up with him. *"Okay"*, says Kharchenko.

Video of Makiivka Highway at Donetsk**335** and Paris Match photo**336**. This video and the photo taken from it were taken on the Makiivka Highway in Donetsk**337**, and, according to witness G9081, show an SA-11 air defence system (court: the NATO designation for a Buk TELAR) and a flatbed trailer used to transport those systems.**338** The court itself also recognises a Buk TELAR on a flatbed trailer in these images. According to the KNMI, the weather pattern in the video (and therefore the photo) corresponds to that of the morning of 17 July 2014, and, assuming that date, the image was taken between 10:13 and 10:26.**339** According to the NFI, the video shows no signs of the content of the image or the metadata having being tampered with**340**, even after repeated examination following allegations of forgery from the Ministry of Defence of the Russian Federation.**341**

Makiivka video.**342** This video (shortened by the JIT to remove identifying data)**343** was taken on Avtotransportna Street in Makiivka and shows a convoy, including a white-coloured Volvo tractor with a red-coloured trailer carrying a Buk TELAR.**344** According to the KNMI, the weather pattern in the video corresponds to that of 17 July 2014, and, assuming that date, the video was recorded between 11:06 and 11:17.**345** Further examination also confirmed the place, date and time of the video recording.**346** Examination by the NFI in response to allegations of forgery from the Ministry of Defence of the Russian Federation concluded that there is no evidence of manipulation nor falsification of the video footage.**347**

11:31:**348** Kharchenko instructs someone to collect all the men, including Dikson, then go to Pervomaiskyi and wait for Kharchenko there. Kharchenko will be there soon.

Zuhres Video.**349** This video was taken from an apartment building in Zuhres located next to and overlooking Highway H21, the through road from Makiivka to Snizhne via Torez.**350** According to witness G9081, the video shows an SA-11 air defence system (court: the NATO designation for a Buk TELAR) and a flatbed trailer used to transport those systems.**351** The court can also see this on the images. According to the KNMI, the weather pattern in the video corresponds to that of 17 July 2014, and, assuming that date, the video was recorded between 11:27 and 11:43.**352**

Intercepted phone calls and visual material on the afternoon of 17 July 2014

Torez Video.**353** This video was taken on 17 July 2014 in Torez, possibly around 12:00, and shows several

vehicles, including a white truck with a red trailer carrying a Buk air defence system.**354** The truck in the images bears striking similarities to the one shown in the Paris Match photo mentioned above.**355** In addition, similarities can be seen at six points between the Buk in this video and one of the Bucs seen in video recordings of a military convoy observed in the Russian Federation on 23, 24 and 25 June 2014. No notable differences are observed.**356**

Torez Photo.**357** This photo was taken from the grounds of a petrol station located on Prospekt Gagarina in Torez, also called H21, and, according to witness G9081, shows a truck with a red flatbed trailer and Buk TELAR.**358** The court can also see this on the image. According to the KNMI, the weather pattern in the photo corresponds to that of 17 July 2014, and, assuming that date, the photo was taken between 12:34 and 12:47.**359** This time does not line up with the 12:42 phone conversation mentioned below, in which Kharchenko says he is at the Furshet in Snizhne. In fact, the Furshet is still fourteen minutes away from where the photo was taken, so in order for the convoy to actually reach the Furshet at 12:42, it must have left from that spot no later than 12:28. However, the court finds no reason to doubt the entire timeline based on this discrepancy of only six minutes. Indeed, it can be inferred from other sources that the flatbed trailer had passed through Torez a little earlier.**360** The argument that this very fact would mean that multiple Buk TELARs may have been transported that morning is not credible. After all, it is completely implausible that several similar Buk TELARs were transported on multiple identical flatbed trailers in a similar convoy, in short succession, when no one is reporting or talking about it.

12:39:**361** Dushman asks Sanych where to drive those iron things. To Stepanivka, is the answer, but call Krot; he is already behind you.

12:42:**362** Kharchenko calls Pulatov and informs him that he is with the 'toys' at the Furshet in Snizhne. Pulatov says he is on his way there now.

12:51:**363** Kharchenko gets a call from Pulatov. Pulatov says he has arrived at the Furshet and cannot see anyone. Kharchenko says he is also at the Furshet and asks if Pulatov cannot see the trailer. After loud honking in the background, Pulatov sees Kharchenko.

13:09:**364** Kharchenko calls Zmey and explains to him where they will meet: in the area near the checkpoint beyond Snizhne and before Stepanivka, at Pervomaiske.

Snizhne Photo. This photo, attached to a Tweet posted at about 14:37 on 17 July 2014, shows a self-propelled Buk TELAR, with camouflage net. This photo shows a self-propelled Buk TELAR on Karapetian Street in Snizhne, not far from the Furshet, travelling eastbound.**365** According to the KNMI, the weather pattern in the photo corresponds to that of 17 July 2014, and, assuming that date, the photo was taken between 13:07 and 13:33.**366**

Snizhne Video.**367** The video shows a Buk TELAR driving on Gagarina Street, heading south towards Pervomaiske, Pervomaiskyi and Savur-Mohyla.**368** According to the KNMI, these coordinates are correct, and it can be concluded that if the video was recorded on 17 July 2014, it must have happened between 13:12 and 13:57 local Ukrainian time. The cloud pattern in the video matches the cloud pattern in that area on 17 July 2014.**369** Research by the NFI – and verification of this with Google, in response to Russia's comment that this video footage was faked because of an incorrect date stamp – concluded that it cannot be determined when this video was recorded, but that it was most likely uploaded a few minutes before the time stamp listed of 17 July 2014 at about 16:42:05. The incorrect date stamp, on which Russia based its claim that the video was faked, was caused by a programming error at YouTube, which Google has confirmed. Thus, there is no indication that the video might have been uploaded earlier, say on 16 July 2014.**370** In response to another allegation by Russia that the video was faked because the TELAR was allegedly pasted into it, the National Forensic Centre of the Swedish Police investigated and concluded that technical, aural and visual inspection show no indication of manipulation, and that those investigation results are between 6,000 and 1,000,000 times more likely if the

vehicles were already present in the video when it was made, than if the vehicles were pasted into the video later.**371**

13:35 - 14:02: According to historical telecom records of the phone number ending in -6335, that number connected to a mast on Gagarina Street in Snizhne between 13:35 and 14:02. Between those times, Pulatov calls that number three times, but no call is established. However, a 60-second call is made to 14th by the user of this number at 14:00.**372**

14:07:**373** Kharchenko calls Zmey. Kharchenko tells Zmey to guard the vehicle that is a little further in the field. Person unknown Altai will also come, and then they have to spread the vehicles in the dense thicket until Kharchenko arrives. Kharchenko is going to collect Ryazan and then come back here, and we will see how things develop.

14:10:**374** Kharchenko gets a call from Ryazan. Kharchenko says he is about to go to Snizhne. Ryazan should wait for him in the shade by the roundabout near Furshet.

14:33:**375** 14th has a question for person unknown about the guests, as reported yesterday on behalf of Taiga. 14th wants to minimise the time lag between when person unknown receives information and when he passes it on to 14th. Therefore, 14th would prefer that Taiga communicate directly with him. This is exactly what person unknown also wants, which is why he established direct communication between Taiga and 14th.

14:34:**376** 14th asks Taiga to call him immediately if he has any information regarding the guests. Because we are all already waiting, says 14th. No guests are expected at this time, says Taiga.

15:07:**377** When Girkin asks Tor what the situation is there, Tor replies that he has handed Marynivka over to Cap, that he is withdrawing his men from Marynivka, and that they are holding out in Stepanivka. Girkin instructs Tor to dig in, as they are bringing three more Grad batteries Tor's way. Girkin asks Tor how many armoured vehicles Cap has there. Tor says three tanks have just passed by, citing the name Giurza. Tor further informs Girkin of the total number of tanks, where they are and how many are broken.

16:20 Flight MH-17 crashes.**378**

16:22:**379** Dushman tells person unknown Kombat**380** that today he deployed his tanks at Marynivka, Stepanivka and Dmytrivka, that yesterday they tried to bomb from four thousand metres and did not dare to go lower to avoid being destroyed by Manpads, and that today a Buk was positioned and we are now going to shell them with missiles.

16:35:**381** Person unknown says to person unknown Nikolay Ivanovich that men from Snizhne shot down an aeroplane that crashed near Hrabove fifteen minutes ago. Person unknown's men are searching for the pilot.

16:48:**382** Kharchenko reports to Dubinskiy that they are on location and have already downed one Sushka. Well done, is Dubinskiy's response. Dubinskiy orders Kharchenko to come to 'here' that evening; Pulatov will also come here. Kharchenko must then leave one company behind to protect the Buk.

17:16:**383** Dubinskiy asks Kharchenko if the Buk is safe from Grad fire. Kharchenko says they are out of range.

17:42:**384** Botsman tells Dubinskiy that an aeroplane was shot down and that he will go get the boxes and give them to Dubinskiy if necessary. *"And you will hand those over afterwards, right? "We", says Dubinskiy, "have also just now brought down a Sushka, over Savur-Mohyla. We did get a Buk M this morning; that makes a big difference. My boys are also looking for the black boxes now."* Dubinskiy says he is now in Marynivka, that they are being bombarded non-stop by Grads and have suffered very substantial losses. He is waiting now, as Russia would pound their positions from its side. Dubinskiy has to be back in Donetsk in two hours.

Intercepted phone calls made on the evening of 17 July 2014

18:20:**385** Dubinskiy tells person unknown that his men brought down a Sushka near Savur-Mohyla. The person unknown man says the media keeps harassing him about a Boeing that crashed. Dubinskiy doesn't know anything about that.

18:28:**386** Nos says Girkin's assistant must inform the commander that the downed aeroplane is a Boeing. Russia 24 wants to quickly spread the suggestion to the world that the Ukrainians did this to blame the militia.

18:40:**387** Grek is told by person unknown Shmel that a foreign passenger aeroplane has been hit by a Sushka. Bezler is present in the background and also hears this message.

18:44:**388** Kharchenko calls Pulatov. Pulatov inquires about our Buk, to which Kharchenko answers that everything is fine and that the Buk has been moved. Pulatov says the Sushka had shot down a Chinese passenger aeroplane, and immediately after that we caught up with the Sushka. The whole world will be talking about it now. Kharchenko says we were working on the Sushka. Pulatov wants a comprehensive evaluation of the situation that took place. Most importantly: tell *that one*... Pulatov is driving into Torez, and Kharchenko is to come to Torez with some men and then receive further instructions.

19:01:**389** Koreets calls Pulatov: Pulatov tells Koreets that Koreets' 'blood-brother' shot down a Sushka which had shot down a civil aircraft just before.

19:28:**390** Kharchenko reports to Pulatov that he is in Rozsypne. There's no point in doing that, Pulatov says, you'd better drive on to Hrabove; you'll see the smoke in the distance.

19:35:**391** Koba tells person unknown Vova that a passenger aeroplane was just shot down and when asked who did it, responds: *"Who could do it? Who has access to a Buk? Not Ukrops. Strelkov, damn it!"*

19:52:**392** Dubinskiy orders Pulatov to come to the base; Kharchenko has to stay there. Pulatov interrupts Dubinskiy and says he is now at the spot where the aeroplane crashed, but will return. Pulatov answers the question of whether our Buk fired, that the Buk shot down the Sushka after the Sushka shot down the Boeing. His men saw that; Pulatov himself was in Marynivka.

19:54:**393** Dubinskiy wants to see Girkin very urgently and tells him that Pulatov just reported that the Sushka shot down the Boeing, then wanted to attack again, but was then shot down by our people with a Buk. Girkin doesn't really believe this account. Dubinskiy says he has recalled Pulatov and that Kharchenko will remain on location. Girkin tells Dubinskiy to take care of it properly.

19:59:**394** Dubinskiy says Kharchenko should allow the OSCE people access to the crash site and asks if Kharchenko is sure that people saw that 'it' was hit by a Sushka, or whether it was not the work of 'our' people after all. Kharchenko confirms that the Sushka did it. Dubinskiy understands and asks if it is correct that the Sushka was then hit by our people with a Buk. Kharchenko replies: first there was a bang in the sky, and then there was our bang.

20:30:**395** Because of the aeroplane, Girkin doesn't have the opportunity, so therefore Dubinskiy must arrange for the "damaged tank we have that needs to be evacuated", the box being guarded by Kharchenko, to be escorted to the border of the province by a couple of APCs. A group is coming with a trailer and a crane to collect it.

20:32:**396** Dubinskiy tells Kharchenko that a lowboy will come for the box we have there and that two APCs should escort the box to our regional border.

20:41:**397** Kharchenko gets a call from Zmey. Zmey reveals that 'the box' is being taken away by strangers, and he asks if he should escort it. Kharchenko, cursing, tells Zmey to leave it there; Kharchenko will collect it.

20:54:**398** Zmey reports to Kharchenko that it is being escorted by a vehicle and an ack-ack and that they said it is being guarded by his people. It went to town. Let it go there, says Kharchenko.

21:13:**399** Kharchenko tells Dubinskiy that 'the box' was already gone when he returned from the crash site; 'the box' left under its own power and is now in Snizhne. It's sure it's not going to drive to its destination under its own power though. The guys with the trailer are asking Kharchenko to come, and Kharchenko is going to do that. Dubinskiy says he will ask Girkin what they should do next. He does still tell Kharchenko to leave it in Snizhne.

21:32:**400** Ryazan calls Kharchenko. He reports that one of the crew members of the Buk lost the rest of the crew. The crew member is at the checkpoint. Kharchenko instructs Ryazan to take the crew member to Snizhne.

21:40:**401** Kharchenko calls Pulatov. Kharchenko asks if Pulatov can get in touch with the fighters of that new box. They forgot one of their fighters, who is now with Kharchenko. Kharchenko is at Furschet, but they are not there. Pulatov is going to try to contact them.

21:42 - 21:53: According to historical telecom records, four calls were made by Pulatov between 21:42:18 and 21:53:34 to the phone number ending in -6335. The location of that phone number at the time is unknown.**402**

21:47:**403** Mongol tells his wife that 'we' shot down the Boeing, but it was an accident.

22:35:**404** Kharchenko asks Dubinskiy where he needs to be escorted to. Dubinskiy answers: up to the border with Luhansk province, then they will drive on by themselves.

23:05:**405** Girkin has someone ask Dubinskiy if the 'damaged tank' has already started to move. Dubinskiy is coming up now.

23:12:**406** Kharchenko tells Dubinskiy that it is still in Snizhne and has just driven onto the platform. Kharchenko will take it as far as Debaltseve, but Dubinskiy says Kharchenko doesn't have to do that, that it should be the boys that do it. Dubinskiy will call him back in a moment.

23:14:**407** Dubinskiy tells Kharchenko to go from Snizhne to an intersection north of Krasnyj Luch and wait there for an escort that has just left Luhansk.

23:27:**408** Person unknown Vega tells Koreets that electricians are working on that Strela. Giurza told person unknown Vega to report to the commander. Person unknown Vega did that, and the commander wrote down on the piece of paper everything concerning Pervyi, concerning Strela and all that. Person unknown Vega also adds that too many people saw our vehicle today. Koreets doesn't care; no one will fly there for now. A Ukrops Sushka downed a Boeing. And immediately afterwards we took down the Sushka. Yes, so that big missile flew behind it.

23:32:**409** Kharchenko says his men have left. Dubinskiy asks him for the senior's phone number; who is going to be called by those from Luhansk. Kharchenko gives Dubinskiy the number ending in -5784, of 'Leshy' the driver. Kharchenko has to call Leshy quickly to say that 'he' is already entering Krasnyj Luch and that Leshy should clearly arrange where they will meet.

23:34:**410**[Name 5] is called by Plotnitskiy. A Carpathian tree guarded by two APCs needs an escort from the intersection at Krasnyj Luch to the border at Severniy. The convoy will be awaited there. Fuel is also needed for the APCs, as they are running out.

Intercepted phone calls made 18 July 2014

00:23:**411** Boks reports to Dubinskiy that Pulatov is back and that as for today's breaking news, they have found the flight recorders.

00:25:**412** Pulatov tells Dubinskiy that the box he has is from that foreign machine. And just to be safe, that box was sent to Boks's men.

01:26: **413** Not Leshy, but someone calling himself group leader says over Leshy's phone that those responsible for the shipment are Starshyi, Chernyi and Bibliothekar. According to them, no one is supposed to meet the shipment. *Fuck*, is the response; this was all arranged through the Minister of Defence. We are moving slowly along the route we know; the route that was used to transport machinery here. We are now taking them to a position before Debaltseve.

07:17:**414** Kharchenko says to someone in the room he is in: *"Everything is ok. The vehicle has already reached Russia."*

07:41:**415** Dubinskiy furiously asks Kharchenko what happened yesterday with Leshy; it was a mess. Kharchenko said they took the vehicle as far as the intersection, and then the boys continued on their own in the right direction, arriving successfully. There were lots of incoming calls on Leshy's phone from people introducing themselves, one after another, and then later also Girkin. At some point, Leshy turned off the phone. Dubinskiy does not know where the vehicle is now. Kharchenko says it has arrived in Russia.

07:44:**416** Dubinskiy tells Girkin that he has just returned and says that 'he' received calls from as many as eight people and therefore turned off the phone. He was not returning the vehicle himself at all, but immediately handed it off to those awaiting the vehicle, to our people at the intersection. The vehicle reached Russia ages ago. However, Girkin says the point is that they say they have not met them. Girkin is going to look into this further.

08:00:**417** Girkin tells Dubinskiy to have Leshy go and see Girkin immediately, because the group of people who were supposed to receive the car came back without one.

08:01:**418** Dubinskiy orders Kharchenko to come to Dubinskiy with Leshy because the person who was supposed to meet the vehicle has returned without one. Kharchenko says Leshy gave the vehicle to Bibliothekar. That group brought it back on the lowboy. Kharchenko has just been in contact with them: they are already in Russia and are bringing back a new vehicle from Russia. Now Dubinskiy understands.

08:02:**419** Dubinskiy asks Bibliothekar if he received the box from our people last night and if he had removed it. Bibliothekar confirms this and says it is there now, in that area. He will come by later to explain; it was quite complicated.

08:03:**420** Dubinskiy tells Girkin that Leshy handed it off to Bibliothekar and Bibliothekar took it there personally. It's been there for a long time.

10:50:**421** Mongol tells Dubinskiy that the OSCE mission asked the DPR authorities if they could be escorted to yesterday's crash site. Mongol just provided them with an escort. The group does include four Ukrainian aviation experts. Dubinskiy responds by saying that 'we' won't do anything there. Let them go. There are at least two boxes; yesterday evening, the first, and last night my men found the second.

11:22:**422** Kharchenko asks Dubinskiy if he has sorted out this vehicle; is everything okay? Dubinskiy says he and Girkin have been yelling at each other but that it is now clear.

Appendix 4: Decisions on each individual claim for compensation

This appendix consists of:

- Appendix 4.1: decisions on claims by CfR member A1;
- Appendix 4.2: decisions on claims by CfR member A2;
- Appendix 4.3: decisions on claims by CfR member A3;
- Appendix 4.4: decisions on claims by CfR member A4;
- Appendix 4.5: decisions on claims by CfR member A5;
- Appendix 4.6: decisions on claims by CfR member A6;
- Appendix 4.7: names of the two injured parties with claims not submitted by counsel for the relatives.

PLEASE NOTE, THIS IS A TRANSLATION. THE JUDGMENT IN DUTCH IS LEADING.

- 1 The court uses the personal names as recorded in Primo 10779 and the place names as recorded in Primo 06863.
- 2 This was a scheduled day in court that was no longer required for the trial.
- 3 In addition to the difference concerning functional perpetration stated hereafter, the principal variant also includes "..., or alone, ..."
- 4 Official Gazette 2018, 263.
- 5 Decree on court locations dated 27 November 2012.
- 6 Parliamentary paper 33 997, No. 124.
- 7 Treaty between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes related to the downing of Malaysia Airlines flight MH17 on July 17, 2014 (Treaty Bulletin 2017, 102), concluded between the Netherlands and Ukraine in Tallinn on 7 July 2017, in accordance with the provisions of Articles 6 and 43 of the European Convention on the Transfer of Proceedings in Criminal Matters. On 25 August 2018, in implementation of this convention, the Act of 11 July 2018, containing provisions related to the prosecution and trial in the Netherlands of offences related to the downing of Malaysia Airlines flight MH17 on 17 July 2014, entered into force (Bulletin of Acts and Decrees 2018, 263).
- 8 In accordance with Article 6(1) of the Tallinn Convention, by letter dated 19 June 2019, the Dutch authorities invited the Ukrainian authorities to submit a request to transfer the criminal proceedings. In response, by letter dated 23 July 2019, the Ukrainian authorities asked the Dutch authorities to take over the criminal proceedings. By letter dated 22 August 2019 from the Minister of Justice and Security, this request was granted.
- 9 The information in this and the following paragraphs and sub-paragraphs is based on the following parts of the Context File: official reports on Combatant Parties (Primo-04502), Classification of Conflict (Primo-06764), Russian Involvement in the Conflict in Eastern Ukraine (Primo-05427), OSCE (Primo-02258), and Internal Disciplinary System and International Crimes in the 'Donetsk People's Republic' (Primo-12062), as well as the underlying documents and associated appendices. This information is also based on the content of intercepted and recorded telephone conversations, as included in the case file.
- 10 ICTY, Prosecutor v. Tadić aka "Dule," Appeals Chamber Decision, IT-94-1-AR72, Oct. 2, 1997, §70.
- 11 Section 359a DCCP in conjunction with the third clarification ruling on procedural defects and legal consequences under Section 359a DCCP, SC 1 December 2020 (ECLI:NL:HR:2020:1890), paras. 2.2.2, 2.4.4 and 2.6.1.
- 12 Third clarification ruling on procedural defects and legal consequences under Section 359a DCCP, SC 1 December 2020 (ECLI:NL:HR:2020:1890), para. 2.5.2.
- 13 Prime Minister of the Netherlands, Members of the Dutch House of Representatives and the Dutch Safety Board.
- 14 E.g. ECtHR 29 January 2019 (*Güzelyurtlu ea t. Cyprus and Turkey*), ECtHR 4 August 2001 (*Hugh Jordan t. UK*) and ECtHR 4 August 2011 (*Giuliani and Gaggio t. Italy*).
- 15 Or very shortly before, when they received the notification from the investigating judge regarding the pending Section 226a DCCP proceedings.
- 16 Several first-person rulings cited in Th. Cellar, *Traces in Criminal Law 2014*, Case law on the dismissal of mini-instructions.
- 17 Act dated 1 December 2011 (Bulletin of Acts and Decrees 2011, 600), entered into force on 1 January 2013.
- 18 Whether any such request was made to the Ukrainian authorities cannot be verified by the court in the absence of documents relating to it in the case file. As Ukraine was a JIT partner, no requests for legal assistance would be made to that country. It is worth noting in this regard, however, that, according to his personal file, the accused Kharchenko has been untraceable since August 2014 and his whereabouts are not known to the Ukrainian authorities. Under those circumstances, a request to question the accused would have been futile.
- 19 Whereby the court notes that there is a difference between the existence of an official document setting out suspicions and a person being designated as a suspect. The latter is the formal act by which a suspect is notified that he is a suspect; the former is rather an internal working conclusion, in part to enable certain investigative steps to be conducted. It is precisely because of the significance of those investigations that the suspect is not yet informed of the suspicions against him. Providing documents at that time would be counter-productive.
- 20 Dutch Safety Board Act, Chapter 5, Section 5.
- 21 Dutch Safety Board-Public Prosecution Service Coordination Protocol (Netherlands Government Gazette 2008, 45, entered into force on 1 March 2008).

22 Official record of the hearings on 13 and 16 September 2021, including Appendix A thereto.

23 In this case Primo-10519 and Primo-10519.

24 *"Recognising the sovereignty of all Parties and with the prior consent of the JIT leader, the JIT members will have the right to participate in investigative activities in another State within the parameters of that State's domestic law. Where authorised by the domestic laws of the State in which they are operating, they can personally perform investigative activities in the presence of a member of a team in whose country the investigative activities are being performed and insofar as they are authorised to do so under their own domestic laws."*

25 At the time of signing the JIT agreement in August 2014, Section 552qb DCCP was still in effect, but its text is the same as Section 5.2.2 DCCP.

26 See SC 5 October 2010 (ECLI:NL:HR:2010:BL5629).

27 The court is referring here to 'eyewitnesses', not to experts and investigating officers who conducted technical investigations, for example, and who in that capacity combine their own observations as witnesses with technical knowledge and background knowledge.

28 See, *inter alia*, ECtHR 7 August 1996, No. 19874/92 (*Ferrantelli and Santangelo v. Italy*), § 51 and ECtHR 15 December 2015, No. 9154/10 (*Schatschaswili v. Germany*), § 103-105-145. The following consideration recurs repeatedly in ECtHR case law: "(...) all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant is given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings."

29 On this subject, see the annotation by T. T. Kooijmans under ECtHR 1 June 2017, No. 24705/16, No. 24818/16 and No. 33893/16 (*Berardi et al. v. San Marino*, NJ 2017/432).

30 SC 20 April 2021 (ECLI:NL:HR:2021:576).

31 ECtHR 19 January 2021, No. 2205/16 (*Keskin v. Netherlands*).

32 SC 20 April 2021 (ECLI:NL:HR:2021:576).

33 SC 13 September 2022 (ECLI:NL:HR:2022:1198).

34 For the roadmap, see ECtHR 15 December 2011, Nos. 26766/05 and 22228/06 (*Al-Khawaja and Tahery v. the United Kingdom*) and ECtHR 15 December 2015, No. 9154/10 (*Schatschaswili v. Germany*).

35 ECtHR 10 July 2012, No. 29353/06 (*Vidgen v. Netherlands*).

36 ECtHR 10 April 2012, nos. 46699/06 and 46099/06 (*Ellis, Simms and Martin v. United Kingdom*), ECtHR 1 February 2018, no. 27962/19 (*Asani v. Macedonia*) and ECtHR 17 November 2020, No. 59453/10 (*Suleyman v. Turkey*).

37 ECtHR 17 November 2020, No. 59453/10 (*Süleyman v. Turkey*).

38 Or in court, but that is not the case here.

39 Section 360(1), second indent, DCCP.

40 Section 344a(2), DCCP.

41 It is noted that this Code of Conduct was repealed on 6 February 2019. However, the reason for this is not that the content of the Code of Conduct is no longer relevant, but rather an administrative one: due to a change in the law, listing the Code of Conduct on the NRGD's website counts as a required method of publication, making an arrangement involving publication in the Government Gazette no longer necessary. Therefore, the standards contained in the Code of Conduct continue to apply.

42 Ministerial Regulation BWBR0031558, effective 19 May 2012.

43 Primo-06467, p. 8062, Primo-12484, p. 12489, and Primo-07058, p. 18.

44 Primo-07058, p. 24 (mere conclusion, citing Primo-05963 (not included in file)) and Primo-12484.

45 Primo-10981, p. 11401 to 11427, Primo-10981a, p. 16491 to 16512, and Primo-10981b, p. 16932 to 16948.

46 Primo-04398, p. 3537 and 3538, respectively, Primo-02660, p. 1772 and 1773, and Primo-07058, p. 22.

47 Primo-05576, p. 4908 and 4909 and Appendix 2 thereto. More technical detail: Primo-05654, p. 1 to 56.

48 Primo-07058, p. 10 and 16, and Primo-00003, p. 82.

49 English translation of the Expert Report produced by the Lithuanian Forensic Expertise Centre dated 22 October 2021, p. 5 and 6, with appendices.

50 Primo Project Report - Cell-Site Evidence dated 28 February 2022, submitted with pleading notes Part V.I - Evidence 3 - Actual conduct, at the hearing on 25 March 2022.

- 51 Intercepted conversation on 17 July 2014 at 12:51:09.
- 52 Primo-02378, p. 93 and 94, read in conjunction with Appendices 18 (Kharchenko mast data) and 4 (Pulatov mast data) to Primo-14912.
- 53 Video Buk TELAR in Snizhne: Forensic expert report - Video Authenticity, Swedish National Forensic Centre (NFC), 31 March 2021. Photo Buk TELAR in Donetsk: Forensic expert report - Image Authenticity, Swedish National Forensic Centre (NFC), 31 March 2021.
- 54 Primo-05982 (LTFO), p. 4.
- 55 Primo-02356, p. 43, in conjunction with Primo-06212, p. 7432 and Appendix 1.
- 56 Primo-04263, p. 166, and Primo-03002, p. 133.
- 57 Primo-03002, p. 136.
- 58 Primo-02421, p. 1393.
- 59 Primo-01483, pp. 958–960, and Primo-00804, pp. 198–300.
- 60 Primo-08673, p. 1947.
- 61 Appendix 1 to Primo-05824, pp. 6233–6236, in conjunction with Appendix 1 to Primo-02148, p. 1264, and Appendix 6 to Primo-03002.
- 62 Appendix 1 to Primo-02148, p. 1266.
- 63 Appendix 30 to Primo-03752, p. 2764.
- 64 Primo-02775, pp. 1838–1845.
- 65 Primo-02356, p. 59, Primo-01120, p. 390, Primo-05388, p. 4424, and Appendix 18 to Primo-01120.
- 66 Primo-06751, pp. 8369 and 8370, and Primo-02356, Figures 12 and 13 on p. 18 (corresponds to 16:22:23 and 16:22:33 Ukrainian summer time).
- 67 Appendix 3 to Primo-07871A, p. 534.
- 68 Appendix 1 to Primo-13327,, p. 12640.
- 69 Primo-13386, pp. 13136–13145.
- 70 Primo-13386, pp. 13146.
- 71 Primo-02356, p. 60.
- 72 Primo-13386, pp. 13146.
- 73 Primo-14143, pp. 1729.
- 74 Official report IJ interview witness M58 dated 30 November - 3 December 2020, pp. 17, and Primo-14143, p. 1744.
- 75 Official report IJ interview witness M58 dated 30 November - 3 December 2020, Appendix 1, map 12.
- 76 Appendices 9 and 9A to Primo-14138.
- 77 Official report IJ interview witness M58 dated 30 November - 3 December 2020, pp. 18, and Primo-14143, pp. 1741 and 1746.
- 78 Appendix 7 to Primo-14139.
- 79 Primo-02389, p. 13.
- 80 Primo-14138, p. 1365, and Official report IJ interview witness M58 dated 30 November - 3 December 2020, pp. 26 and 40.
- 81 Official report IJ interview witness M58 dated 30 November - 3 December 2020, p. 26.
- 82 Primo-14143, pp. 1753 and 1754, Primo-14138, pp. 1365, 1368 and 1370, Official report IJ interview witness M58 dated 30 November - 3 December 2020, pp. 26.
- 83 Primo-14143, pp. 1754 and 1786, Primo-14138, p. 1366 (<https://dossier-zm.local/Documenten/Kast03/Algemeen%20dossier/Bijlagendossier%20Getuigen/02%20Getuigen%20149b%20Sv/Getuige%20M58%20Alyoshin/09.%20Primo-14138%20PV%20verhoor%2030%20april%202019.pdf>), Official report IJ interview witness M58 dated 30 November - 3 December 2020, pp. 23, 24, 29 and 30.
- 84 Primo-14142, p. 1684.
- 85 Primo-14053, pp. 15621–15674.
- 86 Primo-14053, pp. 15634.
- 87 Primo-14053, pp. 15647.
- 88 Primo-14053, pp. 15636 and 15637.
- 89 Primo-14053, pp. 15632.

- 90 Primo-14053, pp. 15626.
- 91 Primo-14053, pp. 15651 and 15652, and intercepted conversation on 8 July 2014 at 15:07:54.
- 92 Primo-14143, pp. 1729.
- 93 Primo-14140, p. 1615, and Appendix 12 to Primo-14140.
- 94 Primo-14131, p. 1287.
- 95 Primo-13963 and Primo-14053, pp. 15662 and 15663.
- 96 Appendix 12a to Primo-14139.
- 97 Primo-05197, Todesflug MH17 Report, 27.02 minutes.
- 98 Primo-14053, pp. 15660.
- 99 Primo-09910, pp. 10891 and 10892, and Primo-02733, pp. 1605–1607.
- 100 Primo-00830, p. 452, and the official record of IJ's interview of the British journalist dated 5 and 6 July 2021, pp. 20 and 22, and Appendices 9, 11 and 12.
- 101 Primo-06762, p. 42, and Primo-06191, p. 686.
- 102 Primo-07419, p. 9440, Primo-02733, p. 1606, and Primo-13911, pp. 15401 and 15402.
- 103 Appendix 1 to Primo-05835, p. 6284.
- 104 Intercepted conversation on 17 July 2014 at 09:31:30 between Dubinskiy and Pulatov; intercepted conversation on 17 July 2014 at 09:54:08 between Dubinskiy and Kharchenko; intercepted conversation on 17 July 2014 at 09:55:20 between Dubinskiy and Pulatov; intercepted conversation on 17 July 2014 at 11:31:21 between Kharchenko and an unknown person.
- 105 Images 3 and 4 (pp. 10 and 11), images 7, 8, 9, 11, 12 and 13 (pp. 14–20) in Primo-02378, Primo-07273, p. 8977, and Primo-09656, pp. 10645 and 10646, read in conjunction with Appendices 34 (-1455), 40 (-7583) (Bibliothekar's transmission mast data) and 1 (-0785 transmission mast data) to Primo-14912. Also the intercepted conversation on 17 July 2014 at 09:08:26 and the intercepted conversation on 17 July 2014 at 09:22:19.
- 106 Primo-09066, pp. 10392–10394 and Appendices 1, p. 10397 and 3, p. 10399 to this judgment. Also Primo-02378, pp. 67–70, 76, 77, 79, 90, 102, 103, 117, 118, 120, 121, 132, 133 and 139, read in conjunction with Appendices 18 (-7518) and 19 (-5197) (Kharchenko's transmission mast data) to Primo-14912.
- 107 Intercepted conversations on 17 July 2014 at 11:31:21, at 11:36:16, at 11:41:33, at 12:42:57, at 13:09:27 and at 14:07:30.
- 108 Volvo flatbed trailer, with a white cab with a blue stripe, yellow sign with black numbers on the side and a red trailer.
- 109 Primo-06191, p. 683.
- 110 Respectively: intercepted conversations on 17 July 2014 at 16:48:44, at 18:44:37 and at 19:54:17.
- 111 Primo-02520 XX02389. Specification of date and time in Primo-04064, p. 16895, and Appendices 1 and 2 thereto, and Appendix 1 to Primo-05819. Authenticity analysis in Primo-12574, pp. 13113–13115 and 13123.
- 112 Primo-05670.
- 113 Appendix 1 to Primo-02148, pp. 1268 and 1269.
- 114 Intercepted conversation on 17 July 2014 at 20:30:52.
- 115 Intercepted conversation on 17 July 2014 at 20:32:44.
- 116 Intercepted conversation on 17 July 2014 at 23:14:47.
- 117 Intercepted conversation on 17 July 2014 at 23:32:34.
- 118 Primo-07946, pp. 723–727.
- 119 Primo-02389, (<https://dossier-zm.local/Documenten/Kast03/Zaakdossier/04%20Afvoerroute/Primo-02389%20Relaas%20proces-verbaal%20dossier%20Afvoerroute.pdf>) p. 53–55 and pp. 60–62.
- 120 Intercepted conversation on 18 July 2014 at 08:02:43 and at 08:03:44.
- 121 Primo-02389, p. 65, read in conjunction with Appendices 34 (-1455) and 40 (-7583) (Bibliothekar's transmission mast data) to Primo-14912.
- 122 Primo-10995, p. 23, and Primo-08495, pp. 10062–10068.
- 123 Primo-02520 XX02389, three rockets visible at 00:06–00:09 seconds, and Primo-08495, p. 10063.
- 124 Primo-07832 XX02378, four rockets seen at 00:52 seconds.
- 125 Primo-4162, figure 13, p. 835, and Primo-3956, p. 788.

- 126 Primo-4162, p. 835.
- 127 Primo-4162, figure 1 (right), p. 826.
- 128 Primo-02746, p. 1705, Primo 12257, p. 12284, and 12285, Primo-04928, p. 3814 and 3815, and Primo-07626, p. 9520.
- 129 Primo-12290, pp. 3127 et seq., with appendices, pp. 3130 to 3138.
- 130 Primo-6049 (FO appendix file), p. 1181.
- 131 Primo-6049 (FO appendix file), p. 1179.
- 132 Primo-9427, p. 2592.
- 133 Primo-8192 (Ukraine 2014-2015), Primo-8648 (Ukraine 2016) and Primo-8909 (Finland). An overview is added as a schedule in Primo-9427, p. 2573; Primo-3956, p. 799, official record of expert witness interview by IJ RC07 dated 29 April 2021, p. 8, Answers to IJ's written questions 07 of 1 April 2021, p. 4.
- 134 REPORT on Research Related to Technical Investigation into Accident Involving Boeing 777-200 9M-MRD Passenger Aircraft of Malaysia Airlines Crashed on July 17, 2014 During Flight MH17 from Amsterdam to Kuala Lumpur, Moscow 2020, p. 133.
- 135 Primo-12419, pp. 3212.
- 136 Identified by a weight higher than 2.5 grams (slightly higher than the original weight of a square destructive element of 2.35 grams).
- 137 Primo-12419, pp. 3217.
- 138 Primo-3956, p. 788.
- 139 Official record of joint IJ interview of expert witnesses dated 7 May 2021, p. 12.
- 140 Primo-09814, p. 18757.
- 141 Primo-05388, p. 4425.
- 142 SIN AAHZ4490NL#1, Primo-3956, p. 790, weight 6.1 grams.
- 143 Primo-3956, p. 799 (item 3).
- 144 Primo-12290, pp. 3127 et seq., with appendices, pp. 3130 to 3138.
- 145 Primo-12419, pp. 3234 and 3235.
- 146 Primo-12257, pp. 12286 to 12288.
- 147 Primo-6937, p. 1313.
- 148 Primo-7626, pp. 1985.
- 149 Primo-7626, pp. 1983 to 1990, photos 513 to 637 in Courtbook Morrell.
- 150 Official record of joint IJ interview of expert witnesses dated 7 May 2021, p. 10.
- 151 Primo-9126, p. 2516.
- 152 Primo-6418, p. 1209.
- 153 Primo-7626, pp. 1983 to 1990.
- 154 Primo-9126, p. 2516.
- 155 Official record of joint IJ interview of expert witnesses dated 7 May 2021, p. 8.
- 156 Primo-06191, p. 4 and 5, Primo-04329, pp. 31 and 32, Official report IJ interview RC02 dated 23, 24 and 25 November 2020, p. 35, Primo-05332, pp. 1 and 8, Primo-05332, photo 3, p. 4 and Primo-02356, p. 55.
- 157 Primo-06191, p. 4.
- 158 Official report IJ interview witness RC02 dated 23, 24 and 25 November 2020, p. 35.
- 159 Primo-05332, pp. 4 and 5.
- 160 Official record of joint IJ interview of expert witnesses (with appendices) dated 7 May 2021, p. 1-148.
- 161 Official record of joint IJ interview of expert witnesses dated 7 May 2021, p. 77 and pp. 144-145.
- 162 Primo-07670, pp. 1-24.
- 163 Appendix 3 to Primo-06462, paragraph 6.
- 164 Primo-06762, Chapter 6, pp. 68-77.
- 165 Primo-06655, pp. 1-40 and Primo-04672, pp. 1-28, each with appendices.
- 166 Appendix 117 to Primo-06655, p. 620, and Primo-04672, p. 6, map 2.
- 167 Primo-05426, p. 5 of 10.
- 168 Primo-03482, pp. 2178.

- 169 Primo-03482, pp. 2178 and 2179, Primo-13516, p. 13622, Primo-07441, p. 9454 and Primo-06561, p. 8177.
- 170 Primo-06446, pp. 12–14, Primo-12269, pp. 12301 and 12302, Primo-12412, pp. 12413 and 12419, and Primo-14188, pp. 16586–16589.
- 171 Primo-02173, p. 1289.
- 172 Primo-10384, p. 11194.
- 173 Appendix 1 to Primo-12269, pp. 12304 and 12305.
- 174 Primo-11570, p. 11905.
- 175 Primo-04044, pp. 766 and 771.
- 176 Primo-07584, pp. 1.
- 177 Primo-09862, p. 1896.
- 178 Primo-02894, pp. 1877 and 1881, and Primo-03334, p. 2054.
- 179 Primo-07584, pp. 7 and 19, and intercepted conversation on 16 June 2014 at 12:56:35.
- 180 Intercepted conversation on 7 March 2015 at 22:03:17 and intercepted conversation on 8 March 2015 at 18:45:56.
- 181 Primo-07733, p. 5, and Primo-14266, p. 5.
- 182 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 82, 87 and 88.
- 183 Primo-05841, pp. 6317, 6322, 6329–6331, and 6334.
- 184 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 36 and 37.
- 185 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 38 and 39.
- 186 NFI Report dated 29 July 2021, Comparative voice analysis of fourteen recordings of telephone conversations, p. 16.
- 187 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 75–83 and p. 95.
- 188 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 87, 89 and 90.
- 189 Translation of the official record of the videos of Pulatov and Dubinskiy attached to the file, prepared by the investigating judge on 15 January 2021, pp. 23, 25, 31, 63, 64, 68 and 97–99.
- 190 Primo-10072, p. 5.
- 191 Primo-10072, p. 5, Primo-03608, pp. 2283–2288, Primo-03801, pp. 2910 and 2911, and Primo-12637, p. 13424.
- 192 Primo-08294, p. 10021.
- 193 Primo-03608, pp. 2283 to 2288.
- 194 Appendix 2 to Primo-03801, p. 2915.
- 195 Primo-13333, p. 12644.
- 196 Primo-03801, pp. 2910 and 2911, and Appendix 2 hereto, p. 2915.
- 197 Intercepted conversation on 6 July 2014 at 08:19:45.
- 198 Appendix 2 to Primo-03801, p. 2918.
- 199 Several of these individuals hold other positions at earlier or later moments.
- 200 Primo-03883, p. 3013–3028.
- 201 Primo-05484, pp. 4509.
- 202 Official report, Translation of the videos in case file of Pulatov and Dubinskiy, dated 15 January 2021, pp. 12–16 and page 21.
- 203 Official report, Translation of the videos in the case file of Pulatov and Dubinskiy, dated 15 January 2021, pp. 40.
- 204 SC 2 December 2014 (ECLI:NL:HR:2014:3474), SC 24 March 2015 (ECLI:NL:HR:2015:718) and SC 5 July 2016 (ECLI:NL:HR:2016:1316).
- 205 For example, SC 8 April 1997 (ECLI:NL:HR:1997:ZD0681, NJ 1997, 443).
- 206 SC 29 April 1997 (ECLI:NL:HR:1997:ZD0148, NJ 1997, 654); District Court of Limburg 13 November 2019

(ECLI:NL:RBLIM:2019:10220); SC 12 June 2018 (ECLI:NL:HR:2018:895) and SC 29 April 1997 (NJ 1997, 654).
207 *Target Acquisition Radar*, a target-selecting radar component of a Buk battalion, with a much longer range than the radar of a TELAR.

208 That annex is included in Appendix 1 to this judgment.

209 That annex is included in Appendix 1 to this judgment.

210 ECLI:NL:HR:2019:793, under 2.2.

211 Convention on Court Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 and 30 October 2007, respectively.

212 These proceedings are based on a provision of the US Torture Victim Protection Act which reads: "*an individual who under actual or apparent authority of color of law of any foreign state or nation (...) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages*".

213 To avoid conflicting judgments in civil cases between the same parties on the same question, any judge who is presented with a case that is already being heard by a competent court abroad must decline jurisdiction.

214 EC Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations, OJEU 2007 L 199.

215 *Rome Regulations Commentary*, Galf-Peter Calliess (Wolters Kluwer, second edition, 2015), p. 526: "*There is a long-standing controversy as to whether the escape clause may also be invoked to create a uniform connection to a single law in cases of mass accidents that involve many victims who have their habitual residence in different states. This question should be answered in the negative. The existence of a closer connection has to be determined with regard to each individual relationship between the tortfeasor(s) and the respective victims.*"

216 Parliamentary Papers 34 257, No. 6. Memorandum regarding the report, under "7. Transitional Law."

217 Netherlands Supreme Court 27 September 2016 (ECLI:NL:HR:2016:2201) and Netherlands Supreme Court 4 October 2016 (ECLI:NL:HR:2016:2241).

218 Resolution of the Plenum of the Supreme Court of Ukraine "On Ukrainian courts" practice of applying legislation on recovery of pecuniary damages arising from criminal offence and recovery of groundlessly acquired property No. 3 dated 31 March 1989.

219 Analogous, for example, to the rulings in *Vallianatos and others vs. Greece*, ECHR 7 November 2013 (29381/09 and 32684/09) and *Oliari and others vs. Italy*, ECHR 21 October 2015 (18766/11 and 36030/11).

220 See *Verkeersrecht* (journal) 2018/156, *De wet affectieschade in werking* [The law regarding emotional damage in effect], S.D Lindenbergh: under 5.

221 The names of these injured parties and – to the extent necessary – the names of the loved ones about whom they are speaking have been redacted by the court. Appendix 4 lists the names of the injured parties, also indicating the numbering used in this judgment.

222 Regardless of the living situation on 17 July 2014.

223 Regardless of the age of the children. Includes biological, adoptive, stepfamily and foster relationships.

224 Includes biological, adoptive, stepfamily and foster relationships.

225 Includes biological and adoptive relationships, but not foster or stepfamily relationships.

226 Includes biological and adoptive relationships, but not foster or stepfamily relationships.

227 Includes biological siblings, including half-siblings, stepsiblings and adoptive and foster relationships.

228 Where the court addresses individual claims below, it will refer to those injured parties – at their own request – in each case using a 'code' (e.g. A1.1). The codes A1 to A6 correspond to the six respective counsel for the relatives, and the number after the point is the number which counsel in question assigned to that injured party.

229 SC 1 June 2021 (ECLI:NL:HR:2021:812).

230 Primo-08529, p. 10076, Primo-07316, p. 9284 and intercepted conversation on 19 July 2014 at 12:28:02.

231 Primo-04996, p. 4094.

232 Primo-05024, pp. 4173 and 4174.

233 Primo-03490, p. 2221, Primo-02712, p. 1592, and Primo-02743, p. 1694.

234 Primo-03145, p. 1988.

235 Primo-05542, p. 4579.

236 Primo-05359, p. 4396.

237 Primo-03604, pp. 2274 and 2281.

- 238 Primo-08704, p. 10244.
- 239 Primo-09443, p. 10613 and Primo-10336, p. 11140.
- 240 Primo-03480, pp. 2169 and 2173.
- 241 Primo-04830, p. 14931.
- 242 Primo-08268, p. 9995.
- 243 Primo-04186, p. 3323.
- 244 Primo-03578, pp. 2241–2243.
- 245 Primo-07297, pp. 9050 and 9058.
- 246 Primo-04057, pp. 3140 and 3146.
- 247 Primo-00003, p. 10.
- 248 Primo-04307, pp. 3365 and 3370.
- 249 Official record of questioning of witness S21 by the investigating judge between 1 May 2021 and 1 August 2021, pp. 22 and 23.
- 250 Primo-02992, p. 1903.
- 251 Primo-04979, pp. 4014 and 4017.
- 252 Primo-04304, pp. 3351 and 3352.
- 253 Primo-04384, p. 3497.
- 254 Based on information from intercepted conversations on 12 July 2014 at 16:12:23, on 16 July 2014 at 18:55:28 and on 16 July 2014 at 20:37:39.
- 255 Appendix 21 to Primo-05427, p. 149.
- 256 Primo-05532, p. 4574, and intercepted conversation on 15 July 2014 at 16:29:56.
- 257 Primo-04017, pp. 3119 and 3120.
- 258 Primo-04790, pp. 3605, 3608 and 3614.
- 259 Primo-05760, pp. 6159 and 6163.
- 260 Primo-03364, p. 1114 and Primo-04502, p. 3.
- 261 Primo-05708, p. 6118, and intercepted conversation on 15 July 2014 at 14:52:02.
- 262 Intercepted conversation on 8 June 2014 at 11:30:47.
- 263 Intercepted conversation on 8 June 2014 at 11:46:33.
- 264 Intercepted conversation on 6 July 2014 at 16:48:47.
- 265 Intercepted conversation on 6 July 2014 at 17:13:00.
- 266 Intercepted conversation on 7 July 2014 at 13:31:28.
- 267 Intercepted conversation on 15 July 2014 at 13:25:41.
- 268 Intercepted conversation on 15 July 2014 at 13:29:07.
- 269 Intercepted conversation on 15 July 2014 at 13:42:12.
- 270 Intercepted conversation on 15 July 2014 at 13:57:01.
- 271 Intercepted conversation on 15 July 2014 at 14:36:36.
- 272 Intercepted conversation on 15 July 2014 at 14:37:46.
- 273 Intercepted conversation on 15 July 2014 at 15:23:23.
- 274 Intercepted conversation on 15 July 2014 at 16:17:15.
- 275 Intercepted conversation on 15 July 2014 at 16:29:56.
- 276 Intercepted conversation on 15 July 2014 at 17:56:41.
- 277 Intercepted conversation on 15 July 2014 at 19:37:27.
- 278 Intercepted conversation on 15 July 2014 at 20:27:43.
- 279 Intercepted conversation on 15 July 2014 at 21:16:33.
- 280 Intercepted conversation on 15 July 2014 at 22:54:14.
- 281 Intercepted conversation on 15 July 2014 at 23:29:24.
- 282 Intercepted conversation on 16 July 2014 at 04:37:06.
- 283 Intercepted conversation on 16 July 2014 at 07:34:17.
- 284 Primo-03610, p. 2335, and Primo-11298, p. 11664.

- 285 Primo-11298, p. 11664.
- 286 Intercepted conversation on 16 July 2014 at 11:43:49.
- 287 Intercepted conversation on 16 July 2014 at 11:50:49.
- 288 Intercepted conversation on 16 July 2014 at 12:14:35.
- 289 Intercepted conversation on 16 July 2014 at 13:16:12.
- 290 Intercepted conversation on 16 July 2014 at 13:22:24.
- 291 Intercepted conversation on 16 July 2014 at 13:26:21.
- 292 Intercepted conversation on 16 July 2014 at 13:33:02.
- 293 Intercepted conversation on 16 July 2014 at 13:39:27.
- 294 Intercepted conversation on 16 July 2014 at 15:28:24.
- 295 Intercepted conversation on 16 July 2014 at 16:23:14.
- 296 Intercepted conversation on 16 July 2014 at 17:11:11.
- 297 Intercepted conversation on 16 July 2014 at 17:52:25.
- 298 Intercepted conversation on 16 July 2014 at 17:54:42.
- 299 Intercepted conversation on 16 July 2014 at 18:12:49.
- 300 Intercepted conversation on 16 July 2014 at 18:43:08.
- 301 Intercepted conversation on 16 July 2014 at 18:55:28.
- 302 Intercepted conversation on 16 July 2014 at 19:09:20.
- 303 Intercepted conversation on 16 July 2014 at 19:13:30.
- 304 Intercepted conversation on 16 July 2014 at 19:48:23.
- 305 Intercepted conversation on 16 July 2014 at 19:57:59.
- 306 Intercepted conversation on 16 July 2014 at 20:06:49.
- 307 Intercepted conversation on 16 July 2014 at 20:11:57.
- 308 Intercepted conversation on 16 July 2014 at 20:45:18.
- 309 Intercepted conversation on 16 July 2014 at 20:49:55.
- 310 Intercepted conversation on 16 July 2014 at 20:57:01.
- 311 Intercepted conversation on 16 July 2014 at 22:02:39.
- 312 Intercepted conversation on 17 July 2014 at 00:12:15.
- 313 Intercepted conversation on 17 July 2014 at 00:17:09.
- 314 Intercepted conversation on 17 July 2014 at 00:26:56.
- 315 Intercepted conversation on 17 July 2014 at 07:05:46.
- 316 Intercepted conversation on 17 July 2014 at 08:23:24.
- 317 Intercepted conversation on 17 July 2014 at 08:27:03.
- 318 Intercepted conversation on 17 July 2014 at 08:38:20.
- 319 Intercepted conversation on 17 July 2014 at 09:08:26.
- 320 Primo-09935, p. 11005.
- 321 Primo-10305, pp. 11095–11109.
- 322 Appendix 1, pp. 12613, 12615 and 12616, to Primo-13325.
- 323 Primo-12574, pp. 13100 and 13121, Primo-13488, p. 13157, and Forensic expert report - Image Authenticity, Swedish National Forensic Centre (NFC), 31 March 2021, Appendix 2, pp. 5, 6, 7, 8 and 11.
- 324 Intercepted conversation on 17 July 2014 at 09:20:25.
- 325 Intercepted conversation on 17 July 2014 at 09:22:19.
- 326 Intercepted conversation on 17 July 2014 at 09:23:13.
- 327 Intercepted conversation on 17 July 2014 at 09:24:51.
- 328 Intercepted conversation on 17 July 2014 at 09:31:30.
- 329 Intercepted conversation on 17 July 2014 at 09:51:39.
- 330 Intercepted conversation on 17 July 2014 at 09:53:10.
- 331 Intercepted conversation on 17 July 2014 at 09:54:08.

- 332 Intercepted conversation on 17 July 2014 at 09:55:20.
- 333 Intercepted conversation on 17 July 2014 at 10:01:03.
- 334 Intercepted conversation on 17 July 2014 at 10:04:43.
- 335 Primo-03510 XX2378.
- 336 Primo-01213 XX03510.
- 337 Primo-03510, pp. 2224 and 2225, and Primo-05522, pp. 4546–4549.
- 338 Primo-01226, p. 642.
- 339 Appendix 1, pp. 2253 and 2254, to Primo-03584.
- 340 Primo-06616, pp. 8244 and 8245, and pp. 8251, 8252 and 8255.
- 341 Primo-12574, pp. 13103–13105 and 13122.
- 342 Primo-07832 XX02378.
- 343 Primo-07832, pp. 9636 and 9637.
- 344 Primo-07288, pp. 9009 and 9012.
- 345 Appendix 1, pp. 12625, 12626 and 12628, to Primo-13326.
- 346 Primo-08664, pp. 10189–10210.
- 347 Primo-12574, pp. 13107–13110 and 13122.
- 348 Intercepted conversation on 17 July 2014 at 11:31:21.
- 349 Primo-01213 XX01309 IMG_0647.
- 350 Appendices 3 and 6 to Primo-03445, p. 2140.
- 351 Primo-01226, p. 642 and Appendix 2 thereto.
- 352 Appendix 1, pp. 1247, 1253, 1254, 1269 and 1270, to Primo-02148. The video with the gun truck was examined in Appendix 1 to Primo-05818, KNMI Investigation Assessment of 01Zuhres Footage, May 2015, pp. 6193 and 6194. Primo-02378, p. 73.
- 353 Primo-06202 XX02378.
- 354 Primo-06202, p. 7389.
- 355 Primo-02378, p. 85.
- 356 Primo-07243, p. 8968.
- 357 Primo-10010, 11055–11059, and Appendices 2 and 3 thereto.
- 358 Primo-10695, pp. 11362, 11363 and 11367.
- 359 Appendix 1, pp. 1247, 1255 and 1256, to Primo-02148.
- 360 Primo-09022, p. 10375.
- 361 Intercepted conversation on 17 July 2014 at 12:39:32.
- 362 Intercepted conversation on 17 July 2014 at 12:42:57.
- 363 Intercepted conversation on 17 July 2014 at 12:51:09.
- 364 Intercepted conversation on 17 July 2014 at 13:09:27.
- 365 Primo-03883, p. 3024 and Primo-10646, pp. 11326, 11327 and 11329.
- 366 Appendix 1, pp. 1247, 1258 and 1259, to Primo-02148.
- 367 Primo-00131 XX01312.
- 368 Primo-05899, pp. 6574–6578, read in conjunction with Primo-02378, p. 128.
- 369 Appendix 1, pp. 1247, 1261–1263 and 1269, to Primo-02148.
- 370 NFI report Investigation into 'encoded date' of video file 'The weapon that killed the Malaysians, Snizhne, 17 July 2014', dated 9 February 2021, pp. 15, 17 and 18.
- 371 Forensic expert report - Video Authenticity, Swedish National Forensic Centre (NFC), 30/31 March 2021, Appendix 1, pp. 7, 8 and 22.
- 372 Primo-05484, pp. 4508 and 4509, and Primo-09443, p. 10606.
- 373 Intercepted conversation on 17 July 2014 at 14:07:30.
- 374 Intercepted conversation on 17 July 2014 at 14:10:00.
- 375 Intercepted conversation on 17 July 2014 at 14:33:10.
- 376 Intercepted conversation on 17 July 2014 at 14:34:51.

- 377 Intercepted conversation on 17 July 2014 at 15:07:52.
 - 378 Primo-01120, p. 390 (taking into account local time differences).
 - 379 Intercepted conversation on 17 July 2014 at 16:22:33.
 - 380 Civilian from Druzhkovka; Primo-04307, p. 3360.
 - 381 Intercepted conversation on 17 July 2014 at 16:35:30.
 - 382 Intercepted conversation on 17 July 2014 at 16:48:44.
 - 383 Intercepted conversation on 17 July 2014 at 17:16:28.
 - 384 Intercepted conversation on 17 July 2014 at 17:42:43.
 - 385 Intercepted conversation on 17 July 2014 at 18:20:32.
 - 386 Intercepted conversation on 17 July 2014 at 18:28:29.
 - 387 Intercepted conversation on 17 July 2014 at 18:40:45.
 - 388 Intercepted conversation on 17 July 2014 at 18:44:37.
 - 389 Intercepted conversation on 17 July 2014 at 19:01:38.
 - 390 Intercepted conversation on 17 July 2014 at 19:28:00.
 - 391 Intercepted conversation on 17 July 2014 at 19:35:46.
 - 392 Intercepted conversation on 17 July 2014 at 19:52:23.
 - 393 Intercepted conversation on 17 July 2014 at 19:54:17.
 - 394 Intercepted conversation on 17 July 2014 at 19:59:11.
 - 395 Intercepted conversation on 17 July 2014 at 20:30:52.
 - 396 Intercepted conversation on 17 July 2014 at 20:32:44.
 - 397 Intercepted conversation on 17 July 2014 at 20:41:00.
 - 398 Intercepted conversation on 17 July 2014 at 20:54:12.
 - 399 Intercepted conversation on 17 July 2014 at 21:13:42.
 - 400 Intercepted conversation on 17 July 2014 at 21:32:39.
 - 401 Intercepted conversation on 17 July 2014 at 21:40:49.
 - 402 Primo-05484, pp. 4508 and 4509.
 - 403 Intercepted conversation on 17 July 2014 at 21:47:47.
 - 404 Intercepted conversation on 17 July 2014 at 22:35:02.
 - 405 Intercepted conversation on 17 July 2014 at 23:05:49.
 - 406 Intercepted conversation on 17 July 2014 at 23:12:17.
 - 407 Intercepted conversation on 17 July 2014 at 23:14:47.
 - 408 Intercepted conversation on 17 July 2014 at 23:27:33.
 - 409 Intercepted conversation on 17 July 2014 at 23:32:34.
 - 410 Intercepted conversation on 17 July 2014 at 23:34:14.
 - 411 Intercepted conversation on 18 July 2014 at 00:23:38.
 - 412 Intercepted conversation on 18 July 2014 at 00:25:26.
 - 413 Intercepted conversation on 18 July 2014 at 01:26:38.
 - 414 Intercepted conversation on 18 July 2014 at 07:17:31.
 - 415 Intercepted conversation on 18 July 2014 at 07:41:06.
 - 416 Intercepted conversation on 18 July 2014 at 07:44:57.
 - 417 Intercepted conversation on 18 July 2014 at 08:00:37.
 - 418 Intercepted conversation on 18 July 2014 at 08:01:35.
 - 419 Intercepted conversation on 18 July 2014 at 08:02:43.
 - 420 Intercepted conversation on 18 July 2014 at 08:03:44.
 - 421 Intercepted conversation on 18 July 2014 at 10:50:10.
 - 422 Intercepted conversation on 18 July 2014 at 11:22:50.
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Exhibit E

G. I. Blinov, GROUND ARTILLERY FIRING THEORY (Military Artillery Command Academy,
Leningrad, 1956)

(excerpt, translation)

**Excerpt
Translation**

G. I. Blinov, GROUND ARTILLERY FIRING THEORY (Military Artillery Command Academy, Leningrad, 1956).

GROUND ARTILLERY FIRING THEORY

[...]

The textbook "Ground Artillery Firing Theory" is intended for students of the Military Artillery Command Academy. It can also be used within the troops as a teaching guide for officers for their more in-depth study of firing theory.

The first part of the textbook deals with projectile dispersion during firing, hit probability and the theoretical justification of ranging to establish a bracket.

The second part describes the magnitude method of adjustment, shift of fire and silent registration

[...]

p. 30

Thus, the shell dispersion in range in case of battery fire increases by an average of 25% as compared to the shell dispersion in case of firing a single gun.

It should be noted that we obtained the numerical value E [...] by averaging the mean errors of registration fire with two-station observation.

[...]

Thus, depending on the calibration accuracy and the number of guns in the battery, the shell dispersion in case of battery fire will be 17-35% (25% on average) higher than that in case of firing a single gun.

Exhibit F

VKontakte page, *Novorossiya militia update. Photo and video from eyewitnesses*
(9 January 2015)

(translation)

Translation

Vkontakte page, *Novorossiia militia update. Photo and video from eyewitnesses (9 January 2015)*, available at: https://vk.com/wall-57424472_38522, https://vk.com/wall-57424472_38414.

Novorossiia militia updates

9 Jan 2015

Photos and video from eyewitnesses.

"As a result of the shelling by the AFU of Dokuchaievsk there were direct hits of private houses in the village of Yuzhniy (Old Colony). One person was killed. Residents stayed in basements for several hours."

Novorossiia militia updates

9 Jan 2015

09.01.15.

Message from a resident of Dokuchaevsk.

"On the night of January 8 to 9, the city of Dokuchayevsk was subjected to heavy shelling by the Ukrainian army and the National Guard of Ukraine. The shelling came from the direction of Novotroitskoye settlement and Bugas village. The death-squads fired from a heavy gun, one person was killed and two houses were destroyed as a result of the shelling."

From the militia.

"On the night of January 8-9, it was not quiet near Mariupol. From the side of Pavlopol village, explosions were heard. The Novoazovsk area got under fire from the Ukrainian armed forces."

Exhibit G

Vkontakte page, *Novorossiya militia Updates. Overview report* (9 January 2015)

(translation)

Translation

Vkontakte page, *Novorossiya militia Updates. Overview report (9 January 2015)*, available at: https://vk.com/wall-57424472_38467.

Updates from the Novorossiya militia

9 Jan 2015.

Overview report from the Novorossiya militia's Information Bureau.

"During the day, the situation in Donbass remained tense and has tendency to escalate at the moment. In violation of the achieved agreements on the ceasefire in certain sections of the line of contact, the Bandera supporters continued to shell militia positions.

Twenty-six instances of the use of weapons have been recorded:

Between 18.00 and 18.30, from positions located in the vicinity of the village of Krymskoe settlement, artillery fire was fired at the militia holding their positions near the village of Sokolniki (33 km north-west of Lugansk);

At 18.15, from a tank and at 21.30, from anti-tank guided missiles and small firearms from the direction of Peski village were fired at the positions of the DPR Army in the vicinity of Oktyabrskaya mine;

At 18.20 artillery and at 22.15 mortars from the direction of Nykolayevka were shelled militiamen near Dokuchaievsk;

At 18.25. From the direction of the village of Bogdanivka, mortars were fired at the positions of the People's Militia in the area of Styla (26 km south of Donetsk);

At 18.55, there was small arms fire from the direction of Shumy village at Donbas defenders in the vicinity of mines 6 and 7;

At 20.35, there was mortar fire from the direction of Opytnoye settlement of the militia near the village of Spartak (8 km north of Donetsk);

At 21.25, 21.55 and 01.00, Kuibyshevskiy (houses 147 and 190 Kuibyshev Street) and Petrovskiy districts of Donetsk were shelled by barrel artillery;

At 22.00, from the direction of the village of Granitnoye, artillery shelling struck Donbas militia positions near the settlement of Solntsevo (48 km south-east of Donetsk);

At 22.15, from the direction of the town of Volnovakha, defence lines near the village of Petrovskoye (36 km south-east of Donetsk) were shelled;

At 23.00, from the direction of Novotroitske village, artillery shelling positions of the DNR Army near the town of Dokuchaievsk came under artillery fire;

At 23.00, the militia came under artillery fire near the settlement of Yasnoye (19 km south-west of Donetsk);

At 23.10, artillery fire from the direction of Slavnoye village hit Donbass defenders near the village of Yelenovka (13 km north-west of Donetsk);

At 23.15 from the direction of the town of Krasnogorovka, and at 23.40 from the direction of the village of Nevelskoye, positions of the DPR Army were shelled near Abakumova mine.

Militia casualties as well as civilian casualties and damage to infrastructure are being identified. Shellings of militiamen blocking the death-squads at Donetsk airport continued:

At 18.35 from the Peski settlement, small arms fire, and at 22.50 and 00.05, the Volvo Centre was shelled with mortars;

At 20.05, 23.15 and 23.20 mortars were fired from positions in Avdeyevka and Peski, and at 23.25, an old terminal station was shelled by barrel artillery.

According to DPR intelligence, the withdrawal of fascist units as well as heavy arms and military equipment from the line of contact with the self-defence units of the Donetsk and Lugansk people's republics has not been observed.

Death-squads are actively engaged in sabotage and reconnaissance activities.

Exhibit H

VKontakte page, *Novorossiya militia Updates. Summary of military developments in Novorossiya* (11 January 2015)

(translation)

Translation

Vkontakte page, *Novorossiya militia Updates. Summary of military developments in Novorossiya* (11 January 2015), available at: https://vk.com/wall-57424472_38757.

Novorossiya militia Updates

11 Jan 2015 at 13:00

Summary of military developments in Novorossiya by military observer Boris Rozhin ("colonelcassad").

"Massive shelling of Donetsk, as well as fighting in the LPR near the Bakhmutka highway and in the Stanychno-Luganskyi direction has continued in Novorossiya over the course of the day. The intensification of hostilities comes amid talks and politicians of the Donetsk and Lugansk people's republics and their leaders about the need for a peaceful settlement of the conflict in Donbas.

However, so far these talks have not brought tangible results, as the sounds of fighting and artillery cannonade can still be heard in the frontline towns and villages of Novorossiya.

Military developments in the DPR

Donetsk was under heavy shelling by Ukrainian artillery all night and day on January 10. Kuybyshevskiy, Kievskiy and Petrovskiy districts of the city were shelled, with Oktyabrskiy settlement and Azotniy district suffering the most damage. Ukrainian security forces shelled the settlements of Opytnoye, Tonenkoye, Orlovka, Peski, Krasnogorovka and Maryinka. As a result of the shelling, there was extensive damage to residential buildings and communications, and there were casualties among the civilian population. There was increased activity on the outskirts of Donetsk by the Ukrainian armed forces attempting to break through to the militia positions, and there were also reports of flights by Ukrainian drones.

From 04:00 a.m. (Moscow time), the Petrovskiy district was shelled from Krasnogorovka; hits were recorded in the residential areas of Trudoviye Reservi, 11 Poselok and Tikhiy. From 08:47 the Ukrainian armed forces subjected to massive shelling the Putilovka area, the Groves, the Putilovka bridge, the Shcheglovka settlement and the Tochmash area. At 9:40 a.m., the Ukrainian military launched an artillery attack on the Petrovskiy district of Donetsk from positions in the vicinity of Avdeyevka. At 11:15 a.m., mortar fire was launched from the direction of Peski on the Oktyabrskaya mine. From 11:40 Ukrainian forces fired artillery and mortars from the direction of Peski and Opytnoye on the area of the Metro shopping mall and Donetsk airport. At around 17:45 Ukrainian forces fired Grad MLRS from the direction of Orlovka to the area of the airport and the Metro shopping mall.

From 11:30 onwards, the DPR army returned fire at the Ukrainian armed forces' positions in the direction of Peski (with tank artillery fire) and Maryinka (with anti-aircraft fire). As a result of militia fire on Ukrainian armed forces positions in Maryinka, near the Shevchenko collective farm, an ammunition depot of the Ukrainian armed forces was destroyed. There were also reports of counterattacks in Maryinka with the use of grenade launchers and small arms. Militia attacked the Ukrainian armed forces' checkpoint near Marinka, located at the circle of the road in the direction of Ugledar.

As of 16:00, fighting was taking place in Peski and continued until 19:00 with the use of small arms and tank guns. As of 21:00 the fighting subsided, with short bursts of machine gun fire from the Ukrainian security forces.

Due to the increased intensity of shelling in Donetsk, the militia command is conducting a redeployment of its units. In the morning of 10 January, a convoy of Ural trucks and Kamaz trucks drove from Shakhtyorsk towards Donetsk, and around 11:30 a.m., a convoy of Ural trucks with personnel and ammunition entered Donetsk from Makeyevka.

Around 8am on 10 January, small arms clashes was taking place near Opytnoye and Avdeyevka. Militia also fired mortars at the armed forces' positions from the direction of Yasynovataya.

On 10 January, the Donetsk-Mariupol motorway was closed due to heavy shelling and the danger of Ukrainian forces breaking into the city. Traffic was resumed in the evening.

At around 01:00 on 10 January, the Ukrainian armed forces launched an attack on the outskirts of Gorlovka using Uragan multiple-launch rocket systems and a 2C7 Pion heavy machine gun. No damage or casualties were reported as a result of the shelling. At 14:15, mortar fire from the Yuzhnaya mine hit positions of the Donbas defenders defending the lines on the north-western outskirts of Gorlovka.

The night and morning of 10 January in Nikishino passed quietly, as of 10:00 it was quiet. In the afternoon, fighting broke out in Nikishino with the use of small arms, grenade launchers and mortars. The fighting was positional in nature and no casualties were reported. By 23:30 both Ukrainian forces and militia ceased fire.

DPR

At 07:00 on 10 January, volleys of artillery could be heard in the vicinity of Yelenovka. Between 11:30 and 12:40 a.m., artillery, mortars and tanks fired at least six times from the direction of Novotroitskoye, Taramchuk and Slavnoye villages in the vicinity of Yelenovka.

At 9:15, 13:00 and 13:45 mortars, and at 10:30, the militias defending positions near the town of Dokuchayevsk were shelled by Ukrainian forces from the settlements of Beryozovoye, Olginka and Novotroitskoye. At 13:10, the militia defending near the settlement of Yasnoye were shelled from Ukrainian tanks from the direction of the village of Stepnoye.

Military developments in the LPR

On 10 January, fighting intensified in the area of settlements along the Bakhmutka highway. During the day, artillery and tank dueling took place between the 29th (AFU) and 31st (LPR) checkpoints on the Bakhmutka highway. The militia suffered one fatality and one wounded, while no casualties were reported for the Ukrainian armed forces.

In the vicinity of Krymskoye, the militia went on the attack, the militia's hit groups opened fire on the Ukrainian armed forces' tank and mortar positions near Krymskoye.

On 10 January, Ukrainian security forces started shelling Slovyanoserbsk from Grad MLRS and mortars. The Lugansk people's republic's militia positions near the town of Smiloye were hit by Ukrainian artillery fire from Tryokhizbenka at 7:30 a.m. The militia returned fire with artillery fire at the positions of the Ukrainian security forces near Tryokhizbenka.

On January 10, from the direction of the town of Shchastiye, the Ukrainian military shelled militia positions in the settlement of Veselaya Gora. Ukrainian shells hit houses and communications and, as a result of the shelling, a gas pipeline was damaged.

LPR

On 10 January, active fighting continued near Stanytsa Luganska. At 9:05 and 13:05 from the Kondrashivska-Nova station, and at 12:20 from Stanytsa Luganska, Ukrainian forces fired mortars at the Desulya rest house in Veselenkoye village. Ukrainian forces also fired from their roadblocks near Stanytsa Luganska using mortars and howitzers at militia positions near Valuyskoye and on the southern outskirts of Stanytsa, near the bridge. As a result of the shelling, there were hits in the residential area, and according to preliminary reports, there is one wounded civilian.

Other information

The foreign ministers of the Normandy quartet - Ukraine, Russia, Germany and France - will meet in Berlin on Monday, January 12, according to the German Foreign Ministry.

Exhibit I

VKontakte page, *Novorossiya militia Updates. Morning report* (11 January 2015)

(translation)

Translation

Vkontakte page, *Novorossiya militia Updates. Morning report (11 January 2015)*, available at: https://vk.com/wall-57424472_38748.

Novorossiya militia Updates

11 Jan 2015

Morning report from the Novorossiya Militia Information Bureau.

The Nazis are conducting sabotage and reconnaissance activities. In some areas in violation of the ceasefire agreements are observed shelling of militia positions and civilian infrastructure.

At least twenty-two instances of the use of weapons by the death-squads have been recorded:

At 17.30 artillery shelling from the direction of Orekhovo hit militia positions near the settlements of Prishib and Smeloye. The same positions of Donbas defenders were shelled at 18.00 from the direction of Krymskoye;

At 17.50 and at 5.30 from the direction of Avdeyevka, the old terminal of Donetsk airport was shelled from the barrel artillery;

At 17.50, the southern outskirts of Dokuchaievsk were shelled;

At 18.05, from positions located near the village of Opytnoye, artillery shelled Putilovskiy Bridge and bus terminal of Donetsk;

At 18.30, from the direction of Lopaskino locality, mortars were fired at the militia positions in the Dolgoye area;

At 18.30, 20.00 and 21.10 from the village of Trekhizbenka, barrel artillery shelled LPR militia positions near Slavyanoserbksk;

At 19.30 from the direction of Kondrashovskoye-Novoye station, mortars were fired at the LPR militia checkpoint near Stanichno-Luganskoye;

At 20.10, Pankovka was shelled by gunfire;

At 21.45, mortar fire from the direction of Petrovka village hit the militia's positions near Veselaya Gora. The same positions were shelled three times from the settlement of Shchastye (at 02.55 by small arms, at 03.00 by mortars and at 03.05 by a tank);

At 23.00, from the direction of Maiorsk, artillery fire hit the militia's positions near Gorlovka (mines No. 6 and 7);

At 01.00 from the direction of Peschanoye settlement, at 3.40 from the direction of Verkhnyaya Olkhova by artillery and at 4.00 from the direction of Petrovka by mortars, militia near the village of Oboznoye were shelled;

Annex 8 Exhibit I

At 4.50 artillery, militia near Sokolniki were sheled;

At 5.25, from the direction of Peski, mortars were fired at the militia near the Oktyabrskaya mine.

Exhibit J

Vkontakte page, *Novorossiya militia updates due to the intense shelling of Donetsk*
(10 January 2015)

(translation)

Translation

Vkontakte page, *Novorossiya militia Updates due to the intense shelling of Donetsk (10 January 2015)*, available at: https://vk.com/wall-57424472_38666.

Novorossiya militia Updates

10 Jan 2015.

10.01.15. Militia report.

Due to the intense shelling of Donetsk by the AFU, the militia is conducting a redeployment of its forces. A militia column, including Ural and Kamaz trucks, passed near Shakhtersk. A convoy of Ural trucks drove into Donetsk from the direction of Makeyevka. Those convoys have nothing to do with the AFU, the militia urges the population not to panic. From the direction of the Sea of Azov there was one powerful explosion that looked like a mine. Ambulances were dispatched to the area. Around 16:20 (Moscow time) residents of Aleksandrovka reported shells flying over their houses. Several shells landed in a pond in Kremennaya. At 18:30, from the positions behind the Tekstilshchik area (Donetsk), the militia repulsed an attack (firing) at AFU positions near Maryinka, an AFU roadblock located in the circle of the road in the direction of Ugledar. At 18:26 Dokuchaievsk was hit by an AFU Grad missiles. The latest battle near Stanytsa Luganskaya killed 2 and wounded 14 fighters of the Ukrainian National Guard. Ukrainian forces attempted to break through to Lugansk (Salokombinat area), the militia repulsed the attack. Black thick smoke is observed somewhere near Luhansk airport.

Exhibit K

Vkontakte page, *Novorossiya militia Updates. UAF shelled our positions about 45 times overnight (11 January 2015)*

(translation)

Translation

VKontakte page, *Novorossiya militia Updates. UAF shelled our positions about 45 times overnight* (11 January 2015), available at: https://vk.com/wall-57424472_38754.

Novorossiya militia Updates

11 Jan 2015

11.01.15. Militia report.

During the night, the Ukrainian armed forces shelled our positions about 45 times, as well as Kuibyshev, Petrovsky, Telmanovsky districts of Donetsk, the airport area, the settlement of Peski, Gorlovka. Artillery guns, mortars, tanks and small arms fire were used. At 10:30, from the direction of Tonenkoye-Opytnoye the Ukrainian armed forces were firing towards Metro. Now artillery of the Novorossiya AF is firing at the positions of the (Ukrainian) armed forces.

On the front line of Dokuchayevsk, the Ukrainian death-squads tried to break through, but were unsuccessful.

The town of Dokuchayevsk was subjected to massive strikes with the use of heavy artillery and Grad multiple rocket launchers, and the suburbs of Dokuchayevsk were also shelled, with shelling also taking place at the Novy factory and at Nasosnaya, with windows blown out at the pumping station. The night was not quiet in Donetsk. Small arms fire was heard in the Peski area. Two Grad shells were sent to Petrovka by the Ukrainian armed forces. At night artillery fire was heard in the vicinity of Krasnogorovka. In Alchevsk around night and morning something incomprehensible was happening with electricity. It was on for 20 minutes and then went off again for a couple of hours. MTS is down. Wired Internet too.

Exhibit L

VKontakte page, *Novorossiya militia Updates. Artillery volleys were heard near Yelenovka*
(10 January 2015)

(translation)

Translation

VKontakte page, *Novorossiya militia Updates. Artillery volleys were heard near Yelenovka* (10 January 2015), available at: https://vk.com/wall-57424472_38605

Novorossiya militia updates

10 Jan 2015.

10.01.15. Militia report.

"Artillery volleys were heard near Yelenovka. Residents of nearby villages also heard firing.

It was reported that fighting started in the morning near Novotroitskoye. Near Dolya (Mariupol road), all vehicles are turned back. From 11:40 (Moscow time), Ukrainian forces opened fire from the direction of Peski and Opytnoye at the area of the Metro shopping centre and Donetsk airport. Barrel artillery and mortars were operating.

The Novorossiya Armed Forces are responding firing at the positions of the death-squads. The OSCE reports that on 9 January, the ceasefire regime was violated 29 times from the territory under the Ukraine Armed Forces control.

Exhibit M

Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine
No. 27og on Temporary procedure for controlling the movement of persons, vehicles and cargo
along the contact line within Donetsk and Lugansk regions, 22 January 2015

(excerpt, translation)

**Excerpt
Translation**

Order of the First Deputy Head of the Anti-Terrorist Center at the Security Service of Ukraine No. 27og on Temporary procedure for controlling the movement of persons, vehicles and cargo along the contact line within Donetsk and Lugansk regions, 22 January 2015, available at: <https://zakon.rada.gov.ua/rada/show/v0027950-15#Text>

[...]

Appendix
to the Order of the First Deputy Head
of the Anti-Terrorist Center
at the Security Service of Ukraine
(Head of the Anti-Terrorist Operation
on the territory of Donetsk
and Lugansk regions)
22.01.2015 No. 27og
(as amended by the Order of the First
Deputy
Head of the Anti-Terrorist Center
at the Security Service of Ukraine
(Head of the Anti-Terrorist Operation
on the territory of Donetsk
and Lugansk regions)
28.02.2015 No. 83og)

**TEMPORARY PROCEDURE
for controlling the movement of persons, vehicles and cargo along the contact line within
Donetsk and Lugansk regions**

[...]

1.2. In this Procedure, the terms are used in the following meanings:

uncontrolled territory is the territory where the state authorities temporarily do not exercise or do not fully exercise the powers provided for by the legislation of Ukraine;

coordination Center (hereinafter referred to as the CC) is a unit for regime and economic activities in the territories adjacent to the security strip along the demarcation line, which is established at the ATO operational headquarters and includes representatives of the Security Service of Ukraine (hereinafter referred to as the SSU), the Armed Forces of Ukraine (hereinafter referred to as the AFU), Ministry of Internal Affairs of Ukraine (MIA), National Guard of Ukraine (NGU), State Border Guard Service of Ukraine (SBGS), State Fiscal Service of Ukraine (SFSU) to coordinate the activities of the coordination groups and organise the issuance of passes for individuals and legal entities (individuals), vehicles and cargo;

coordination group (hereinafter referred to as CG) is a unit for regime and economic activities in the territories adjacent to the security strip along the demarcation line, which is established at the departments (divisions) of the Ministry of Internal Affairs of Ukraine of districts (cities), and which includes representatives of the SSU, the Armed Forces, the MIA, the NGU, the State Tax Service, the SFSU, other forces and means of the subjects of the fight against terrorism, as well as enterprises, institutions, organisations involved in the anti-terrorist operation for the purpose of timely and high-quality verification of persons who wish to cross the contact line within Donetsk and Lugansk regions and organisation of issuance of passes for individuals and legal entities, vehicles and cargo.

pass - a document that gives the right to enter, pass (hereinafter - entry) to the uncontrolled territories and exit, exit (hereinafter - exit) from them;

checkpoint - a barrier point in a certain place (on the terrain, in a building or their complex) in the ATO area, designed to control the movement of people and vehicles, checking people's identity documents, personal search of persons and inspection of things on their person, inspection of vehicles and things in order to prevent unauthorised entry of persons into the uncontrolled territory, entry of terrorists and their accomplices from the uncontrolled territory, as well as import (export) to (from) the area of the anti-terrorist operation of objects and substances withdrawn from civilian circulation or restricted in circulation; defense of the forces and means involved in the ATO from illegal attacks by terrorists and illegal armed (paramilitary) groups;

entry-exit control point (hereinafter referred to as the control point) - a specially designated territory of the second line checkpoint on highways, railway stations with a complex of buildings, special, engineering, fortifications and technical means, where certain types of state control are carried out by the controlling bodies and services of Ukraine and where persons, vehicles, cargo and other property are allowed to enter and leave the uncontrolled territory;

controlling bodies and services - subdivisions of the SBGS and other bodies exercising state control at the control points;

competent authorities - subdivisions of counter-terrorism entities;

permit - a document of a standard form that grants the right to transport goods (cargo) from the temporarily uncontrolled territories to another territory of Ukraine and from the territory of Ukraine to the temporarily uncontrolled territories (Annex 1);

application with attachments - an application for obtaining a permit for the movement of goods to (from) certain territories where public authorities temporarily do not exercise or do not fully exercise the powers provided for by the legislation of Ukraine (Annex 2);

Other terms in this Procedure are used in the meaning given in the Criminal Procedure Code of Ukraine, the Customs Code of Ukraine, the Laws of Ukraine "On Combating Terrorism", "On the Unified State Demographic Register and Documents Confirming Ukrainian Citizenship, Identity or Special Status", "On the Legal Status of Foreigners and Stateless Persons", "On Border Control" and other regulatory legal acts.

Exhibit N

Order of the First Deputy Head of the Anti-Terrorist Centre at the Security Service of Ukraine
No. 415og on Temporary procedure for controlling the movement of persons, vehicles and goods
across the contact line within Donetsk and Lugansk regions, 12 June 2015

(excerpt, translation)

**Excerpt
Translation**

Order of the First Deputy Head of the Anti-Terrorist Centre at the Security Service of Ukraine No. 415og on Temporary procedure for controlling the movement of persons, vehicles and goods across the contact line within Donetsk and Lugansk regions, 12 June 2015, available at: https://zakon.rada.gov.ua/rada/show/v415_950-15#Text.

**APPROVED
Order of the First Deputy
Head of the Anti-Terrorist
Center at the Security
Service of Ukraine
(Head of the Anti-Terrorist
Operation on the territory of Donetsk
and Lugansk regions)
12.06.2015 No. 415og
(as amended by the Order of the First
Deputy Head of the Anti-Terrorist
Center at the Security Service of
Ukraine
(Head of the Anti-Terrorist
Operation in Donetsk
and Lugansk regions)
dated 26.12.2015 No. 1182og)**

TEMPORARY PROCEDURE

**for controlling the movement of persons, vehicles and goods across the contact line within
Donetsk and Lugansk regions**

[...]

1.3 In this Temporary Order the following terms are used in the following meanings:

checkpoint (hereinafter referred to as the "checkpoint") - a barrier point in a certain place (on the terrain, in a building or their complex) in the ATO area, intended for controlling the movement of people and vehicles, checking the identity documents of persons, personal inspection of persons and inspection of things carried by them, inspection of vehicles and things transported by them in order to prevent unauthorised entry of persons into the uncontrolled territory, entry of terrorists and their accomplices from the uncontrolled territory, as well as import (export) to/from the ATO area of items and substances withdrawn from civilian circulation or restricted in circulation; defense of the forces and means involved in the ATO from illegal attacks by terrorists and illegal armed (paramilitary) groups;

[...]

Exhibit O

Procedure establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1455, 29 December 2021

(excerpt, translation)

**Excerpt
Translation**

Procedure establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1455, 29 December 2021, available at: <https://zakon.rada.gov.ua/laws/show/1455-2021-п#Text>.

**APPROVED
by the Resolution of the Cabinet of Ministers of
Ukraine
dated December 29, 2021 No. 1455**

PROCEDURE

establishing a special regime of entry and exit, restricting the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in certain areas of Ukraine where martial law has been introduced

[...]

3. In this Procedure, the terms are used in the following meanings:

checkpoint - a reinforced checkpoint, which, by the decision of the military command, is temporarily established at the entrance/exit (entry/exit) to the territory/ from the territory where martial law is introduced and a special regime is established (except for the state border), where places for checking persons, vehicles, luggage and cargo, positions of firearms and military equipment, places for rest and life support of the personnel performing tasks at such a checkpoint are arranged, which may include officials;

[...]

Exhibit P

Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015)

(translation)

Translation

Kharkiv Human Rights Group, *How to Drive Across the Line of Contact. Step-by-step instructions* (9 September 2015), available at: <https://khpg.org/1441791221>

How to drive across the line of contact. Step-by-step instructions

Larissa Lisnyak



The most popular checkpoint in Donetsk Oblast, Kurakhovo checkpoint (sector B) has been closed since June, following escalation of the situation near Maryinka. Therefore, until today, only two checkpoints have been used to officially enter and exit the occupied territory of the Oblast:

Zaitsevo checkpoint (Donetsk-Gorlovka-Mayorsk-Zaitsevo- Artemovsk highway, Sector C); and Bugas checkpoint (Donetsk - Bugas - Volnovakha - Mariupol, Sector B).

There is another checkpoint in the south of the Oblast, i.e. Gnutovo (Sector M). But as can be seen even from the map, territorially it is not the most efficient option, and the checkpoint works intermittently due to constant hostilities.

A positive aspect of the current 'compaction' is that there is no linkage of the pass to a particular sector. The main thing is that you are approved in the electronic "Register of permits for movement of persons in the ATO area" of the Security Service of Ukraine. Then you can cross the contact line through both Bugas and Zaitsevo checkpoints.

Getting ready to leave

Key tips:

On weekends, the queues at the checkpoints are significantly shorter than on weekdays. Instead of the traditional minimum of 3-4 hours, it takes up to 2 hours to cross the border.

Check that have your passport and vehicle's technical passport. If you have a paper pass permit, take it with you, at zero Ukrainian roadblocks it is sufficient to pass. If you have an electronic permit, print it out (on the Permit Registry website, through which you applied, go to the 'Filing

History' section. Click on the application number and you will be taken to the extended version of the application, which should have the word "Formed" in the end). If there is no possibility to print it out, write down your application number (as 'DPR' checkpoints now require entry passes to be filled out, in which passengers' names and pass numbers to the ATO zone are to be indicated, as well as the vehicle registration number and the time of entry).

Put the paper pass or a printout of the electronic permit in your passport at once. Remove any other 'paperwork' from your passport (TIN etc.). The military simply take the passports for inspection (without your presence), the process of taking and returning is chaotic, so it is better not to have anything extra in them. Keep all passports of passengers during the journey by car in one pile next to the driver (inspectors begin to get nervous and pester when each passenger individually starts to give them documents).

If you are travelling with a child under 16, he or she must be entered in your pass (most importantly, the relevant entry must be made in the electronic permit register). Don't forget his or her birth certificate. If the child is accompanied by only one parent (or grandparents) - a notarised (by a Ukrainian notary) power of attorney is mandatory.

Have a biro with you, as you will have to fill in the passes yourself at both Ukrainian and DPR checkpoints.

Expect to have to stand in queues for 3-4 hours when crossing Ukrainian checkpoints in one direction only.

Stock up on snacks and make sure you have drinking water. (There are no shops or kiosks on the roads. On the Mariupol direction, locals sell cakes (piroshki), drinks, make tea and coffee. On the Artemovsk direction there is none of this). Also consider what you might need additionally - napkins, cups, rubbish bags (as rubbish bins are only located near the checkpoints), etc.

If you are travelling by car and have a fridge bag - take it, you won't be wrong (both the water is cool and the food won't spoil).

Be aware that toilets are only available at the checkpoint, the rest of the time you have to go to the toilet in a forest belt or sunflower field (until the sunflowers are harvested)

Bring a mini-pharmacy kit with painkillers, sedatives and other medication for your chronic conditions.

In the early hours of the morning it is quite chilly on the roads, so have warmer clothes so that you can walk along the queue while waiting to stretch your tired legs.

Think about what you will be doing with yourself for 3-4 hours in line (books, crosswords etc.).

Charge phones, laptops, external batteries if available. Check your mobile account, as there will be nowhere to replenish it.

The road to the zero checkpoints is often unpaved, so it is quite common to see flat tyres in the queue. And on the main roads in the areas of checkpoints you can run into splinters from shells every now and then. In such a case besides spare tyre, the experienced stock up with repair kit for sealing of punctures (and as you understand there is no service station anywhere near).

The trails are dirty and dusty. If the cleanliness of your shoes is important to you, put the 'cleaner' in advance.

If you are travelling by public transport, take care of suitcases with wheels or 'kravchuchkas' (handcarts), because you will have to transfer from one transport to another more than once, and sometimes walk up to a kilometre (and up to 10 km in non-standard situations).

Plan your timetable taking into account that from 4 September the Zaitsevo, Bugas and Gnutovo checkpoints operate on a winter schedule: from 7am to 6.30pm (in summer it was from 6am to 8pm)

By car through the Zaitsevo checkpoint

Just as all happy families are happy in the same way and every unhappy family is unhappy in its own way, so Zaitsevo and Bugas have their own nuances.

The Zaitsevo checkpoint is more convenient to cross (both by car and by bus) compared to the Mariupol route. Therefore, I will focus on this route in more detail. I will describe the route from Donetsk to the checkpoint; those who are going in the opposite direction can easily sort it out for themselves.

The safest route from Donetsk by car is as follows: Makeyevka - Makeyevka exit through Zelenyi Microdistrict - Khartsyzsk - Nizhnyaya Krynka - Kommunar village - Zhdanovka (along the town edge) - Yenakievo (through town) - Gorlovka (Kalininsky district) - Maiorsk. This way by car in the early morning takes approximately 1.5 hours. It is possible to drive through Yasynovataya instead of Yenakievo, which is 30-40 minutes shorter, but the route is more problematic due to shelling.

A word of advice: Do not plan to leave Donetsk before 4:30am. Despite a curfew in effect until 6am, it is possible to drive through morning Donetsk (at least in the Voroshilovsky and Kalininsky districts) without any problems. However, the 'DPR' checkpoint in Makeyevka opens at 5am and you simply will not be allowed out until then.

As you enter Gorlovka from Karl Marxovo (there's a stele on the right and a petrol station on the left), follow Gorlovskaya Division Street all the way to its end. The main thing is not to miss the turn onto Kuznetsova-Zubareva Street (the landmark is the remains of what was once a large wholesale market on the left).

On the right-hand side, if you see a city hospital with a conspicuous "Polyclinic" sign on the building, and a machinery plant mangled by time and shelling on the left, you're going the right way. Then you go to the bridge - and further on Marshal Peresypkin Street. The next landmark on your right is a (not working) Amstor supermarket with a shiny 'Comfy' sign. There is a fork in the road, you should go straight ahead. When you get to the signpost for Uzlovskaya COF, turn left onto Boris Makukha Street. Pass Nikitovsky Market.

This is where it is important to stick to passenger cars, almost all of which go to the checkpoint. The central bridge on Boris Makukhi Street was blown up in July last year, so the queue of cars in front of it turns left onto an inconspicuous dirt track and crosses the 'spare' bridge.

After the bridge you will pass a 'DPR' checkpoint. In general, when leaving the territory of the 'republic', there is not much inspection, at most, you will be asked to show your documents. If you enter, they will check your luggage, look through your personal belongings and fill in an entry ticket.

As soon as the flow of traffic has stopped, you have reached your destination. You're in queue number one to the Ukrainian checkpoint at Maiorsk, which, like all other checkpoints in the controlled territory, opens at 7am since 4 September.

If there is a child under 2 years old in the car, a pregnant woman, a disabled person, elderly people over 80 or a person with acute pain in the cabin, your car falls into the 'privileged'

category. Feel free to go ahead: there are two queues at all Ukrainian checkpoints - 'privileged' and regular. Generally, one 'privileged' car is allowed through after five regular.

If you are a mere mortal, however, you will have to wait in line for one to two hours at the Maiorsk roadblock. When you get to the checkpoint, they will check your passport, your paper pass (or a printout of your electronic pass) and your car's technical passport 'by eye'. They will also ask you to open your boot and if they suspect anything, they may inspect it in more detail. In Maiorsk (as far as I have travelled) they do check documents against the electronic database, this procedure is reserved for the Zaitsevo checkpoint. In principle, the checking process here takes 5 minutes, and you get a paper ticket in which the examiner enters the number of passengers; the rest of the data (car number, travel time) you fill in yourself.

Then you race for 10-15 minutes along a half-empty track to queue no. 2, standing directly at the Zaitsevo checkpoint. (When Zaitsevo is closed, the military will direct you to the left - to the Kurdyumovka checkpoint). In queue number 2 you can stand for an hour and a half or two hours, depending on your luck. Again, for those with a right to preferential treatment (see above) there is a freer passage.

As soon as rubbish bins start appearing along the road, it means you have about 40-50 minutes to get to the checkpoint. Appearance of bio-toilets and free drinking water holes means a wait of about 20-30 minutes.

Directly at the Zaitsevo checkpoint, the inspection is more thorough, but it is already tried and tested and therefore does not take more than 10 minutes. If, however, passports are taken to check against the electronic database, the process takes up to half an hour. (But if you do not appear in the "Register of permits for relocation in the ATO zone", all your 3-4 hours spent in line were in vain.) After successfully completing all the procedures at the Zaitsevo checkpoint, you give back your coupon that you received in Maiorsk, and oh, happiness - you are free to go on your way through Ukraine.

As you pull out of the checkpoint, you move along a similar multi-kilometre line of cars in the opposite direction, you can't help but begin to estimate the length of your return. And the way back is the same: the Zaitsevo checkpoint plus inspection and entry ticket - Maiorsk checkpoint, give the ticket - DPR checkpoint with inspection and filling in of entry ticket.

As for crossing in the evening. Ukrainian checkpoints have been open until 18:30 since 4 September. But my experience of crossing was with the previous schedule, closing at 20:00, so I will describe it. Ukrainian checkpoints close at 20:00. Everyone is trying to get back or out in time, so queues are even longer in the evening than in the morning. Stay in line as long as you can, sheer luck is often what works here. At about 7.50 p.m. the border guards in cars pass through the line, estimating how many cars they have time to let through. The rest are told to turn around or they will spend the night in the field. But do not drive away at once. From my own experience - in front of our car there was a 'fatal line', but in those 10 minutes, more cars were allowed through the checkpoint than anticipated. Then you start begging and whining. It works more often than not. It is important - keep all passports and passes in one pile, do not delay the examiner and yourself. He quickly slips a ticket into your car window and you fill it in yourself on the way to the next checkpoint. We received our cherished coupon at 20:20 and crossed the 'exit' checkpoint at 20:30. In our case, the 'luck' worked.

Important: if you have received a ticket, you will be 100% let through at the next Ukrainian checkpoint and thus pass the entire check route. Between the checkpoint (in our case Zaitsevo) and the roadblock (in our case Maiorsk) there is no overnight stay. (The 'DPR' checkpoints are open until 22-23 hours depending on the point, so you will be able to pass them further on).

If you don't make it, that's your fate... In this case, you should additionally provide for some additional nuances to spend the night (food, drink, inflatable pillows, something to cover yourself, torches to go to a forest or a field out of necessity). Returning to the nearest village and staying in a hotel or rented flat means you won't be in the top ten cars in the queue in the morning, but again over a hundred.

It is certainly unpleasant to spend the night in the field. All the more so because provocative exchanges of fire take place around the checkpoints at night (and sometimes in the morning). But if anything goes wrong, you will always be warned by the military. Know that you are not alone in the field, there are other 'poor devils' in cars around you, as well as soldiers from the checkpoints who are on duty all night along the sleeping queue to check and prevent provocations.

By public transport through the Zaitsevo checkpoint

If you want to speed up your crossing time, take public transport. There are two options - with a so-called 'walking crossing' and without change of transport.

'Crossing on foot'. Since June, all official buses, both from the Ukrainian and 'DPR' sides, reach the first Ukrainian checkpoint or roadblock and drop off passengers. It is also possible to use private carriers to reach the checkpoints. For example, the cost of a private minibus from Donetsk to Maiorsk is 100 UAH. Minibuses of the same carriers wait at the checkpoint for passengers from the other side and take them to the desired city on the territory of the DPR.

You then queue up with about 200 similar passengers and wait for a municipal bus. Between the Zaitsevo checkpoint and the Maiorsk roadblock circulate 2-3 such buses. The fare is 25-30 UAH, depending on the capacity of the transport. After crossing the checkpoint, on the other side there are plenty of shuttles and connecting buses that will take you to the required town. The Maiorsk-Zaitsevo route (up to 8km) can also be taken on foot, but there are no more people willing to do so.

There are also up to ten private cars on duty at checkpoints that are willing to drive between checkpoints for 100-150 hryvnias per person instead of the municipal bus. Most of these cars have stickers stating that they are driven by a disabled person (indicating the preferential status of driving back and forth without waiting in line).

Traveling without transfers. According to the latest SBU regulations, the delimitation line can be crossed by cars with up to 8 seats. And in this case, minivans offering non-transferable travel between cities in the controlled and non-controlled areas are favoured. For example, the cost to go from Donetsk to Sloviansk with a change at the checkpoints is 250 UAH, and 350 UAH without a change. Journey with a change will take about 5 hours, without change (the minivan stands in a preferential queue) - 6-7 hours. In peacetime, the journey by car along the route

Donetsk-Slaviansk took up to 2 hours, a shuttle bus with all the stops could take 3.5 hours. But that, alas, is still in the past...

There are also offers for long-distance runs. E.g. Donetsk-Kiev with a change at roadblocks (there is a special bus of the same firm waiting on the other side) with private carriers costs up to 1,000 hrn. But without a change, it is already 1,500 hryvnias.

Specific features of the Bugas checkpoint (Volnovakha, Mariupol direction)

Remember the above phrase that the Zaitsevo checkpoint is more convenient to cross compared to the Mariupol road? Did you enjoy the nuances of passing through Artemovsk highway? Well, passing through the Bugas checkpoint in the Mariupol direction is the same as passing through Zaitsevo, only multiply the negative nuances by two:

-the time in car queues at the zero checkpoints and checkpoints takes an average of 4-5 hours. Very often one of the directions (either entry or exit) is closed for half a day with no reason given. It is on the Mariupol direction that most people spend the night in the open air. And this despite the fact that the Mariupol route is four-lane (two in each direction), while Artemovsk route is one lane in each direction.

-going by way of Zaitsevo, you can easily reach Kramatorsk, Konstantinovka, Krasnoarmeisk, do your business and return to Donetsk on the same day. If you go through Bugas, you book a night in Mariupol, you cannot go there and back in a day (well, except on Sundays, I guess).

- no bio-toilets here (like at the Zaitsevo checkpoint), people go to the forest. Mine signs have not been placed everywhere and demining has not been fully carried out, so six civilians have been blown up this summer alone. They just went 'into the bushes'.

- rubbish dumps along the wooded area (while on the road to the Zaitsevo checkpoint there is rubbish, here it is dumps ranging from bottles, foodstuffs to used nappies and personal hygiene products). Driving along the Mariupol road to the checkpoint I did not see a single rubbish container.

- if there are more than four free drinking water points in the Artemovsk direction, there are only two in the Mariupol direction (one in each direction).

- between checkpoint zero and the Bugas checkpoint, walking is strictly prohibited. There are no municipal buses between the checkpoints. I did not see any connecting buses that could pick you up on the other side. You have to beg passing cars to take you to cross the forbidden section of the road, no amount of begging softens the military heart;

-as far as the human factor is concerned. Maybe it's personal impressions, but the Ukrainian military at the Zaitsevo checkpoint are much more humane than on the Mariupol road. Maybe it is the volume of traffic, the hot southern direction. But even at Zaitsevo, they may snort but then apologise: You know, eight hours in the sun, nerves, wanting to go home... And in general, if you treat them well, they respond with all their heart. And at Volnovakha, they seem to be like the same guys, who are happy to drink cold mineral water from the fridge and will not refuse a cigarette. While an old man over 80 is standing and crying, asking to let him through on foot, he lives in the neighbouring village. They do not let him, they demand to get into a passing car. And no vehicle can officially take the old man, because all of the vouchers issued at ground zero already have a clearly indicated number of passengers. We take the grandfather at our own risk, and at the checkpoint we explain for a long time what and why, we ask to contact the checkpoint - first we get nervous, half an hour of delay, a full inspection of the car, and then (without contacting the checkpoint) they let us through with an old man in the cabin. Thought the

granddad was going to have a heart attack. But, he says, he got used to it. And he advises not to hold a grudge for the 'boys' - it all depends on the shift.

On the Mariupol road, things are tougher (some might say more serious, more professional). This includes the first 'DPR' checkpoint, which is equipped according to all the principles of a full checkpoint. This is not the 'DNR' checkpoint at Maiorsk.

There are heavy fences, weapons and uniforms, like in the best blockbuster films. When you cross the border, you realise that you can't play around here; jokes and local excuses won't do you any good. You have to be prepared that you are dealing with trained special services that react right down to the 'cocking of an eyebrow'.

The only plus in the Mariupol direction is the private (not civilised) trade from boots, 'from the ground', in tents. But this is precisely because of the main disadvantage - long queues compared to the Zaitsevo checkpoint and more frequent overnight stays in the field. First course, second course, third course, pies, pizzas, chebureks, tea, coffee... A noteworthy point is the bag tea for 5 UAH/cup from a brass samovar made in 1891 (stoked really on cones and wood, no boot, but with a chimney).

Who benefits from going through the Bugas checkpoint is the beneficiaries ('privileged'). In principle, the same is at Zaitsevo. Therefore, in Donetsk today, acquaintances with children under 2 are 'worth their weight in gold', mothers need to receive children's benefits and consult Ukrainian professional medical centres, and drivers and other travellers benefit from being able to get through without queuing.

In principle, there are private drivers (who have their own arrangements at checkpoints with preferential treatment) who will take you from Donetsk to Mariupol and bring you back the same day. But here the round trip fare is 500-700 UAH per person.

Exhibit Q

Rinat Akhmetov's Foundation, *How to drive across the contact line. Step-by-step instructions*
(25 September 2015)

(translation)

Translation

Rinat Akhmetov's Foundation, *How to drive across the contact line. Step-by-step instructions* (25 September 2015), available at: <https://akhmetovfoundation.org/ru/news/kak-proehat-cherz-lynyyu-soprykosnovenyia-poshagovaya-ynstruktsyya>.

How to drive across the contact line. Step-by-step instructions | Rinat Akhmetov's Foundation

25.09.2015

The "112 Ukraine" channel's website has published useful information on crossing the contact line. Donetsk journalist Larisa Lisnyak, who has repeatedly "travelled" to/from the ATO zone, gives step-by-step instructions on how to cross the "Zaitsevo" and "Bugas" checkpoints. The text of the article is available below.

The most popular checkpoint in Donetsk region, Kurakhovskiy checkpoint (sector B), has been closed since June, after the situation near Marinka escalated. Therefore, until today, only two checkpoints are officially allowed to enter and exit the occupied territory of the region:

"Zaitsevo" checkpoint (Donetsk - Gorlovka - Maiorsk - Zaitsevo - Artemovsk, sector C);

"Bugas" checkpoint (Donetsk - Bugas - Volnovakha - Mariupol, sector B).

There is another checkpoint in the south of the oblast - checkpoint "Gnutovo" (Sector M). But as can be seen even from the map, territorially it is not the most efficient option, besides, the checkpoint works intermittently due to constant hostilities.

A positive aspect of the current "compaction" is that there is no linkage of the pass to a particular sector. The main thing is that you have to be approved in the electronic "Register of permits for movement of persons in the ATO area" of the Security Service of Ukraine. And then you can cross the line of contact through both the "Bugas" and "Zaitsevo" checkpoints.

Getting ready to leave

Key tips:

on weekends, queues at the checkpoint are significantly less than on weekdays. Instead of the usual minimum 3-4 hours, it takes up to 2 hours to cross the line check availability of passport and vehicle registration document. If you have one, take a paper pass - at zero Ukrainian checkpoints it is sufficient to get through. If you have an electronic permit, print it out (on the Permit Registry website, through which you applied, go to the "Application History" section. Click on the application number, and it will take you to an expanded version of the application, which should have the word "Filed" at the end). If you can't print it out, write down the number of your application (at the moment "DNR" roadblocks require you to fill out a pass with the name and ID

number of each person entering the ATO zone, as well as the vehicle registration number and the time of your trip)

enclose your paper pass or print-out of the electronic permit in your passport at once. Remove any other "paperwork" from the passport. (TIN, etc.). Military personnel simply take away passports for verification (without your presence). The process of taking away and returning is chaotic and it is better not to have any extra things in your "crusts".

all passports of passengers during the journey in a car keep in one pile next to the driver (the inspectors become nervous and pestilent when each passenger individually starts to give them documents)

if you are travelling with a child under 16 years old he needs to be inserted into your pass (the main thing is the appropriate record in the electronic permit register). Don't forget their birth certificate. If a child is only accompanied by one parent (or grandparents) - a notarised (Ukrainian notary public) power of attorney is required.

have a biro with you, as you will have to fill in the pass tickets yourself at both Ukrainian and DNR roadblocks

expect that you will have to stand in a queue for 3-4 hours when crossing the Ukrainian checkpoints in one direction only. Make sure you stock up on brake packs and drinking water. (There are no shops or kiosks on the highways.) On the Mariupol direction the locals sell cakes, drinks, make tea and coffee. On the Artemovsk direction there is none of this either). Also, think about what you might need in addition - napkins, cups, rubbish bags (as rubbish bins are located only near the checkpoint), etc.

if you are going by car and have a fridge-sack - take it, you will not go wrong (water will be cool and food will not get spoiled).

keep in mind that toilets are only at checkpoints; the rest of the time you will have to go and relieve yourself in forest belts or sunflower fields (until the sunflowers are harvested).

take a mini-medicine kit with painkillers, sedatives, and other remedies for your chronic health problems.

early in the morning on the roads is quite cool, so bring warmer clothes so you can stroll along the queue to stretch your legs while you wait

think about what you are going to do for 3-4 hours in the queue (books, puzzles, etc.).

charge phones, laptops, external batteries if available. Check your mobile account, as there will be nowhere to recharge it

the road to the zero roadblocks often goes on unpaved roads, so it's quite common to see flat tyres in the queue. And on the main highways in areas of blockposts now and then you can run into shrapnel from shells. In such a case besides spare tire the experienced don't forget to stock up with repairing kits for patched up punctures (and as you understand there is no service station near it).

it is dirty and dusty on highways. If cleanness of your shoes is important for you, put "cleaner" beforehand.

if you are going by public transport, so take care of your suitcases with "wheels" or trolleys, because you will have to transfer from one transport to another, and sometimes even walk a kilometre (and in unusual cases - up to 10 km).

plan your travel schedule taking into account that from September, 4 checkpoints "Zaitsevo", "Bugas", "Hnutovo" work on a winter schedule: from 7:00 to 18:30 (in summer it was from 6 am to 8 pm)

By car through the "Zaitsevo" checkpoint

Just as all happy families are equally happy and each unhappy family is unhappy in its own way, the "Zaitsevo" and "Bugas" checkpoints have their own nuances.

The "Zaitsevo" checkpoint is more convenient to cross (both by road and by bus) compared with the Mariupol route. Therefore, I shall dwell on this route in more detail. I'll describe the route from Donetsk to the checkpoint; those who travel in the opposite direction will easily find their way there.

The safest way from Donetsk by car is going the following route: Makeyevka - exit from Makeyevka through Zelenyi Microdistrict - Khartsyzsk - Nizhnyaya Krynka - Kommunar settlement - Zhdanovka (at the city edge) - Yenakiyev (through town) - Gorlovka (Kalininskiy district) - Maiorsk. This way by car in the early morning takes about 1.5 hours. It is possible to drive through Yasinovataya instead of Yenakievo, which is 30-40 minutes more economical in time, but again the way is more problematic due to shelling.

Advice: Do not plan to leave Donetsk before 4:30 a.m. Despite a curfew in effect until 6am, it is possible to drive through morning Donetsk (at least in the Voroshilovsky and Kalininsky districts) without any problems. However, the "DNR" blockpost in Makeyevka opens at 5am and you simply will not be allowed out until then.

Once you have entered Gorlovka from Karlo Marxovo (you have the appropriate stele on your right and a petrol station on your left), keep driving along Gorlivska Divisia Street all the way to the end of it. The main thing is not to miss the turn to Kuznetsova-Zubareva Street (a landmark - the remains of once large wholesale market on the left).

If further on the right side you'll see a city hospital with a conspicuous sign on the building: "Polyclinic", and on the left the mangled by time and bombardments machinery plant, so you're going the right way. Then you go to the bridge - and further on Marshal Peresyphkin Street. The next landmark on your right is a not working "Amstor" supermarket with a shiny "Comfy" sign. There is a fork in the road going straight ahead. When you get to the signpost stand for Uzlovskaya Central Mining and Processing Plant, turn left onto Boris Makukhi Street. Passing "Nikitovsky market".

Here it is important to stick to passenger cars, almost all of them go to the checkpoint. The central bridge on Boris Makukhi Street was blown up last July, so the line of cars before it turns left onto an unremarkable dirt track and crosses the "spare" bridge.

After the bridge, pass a "DNR" blockpost. Generally, when you leave the territory of the "republic" there is no special inspection, at most you will be asked to show your documents. If you enter, they will check your luggage compartment, look through your personal belongings and fill in an entry ticket.

As soon as you stop, you have reached your goal. **You are in queue No1 for the Ukrainian roadblock at Maiorsk**, which, like all other checkpoints in NGCA, opens at 7am on 4 September.

If there is a child under 2 years old, a pregnant woman, a disabled person, elderly people over 80 or a person with acute pain in the car, your car is classified as "privileged". Feel free to go ahead: there are two queues at all Ukrainian blockposts - concessionary and regular. Generally, one privileged car is allowed through after five regular cars.

If you are a 'mere mortal', however, you will have to wait in line for one to two hours at the Maiorsk blockpost. When you get to the roadblock they will "eyeball" your passport, paper pass (or print out of the electronic pass) and vehicle registration document. They will also ask you to open your boot and if you suspect anything, they may inspect it in more detail. In Maiorsk (as far as I have travelled) they do not use the electronic database to check documents, this procedure is reserved for the "Zaitsevo" checkpoint. In principle, the inspection process here takes 5 minutes, and you get a paper ticket in which the inspector enters the number of passengers, and you fill in the rest of the data (car number, travel time) yourself.

Further, 10-15 minutes you are rushing along a half-empty highway to the new **queue No.2, situated directly at the checkpoint "Zaitsevo"**. (When the "Zaitsevo" checkpoint is closed, the military will direct you to the left - to the "Kurdyumovka" checkpoint). You can stand in line No 2 for an hour and a half or two hours, depending on your luck. Again, for those on benefits (see above), there is freer passage.

As soon as rubbish bins start appearing along the road, it's about 40-50 minutes to the checkpoint. Bio-toilets and points with free drinking water appear - you have to wait about 20-30 minutes.

Directly at the "Zaitsevo" checkpoint, the inspection is more thorough, but it has already been practiced and therefore does not take more than 10 minutes. If, on the other hand, passports are taken in order to search electronically, the process takes up to half an hour. (But if you do not appear in the "Register of permits for relocation in the ATO zone", all you spent 3-4 hours in line in vain.) After you have successfully completed all procedures at the checkpoint "Zaitsevo" you give back your coupon that you received in Maiorsk", and oh, happiness - you are free to go further in Ukraine.

Leaving the checkpoint, you move along the same multi-kilometre queue of cars standing in the opposite direction, involuntarily assessing the length of your return. And the way back is the same: checkpoint "Zaitsevo" plus inspection and a ticket to pass - roadblock "Maiorsk", give the ticket - roadblock "DPR" with inspection and filling in the ticket to enter.

As for evening crossing. Ukrainian checkpoints have been open until 6:30 pm since September 4. But my experience of crossing was related to the previous schedule, closing at 20:00, so I will describe it. Ukrainian checkpoints close at 20:00. Everyone is trying to get back or out in time, so queues are even longer in the evening than in the morning. Stay in line as long as you can, the odds are that's what works here. At about 7.50 p.m. the border guards in cars pass through the line, estimating how many cars they can let through. The rest are told to turn around or they will spend the night in a field. But do not drive away at once. From my own experience - they "drew the fatal line" in front of our car, but in those 10 minutes they let more cars through the checkpoint than anticipated. Then you start begging, pleading. Most of the time it works. It is important - keep all passports and passes in one pile, do not detain the inspector and yourself. He quickly slips a ticket into your car window and you fill it in yourself on the way to the next checkpoint. We received our cherished coupon at 20:20 and crossed the "exit" roadblock at 20:30. In our case, the 'luck of the draw' worked.

Important: if you have received a coupon, you will be 100% allowed through at the next Ukrainian checkpoint and thus pass the entire checkpoint. Between the checkpoint (in our case "Zaitsevo") and the roadblock (in our case "Maiorsk") you will not be left overnight. (The "DNR" checkpoints are open until 22-23 hours depending on the point, so you will have time to pass them further on).

And if you didn't have time, then it's your destiny... In this case you are to provide extra nuances for spending the night (food, drinks, inflatable cushions, hiding places, lanterns to go to the forest or a field to have a rest). Going back to the nearest village and staying in a hotel or rented flat means you won't be in the top ten cars in the queue in the morning, but again in the hundredth. To spend the night in the field is not pleasant, of course. All the more so because at night (and sometimes in the morning) provocative exchanges of fire take place in the vicinity of checkpoints. But if something goes wrong, you will always be warned by the military. Know that you are not alone in the field, there are other "troublemakers" in cars with you, as well as military personnel from the checkpoints who are on duty all night along the sleeping queue to check and prevent provocations.

By public transport through the "Zaitsevo" checkpoint

If you want to speed up crossing the line of separation, use public transport. There are two options - with the so-called "pedestrian crossing" and without transfers.

"Pedestrian crossing". Since June, all official buses, both from the Ukrainian and "DNR" sides, reach the first Ukrainian roadblock or checkpoint and drop off passengers. It is also possible to use private carriers to reach the checkpoints. For example, the cost of a private minibus from Donetsk to "Maiorsk" is 100 grivnas. Minibuses of the same carriers wait at the checkpoint for passengers from the other side and bring them to the desired city on the territory of the "DNR".

Then you stand in a line of about 200 passengers and wait for a municipal bus. Between the checkpoint "Zaitsevo" and the checkpoint "Maiorsk" 2 or 3 such buses circulate. The fare is 25-30 Grivnas depending on the capacity of the vehicle. After crossing the checkpoint, on the other side there are a lot of shuttles and buses, which will take you to the necessary town. The Maiorsk-Zaitsevo route (up to 8 km) can also be taken on foot, but there are no more people willing to do so.

Also at the roadblocks are up to ten private cars, which are ready to take you between the roadblocks for 100-150 grivnas per person instead of the municipal bus. Most of these cars have stickers saying that they are driven by a handicapped person (indicating the "privilege" of going back and forth without waiting in line).

Fare without transfers. According to the latest SBU regulations, cars with up to 8 seats may cross the line. And in this case, minivans offering connection-free travel between cities of the controlled and non-controlled territories are in favour. For example, the cost of "Donetsk-Slaviansk" with a change at the checkpoints is 250 grivnas, and without a change it is 350 grivnas. Journey with a change will take about 5 hours, without change (the minivan stands in a preferential queue) - 6-7 hours. In peacetime a way on a car on a route "Donetsk - Slaviansk" took up to 2 hours, on the regular bus with all stops it was possible to reach for 3,5 hours. But it is, alas, for now in the past...

There are proposals for long-distance flights. Here "Donetsk-Kiev" with the change at roadblocks (on the return side the concrete bus of the same firm waits) from private carriers costs to 1000 grn. But without changing the line it is already 1500 grivnas.

Peculiarities of checkpoint "Bugas" (Volnovakha, Mariupol direction)

Do you remember the above-mentioned phrase that the checkpoint Zaitsevo is more convenient to cross as compared with Mariupol highway? Did you enjoy the nuances of crossing on the Artemovsk route? Well, passing through checkpoint "Bugas" in Mariupol direction is the same as through "Zaitsevo", only multiply negative nuances by two:

The time in car queues at the zero checkpoint and the checkpoint takes an average of 4-5 hours. Very often, one of the directions (either entry or exit) is closed for half a day with no reason given. It is on the Mariupol direction that most people spend the night in the open air. This is despite the fact that the Mariupol motorway is four lanes (two in each direction), while Artemovsk motorway is one lane in each direction.

By going through checkpoint "Zaitsevo" one can easily get to Kramatorsk, Kostyantynivka, Krasnoarmiysk, solve all the issues and come back to Donetsk the same day. If you go through the checkpoint Bugas, you book overnight in Mariupol, you can't go there and back in a day (well, except Sunday, I guess)

There are no bio-toilets (like at the "Zaitsevo" checkpoint), people go to the landing. Signs saying "mines" have not been placed everywhere, demining has not been done completely, so six civilians have been blown up this summer alone. They just went "into the bushes".

rubbish dumps along the wooded area (while the route to the "Zaitsevo" checkpoint is exactly rubbish, here there are dumps ranging from bottles, foodstuffs to used nappies and personal hygiene products). Driving along the Mariupol route to the checkpoint I did not see a single rubbish container

While there were more than four free drinking water collection points along Artemovsk direction, there were two in Mariupol direction (one in each direction)

Between the zero checkpoint and the "Bugas" checkpoint, walking is categorically prohibited. There are no municipal buses between the checkpoints. There are no buses that can pick you up on the other side. You have to beg passing autos to take you to cross the forbidden section of the road, no amount of begging will soften your heart;

As for the human factor. Maybe it's personal impressions, but the Ukrainian military at the "Zaitsevo" checkpoint is much more humane than on the Mariupol road. Maybe it is the volume of traffic, the hot southern direction. But at "Zaitsevo" they may also snort, but then apologise: understand, eight hours in the sun, nerves, they want to go home... And in general, if you treat them with humanity, they do it with all their heart. And near Volnovakha there are the same guys who are happy to drink cold mineral water from the fridge and will not refuse from cigarettes. And a grandfather, aged over 80, is standing and crying, asking to let him walk, he lives in the neighbouring village. They do not let him in, they demand to ask to get into a passing car. And no vehicle can officially take the old man, because all of the vouchers issued at ground zero already have a clearly indicated number of passengers. We take the grandfather at our own risk, and at the checkpoint we explain for a long time what and why, we ask to contact the checkpoint - first we get nervous, half an hour of delay, a full inspection of the car, and then (without contacting the checkpoint) they let him in with the old man in the cabin. Thought the granddad was going to have a seizure. But, he says, he got used to it. And he advises not to take offence at "the boys" - it all depends on the shift

On the Mariupol motorway, things are tougher (some would say more serious, more professional). Including the first "DNR" checkpoint, equipped according to all the principles of a full checkpoint. This is not the "DNR" checkpoint at Maiorsk. Here there are powerful fences, weapons and uniforms, like in the best blockbusters. When you cross the checkpoint you understand that you will not be able to play around here, jokes and local excuses will not work. You must be prepared that you are dealing with trained special forces, reacting down to the "raising of an eyebrow".

The only plus in Mariupol is deployed private (not civilised) trade from boots, "from the ground", in tents. But it is precisely because of the main disadvantage - long queues compared to the "Zaitsevo" checkpoint and more frequent overnight stays in the field. First, second, third, pies, pizzas, chebureks, tea, coffee... Remarkable point - the packet tea for 5 grivnas / cup from a brass samovar 1891 (stoked really on the cones and wood, no boot, but with a pipe).

Who benefits from going through the "Bugas" checkpoint is the beneficiaries. In principle, so is going through the "Zaitsevo" checkpoint. Therefore, today in Donetsk acquaintances with children under 2 years of age are "worth their weight in gold", and mothers need to receive children's payments, and to consult Ukrainian professional medical centres, and drivers with other fellow travellers benefit - they pass through without queuing.

In principle, there are private drivers (who have their own arrangements at checkpoints with the condition of preferential queuing) who will take you from Donetsk to the same Mariupol and return the same day back. But here the round trip fare is 500-700 grivnas per person.

Exhibit R

RBC, *Who started the war in Avdeyevka* (31 January 2017)

(translation)

Translation

RBC, *Who started the war in Avdeyevka* (31 January 2017), available at: <https://www.rbc.ru/newspaper/2017/02/01/589063099a79474b524c6b1d>

Who started the war in Avdeyevka

(Photo: Dan Levy/RIA Novosti)

How long will the escalation near Donetsk last?

Fighting between the Donetsk People's Republic and the Ukrainian military continues in Avdeyevka. While both sides accuse each other of provocation, the city is without heating and on the brink of a humanitarian disaster, while Petro Poroshenko convenes the National Security Council.

Picture: Militiamen of the Donetsk people's republic. February 2015.

What happened

The situation in Donbas sharply escalated on 29 January as fighting broke out between the forces of the self-proclaimed Donetsk people's republic and the Ukrainian army near the town of Avdeyevka. The settlement, which had already been in the epicentre of fighting in 2014, is located 6km north of Donetsk and is controlled by the Ukrainian side.

Both sides accuse each other of exacerbating the situation near Avdeyevka. Kiev claims that the DPR fighters launched an assault near the Avdeyevka industrial zone in order to seize the positions of the Ukrainian Armed Forces. For its part, the Donetsk people's republic's defence ministry claims that the Ukrainian side was the first to start shelling the territory controlled by the Donetsk people's republic, in the morning of 29 January alone firing some 900 mines and shells.

"Avdeyevka on the brink of death"

Avdeyevka, home to more than 34,000 people at the start of the armed conflict in Donbas, is a single-industry town and depends entirely on Avdeyevka Coke and Chemical Plant (ACCP), part of Ukrainian businessman Rinat Akhmetov's Metinvest holding company.

According to Metinvest's press service on its official Facebook page, as a result of the clashes, "the city was left without power. Since the evening of 30.01, all power lines at the Avdeyevka Coke Plant have been cut. The plant is de-energised. Two workshops out of four have already been mothballed. The city, which depends on the plant for heat and water, is on the brink of disaster."

The company's management explained to RBC that ACCP continues to maintain heat supply to Avdyivka using coke gas, but it is 'catastrophically low'. If natural gas supply is not restored, there will be enough coke oven gas 'until the end of the day', the source said. If the plant is shut down, it will be impossible to restart it and the enterprise will cease to exist, he continues, stressing that this would mean the virtual 'death of Avdeyevka itself'.

Picture: View of Avdeyevka Coke Plant (ACCP). 31 January 2017 (Photo: Inna Varenytsia/AP)

Kiev's position

A state of emergency has been declared in the city, Ukrayinskaya Pravda quoted the Donetsk Oblast's police chief, Vyacheslav Abroskin, as saying. If the city remains without heat, the local authorities are ready to start evacuating its residents, primarily children. According to the head of the Donetsk military-civil administration, Pavel Zhebriivskiy, there are currently about 16,000 people in Avdeyevka, while cities in Donetsk Oblast are ready to receive up to 9,000 people.

The headquarters of the antiterrorist operation (ATO) said that 'intense small arms and mortar fire' from the DPR started on 29 January at around 5:00 local time, and two hours later an assault on Ukrainian positions began, which was repulsed. Kiev believes that the purpose of the attack was to push Ukrainian units away from their positions and accuse Kiev of violating the Minsk agreements.

Fighting in the city area lasted for three days. In the morning of 31 January, the ATO headquarters said that the outskirts of Avdeyevka had been shelled using Grad multiple rocket launchers, which are prohibited under the Minsk agreements. According to Ukrayinskaya Pravda, 71 violations of the ceasefire regime were recorded during the day, and 1,284 rounds of ammunition were fired from Donetsk towards Ukrainian forces' positions. According to the Minsk agreements, the Grads should be withdrawn to 70 km from the line of contact.

Representatives of the Donetsk people's republic asked Kiev for a cease-fire and then violated it themselves by going on the offensive again, Zhebriivskiy said on his Facebook. According to the Ukrainian side, shells in Avdeyevka are falling near residential buildings and a hospital, and one of the shells hit a five-storey house.

At least six Ukrainian servicemen were killed in the fighting, the Zerkalo Nedeli weekly has said, with reports of possible civilian casualties. At the same time, according to the Ukrainian Defence Ministry's chief intelligence directorate, 15 Russian servicemen were killed and another 24 were wounded during the Avdeyevka attack.

This is the most serious fighting in Avdeyevka since 2014, RBC's source close to the ATO command headquarters admits. Despite attempts to obtain an artillery silence from the Donetsk People's Republic, 'the shelling is only getting more intense'. Poroshenko's administration described situation in Avdeyevka as 'very tense', the deputy head of the Ukrainian presidential administration, Kostyantyn Yeliseyev, said on Channel 5.

"The shelling continues unabated"

The Donetsk people's republic blames the Ukrainian military for the shelling. Eduard Basurin, deputy commander of the operational command of the self-proclaimed DPR, told RBC that 'it is quiet now on the Avdeyevka side'. "We have stated that we will not fire back if the Ukrainian army stops firing in our direction," he said.

Earlier, Basurin said that Ukrainian security forces fired more than 1,900 bombs and shells in one day on the territory of the Donetsk people's republic, in addition, IFVs and small arms were used. According to Basurin, shelling from the Ukrainian side targeted 14 residential areas of the Donetsk people's republic and the outskirts of Donetsk. According to Basurin, on the night of 31 January, at least four shells hit multi-storey residential buildings on the outskirts of Donetsk, the

railway track near Donetsk train station was damaged, and a broken power line left Donetsk's Severny district without electricity.

Picture: A residential building on Listoprotkachikov Street in Donetsk's Kievsky district damaged by shelling. 31 January 2017 (Photo: Mikhail Parkhomenko/RIA Novosti)

The third day of fighting near Avdeyevka is confirmed by DPR militiaman Aleksandr Zhuchkovskiy to RBC. According to him, there is no storming of Avdeyevka and in fact position fighting is going on, 'although the DNR army has a clear advantage at the moment'.

"The Ukrainian armed forces have a very powerful fortification on the outskirts of Avdeyevka, and it is unrealistic to break through it with a rush - it takes time and additional forces that have not yet been deployed," the militiaman said. "Despite the theoretical Minsk agreements, the militia has a serious need to take control of Avdeyevka. From there, from residential areas, heavy fire is conducted by Ukrainian artillery, including rocket-propelled artillery. Tonight, least ten packets of Grad rockets were fired at Donetsk and Makeyevka from there. It is difficult to respond to this shelling - one would have to shoot at residential areas in Avdeyevka and Peski, where the Ukrainian armed forces are firing from. It makes sense to take control of these settlements, although it should have been done two years ago."

Poroshenko gathers security forces and diplomats

Following the escalation of hostilities in Avdeyevka, Petro Poroshenko was forced to cut short a visit to Germany, where he was discussing the situation in Donbas with Chancellor Angela Merkel. According to deputy head of the administration Yeliseyev, Kiev intends to initiate a meeting of the trilateral contact group 'in any mode, even via videoconference'.

Picture: Ukrainian President Petro Poroshenko and German Chancellor Angela Merkel meet in Berlin. 30 January 2017 (Photo: Mikhail Palinchak/RIA Novosti)

The president is also gathering the military cabinet of the National Security and Defence Council of Ukraine, the Interfax-Ukraine news agency reported, citing a source in the inner circle of the Ukrainian head of state.

As RBC earlier reported, the Kremlin is 'extremely concerned' about a new round of hostilities at the line of contact in eastern Ukraine, Russian presidential press secretary Dmitriy Peskov has said. In his words, Moscow has reliable data according to which 'Self-styled militias' (not affiliated with the Ukrainian Armed Forces), supported by Ukrainian artillery, attempted to attack territory controlled by the self-proclaimed DPR and LPR. "The Donbas militias had to fight back near Avdeyevka, had to fight to take back the occupied territory," the presidential spokesman said, regretting the loss of life on both sides of the conflict.

According to Ukrainian political analyst Kostyantyn Bondarenko, the reason for another escalation on the front is that 'there are forces on both sides that are not under the control of official Kiev and not under the control of DPR leaders.' The expert told RBC that in such a situation "Mutual provocations will be inevitable as long as both sides do not fully implement the Minsk agreements."

Bondarenko does not predict that the escalation will be long-lasting; most likely, the contact group in Minsk will indeed meet soon and another attempt will be made to reach an agreement. "Fighting is not beneficial to either side. But there can only be a real solution to the situation if a third-party peacekeeping contingent is brought in. However, the introduction of UN blue helmets requires a decision of the Security Council, and this can take at least six months. The OSCE does not have an armed peacekeeping mission," the expert said.

The political consequences of the fighting in Avdeyevka are a sharp decline in the parties' trust in each other, which may slow down the settlement process, Alexey Chesnakov, director of the Centre for Political Conjuncture, which is close to the Kremlin, told the RBC news agency. At the same time, the expert rejects the possibility of canceling the Minsk agreements, as revising them would mean refusing to peacefully resolve the situation.

Authors: Vera Kholmogorova, Artem Solodkov, Vladimir Dergachev.

Exhibit S

Rinat Akhmetov Foundation, *Akhmetov's Headquarters Humanitarian Aid Escort Team Comes under Fire* (25 June 2015)

(translation)

Translation

Rinat Akhmetov Foundation, *Akhmetov's Headquarters Humanitarian Aid Escort Team Comes under Fire* (25 June 2015), available at: <https://akhmetovfoundation.org/ru/news/grupa-suprovodu-gumanitarnogo-vantazhu-shtabu-ahmetova-potrappyla-pid-obstril>.

Akhmetov's HQ Humanitarian Aid Escort Team Comes Under Fire | Rinat Akhmetov Foundation

A convoy escorting a humanitarian aid convoy from Akhmetov's headquarters came under fire in the crossfire near Volnovakha today. They were heading from Donetsk, where the HQ's logistics centre is located, towards the Bugas checkpoint.

No members of the Humanitarian HQ were injured. The escort vehicle turned around and drove away to a safe distance.

At the same time, there were Red Cross humanitarian mission vehicles near Bugas, returning from Donetsk after delivering aid. The Red Cross convoy was also forced to turn around.

"Something scary again at the roadblock near Novotroitskoye at the Bugas crossing point. Our 19 trucks are standing still. There are about 12 World Food Programme vehicles in front of us. The Red Cross vehicles came under fire. Our escort vehicle came under fire. The density of fire at the last Ukrainian checkpoint is the strongest," **Natalia Yemchenko, SCM public relations and communications director and a member of the Rinat Akhmetov Humanitarian Headquarters' council**, reports on her Facebook page.

Yesterday, Rinat Akhmetov's headquarters carried out a test shipment of a convoy with food for Donbas civilians through the Volnovakha checkpoint. On the evening of 24 June, 10 vehicles with humanitarian aid crossed the line of contact. They delivered 15,000 survival kits to Donbass Arena.

Another 19 vehicles were due to undergo customs inspection today, but due to shelling near Volnovakha they have been forced to suspend movement and are awaiting the opportunity to pass. If the 380 tonnes of food carried by the convoy is successful delivered, it is planned to form 20,000 of adult survival kits and 6,000 children's kits for civilians in Donbas who are in non-government-controlled territory.

We shall remind you that at the moment, due to problems with the delivery of humanitarian goods when crossing the line of contact, survival kit distribution centres from Rinat Akhmetov's headquarters in the non-government-controlled territories are operating only in Donetsk.

Exhibit T

VKontakte page, *Novorossiya militia reports. Military review by military correspondent call sign "Samur" (13 January 2015).*

(translation)

Translation

Vkontakte page, *Novorossiya militia reports. Military review by military correspondent call sign "Samur"* (13 January 2015), available at: https://vk.com/wall-57424472_39169.

Reports from the Novorossiya militia

13.01.15. War review by military correspondent with call sign "Samur".

"Cannonade has been going on in Donetsk since early morning. We will start with a relatively calm area - the southern flank. Here the line of fire actually coincides with the riverbed of the river Kalmius. On the left, eastern bank of the river, Ukrainian army positions and roadblocks have moved forward beyond the suburb of Mariupol, Talakovka, towards the village of Gnutovo.

The terrain in this area is predominantly open, with only dacha plots blocking the view in some directions. The incessant firing of various types of weapons has continued here in the same way as in Donetsk since 7 January. It was not until the morning of 13 January that an unstable silence was established.

In recent days, Ukrainian army artillery has also been striking at militia positions north of the Talakovka-Gnutovo direction, from the villages of Pavlopol and Granitnoye towards the district centre of Telmanovo and the Telmanovsky district.

The village of Telmanovo found itself in a critical situation: many life support facilities in the district centre were damaged as a result of artillery shelling.

The town of Dokuchayevsk remains under fire by the Ukrainian Government. It is being shelled from artillery positions to the west of Yelenovka and on the outskirts of Volnovakha. The town is in the "focus" of the intersection of two directions of fire.

On the morning of 12 January, a day shift who had arrived by bus at the Dokuchayevsky dolomite quarry was forced to rush out of the bus and immediately hit the ground: at the same time another firing attack began.

On the same day, shrapnel hit a resident of the village of Aleksandrinka, east of Dokuchayevsk. The shells landed specifically in the private sector there.

In the Krasnogvardeysky district of Makeyevka, many residents spent the night of 11-12 January in basements. The north-western part of Makeyevka was shelled by Ukrainian troops from the Peski settlement and Avdeyevka. The fire did not stop on the day of 12 January and on the night of 13 January. The militia's artillery was forced to send "retaliatory fire", including from Grad systems, towards the enemy positions.

At 12-13 p.m. on 13 January, the hottest area of the Donetsk Front remained the Peski settlement and the airport. Ukrainian army artillery continued to fire from Peski towards the Krasnogvardeysky district of Makiivka.

According to a militiaman with the call sign "Sheva", the peak of the enemy's fire activity began to subside in the afternoon. The results of the counter-battery fighting undertaken by the DNR army command had an effect. The militias continue to hold their positions firmly.

In recent days, it has been noted more than once that the hot summer of 2014 has returned to Donbas in the midst of winter. After all, last summer and this winter the Ukrainian punitive

forces remain faithful to their firing tactics: to shoot not so much at the positions of their enemy, but to "terrorize" the civilian population.

This has one goal: to dissatisfy the republic's residents with the militias and the very existence of the DPR. The civilians are indeed dissatisfied with this, as in fact they are becoming hostages of the hostilities on both sides.

The "negotiation process" on the peaceful settlement of the conflict between Ukraine and Donbass, which has been now and then disappearing again, if viewed not from the heights of big politics but from the shelled streets of Donetsk, has so far only had the opposite effect: the more talk of diplomatic sit-ins, the harder the guns fire."

Exhibit U

Ministry of Defence of Ukraine, Press Release, Territorial Defence Battalions Will Be Subordinated to ATO Leadership, - Mikhail Koval, 18 June 2014

(translation)

Translation

Ministry of Defence of Ukraine, Press Release, Territorial Defence Battalions Will Be Subordinated to ATO Leadership, - Mikhail Koval, 18 June 2014, available at: https://web.archive.org/web/20140618193418/https://www.kmu.gov.ua/control/uk/publish/article?art_id=247399455&cat_id=244276429.

Territorial Defense Battalions Will Be Subordinated to ATO Leadership, - Mikhail Koval

18.06.2014 | 19:15

Press service of the Ministry of Defense

Commenting on the course of the active phase of the anti-terrorist operation, Acting Minister of Defense of Ukraine Colonel-General Mikhail Koval noted that yesterday, 17 June 2014, the leadership of the Aidar territorial defense battalion, whose personnel are engaged in the anti-terrorist operation, decided to independently assault the terrorist groups stationed in Lugansk without the consent and coordination of the ATO leadership.

During the march, the battalion's soldiers were ambushed by militants. The terrorists were firing heavy fire from automatic weapons and grenade launchers.

Having accepted an unequal battle, the fighters of the Aidar battalion called for reinforcements at the ATO headquarters.

The leadership of the headquarters made an immediate decision to provide assistance to the battalion. Two combat task forces were sent to the site of the clash with the militants.

As a result of the fierce battle, Ukrainian servicemen were killed and wounded.

Terrorists also suffered numerous casualties, the number of which is being clarified.

The Ministry of Defense of Ukraine officially states that this incident occurred due to an unauthorized decision by the command of the Aidar battalion to conduct active hostilities.

In view of the facts of unauthorized decision-making and lack of coordination with the ATO leadership, the defense ministry has proposed that territorial defense battalions involved in the anti-terrorist operation should be promptly subordinated to the ATO leadership.

Exhibit V

*Spilno, Kiev-2 Battalion Commander - I Wish Children Wanted to Live in Our Country. I Wish
Our country Was in Order (24 December 2017)*

(excerpt, translation)

**Excerpt
Translation**

Spilno, Kiev-2 Battalion Commander - I Wish Children Wanted to Live in Our Country. I Wish Our country Was in Order (24 December 2017), available at: <https://spilno.net/komandir-batalona-kiev-2-ya-xochu-chtoby-deti-xoteli-zhit-u-nas-v-strane-chtoby-v-etoj-strane-by-poryadok/>.

Kiev-2 Battalion Commander - I Wish Children Wanted to Live in Our Country. I Wish Our country Was in Order

The Kiev-2 battalion was shrouded in a trail of myths and rumours immediately after its creation. The period when the unit was involved in combat operations was also repeatedly used as "inspiration" for fake provocations by the enemy. Bogdan Voytsekhovskiy, former commander of the Kiev-2 battalion (call sign "Sotiy") and a soldier of that unit (call sign "Kostil") revealed the details of certain military operations in which the unit took part, spoke out about the involvement of certain personalities - who are gradually becoming historical figures, and someone looking for media dividends.

Please introduce yourself.

Bogdan Voytsekhovskiy. The former commander of the "Kiev-2" battalion, the call sign was "Sotiy".

"Kostil" - a former member of the "Kiev-2" battalion, a private.

How and when did the Kyiv-2 battalion emerge?

Bogdan Voytsekhovskiy: The battalion began to be formed in the spring of 2014. Initially, all orders were signed. The battalion was formed on the base of the Ministry of Internal Affairs in April 2014, the core staff, the first core that came then and started enlistment and training.

Who was the core of the battalion?

Bogdan Voytsekhovskiy: There were mostly guys from Maidan. Partly from the "Afghan Hundred". Other "Maidan units". A lot of former policemen and servicemen came there. We had a very diverse composition, and I think we were lucky to have it. Thanks to this, we were out and about in various tricky situations. Because the people were very different and when a lot of knowledge converge you end up with something applicable in our difficult activities especially in the one we had in 2014.

Where was the battalion stationed and what combat missions did it perform?

"Kostil": We were stationed near Volnovakha. We had a roadblock. Our tasks - pass control. Not to allow smuggling and everything else. In addition, to keep order in the city. Outside roadblocks, constant patrolling of the city and neighboring villages. There was plenty of work to do. I still have many acquaintances in Volnovakha who call and remember Kiev-2.

Bogdan Voytsekhovskiy: I will make a remark. When we formed the base, of course, nobody allowed us. We went to former Yanukovych's hunting farm "Sukholuchye". It was the battalion's training base, where units were formed which later joined the battalion. The guys lived and trained there.

Our first task was to go to the ATO zone near Debaltsevo, village Chernuhino, 10 km from Debaltsevo. Debaltsevo is still Donetsk oblast, but Chernukhino is already Lugansk oblast. It was our baptism of fire. Naturally, we were like blind kittens. Nobody knew anything. Neither where was going on. Neither the soldiers knew, nor we knew. That's the kind of thing that happens. Probably because our unit was multinational. We had Christians, Jews, Muslims in our battalion. And so all the gods made it so that we got out of there without too many casualties, fortunately only one bicentennial on the other hand.

After that we were redeployed to Volnovakha.

Topics affecting the battalion and its servicemen are periodically raised on social media. The battalion has been accused of smuggling murders and other crimes.

This information was actively disseminated in 2015 by a person called Dmitriy Tsvetkov, who introduced himself as a former member of the Kyiv-2 battalion and others. What do you think about this information?

"Kostil": I personally won't say anything about it. It's the ravings of a blue-horse. That's all I can say.

Bogdan Voitsekhovskiy: I will say a little bit more.

I've never wanted to comment on it. I did not want to get into these squabbles.

The situation is very simple. Tsvetkov is a very specific person. All my acquaintance with him consisted in the fact that when he enlisted in battalion he wanted to remove him from the battalion as soon as he came (to Volnovakha ed.). I got information that before he left he had been drinking and started poking each other with weapons with some comrade. I thought, as I don't know the man. He had just arrived from a training camp. I lined up the whole unit.

I took his gun from him in front of the formation, took his ID. And I said, you're on the flight to Kiev tomorrow. The man seemed very offended. He is such an aspiring young man. After that my deputies persuaded me: "Let's leave him, there are not enough people, everyone is on edge". So we kept this man.

What he started to write about some murders, some welders. Imagine the scene. There is a bunch of people at the roadblock. Border guards, SBU guys. And the man writes that I personally killed a man right at the roadblock. I had nothing to do. I was beating him there, I took from him, as far as I remember, I read on the Internet, some amount in rubles and some amount in grivnas. Well, somehow ... When a dog has nothing to do, you know what it does.

So about this man, I do not want to comment. We had him for exactly one and a half months. Then he is in a bullet-proof waistcoat somewhere in the Kiev flat. It is obvious because he writes that I am threatening him or someone is threatening him. He is hiding all this poor guy.

He made such a statement about what we were doing in Volnovakha. Well, he is somewhere out there, he lives in these social networks, he writes. He has a group of comrades who do it with him. I do not even want to comment on it.

As for the smuggling. This is also a big topic. I will explain why. Thousands of cars pass through the roadblock. Here is a man who lives in Dokuchayevsk is a territory of "DPR". He takes fish and some bananas in a small bus. Is it smuggling or not? They are citizens of Ukraine. They went to Mariupol and bought. They say we bought several cases for our own use. Can I be accused of letting in contraband? I think not. They are citizens of Ukraine, they have the right to

move around. When our colleagues come to me, I will not pass through units, let's say from friendly units. They say, here we had a special operation near the contact line. We need four trucks, they go that way sealed... I will not fight with them. I do not need it. I have other tasks. Of course they take those trucks. Then it turns out those trucks are rumored to contain cigarettes. That's their livelihood. They're still doing it now. Is it smuggling or not? I mean, did I miss it? No. And all the people who passed through that roadblock, they remember us. There was never any trouble. Yes, there were problems with those people who behaved impudently, especially the Donetsk Oblast police officers who tried to cut in line. Sometimes their wheels blew out... things like that happened. But we behaved normally with normal people and acted normally. And there was the question of some murders. Before us there was the 72nd Brigade. In the 72nd Brigade there was a serviceman Kostakov. He was in charge of intelligence. Our guys introduced me to this man. In our unit we had representatives of C14, "Svobodovtsy", there was Zhenya Karas, not an unknown person. Zhenya introduced me to this man. I met him exactly twice. And now there are rumors on the Internet that they found Kostakov's corpse near Volnovakha. That somehow my unit and I were involved in his murder. Because somewhere on the Internet there was information that someone saw him sitting at our roadblock chained to a battery. I don't even want to comment on that. This is nonsense that just doesn't add up to anything.

[...]

Maidan activists and well-known volunteers of the Peacemaker Centre and Igor Savchuk and Yaroslav Bondarenko served in your battalion, what can you tell us about them?

Bohdan Voitsekhovskiy: We met them when we were going to Volnovakha. I am always wary of things I don't understand.

If you can, Bogdan, in a nutshell, who are these guys?

Bogdan Voitsekhovskiy: I found that out a bit later. In the beginning they were just ordinary fighters for me.

I tried to get to know everyone. Get to know everyone in detail.

These guys are from Maidan. I communicated with Mariupol guys as well. Bef

ore we left for the ATO zone, and we left at the end of summer, in fact the end of July beginning of August, they were already going to the ATO zone, they were holding some actions with people. It was both Berdyansk and Mariupol. The guys from Azov know them, I talked to Azov people. So somehow they were already informed about what was going on there, because initially we were near Chernukhino, and then we went to Mariupol.

From the beginning we used everything this way. We had a roadblock, we had duty functions at the roadblock itself, and accordingly our unit's squads worked throughout the Volnovakha district. Starting from Granitnoye, where the front line is, and ending with Novotroitskiy and Olenivka, which is the other side, where the contact line is again.

At first we checked people this way. We simply checked passports and that's it. Any person from the same gangs could pass through. Then we received an offer from these guys in particular, there were also guys from S14, "Svobodovtsy" who also took part in it. They are also advanced in computer technology. We started running people through the databases.

[...]

Exhibit W

Radio Liberty, "*C14*". *Radical Nationalists or Neo-Nazis?* (19 March 2018)

(excerpt, translation)

**Excerpt
Translation**

Radio Liberty, "C14". *Radical Nationalists or Neo-Nazis?* (19 March 2018), available at: <https://www.radiosvoboda.org/a/29109819.html>.

"C14". Radical Nationalists or Neo-Nazis?

[...]

What exactly do you do? What are the areas of activity of C14?

[...]

In 2013, a "brass knuckle terror" began against our and other activists, when we were attacked and beaten near our homes. In total, about twenty activists from Kiev and Kiev region were beaten. They severely broke my brother's skull bones, confusing him with me. Later, we detained a group of 'titushky' who turned out to be members of a special police unit.

And then there was the Maidan, in which we took an active part. We had our own hundred "named after Prince Svyatoslav the Brave". And then 90% of S14 activists volunteered for the war. We fought as part of the Kiev-2, Harpoon, and OUN units, the 54th reconnaissance battalion, special forces regiments, and in the ranks of the DUK PS.

Exhibit X

Vesti Reporter, *Manson, Warrior of Allah* (26 June — 2 July 2015)

(translation)

Translation

Vesti Reporter, *Manson, Warrior of Allah* (26 June — 2 July 2015), available at: <https://web.archive.org/web/20150629231944/http://reporter.vesti-ukr.com/art/y2015/n22/16392-menson-voin-allaha.html#.VZHSI3bP02w>.

Manson, Warrior of Allah / Vesti Reporter Magazine

On Thursday, 18 June, Interior Minister Arsen Avakov announced that the high-profile murder of journalist and writer Oles Buzina was solved. On the same day, the police detained 25-year-old nationalists Andrey Medvedko and Denys Polischuk, whom the Interior Ministry's head described as suspects in the murder. 'Reporter' studied the biographies of the detainees and tried to understand whether they had motives for committing the crime.

Allah at large

Already on Tuesday afternoon, the court released Denys Polischuk on a hefty bail of 5m hryvnias. Who exactly paid the bail was a mystery at first, but later MP Anton Gerashchenko said that the amount was donated by Aleksey Tamrazov, a former top manager of the state-owned UkrGazVydobuvannya, who is considered to be a person from Dmytro Firtash's sphere of influence. He left his post as first deputy chairman of UkrGazVydobuvannya back in March 2014 and is now believed to be the owner of the online publication Insider. Tamrazov could not be contacted and nothing is known about the reasons behind his bail.

Polischuk is little known to the general public and in Kiev's street nationalist circles. As it turned out, in the 2012 elections he ran for the Verkhovna Rada on the lists of the Ukrainian National Assembly. However, the UNA, which today is reformed into the Right Sector, was not passable at that time, and Polischuk got the 52nd place. This unpromising position could be explained by the fact that the UNA played a clearly technical role in the elections, pulling over part of the nationalist electorate.

Polischuk's CV posted on a job search website indicates that the suspect has been working since April 2013 as a project manager at FDM Group, a construction company that sells façade panels. However, according to relatives, he has been serving in the 54th Independent Reconnaissance Battalion for almost a year, where he commanded a reconnaissance company under the callsign 'Allah'. Denys Polischuk had the rank of junior lieutenant, which he received while studying at the Military Institute of Telecommunications and Informatization of the KPI. Polischuk's defenders say that on 16 April, the day Oles Buzina was killed, he was in the ATO zone in Sector M.

By the way, Denys Polischuk's lawyer in court is Alexander Dulsky, a lawyer close to the Right Sector, who has more than once pulled radical nationalists out of jail. Alexander Dulsky's brother Nikolai is leader of such radical right-wing movements in Kiev as Fashionable Verdict and Nazhdak.

Manson for white children

At the time of going to press, the second suspect, Andrey Medvedko, was still under arrest. According to the investigation, he was the direct killer of Oles Buzina, shooting at the journalist five times.

Alexander Medvedko, accused of murdering Oles Buzina, is one of the founders of the radical far-right group C14.

Medvedko, aka Menson, is a much better known figure in Kiev's far-right scene than Polischuk. First and foremost as one of the founders of the C14 group. The name has often been read as 'Sich', however, the participants themselves preferred to decipher it as Combat 14, where '14' is a number common to the far-right subculture as a numerical designation of the famous 'commandment' of American racist David Lane: "We must protect the very existence of our people and the future for white children."

C14 gained notoriety in 2012-2013 for a series of anti-building development actions in which young guys in balaclavas bravely tore down green fences. Far less attention has been paid to the attacks carried out by these same guys on left-wing and trade union activists. However, not even all members of C14 realised at the time that the group was really just a successful project of All-Ukrainian Association "Freedom" (VO Svoboda) to mobilise aggressive far-right youth from the ranks of football fans to party actions. Medvedko himself had the status of assistant to Svoboda MP Eduard Leonov.

Football and near-football activities played a big part in Manson's life. He was a member of the fan 'firm' "Medobory" and at the same time managed to work for the Ministry of Youth and Sport, under whose auspices he organised the "Young Footballers' Cup". However, in the fan community, this championship was better known as the "White Kids' Cup": the organisers actively used the sport event for anti-immigrant and racist propaganda. 'Celtic crosses' and the 'black sun' were always present in the championship symbols and posters.

During the revolution, C14 played an important role in Svoboda's seizure of the KCSA (Kiev city state administration) building, where Medvedko was one of the commandants. The group's activities as part of Samooborona (Self-defence) on Maidan were repeatedly criticised - the fans caught 'untrustworthy' and allegedly even organised a 'torture chamber' in the basements of the KCSA. However, according to witnesses, C14 was not directly involved in the 18-20 February clashes.

After Yanukovich was overthrown and the clashes in the east began, most of the fans continued to stay in Kiev. In May 2014, Medvedko tried to run for the Kiev council on behalf of Svoboda, but was defeated. Already in the summer, during active hostilities together with other C14 members, he joined the Kiev-2 battalion of the Interior Ministry and went to war. Manson had officially left the battalion just a couple of weeks before his arrest.

Consequences and causes

The court hearing showed that the investigation into Avakov's accusations against Polischuk and Medvedko was at least poorly prepared.

The testimony by the former owner of the car in which Buzina's killers allegedly travelled, who identified Manson and Allah, is clearly contradictory. A number of other witnesses saw Polischuk and Medvedko not far from the crime scene, but wearing balaclavas.

All these arguments, as well as the sense of solidarity characteristic of far-right movements, have led to a heated campaign in support of the suspects. Notably, on many neo-Nazi and simply patriotic social media pages, though pushing the basic idea of the innocence of

Polischuk and Medvedko, there is often the opinion that 'Buzina's killers should be rewarded rather than punished.' Such an idea was put forward, in particular, by the notoriously radical right-wing MP Igor Mosiychuk.

Why was Buzina killed, apart from, of course, the hate motive for the 'main Ukrainaphobe'?

In dealing with the ultra-right and, conversely, with representatives of the anti-fascist subcultures in the capital, one also hears a different version, that Buzina's murder could have been a public relations stunt for C14 and its patrons who had lost their street cred. Over the past year, many new groups have sprung up in Kiev, like Nazhdak, The Fashionable Verdict, Vidzichi, and a number of old organisations have been given serious military and political cover: the UNA-UNSO and the Trident (Trizub) have formed a political party called 'Right Sector' and the namesake volunteer corps under the patronage of Igor Kolomoysky, The Patriot of Ukraine has grown into the Azov regiment under the wing of Arsen Avakov, while Korchynsky's Brotherhood and the St. Maria battalion are patronised by Oleh Lyashko. Svoboda, on the other hand, has lost political clout over the past year and has failed to form a meaningful fighting force of its own.

The beating of gay-pride activists in Kiev, as well as Buzina's murder, could have been a public relations exercise to raise the profile of specific right-wing organizations.

C14's street activity has been growing markedly in recent months. Members of the group were seen attacking the anarchist march on 1 May, but their real breakthrough was in organising the attack on the Kiev Gay Pride march. Although Right Sector then claimed responsibility for the clashes with the police, the main mobilization of right-wing radicals took place through the Zero Tolerance public owned by C14. Notably, the release of the detainees at the time was also handled by lawyer Alexander Dulsky.

Thus, the 'Buzina case' for C14 could become a second 'Pavlichenko case' (the famous trial against the family of football fans accused of murdering the capital's referee). Svoboda's active involvement in legal support for Pavlichenko and protests during the trials helped the party to mobilise the near-football electorate in 2012-2013. It is possible that now the nationalists will also try to make a show out of the Buzina murder trial. It is already happening even now. At the same time, the society is confronted with the idea of the right of 'armed patriots to carry out justice'.

Exhibit Y

Ukrainian News, *US Considers C14 and National Corps Nationalist Hate Groups*
(14 March 2019)

U.S. Considers C14 And National Corps Nationalist Hate Groups

Українські новини

The U.S. State Department’s Bureau of Democracy, Human Rights, and Labor considers the C14 and the National Corps nationalist organizations as nationalist hate groups.

This is stated in the bureau’s 2018 report on human rights in Ukraine, the Ukrainian News Agency reports.

“There were reports that members of nationalist hate groups, such as C14 and National Corps, at times committed arbitrary detentions with the apparent acquiescence of law enforcement. For example according to the United Nations High Commissioner for Human Rights Monitoring Mission in Ukraine (HRMMU), on March 14, members of C14 unlawfully detained a man in Kyiv region who was suspected of being a member of an armed group in the ‘LPR.’ After interrogating him while he was face down and handcuffed, C14 handed him over to the SBU... There were reports that nationalist hate groups committed attacks on journalists. For example according to the Institute of Mass Information (IMI), on July 19, members of nationalist hate group C14 in Kyiv attacked a journalist covering a trial of C14 members who had been charged with attacking a Romani camp,”

According to the bureau, security forces generally prevented or responded to societal violence. At times, however, they used excessive force to disperse protests or, in some cases, failed to protect victims from harassment or violence.

“For example, on June 8, a group of violent nationalists from the National Druzhina organization--established with support from the National Corps--attacked and destroyed a Romani camp in Kyiv after its residents failed to respond to their ultimatum to leave the area within 24 hours. Police were present but made no arrests, and in a video of the attack posted on social media, police could be seen making casual conversation with the nationalists following the attack,” the report states.

The report also cites cases of government cooperation with xenophobes. According to the report, investigative journalists exposed several instances during the year in which the government provided grant funds to or cooperated with hate groups. Media outlets reported that C14 and other hate groups had entered into formal agreements with municipal authorities in Kyiv and other cities to form “municipal guard” patrol units to provide public security. In a December 2017 media interview, the head of C14 described cooperation with the SBU and police.

The report also states that human rights groups expressed growing concern about an increasingly

organized set of nationalist hate groups committing violent attacks on ethnic minorities (especially Roma), LGBTI persons, feminists, and other individuals they considered to be “un-Ukrainian” or “anti-Ukrainian” in 2018. According to the report, the HRMMU noted that the failure of police and prosecutors to prevent these acts of violence, properly classify them as hate crimes, and effectively investigate and prosecute them created an environment of impunity and lack of justice for victims.

“Mistreatment of members of minority groups and harassment of foreigners of non-Slavic appearance remained problems. NGOs dedicated to combating racism and hate crimes observed that overall xenophobic incidents increased considerably during the year... There were numerous reports of societal violence against Roma during the year, often perpetrated by known members of violent nationalist hate groups. In some instances, police declined to intervene to stop violence... There was frequent violence against LGBTI persons, and authorities often did not adequately investigate these cases or hold perpetrators to account. An increase in attacks was due to increasingly active nationalist hate groups. The HRMMU noted that attacks against members of the LGBTI community and other minorities were rarely classified under criminal provisions pertaining to hate crimes, which carried heavier penalties. Crimes and discrimination against LGBTI persons remained underreported,” the report states.

According to the report, the HRMMU noted that the failure of police and prosecutors to prevent these acts of violence, properly classify them as hate crimes, and effectively investigate and prosecute them created an environment of impunity and lack of justice for victims.

“A June 13 joint open letter to Ukrainian authorities from Human Rights Watch, Freedom House, Amnesty International, and Frontline Defenders also expressed concerns about the spike in attacks and impunity, and noted ‘the inadequate response from the authorities sends a message that such acts are tolerated,’” the report states.

As Ukrainian News Agency earlier reported, Interior Affairs Minister Arsen Avakov has expressed confidence that neither the Natsionalna Druzhyna nor the National Corps will interfere in the electoral process during the March 31 presidential elections.

Exhibit Z

Ukrainian News, *Ukrainian Nationalist Organisation C14 Has Been Listed As a Terrorist Organisation by TRAC International* (15 November 2017)

(translation)

Translation

Ukrainian News, *Ukrainian Nationalist Organisation C14 Has Been Listed As a Terrorist Organisation by TRAC International* (15 November 2017), available at: <https://ukranews.com/news/530220-mezhdunarodnaya-organyzacyya-trac-vnesla-ukraynskuyu-nacyonalystycheskuyu-organyzacyyu-s14-v>.

Ukrainian nationalist organisation C14 has been listed as a terrorist organisation by TRAC International

Ukrainian news



Nationalists are linked to "svobodovtsy". Photo: facebook.com/politicalpartynationalcorps

The international organization for the detection and analysis of terrorism TRAC has put the Ukrainian nationalist organization C14 on the list of terrorist.

This is stated in a report of the organization, reports "Ukrainian news".

"The C14 (Sich) group is a paramilitary right-wing radical group that has close ties with the nationalist Ukrainian party "Svoboda," it said.

Founded in 2010, C14 is named after the 14-word slogan: "We must secure the existence of our people and a future for white children".

The expression belongs to an American Nazi, David Lane. The leader of the organisation is Evgeniy Karas, call sign "Vortex".

Annex 8 Exhibit Z

It is noted that C14 recruited its members among football fans, in particular from "Dynamo" Kiev, "Metallist" Kharkov and "Shakhter" Donetsk.

According to the report, its members were accused of hate crimes (distribution of racist materials and attacks on markets whose owners were of non-Ukrainian ethnic origin).

We shall remind you that Czerwak called Poland's policy "chauvinistic" and said that "the OUN and the UPA have already brought Poles to their senses".

Meanwhile, in Poland, Wiatrowicz was called "an irresponsible person with obsessive anti-Polish ideas".

Exhibit AA

UK Parliament, *REPORTING OF UKRAINE BY THE BBC - Early Day Motions*
(30 October 2017)

REPORTING OF UKRAINE BY THE BBC - Early Day Motions - UK Parliament

Motion text

That this House is deeply concerned by the reporting by the BBC of the Kiev-based organisation C14, a far right organisation with neo-Nazi origins; considers the reporting of C14 activities fails to uphold BBC editorial values; is further concerned that the BBC has afforded a degree of legitimacy to C14, allowing it to disguise itself as a nationalist organisation engaged in reasonable activities designed to defend Ukrainian sovereignty; believes that the BBC has failed to apply due rigour in failing to report on the known history of violence by C14, including attacks on the LGBT community, violence against ethnic minorities, journalists and trade unionists and an attack on a police officer using a grenade during Kiev Pride; expresses deep concern at reporting of C14 activities as educational conversation and petty hooliganism; and calls on the BBC to uphold the values and standards expected by licence fee payers in the reporting on Ukraine.

[Signatures \(10\)](#)

[Supporters \(10\)](#)

[Withdrawn signatures \(0\)](#)

The first 6 Members who have signed to support the motion are the sponsors. The primary sponsor is generally the person who tabled the motion and has responsibility for it. The date shown is when the Member signed the motion.

In addition to the sponsors, the following Members have signed to support the motion.

There are no withdrawn signatures for this motion.

Exhibit AB

European Roma Rights Centre, *Anti-Roma Pogroms in Ukraine: On C14 and Tolerating Terror*
(12 June 2018)

Anti-Roma pogroms in Ukraine: on C14 and tolerating terror

12 June 2018

By Bernard Rorke

Three anti-Roma pogroms within a month mark a worrying escalation of racist violence by neo-fascist militias in Ukraine, and evidence of official collusion is a deeply sinister added element. The European Roma Rights Centre (ERRC) has expressed its deep concern at the lax response from law enforcement agencies to racially motivated violence, which renders minorities even more vulnerable, and besmirches the image political leaders in Kyiv strive to cultivate of a tolerant, forward-looking nation.



The U.S. Embassy in Ukraine called on law enforcement officers to investigate the recent attacks on Roma and tweeted the following: “No one in Ukraine should live in fear because of who they are. We urge law enforcement to investigate recent attacks on Roma. Justice and Tolerance for minority communities are key in the new Ukraine.” <https://bit.ly/2khEFm5>.

Three pogroms

In the most recent attack on May 22, ERRC News [reported](#) that a group of masked men armed with guns and bats forced Roma families living near the village of Velyka Berezovytsia Ternopil to flee into the forest, and then set fire to their makeshift dwellings. Shots were fired and three people were injured in the attack. The terrified seven adults and 30 children lost all their property and documents in the arson attack. Doctors at the local hospital were forced to call the police when the injured Roma came under renewed attack as they were being brought in for treatment.

Just a week earlier, in the village of Rudne in the Lviv region, a 30-strong gang of masked men descended upon Roma shacks at 2a.m. on May 10, dragged people out of their beds, beat them and set their homes alight, destroying all their belongings and forcing them to flee. Police and ambulance responders were on the scene, but no arrests were made. The victims' whereabouts are unknown.

This attack came just 10 days after members of the neo-Nazi paramilitary group C14 filmed themselves carrying out a pogrom in the Lysa Hora nature reserve near Kyiv, where they drove fifteen families from their homes. As reported by ERRC on April 21, a C14 gang, carrying weapons, attacked the Roma. A video posted days later showed whole families with small children fleeing in terror, chased by masked men who hurled stones and sprayed them with gas canisters, before setting their tents ablaze.

Official collusion

What is especially sinister is the evidence of official collusion in each of these attacks. Following the first attack, the prominent C14 member Serhiy Mazur openly boasted on his Facebook page about the successful operation, as the result of

collaboration between C14 and the Holosiyiv District Administration.

The police took no action at first, stated that they had not received any complaints of violence or beatings, and claimed that local representatives and firemen were present during a clean up operation where rubbish left behind by Roma was burned. By April 25, the video footage, eyewitness accounts and media coverage forced the police to announce that a criminal investigation had been initiated.

Concerning the May 10 attack in the village of Rudne, the [Kharkiv Human Rights Protection Group](#) (KHRPG) reported that unknown persons visited the camp days before the attack and warned the Roma to leave. On May 10, the district administration news service announced that municipal workers, police and security “conducted an explanatory operation” with the Roma, after which they left the territory. Accounts from people in the nearby village suggest that police were actively involved in the attack. After being ordered to investigate by the Human Rights Commissioner, the National Police of Lviv region opened a criminal case of hooliganism.

As Jonathan Lee reported in [ERRC News](#), after the third May 22 pogrom, one of the Romani women told our monitor on the ground: “I don’t trust the police. The next day I saw the police officer drinking coffee with one of the guys who attacked our camp.” She added “One of the guys who attacked us threatened to find us even underground if we dare to complain to the police”.

Who is C14 and why does it enjoy such impunity?

The brazen effrontery of these thugs and the impunity they enjoy beg some fundamental questions about official attitudes to the protection of minorities and the legal standing of ultraviolent fascist groups in Ukraine. C14 first emerged around 2010 as the youth wing of the extremist Svoboda party, and was one of the far-right groups active in the Euromaidan uprising of 2013-2014. Since Russia’s military aggression began in 2014, right-wing militias such as Azov and Right Sector played a role in fighting off the Russian-backed separatists, which earned them significant public admiration. This has translated into tacit support for their criminal actions way behind the front lines.

Back in 2014, C14 leader Yevhen Karas denied being a Nazi when he [appeared](#) on BBC’s Newsnight program, explaining that his main “confrontations” were with non-Ukrainian ethnic groups that controlled Ukraine’s political and economic forces, specifically Russians, Jews and Poles. In a recent TV interview, Karas declared “*We don’t consider ourselves a neo-Nazi organization, we’re clearly Ukrainian nationalists.*”

Activists from C14 also insist that the group’s name is not a reference to the 14-word slogan coined by US Nazi David Lane – “We must secure the existence of our people and a future for White Children” – but that C14 just resembles the word Sich (18th century Cossack political entities) in Cyrillic (Січ).

C14 denials cut little ice with activists who monitor the activities of far-right groups in Ukraine, and who point out that C14 has been involved in violent attacks on people taking part in the annual Kyiv Pride march, and physical force disruptions of exhibitions, commemorations and peaceful protests. Far right terror is being deployed to create a climate of fear behind the frontlines. Brutal attacks on International Women’s Day marches in several Ukrainian cities earlier this year prompted Amnesty International to warn that “the Ukrainian state is rapidly losing its monopoly on violence.”

In February 2018, two men linked with C14 were charged with the murder of the pro-Russian journalist Oles Buzyna three years earlier. Halya Coynash reported that C14 has advertised its services to prospective ‘donors’ by offering to make trouble for their enemies. It should be troubling that such ‘services’ are on offer from a gang that has official authorization to ‘keep the peace’, as C14 and Kiev’s city government [signed an agreement](#) late last year allowing C14 to establish a “municipal guard” to patrol the streets; three such militia-run guard forces are already registered in Kiev, and at least 21 operate in other cities.

The BBC landed in hot water for its reporting on C14 recently. A parliamentary motion, tabled on October 30 last year (<https://bit.ly/2JsaDqU>), and sponsored by MP John Cryer, accused the BBC of failing to uphold editorial values and apply due rigour in its reporting on C14, “allowing it to disguise itself as a nationalist organisation engaged in reasonable activities designed to defend Ukrainian sovereignty”. The BBC was accused of omitting to report on the known history of C14 violence “including attacks on the LGBT community, violence against ethnic minorities, journalists and trade unionists and an attack on a police officer using a grenade during Kiev Pride.”

Conclusion and a fourth pogrom

On the same day that Freedom House published [a new report](#) warning of the dangers posed by increasingly active extremist groups in Ukraine, news has just come in of a fourth pogrom-style attack on Roma carried out on June 8 by members of the National Druzhyna militia, who first posted threats on Facebook, then broadcast the attack and destruction of the camp on Facebook live (<https://bit.ly/2MaITbY>). The police have stated that the camp was empty when the militia arrived, so there were no victims and no arrests, and they will not open any criminal proceedings related to this incident.

According to the author of the Freedom House report, Kiev-based historian and political scientist Vyacheslav Likhachev, “The most disturbing element of their recent show of force is that so far it has gone fully unpunished by the authorities. Their activities challenge the legitimacy of the state, undermine its democratic institutions, and discredit the country’s law enforcement agencies.” For as long as neo-fascist paramilitaries can act with impunity, and their deeds go unpunished, the Roma of Ukraine are once again hunted and haunted by the spectre of the officially-sanctioned pogroms of the dark times of the 20th Century.

(This article was originally published on the Hope not Hate international blog)

Exhibit AC

US Holocaust Memorial Museum, *US Holocaust Memorial Museum Expresses Deep Concern About Anti-Romani Violence and Antisemitism in Ukraine* (14 May 2018)

US Holocaust Memorial Museum Expresses Deep Concern About Anti-Romani Violence and Antisemitism in Ukraine

May 14, 2018

UNITED STATES HOLOCAUST MEMORIAL MUSEUM EXPRESSES DEEP CONCERN ABOUT ANTI-ROMANI VIOLENCE AND ANTISEMITISM IN UKRAINE

WASHINGTON, DC – The United States Holocaust Memorial Museum expresses deep concern regarding recent manifestations of intolerance and antisemitism in Ukraine including violence directed against the Romani communities in Kyiv and L'viv. On April 21 members of the neo-Nazi Ukrainian organization C14 in the Holosiyiv District of Kyiv forced 15 families to flee the area and burned down their dwellings. On May 9, approximately 30 masked men burned down the Rudne settlement in the L'viv district. The Roma were targeted by the Nazis during World War II and at least 200,000 were killed by the Germans and their collaborators. There has also been an alarming rise in antisemitic activity including the desecration of Jewish memorial sites, torchlight marches and antisemitic speeches organized by neo-Nazi groups in L'viv and Odessa glorifying Nazi collaborators who participated in the mass murder of Ukrainian Jews.

While acknowledging the hate crime investigation of the April 21 attack on the Romani community that has been opened by the Kyiv municipal police and the recent statement by Ukrainian President Petro Poroshenko strongly condemning “any manifestations of intolerance and antisemitism” and promising immediate reaction by Ukrainian law enforcement agencies, it is clear that more needs to be done to combat antisemitic and anti-Roma prejudice and to stop the various efforts to distort the nation’s Holocaust history by glorifying Nazi collaborators and white-washing historical truth.

This will require greater consistency of government action. The Memorandum of Cooperation signed on March 18 between the Ministry of Culture, Ministry of Education and Science, Kyiv Municipality, and the National Historical and Memorial Reserve Babyn Yar is a positive step promising to advance the project to create the Babyn Yar Holocaust Memorial Center, a museum and educational center, at one of the most horrendous mass murder sites of the Holocaust. At the same time, however, the continuing effort led by the leadership of the government’s Ukrainian Institute of National Memory to praise certain leaders of the Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) and cleanse their murderous records raises doubts regarding the government’s intentions.

The Museum urges the Ukrainian government to consistently combat new manifestations of intolerance – including antisemitism and anti-Romani sentiment – and to honestly confront the country’s past, including the participation of some Ukrainians in the murder of Jews and Roma during the World War II. Ensuring consistency in the government’s approach and the commitment of national resources to initiatives to memorialize and educate about the tragedy of Babyn Yar and the Holocaust in Ukraine will be positive steps in this process.

A living memorial to the Holocaust, the United States Holocaust Memorial Museum inspires citizens and leaders worldwide to confront hatred, prevent genocide, and promote human dignity. Its far-reaching educational impact and global impact are made possible by generous donors. For more information, visit ushmm.org.

###

[View All Museum News Releases](#)

Exhibit AD

Kharkiv Human Rights Group, *Neo-Nazi C14 vigilantes appear to work with Kiev police in latest "purge" of Roma (25 October 2018)*



Human Rights Protection Group

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Neo-Nazi C14 vigilantes appear to work with Kyiv police in latest 'purge' of Roma

25.10.2018

Halya Coynash




Members of the neo-Nazi C14 movement, together with the 'Kyiv Municipal Watch' civic organization which is led by C14 activist Serhiy Bondar, have carried out another raid, driving Roma citizens out of the area around the Southern Railway Station in Kyiv. The raid does not appear to have been accompanied by shocking images of violence like some five others this year, but that is the only positive difference. What is much more disturbing is that the action appears to have been with the cooperation of the police, and was essentially given glowing coverage on a national television news broadcast.

Bondar posted [a video](#) on his Facebook page on 24 October, together with a caption reading (in his words): "A purge of gypsies at the capital's railway station". He later [began backtracking](#), claiming that they had not driven anybody away that they had simply posted videos "with gypsies who rob people" – as their "ethnic trade" – and that the police, to their amazement, had done it themselves.

It is worth noting that the above language, and worse, are used extensively by Bondar and other C14 activists. This is just one of the reasons for concern at indications that these far-right vigilantes appear to be working closely with the police. That is certainly the impression given by the TSN.ua news broadcast on 24 October, which Bondar proudly posted on his FB page. It is small wonder that he was pleased since the presenter of the feature virtually parrots parts of the C14 video, with only two Roma people driven out shown in a negative light. There is one telling detail, namely that the television program is carefully not to ethnically label the people driven out, with the feature entitled: '[Police and civic activists tried to clean the capital's station of thieves](#)'. It does, however, show the activists wearing camouflage gear and chevrons clearly showing the C14 symbol, and little effort would be required to find out how C14 presents its vigilante activities, and why this organization has gained notoriety over recent months.

There may well be a problem with thieves at Kyiv stations, and there is little



 e in closing ones eyes to the fact that some of the Roma who come to Kyiv live temporarily near the stations are involved in criminal activities. Thieves should undoubtedly be stopped, but that is the task of the police, not of C14 vigilantes with racist views, [a shocking track record](#) and [openly declared willingness](#) to cause trouble to people's 'enemies' for money.

There have been a minimum of five attacks on Roma camps since April this year; with the last leaving one young man dead and a woman and child injured. All of the attacks - [at Lysa Hora](#) in Kyiv on 21-22 April; [Rudne on 9 May](#); the [Ternopil Oblast on 22 May](#); at Holosiyiv Park in Kyiv on 7 June and [near Lviv on 24 June](#) - seem to have been carried out by activists involved in far-right groups. One C14 activist, Serhiy Mazur, was recently [placed under house arrest](#) over charges relating to the attack on a Roma settlement on Lysa Hora in Kyiv.

[As reported](#), there was effectively a pogrom on April 21-22, with families driven out and their makeshift homes burned. All of this was described in detail, albeit with euphemisms, by Mazur on his Facebook page.

The Kyiv police continued to downplay this raid by vigilantes with neo-Nazi leanings right up until 25 April when the Internet publication LB.ua posted a [video](#) showing whole families running in terror from young men, many in masks, hurling stones and spraying gas canisters in the direction where families with some very small children were trying to take shelter. One Roma man can be seen on the video trying to use a thin branch in defence, but then realizing he is outnumbered and also fleeing. That evening the Kyiv police finally announced that a criminal investigation had been initiated. Human rights activists are [reportedly](#) working to ensure that the police keep their promise and change the classification of the crime from 'hooliganism' to that of a hate crime under Article 161 of the Criminal Code.

It was noticeable, and worrying, that in his [report](#) on 19 April, Mazur asserted that the C14 activists had first appeared, with an ultimatum to get out by the following day, together with representatives of the Holosiyiv administration.

C14 members object to being called 'neo-Nazi', however researchers following far-right groups, like [Anna Hrytsenko](#), [Anton Shekhovtsov](#) and [Vyacheslav Likhachev](#) are clear that the group fits this description because of their hate crimes and the neo-Nazi symbols they use.

This has raised concern over the [reported cooperation](#) between C14 activists and the Holosiyiv District Administration, as well as in connection with the grants they recently [received](#) from the Ministry for Youth and Sport. While claiming to be nationalists' defending Ukraine against 'separatists', 'titushki' or paid thugs, corrupt courts, etc, the C14 activists' view of who is 'separatist' is highly specific and [open to doubt](#), and [their effective offer](#) to act as titushki themselves for their 'donors' a matter of immense concern. The activists have a long record of intolerance towards people whose race, religious or political views, or sexual orientation are not to their liking, with all of this making any cooperation with municipal authorities or the police unacceptable.



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Contrasting design theme (visually impaired)



Exhibit AE

The Washington Post, *Ukraine's ultra-right militias are challenging the government to a showdown* (15 June 2017)

Ukraine's ultra-right militias are challenging the government to a showdown

Joshua Cohen

Josh Cohen is a former U.S. Agency for International Development project officer involved in managing economic reform projects in the former Soviet Union.

As Ukraine's fight against Russian-supported separatists continues, Kiev faces another threat to its long-term sovereignty: powerful right-wing ultranationalist groups. These groups are not shy about using violence to achieve their goals, which are certainly at odds with the tolerant Western-oriented democracy Kiev ostensibly seeks to become.

The recent brutal stabbing of a left-wing anti-war activist named Stas Serhiyenko illustrates the threat posed by these extremists. Serhiyenko and his fellow activists believe the perpetrators belonged to the neo-Nazi group C14 (whose name comes from [a 14-word phrase](#) used by white supremacists). The attack took place on the anniversary of Hitler's birthday, and C14's leader published a [statement](#) that celebrated Serhiyenko's stabbing immediately afterward.

The attack on Serhiyenko is just the tip of the iceberg. More recently C14 [beat up](#) a socialist politician while other ultranationalist thugs stormed the [Lviv](#) and [Kiev](#) City Councils. Far-right and neo-Nazi groups have also assaulted or disrupted [art exhibitions](#), [anti-fascist demonstrations](#), a "Ukrainians Choose Peace" [event](#), [LGBT events](#), a [social center](#), [media organizations](#), [court proceedings](#) and a [Victory Day march](#) celebrating the anniversary of the end of World War II.

According to a [study](#) from activist organization Institute Respublica, the problem is not only the frequency of far-right violence, but the fact that perpetrators enjoy widespread impunity. It's not hard to understand why Kiev seems reluctant to confront these violent groups. For one thing, far-right paramilitary groups [played](#) an important role early in the war against Russian-supported separatists. Kiev also fears these violent groups could turn on the government itself — something they've [done](#) before and continue to [threaten](#) to do.

To be clear, Russian propaganda about Ukraine being overrun by Nazis or fascists is false. Far-right parties such as Svoboda or Right Sector draw little support from Ukrainians.

Even so, the threat cannot be dismissed out of hand. If authorities don't end the far right's impunity, it risks further emboldening them, argues Krasimir Yankov, a researcher with Amnesty International in Kiev. Indeed, the brazen willingness of Vita Zaverukha — a [renowned neo-Nazi](#) out on bail and [under house arrest](#) after killing two police officers — [to post pictures of herself](#) after storming a popular Kiev restaurant with 50 other nationalists demonstrates the far right's confidence in their immunity from government prosecution.

It's not too late for the government to take steps to reassert control over the rule of law. First, authorities should enact a "zero-tolerance" policy on far-right violence. President Petro Poroshenko should order key law enforcement agencies — the Interior Ministry, the National Police of Ukraine, the Security Service of Ukraine (SBU) and the Prosecutor Generals' Office (PGO) — to make stopping far-right activity a top priority.

The legal basis for prosecuting extremist vigilantism certainly exists. The Criminal Code of Ukraine [specifically outlaws](#) violence against peaceful assemblies. The police need to start enforcing this law.

Most importantly, the government must also break any connections between law enforcement agencies and far-right organizations. The clearest example of this problem lies in the Ministry of Internal Affairs, which is headed by Arsen Avakov. Avakov has a long-standing relationship with the Azov Battalion, a paramilitary group that uses the SS symbol as its insignia and which, with several others, was integrated into the army or National Guard at the beginning of the war in the East. Critics [have accused](#) Avakov of using members of the group to threaten an opposition media outlet. As at least one commentator [has pointed out](#), using the National Guard to combat ultranationalist violence is likely to prove difficult if far-right groups have become part of the Guard itself.

Avakov's Deputy Minister Vadym Troyan was a member of the neo-Nazi Patriot of Ukraine (PU) paramilitary organization, while current Ministry of Interior official Ilya Kiva — a former [member](#) of the far-right Right Sector party whose Instagram feed [is populated with images](#) of former Italian fascist leader Benito Mussolini — [has called](#) for gays "to be put to death." And Avakov himself used the PU to promote his business and political interests while serving as a governor in eastern Ukraine, and as interior minister [formed and armed](#) the extremist Azov battalion led by Andriy Biletsky, a man nicknamed the "White Chief" who [called](#) for a crusade against "Semite-led sub-humanity."

Ukraine's ultra-right militias are challenging the government to a sh...

<https://www.washingtonpost.com/news/democracy-post/wp/2017/06/...>

Such officials have no place in a government based on the rule of law; they should go. More broadly, the government should also make sure that every police officer receives human rights training focused on improving the policing and prosecution of hate crimes. Those demonstrating signs of extremist ties or sympathies should be excluded.

In one notorious incident, media captured images of swastika-tattooed thugs — who police [claimed](#) were only job applicants wanting to have “fun” — [giving](#) the Nazi salute in a police building in Kiev. This cannot be allowed to go on, and it's just as important for Ukrainian democracy to cleanse extremists from law enforcement as it is to remove corrupt officials from former president Viktor Yanukovich's regime under Ukraine's “[lustration](#)” policy.

It's still not too late for Poroshenko to end the far right's growing sense of impunity. But he must act now.

Exhibit AF

The Guardian, *"They wanted to kill us": masked neo-fascists strike fear into Ukraine's Roma*
(27 August 2018)

'They wanted to kill us': masked neo-fascists strike fear into Ukraine'... <https://www.theguardian.com/global-development/2018/aug/27/they-...>

'They wanted to kill us': masked neo-fascists strike fear into Ukraine's Roma

Hannah Summers

The Roma mother pulls her young daughter close as she describes how her family's home in western Ukraine's Ternopil settlement was attacked and razed.

"People wearing masks attacked us," says Iryna, 42, who fled with her two children. "Inside our home were our documents, and money we had been saving, but everything was burned."

They have been taken in by another family living near the now-abandoned settlement. "We had a police guard for two weeks but don't feel safe here. We stayed here because we want justice."



However, police stand accused of failing to protect the Roma from a growing number of ethnically-motivated attacks by far-right groups. In recent months there have been at least eight brutal incidents, with two people killed and others injured.

Marking the start of the wave of violence was an [arson attack on the Lysa Hora nature reserve settlement in Kiev](#) on 21 April by roughly 30 members of C14, a neo-Nazi group. Police arriving at the scene allegedly failed to protect the families and instead advised them to leave Kiev.

Similar attacks followed. In early July, a Romani woman was stabbed to death in Zakarpattia Oblast in the eighth violent incident against Roma in less than three months. The perpetrators have not yet been identified.

Video on nationalist raid on Roma out of a settlement in Goloseevsky Park in Kiev in June

The previous month, a man in his early 20s was killed and others injured – including a 10-year-old boy – after masked men raided a Romani community outside Lviv.

David Popp, who made a living collecting plastic bottles and scrap metal, was [stabbed in the head and chest](#) by a suspected ultranationalist gang member.

Eight men who allegedly tore through the settlement, attacking dwellings with knives and chains, were arrested. But there has been criticism the police are not doing enough.

"The failure of national police to adequately respond to at least eight violent incidents ... and harassment involving public officials, is fostering a culture of impunity," says Neil Clarke of [Minority Rights Group International](#).

After the Ternopil attack in May, Andriy, a 43-year-old Romani whose house is on the outskirts of the city, took in some of the people who had lost their homes.

"I have lived here for 10 years and I don't know what Roma have done to these nationalists. I don't know why they have attacked us and I have no idea what will happen next," he says.



'They wanted to kill us': masked neo-fascists strike fear into Ukraine'...

<https://www.theguardian.com/global-development/2018/aug/27/they-...>

Andriy took in some people after they were attacked in Ternopil

Regina, 23, now staying with Andriy after fleeing the settlement, thinks the Russians are responsible for fuelling tensions. "Maybe the Russians are behind it and trying to destabilise Ukraine. After this attack we feel very anxious. If we hear a dog barking, we run to see who it is. I used to always go to the shop at 10pm but now I won't go out later than 6pm."

Against the backdrop of Ukraine's confrontations with Russia and corruption-riddled domestic politics, extreme nationalist groups such as C14 and others have become increasingly popular in recent years.

Animosity towards Roma, who live in tarpaulin camps and abandoned buildings in and around Kiev, is high with many residents complaining the Roma settlements are unsightly and messy.



Scenes in and around Roma encampments on the outskirts of Beregovo and Uzhgorod, western Ukraine

They have become an easy target for far-right groups, with tensions stoked by the authorities allegedly turning a blind eye.

'They wanted to kill us': masked neo-fascists strike fear into Ukraine'... <https://www.theguardian.com/global-development/2018/aug/27/they-...>

Now the [European Roma Rights Centre \(ERRC\)](#) is suing the national police for failing to investigate the attacks properly, and for negligence in protecting the Romani citizens from ethnic violence. Along with the [National Roma Centre](#), they will allege failings under the European convention on human rights.

They claim there is growing evidence of collusion between the national police and far-right militias. Activists allege that, after the attack in Ternopil, a Romani woman said: "I don't trust the police. The next day I saw the police officer drinking coffee with one of the guys who attacked our camp."



The head of the police in Ternopil, Oleksandr Bohomol, met with Volodya Navorotsky and Jonathan Lee from the ERRC.

Bohomol told them he regretted that such a shameful act should have happened in the region, and said the police under his control had been very proactive in terms of protection measures, and reacting to and preventing further attacks. "In my opinion this was planned by someone we don't know," he said, "we have a not very friendly neighbour to this country and it looks like the worse the situation is here, the better he feels."

Lee told the Guardian he thinks Bohomol and many others blame Russia for the attacks.

"Ukraine is a wartime country and people look for an enemy in everything," he says.

"The fact remains however, that regardless of who is funding these far-right groups, these attacks were carried out by young Ukrainian men who needed no encouraging to go and attack Romani families. This is a Ukrainian problem, which reflects the level of deeply entrenched anti-gypsyism in society."



A walled-off Romani settlement in Beregovo

In the town of Beregovo lies a walled-off settlement where many fleeing the violence have returned after many years. More than 5,000 people inhabit the area, which the Roma have called home since the 1860s. Most houses have no running water, electricity or gas, and work is scarce.

Ali used to work in Kiev but has returned to Beregovo while he plans his exit strategy. "I will get a passport for foreign travel – my family hope to get Hungarian citizenship so we can be safe."

He was returning from work when friends and relatives survived an attack on the Lysa Hora nature reserve in Kiev in April.

"They had sought refuge at the train station when a 'friend' of the police called and said we were allowed to return to the camp. But when we got back there, nationalists were waiting and began shooting."

Police did nothing until a video, showing terrified women and children fleeing gas and stones launched at them by masked men, went viral.



'They wanted to kill us': masked neo-fascists strike fear into Ukraine!...

<https://www.theguardian.com/global-development/2018/aug/27/they-...>



Ilona, 65, was among those who fled to Beregovo. "They demolished our settlement and wanted to kill us," she says.

"The police were asking the nationalists questions like they knew them, and they warned us. They told us: 'Get your things, some people will come.' The police knew what was going to happen but they didn't stop it."

Daryna is the unofficial matriarch at a Roma settlement in the western city of Uzhgorod. She looks after people and deals with the local authorities. She grew up with Ukrainians, Russians and Lithuanians, and says relations have changed in recent times.



"When I was young we were friends, chatting and playing. Now white kids and Roma kids see themselves as totally different.

"Our kids have no friends from outside the settlement and are abandoned here. Last week, when I went to the store, there were white kids calling us 'dirty gypsies' and saying: 'Why are you here?'" She says she blames their parents. "They make their kids hate us."

Nadiya, 45, who lives in the same settlement, agrees things have got worse.

Surrounded by framed photos of her family dating back several generations, she explains: "The city is dividing us. Here they have built a wall around us because they don't want customers at a new car wash to see Romani people here.

"The attacks continue and, if the authorities do not step in to prosecute these people and bring justice, then in three or four years time we will find ourselves completely cut off from society."



Exhibit AG

Greater Manchester Police Counter Terrorism Branch Prevent Team, Extreme Right Wing
symbols, numbers and acronyms



Extreme Right Wing symbols, numbers and acronyms

WARNING

The information which is contained within this document is produced by Greater Manchester Police Counter Terrorism Branch Prevent Team.

**All the information is for training and information purposes only.
None of the views or images contained within this product are supported by Greater Manchester Police.**

This document contains images of swastikas and other Nazi and Right Wing related Symbols, Acronyms, and Numbers.

All the information contained within the document is available via open sources.

The Threat

The Extreme Right Wing (XRW) can be defined as activists who commit criminal activity motivated by a political or cultural view point which includes all of the following: Racism, Extreme Nationalism, Fascism and Neo Nazism. As such, members of the XRW would be considered to be domestic extremists. Domestic extremism mainly refers to individuals or groups that carry out criminal acts of direct action in pursuit of a campaign. They usually aim to prevent something from happening or to change legislation or domestic policy, but try to do so outside of the normal democratic process. As such, domestic extremists can also include individuals motivated by extreme animal rights, left wing ideology, militant single issues groups and even violent Scottish and Welsh nationalists.

The vast majority of people involved in animal rights, nationalist and political campaigns are peaceful. However, such causes have sometimes attracted extremists who have resorted to violence and intimidation. For the most part the actions of domestic extremists pose a threat to public order, but not to national security. They are normally investigated by the police, not the Security Service.

However, domestic extremists may seek to carry out solo acts of violence. In 1999, David Copeland, a neo-Nazi, carried out a series of bomb attacks against gay and ethnic minority targets in London. His attacks killed three people and injured 129 more.

It is therefore important that frontline personnel have the knowledge and skills to identify individuals who are linked to XRW activity.

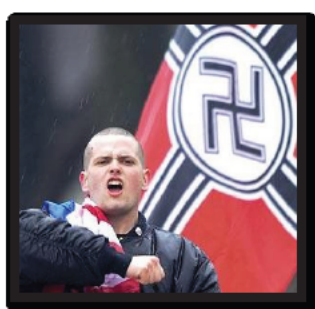
Symbolism

A symbol is a visual image or sign representing an idea. Human cultures use symbols to express specific ideologies and social structures and to represent aspects of their culture. They have the ability to be extremely powerful as they can convey complex messages, ideologies and history in a compact, recognizable form. As such, relatively simple symbols can be hugely significant to different cultures around the world. One can see this in the reverence held for national flags or religious symbols. As such, the defamation of a particular symbol has the potential to be hugely insulting to entire communities or even entire countries.

Unfortunately, symbols can also convey negative connotations. Some symbols are designed to communicate ideologies that promote hate and anger or instill in others fear and insecurity. Members of the XRW use symbols to intimidate individuals and communities. Hate symbols are more than just "signs" demonstrating racist, anti-Semitic and anti-Christian attitudes and beliefs -- these symbols are meant to instil a sense of fear and insecurity within a particular community. These symbols can be found in graffiti, tattoos, flyers and literature, banners and flags or displayed as

jewellery or on clothing. These symbols give extremists a sense of power and belonging, and a quick way of identifying with others who share their ideology.

However, it is important to note that symbols carry different meanings depending upon one's cultural background. A symbol can have massively different interpretations, depending on the culture it originates from. For example, most people within Western Society view the Swastika as synonymous with the Nazi party, their extreme ideology and the crimes they committed. However, variations of the Swastika were used in many ancient cultures and they remain in use today, particularly within Indian culture and the religions of Hinduism, Buddhism and Jainism.



Different uses: Swastika at XRW demonstration and at a Hindu temple.

Similarly, the German Nazi Party glorified an idealized "Aryan/Norse" heritage. As a result, the XRW have appropriated many symbols from pre-Christian Europe for their own uses. They give such symbols a racist significance, even though the symbols did not originally have such meaning and are often used by non-racists today, especially practitioners of modern pagan religions

Other symbols within this paper may also be significant to groups or individuals, who are not extreme or racist. Where possible the information caption will describe the original meaning. However, it should be noted that the symbols may have multiple interpretations to different groups and it may not be possible to relay every single possible meaning of a particular symbol. For these reason, all of the symbols depicted here must be evaluated in the context in which they are used.

The following pages include a selection of numbers, symbols and acronyms (NSAs) that have been adopted by XRW individuals and groups. This list is not an exhaustive of all NSAs used by the XRW but rather a selection of those that have been seen in the United Kingdom and those of greatest significance to other XRW groups around the world. New or previously unknown NSAs are likely to appear in the future.



18

18: The first letter of the alphabet is A; the eighth letter of the alphabet is H. Thus, 1 plus 8, or 18, equals AH, an abbreviation for Adolf Hitler. Neo-Nazis use 18 in tattoos and symbols. The number is also used by Combat 18, a violent British neo-Nazi group that chose its name in honour of Adolf Hitler.



14

14: This numeral represents the phrase "14 words," the number of words in an expression that has become the battle cry and rallying slogan for the white supremacist movement:

"We must secure the existence of our people and a future for white children."

This expression was coined by white supremacist David Lane while in prison serving essentially a life sentence for his role in The Order, a 1980s white supremacist terrorist group that conducted armed robberies, bombings, and assassinations. Lane died in prison in 2007.



28

28: The number stands for the name "Blood & Honour" because B is the 2nd letter of the alphabet and H is the 8th letter.

Blood & Honour is an international neo-Nazi/racist skinhead group started by British white supremacist and singer Ian Stuart. It has chapters around the world.



88







88: The eighth letter of the alphabet is "H." Eight two times signifies "HH", shorthand for the Nazi greeting, "Heil Hitler." 88 is often found on hate group flyers, in both the greetings and closing comments of letters written by neo-Nazis, and in e-mail addresses.








1488

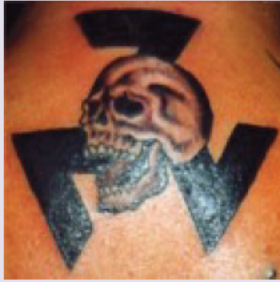
1488: Often, the two numbers are used in conjunction to indicate a belief both in the ideology of National Socialism and the validity of the "14 words." This symbol can often be found at the close of a letter.

 <p>100%</p>	<p>100%: This is an expression of an individual's pure Aryan or white roots. It is common among white supremacists. It is also a statement by white supremacists on the need for a pure, white race that is uncorrupted by interracial relationships</p>
<p>5</p>	<p>5: This numeral represents the expression, "5 words," which signifies, "I have nothing to say." Alex Curtis, a San Diego-based white supremacist who coined the phrase, believes that white racists in the United States should use the five words to demonstrate a "code of silence" and to help avoid prosecution by law enforcement.</p>
<p>4/20</p>	<p>4/20, 420, 4:20- The anniversary of Adolf Hitler's birthday is also used as a tattoo by racists and neo-Nazis, to affirm their belief in the ideals of National Socialism.</p>
 <p>ZOG</p>	<p>ZOG: Stands for 'Zionist-Occupied Government'. These terms refer to the belief that the Jews occupy and control the government, as well as the media. The letters often appear in a circle with a slash over it. JOG for Jewish Occupied Government is a similar phrase also often used for the same purpose.</p>
<p>RaHoWa</p> 	<p>RAHOWA stands for the expression "Racial Holy War." It signifies the battle that white supremacists believe will pit the white race against minorities and Jews and lead to Aryan rule over the world.</p>
 <p>23</p>	<p>23: The 23rd letter of the alphabet is W. Therefore, white supremacists and racist skinheads use 23 in tattoos to represent "W," as an abbreviation for the word "white".</p>

	<p>The swastika was adopted by Germany’s Nazi Party. Prior to the Nazis co-opting this symbol, it was known as a good luck symbol and was used by various religious groups. Hitler made the Nazi swastika unique to his party by reversing the normal direction of the symbol so that it appeared to spin clockwise. Today, it is widely used, in various incarnations, by neo-Nazis, racist skinheads and other white supremacist groups.</p>
	<p>Nazi symbol signifying the Schutzstaffel (SS), Heinrich Himmler’s police forces, whose members ranged from agents of the Gestapo to soldiers of the Waffen SS to the guards at concentration and death camps.</p> <p>The symbol is frequently seen in neo-Nazi tattoos and graffiti and characterizes the beliefs of neo-Nazis and racist skinheads – violence, anti-Semitism, white supremacy and fascism.</p>
	<p>This is one of the most popular symbols for neo-Nazis and white supremacists. First popularized by the Ku Klux Klan, the symbol was later adopted by the National Front in England, the website Stormfront and the racist band Skrewdriver to represent international "white pride." It is also known as Odin’s Cross. It is important to note that the Celtic Cross is used widely today in many mainstream and cultural contexts. No one should assume that a Celtic Cross, divorced from other trappings of extremism, automatically denotes use as a hate symbol.</p>
	<p>Known as the "Death’s Head" or <i>Totenkopf</i>. The "Death’s Head" was the symbol of the SS-Totenkopfverbände whose purpose was to guard the concentration camps.</p> <p>This symbol is often seen in tattoos.</p>
	<p>The Aryan Fist symbol is a twist on the fist representing the Black power movement and the battle against racial oppression. The Aryan fist is a symbol of white power used by hate groups who promote their racist agenda as white pride activism.</p>
	<p>Known as the ‘triskele’ - essentially a variation on the swastika, and popular for that reason. The triskele was a symbol occasionally used by the Nazi regime, most notably as the insignia for a Waffen SS division composed of Belgian volunteers. After World War II, the "Three Sevens" version of the triskele was popularized by white supremacists in Europe and South Africa.</p>

	<p>Skrewdriver was a white supremacy band that formed in Lancashire in the 1970s. Both the band and its now deceased leader, Ian Stuart (Donaldson) are legendary within the white supremacist and racist skinhead movements.</p> <p>Although the band fell apart after Stuart's death in 1993, many white supremacists and racist skinheads pay tribute to Skrewdriver by sporting Skrewdriver tattoos and by wearing Skrewdriver pins, patches, or clothing.</p>
	<p>The symbol is called a Wolfsangel and was originally an ancient runic symbol that was believed to be able to ward off wolves</p> <p>However, the Wolfsangel was adopted by the Waffen-SS during the Nazi era in Germany. As a result, it became a symbol of choice for neo-Nazis in Europe and the United States.</p>
	<p>To the left are 3 different versions of the 'Rune'. Traditionally, the "Rune" expresses faith in the pagan religion of Odinism and was originally a symbol of the Vikings.</p> <p>Whilst not originally a racist symbol, it was adopted by Nazi Party as it was seen to represent Aryan heritage and cultural pride.</p>
	<p>Traditionally, 'The Iron Cross' (without the swastika) was a medal that originated during the Napoleonic Wars. In 1939, Adolf Hitler renewed use of the Iron Cross and superimposed the Nazi swastika in its centre.</p> <p>Today, the symbol (with or without the swastika) is often displayed by neo-Nazi groups, especially as jewellery. It is sometimes used for shock effect as it conjures up images of Nazi Germany and its military without being explicitly Nazi itself.</p>
	<p>Originally an ancient European symbol with no racist connotations, it was adopted in the 1930s by the SS's Lebensborn project. The Lebensborn project encouraged SS troopers to have children out of wedlock with "Aryan" mothers and which kidnapped children of Aryan appearance from the countries of occupied Europe to raise as Germans.</p> <p>Known as a 'Life Ruin' to the Nazis, today it signifies to extremists the future of the white race.</p>
	<p>The Nazi Party began using this symbol in the 1930's to represent the power and strength of the party.</p>

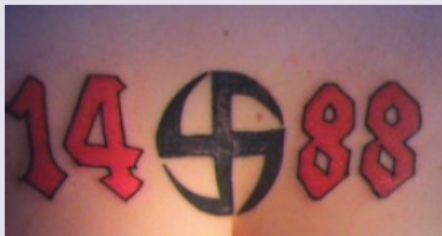
The following section will provide some examples of where the above symbols have been used by members of the XRW. One should note that symbols may not be drawn by XRW members in the exact same manner as displayed the above section. They may be slightly altered or include a combination of symbols.



Tattoo containing a variation of the Triskele behind a skull



Tradition Nazi party flag with a Triskele replacing the Swastika.



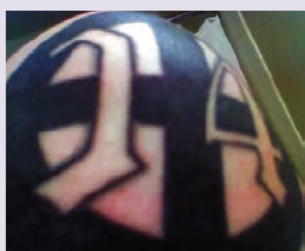
A tattoo '1488' with the numbers '14' (14 Words) and '88' (Heil Hitler) separated by a variation the swastika.



Graffiti of '1488' with the numbers '14' (14 Words) and '88' (Heil Hitler) separated by a traditional swastika.



Tattoos of the Schutzstaffel (SS Lightning bolts), 88 (Heil Hitler) and the Swastika.



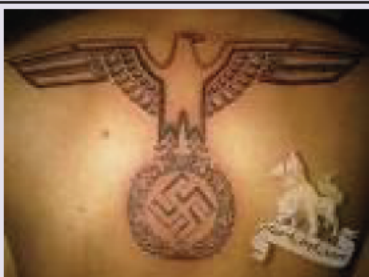
Tattoo of the number 14 representing the 14 words. In addition, there is a variation of the Odin's cross.



National Front banner containing the 14 Words during a protest in Manchester City centre (April 2014).



Flag found during a police search of an address in Greater Manchester. It contains several XRW symbols including the Swastika, Schutzstaffel (SS Lightning bolts), Iron Cross and the Death Head.



Tattoo with the Nazi Eagle and Swastika Symbol. Variation may just include the eagle.



Tattoo of the Aryan Fist. In addition, there is the number '14' (14 words) tattooed on the back of the thumb.

Should you require further advice or information regarding the information contained within this document, please contact you Greater Manchester Police Prevent Team.

Your local Prevent Engagement Officer is

**DC Kim Parkinson
e: kim.parkinson@gmp.police.uk
m: 07900 709270**



Exhibit AH

Bell Tower, *Rune Symbols and Meanings: Life / Man Rune* (21 July 2018)

(translation)

Translation

Bell Tower, *Rune Symbols and Meanings: Life / Man Rune* (21 July 2018), available at: <https://www.belltower.news/die-man-rune-51318/>.

Rune Symbols and Meanings: Life / Man Rune

Roland Kaufhold

The "Lebensrune" (Man rune) is pronounced as "z". At the beginning of the People's movement, the rune was interpreted as a life rune and its reversed counterpart - as a death rune. Under the Nazi regime, the Lebensrune was used as the sign of "Lebensborn" organisation. During the Nazi era, the Lebensborn was a state-sponsored association supported by the SS, whose aim was to bring about an increase in the birth rate of "Aryan" children on the basis of Nazi racial hygiene and health ideology.



Algiz is derived from the Common Germanic word for "elk" ("moose") or "protection". However, esotericist Guido von List changed the rune name to "Man" and assigned to it the meaning of "protection"

Later on the "Man" rune became a popular Nazi propaganda symbol. In particular, it was considered a distinguishing symbol for the National Socialist Women's League, pharmacists and some others.

According to the Nazi's ideology the rune represents a man with arms outstretched towards divine power and is considered as the general symbol of the power of the people and the popular movement.

Nowadays, the rune is still very important as a popular decorative element mostly used in privileged circles, e.g. for birth announcements. If it is used in a neo-Nazi context in connection with the assault teams or "Lebensborn" (literally: "Fount of Life") the use of "Man" rune is prohibited.



Stefan Zweig (1881 - 1942) is still one of the most widely read writers today; his works are also available in Israel. He grew up in a Jewish family in Vienna and had already written literary texts as a teenager. Some of his works dealt mostly with Jewish themes. Nevertheless, his spiritual affiliation to Judaism was sometimes doubted.

From | February 18, 2021



The National Socialists used numerous Germanic and pagan signs and symbols and reinterpreted them for their propaganda purposes. Many of..

By Simone Rafael | November 15, 2018



A flag is a symbol. Those who show their flags want to show their colors. What exactly a particular flag means, there are...

By Simone Rafael | August 26, 2016

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Exhibit AI

Nash Kiev, *Ukrainian Nationalism: Freedom or Death and Preservation of Statehood*

(translation)

Translation

Nash Kiev, *Ukrainian Nationalism: Freedom or Death and Preservation of Statehood*, available at: <https://nashkiev.ua/life/ukrainskii-natsionalizm-volya-abo-smert-ta-zberezheniya-derzhavnosti>.

UKRAINIAN NATIONALISM: FREEDOM OR DEATH AND PRESERVATION OF STATEHOOD

What are the consequences of raising a nationalist society to power, given all the tools and means of government are granted based on historical lessons?

What will wartime and postwar ethnic nationalism be like for Ukrainians, given its widespread distribution?

What is nationalism?

Nationalism has always been a controversial ideology. Born in the processes of the formation of independent, national states, the collapse of empires and the separation of colonies from metropolises, it changed the geopolitical processes, embodying the spirit of the nation among different layers of the population.

The main principle of nationalism is the value of the nation as the highest form of social unity and its advantages in the state-building process

- freedom of individuals is possible only when they identify themselves with the nation;
- the freedom and sovereignty of nations is a condition of world order and justice.

Nationalism during the war

War is a time to effectively spread nationalist sentiments among the citizens of Ukraine in order to drive away and defeat the enemy who came to “denazify” us. However, one should keep in mind it is better to walk the path of creation of the Ukrainian United Independent State and the struggle for this idea with the right vector and understanding the purpose, so that the consequences of the struggle do not become fatal for the future of the country. Not realizing the lessons of history until the end, we again suffer from the same insidious enemy against which we fought from the beginning of the nationalist movement - this is great-power chauvinism, no longer Polish, but Russian.

Therefore, it is worth asking in order not to make a mistake: how will the policy of Ukrainian nationalism be implemented after the victory over Russia in a large-scale war and during the reconstruction period?

First, we have to understand what certain historical experience of the creation of the Ukrainian nationalist state testifies to.

A retrospective journey into the history of Ukrainian nationalism

Ukrainian nationalism at the beginning of the 20th century was a radical reaction to the violation of the rights of the Ukrainian population by three regimes: Polish, Russian and German.

The beginning was laid by Ukrainian (Galician) integral nationalism, whose main ideologist was Dmytry Dontsov. He envisioned a struggle and resistance to the imperial nationalism of Russia and the chauvinism of Poland.

The prejudice against this struggle was caused by its means, which referred to the ideology of Benito Mussolini, which arose after the victory of fascism in Italy in 1923, and communist Bolshevism.

The methods of capturing the state apparatus and tightening it (this is the task we face!), and in this respect both fascism and Bolshevism still remain classic examples of how it should be done.

Dmytry Dontsov in the article "Bellua sine capite"

So, let's clarify: to what extent did Ukrainian nationalists identify with fascism as a universal phenomenon?

Ukrainian integral nationalism could imitate certain features of fascism, but, as a national liberation movement, it had significantly different tasks and priorities. We can talk about two main varieties of integral nationalism, or ultra-nationalism — which is ultra-nationalism in nation-states, which has its own goals, its own methods of activity, and integral nationalism, which was formed in stateless nations and has completely different priorities than fascists. Nonetheless, the integral nationalism of a stateless nation can turn into fascism, but in the case of acquiring its own state.

Aleksandr Zaitsev, Doctor of Historical Sciences, Professor of the Department of Modern and Contemporary History of Ukraine at the Ukrainian Catholic University (UCU)

Stepan Bandera

The successor to Dontsov's ideology was Stepan Andreyevich Bandera, who after the split of the Organization of Ukrainian Nationalists became the head of the OUN (b) in the period from 1940 to 1959, and somewhat modernized and improved the ideology of the spiritual teacher Dmytry Dontsov.

The main goal of the OUN (b) was the establishment of the Ukrainian United Independent State, the preservation and development of the Ukrainian Nation on the entire Ukrainian ethnic territory. This goal was to be achieved through a national revolution and establishing a dictatorship. Stepan Bandera's radical-totalitarian idea of nationalism was to a certain extent realized by terrorist acts against the terror of the occupation authorities.

The murder of Ivan Babiy, the director of the Ukrainian gymnasium in Lvov, a former sergeant major of the Ukrainian army, who was a supporter of Ukrainians and Poles of Galicia as an inseparable part of Poland, caused special public condemnation.

The motives of the OUN on the basis of the Ukrainian military organization were enough to use effective means of fighting the Polish political system in the ethnic territory of Ukraine and to form the Regional Executive. These actions were also aimed at creating a disciplined hierarchical political organization capable of carrying out a national revolution.³⁰ June 1941,

Lvov. Liubomyrsky Palace on Rynok Square, 10. Yaroslav Stetsko, one of the leaders of the OUN (b) reads an important document and becomes the Prime Minister of the Ukrainian State.

By the will of the Ukrainian people, the Organization of Ukrainian Nationalists under the leadership of Stepan Bandera proclaims the restoration of the Ukrainian State, for which whole generations of the best sons of Ukraine laid down their heads.

Yaroslav Stetsko, one of the ideologists and leaders of Ukrainian nationalism. Together with Stepan Bandera, he is the author of the Act of Restoration of the Ukrainian State.

After the speech, a temporary government was created, the Ukrainian State Board headed by Yaroslav Stetsko.

Stepan Bandera and Yaroslav Stetsko were asked to withdraw the Act, to which they, of course, did not agree. They were arrested and later sent to Sachsenhausen concentration camp. This became the basis for the events of the 11th of July, when the activities of any Ukrainian organizations were banned, and in September mass arrests of his men began; according to the data provided by the Polish historian Andrzej Elias, 80% of the leadership of the OUN (b) was arrested.

The difference between patriotism and nationalism

These two ideologies are united by spiritual devotion to the country and consolidation.

Patriotism implies love for one's native land. A patriot is someone who shows loyalty to his or her country, willingness to defend its territory and pride in his or her national affiliation to a certain ethnic community. Furthermore, patriotism is one of the moral principles of nationalism.

Nationalism embodies the national self-awareness that follows certain spiritual beliefs and values regarding the independence, well-being of one's state and its citizens in one or another political and ideological coordinate system. Moreover, it is awareness of the proper command of the state language, knowledge of history, respect and reverence for the culture and traditions of one's country, sometimes setting the place and value of one's nation higher than others.

Where does patriotism end as one of the moral principles of nationalism?

Where there is a stateless nation that seeks to pursue a certain goal based on the level of political culture, consciousness and awareness. The ideology of radical nationalism involves action, drastic changes, and not idle talk in the form of long legislative processes. Without weighing all the “pros” and “cons”, the majority sees radicalism as an absolute effectiveness. However, these are signs of a stateless nation that simplifies the political process and does not strive for diplomatic dialogue, on which the modern policy of such leading world powers as the USA, Germany and France is built.

An example of the transition from integral nationalism of a stateless nation to fascism

Ante Pavelic's Croatian “Ustasha”, which caused the breakup of Yugoslavia from April 1941 to 30 June 1945 is an example of the consequences of radical nationalism and fatal revolutionary movements. They created their own, partially puppet state, the Independent State of Croatia, but with the support of Adolf Hitler's Nazi Germany. This enabled the Ustasha to create a fascist

regime in Croatia. Until that time, the Ustasha did not have a clearly fascist orientation, they had other priorities

— acquisition of the state. The means of fascism became relevant after gaining power.

However, to some extent, without following the theory of nationalism, victory over authoritarian or imperial regimes is impossible.

The ideology of modern Ukrainian nationalism must be transformed from a liberation-ethnic one to a modernized statist one based on patriotic principles of morality and in general with the vector of nationalism as civic patriotism. However, not on the radical totalitarian principle of building a new state.

Civic patriotism as an alternative orientation of Ukrainians after the war

Nikolay Alekseevich Kuzhelny, Candidate of Political Sciences, in his article “Civic patriotism as a social value” (2019) identified civic patriotism as an integrative potential for the Ukrainian state, which implies highly developed civic competences.

According to Kuzhelny, the willingness to consciously fulfill civic duties and an active position in the field of protection of public interests is the key to creating a better state Ukraine for the implementation of the European integration vector of development and evolution of social values in accordance with rapid changes.

It is obvious that the circle in which Ukraine, with tightly clasped hands, appears before the whole world, will not be broken, if you do not constantly try to unclasp each finger with hatred for each other because of the eternal Russian enemy, who only wants Ukraine as a separate state to cease to exist. That form of Ukrainian nationalism, which is implemented on the basis of patriotism, should remain in society in the post-war period of Ukraine.

It is the consolidation, love for one's country, restoration of historical memory, national dignity, and the political and spiritual consciousness of Ukrainians that should spread among Ukrainian society during the war and after victory, during the reconstruction period.

A nation without statehood is a crippled human collective organism... After all, just as the first need of every individual creature on earth is to preserve its life, ensure its development, and pass on its heritage to future generations, so for every nation its own state is the best means of preserving life and development

Vladimir Vinnichenko

Author of the text: Miroslava Rebediuk

Exhibit AJ

Nigilist, "C14" and "Osvytnya Assambleya": *teaching bad things at the public's expense*
(28 October 2017)

(translation)

**Excerpt
Translation**

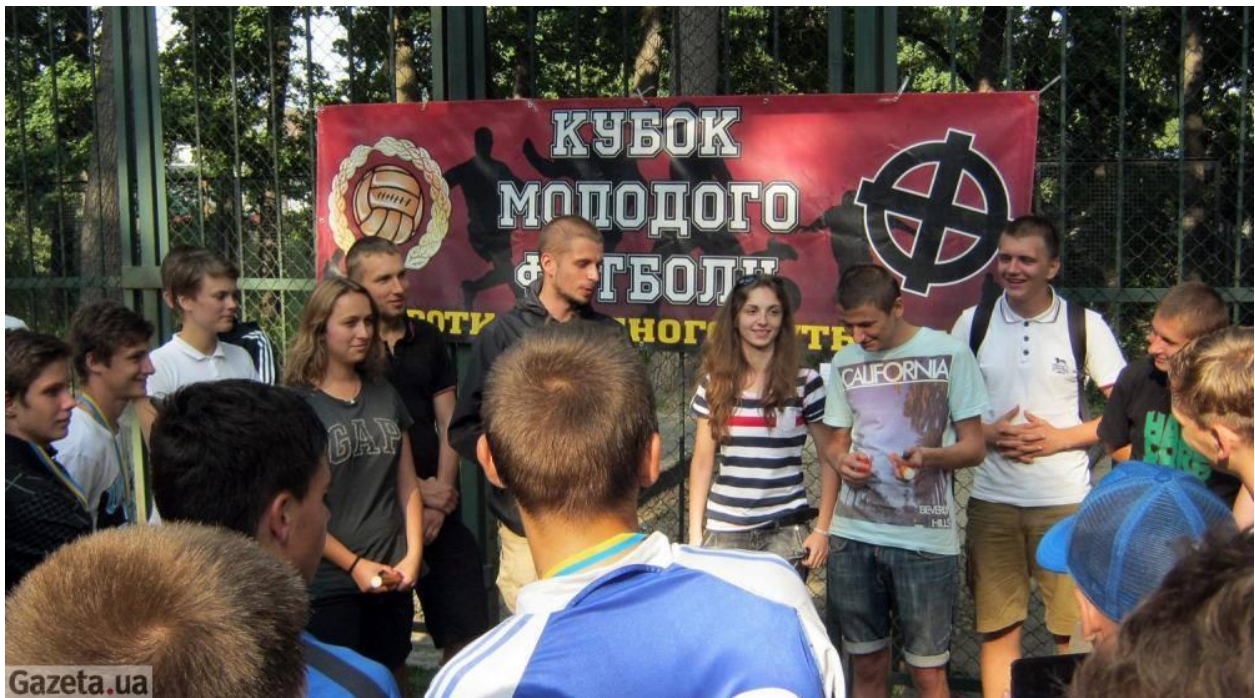
Nigilist, "C14" and "Osvytnya Assambleya": teaching bad things at the public's expense (28 October 2017), available at: <https://www.nihilist.li/2017/10/28/C14-i-osvitnya-asambleya-nauchim-plohomu-za-obshhestvenny-j-schyot/>.

"C14" and "Osvytnya Assambleya": teaching bad things at the public's expense



C14 leader Evgeny Karas and his friends. No, it's not a neo-Nazi symbol, just a cross in a circle.

In the competition for Kiev's public budget projects, along with a variety of projects on sports, municipal services, healthcare and other social issues, there is an interesting initiative called "Osvytnya Assambleya". Who exactly the initiative will educate and what it will teach is not specified in its draft, and I even know why. The Assembly is a project of the neo-Nazi organisation C14 (yes, 14 means exactly what you think it means). One of its founders is C14 leader Evgeny Karas.



C14 youth initiative. No, it's not a neo-Nazi symbol, just a cross in a circle.

Beginning with the 2010-2011 political season and later, activists from this organisation tried to squash protests against corruption in education, its commercialisation and personally Education Minister Dmitry Tabachnik, which were carried out by the trade unions "Pryama Diya" and "Studenska Diya", as well as by the Foundation for Regional Initiatives. When it became clear that provocateurs with portraits of Tabachnik with peasants were not welcome at these rallies, the Nazis turned to their favourite tactic of group tracking and attacking activists [1, 2, 3, 4] and there was also a collective conflict.



Evgeny Karas and members of C14 in KCSA. No, it's not a neo-Nazi symbol, just a cross in a circle.

The leader of the initiative, Evgeny Karas, was for a long time a member of the Svoboda party, about whose benefit to the Party of Regions and the Kremlin only a lazy man has not spoken (in my opinion, this topic was most convincingly exposed by Sergey Leshchenko, who found proof of payment to Svoboda from the "black accounting" of the Party of Regions). This explains such activity against the anti-Minister initiatives.

Apart from playing into the hands of Tabachnik himself, let us recall the other deeds of C14, which are not really about education anymore, but which create a portrait of an extreme right-wing, aggressive and provocative organisation. Far from being a pedagogical example to anyone:

- nearly getting Ukrainian football sanctioned for racist fans;
- attacked the editorial board of Moskovsky Komsomolets without any consequences;
- befriended Russian pro-imperial Nazis;
- sought asylum at the Canadian embassy in the last days of Maidan;
- Passed as suspects in the murder of Buzina, whose death was immediately reported to the whole of Russia by Putin;
- accused of war crimes in the ATO zone;
- engaged in defamation of the Autonomous Opora, a wholly pro-Ukrainian organisation consistently fighting in Lvov against both illegal developments and neo-Nazis; while sending their former associates who supported the Opora to trial by the "nationalist Gestapo".

Based on all of the above, I don't think these citizens will teach anyone anything good. I am not going to agitate you to vote for any particular project, but I am sure that any other project you will vote for will be better than Osvytnya Assamblya.

Exhibit AK

ADL, 1488: Symbol of Hate

1488

14/88

ALTERNATE NAMES: 8814

1488 is a combination of two popular white supremacist numeric symbols. The first symbol is [14](#), which is shorthand for the "[14 Words](#)" slogan: "We must secure the existence of our people and a future for white children." The second is [88](#), which stands for "Heil Hitler" (H being the 8th letter of the alphabet). Together, the numbers form a general endorsement of white supremacy and its beliefs. As such, they are ubiquitous within the white supremacist movement - as graffiti, in graphics and tattoos, even in screen names and e-mail addresses, such as aryanprincess1488@hate.net. Some white supremacists will even price racist merchandise, such as t-shirts or compact discs, for \$14.88.

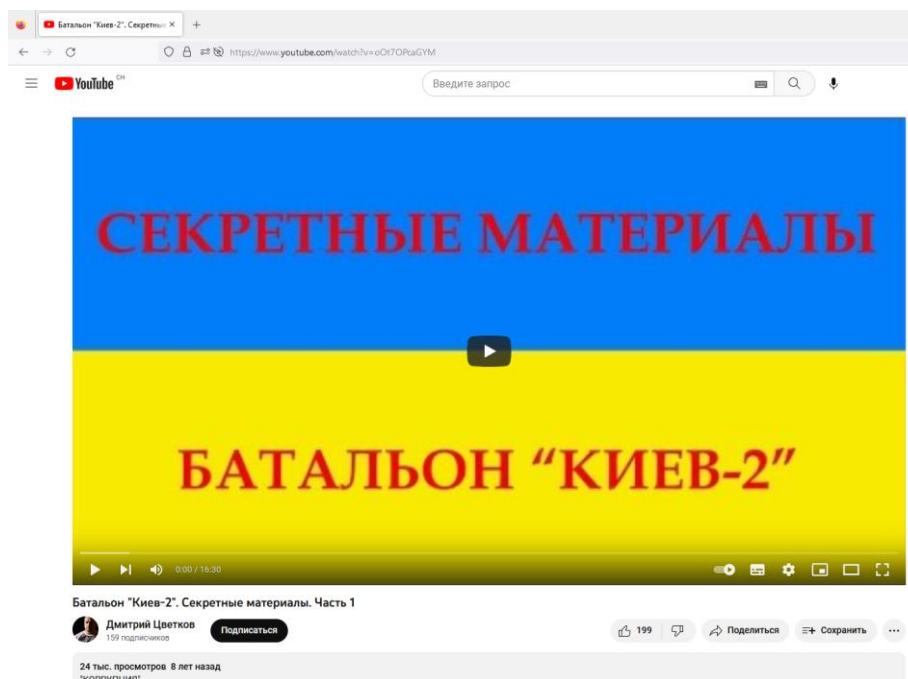
The symbol is most commonly written as 1488 or 14/88, but variations such as 14-88 or 8814 are also common.

Exhibit AL

YouTube, *Dmitriy Tsvetkov, Battalion "Kiev-2". The Confidential Materials. Part 1*
(9 February 2015)

(translation)

YouTube, *Dmitriy Tsvetkov, Battalion "Kiev-2". The Confidential Materials. Part 1* (9 February 2015), available at: <https://www.youtube.com/watch?v=oOt7OPcaGYM>.



Video Transcript (translation)

[00:10]

[Speaks Russian]: I am a soldier of the Kiev-2 volunteer battalion, which is part of the main police department in Kiev. At the moment, the battalion personnel are drawing duty at a roadblock on the Donetsk-Mariupol highway near the town of Volnovakha.

[00:28]

[Speaks Russian]: By swearing the oath of allegiance to the people of Ukraine, I have undertaken to fight against crime and enforce the law of Ukraine. Corruption is a crime, so by failing to report on corrupt practices, I am not only indulging in crime but also falling under Article 396 of the Criminal Code of Ukraine for harboring the crime.

[00:53]

[Speaks Russian]: While having information about the corrupt and criminal actions of the commander of the Kiev-2 battalion, Major Bogdan Voitsekhovskiy, and his assistant Vyacheslav Kryazh, I reported on the facts of the criminal activities of the command to Zoryan Shkiryak, advisor to the Minister of Internal Affairs when I met him personally in December 2014 and who answered that the same outrage happened in any volunteer battalion. When I asked what I should do next, as serving under such command was not in line with my moral principles, Zoryan Shkiryak promised to transfer me from the battalion to the Ministry of Internal Affairs.

[01:37]

[Speaks Russian]: I saw this prospect as an opportunity to find leverage on the Kiev-2 battalion command within the ministry and initiate an internal investigation. However, Zoryan Shkiryak has not kept his promise.

[01:56]

[Speaks Russian]: As I continued to look for an opportunity to stop the unlawful actions of the Kiev-2 battalion commander and his entourage, I drafted a letter to the first deputy minister of internal affairs, Catherine Zguladze. Since Zguladze, who only took over as the first deputy minister at the end of December, immediately went on a two-week leave, I gave the letter to her assistant. I was told that the letter was officially registered and a meeting with Ekaterina Zguladze should take place in mid-January.

[...]

[10:41]

[Speaks Russian]: The cultivation of Nazi ideas by the commander, participation of personnel, admiration for the Wehrmacht army. **[Speaks Ukrainian]:** This is a public denunciation or justification of the evils of fascism, propaganda of neo-Nazi ideology. Article 436/1.

[10:59]

[Speaks Russian]: Failure to obey the order of the Minister of Internal Affairs to return battalions to Kiev on the eve of the Ukrainian parliamentary elections in October 2014. **[Speaks Ukrainian]:** This is not obeying the order. Part two of Article 403 of the Criminal Code of Ukraine.

[11:18]

[Speaks Russian]: Staging a terrorist attack by taking and blowing up a vehicle of a civilian who has nothing to do with terrorism and separatism. **[Speaks Ukrainian]:** This is a impairment or destruction of someone else's property. Part two of Article 194. Violence against citizens in the area of military operations. Part one of Article 433 of the Criminal Code of Ukraine.

[11:44]

[Speaks Russian]: Regular violations of Ukrainian legislation, illegal acts, crimes committed or initiated by the command of Kiev-2 battalion impose an indelible brand of shame on the entire battalion personnel, on ordinary soldiers, who are volunteers and have the desire to defend Ukraine from both external aggressor and internal enemy, have nothing to do with corrupt schemes of leaderships. I consider it my duty to express distrust to the command of the Kiev-2 battalion, and in particular, to the command of Major Bogdan Voytsekhovsky, call sign "Sotnya", his deputy commander Vyacheslav Kryazh, call sign "Makhno", as well as to initiate an internal investigation in relation to the above-mentioned facts.

[...]

Exhibit AM

ADL, Runa of Life: Symbol of Hate

HATE SYMBOL

Life Rune

Hate on Display / Life Rune



ALTERNATE NAMES: Elhaz Rune, Algis Rune

Nazi Germany appropriated many pre-Roman European symbols, such as runic symbols, in an attempt to glorify an idealized "Aryan/Norse" heritage. One of these was the so-called "life rune" (from the German *Lebensrune*), also known as the Elhaz or Algis rune. Elhaz means "elk" and in early Europe this symbol had meanings related to stags or hunting, as well as honor, nobility, or protection. The Nazis used the symbol in various contexts, including the SS's *Lebensborn* project, which encouraged SS troopers to have children out of wedlock with "Aryan" mothers and which kidnapped children of Aryan appearance from the countries of occupied Europe to raise as Germans.

Because of the Nazi use of the symbol, later white supremacists continued to use the Life rune and it became very popular after the neo-Nazi National Alliance adopted the symbol as part of their logo. Since then, it has become a very common white supremacist symbol, used by neo-Nazis and other white supremacists.

Because the Life Rune also continues to be used by non-racists, typically

adherents of neo-pagan religions, one should not simply assume that a particular use of this symbol is racist, but should carefully judge it in its context.

Additional Images



MORE TO EXPLORE

Runic Writing (racist)

Arrow Cross

Aryan Fist

Exhibit AN

ADL, Runa Tur: Symbol of Hate

HATE SYMBOL

Tyr Rune

Hate on Display / Tyr Rune



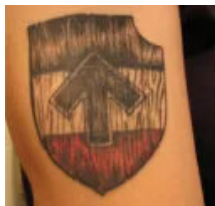
The Tyr rune is one of many ancient European symbols appropriated by the Nazis in their attempts to create an idealized "Aryan/Norse" heritage. This gave symbols such as the Tyr rune a new, racist significance that they did not originally have.

Nazi Germany used the Tyr rune as a symbol for a number of Nazi entities, including the leadership schools (Reichsführerschulen) of Hitler's brownshirts, the Sturmabteilung, and a Waffen SS infantry division, among others.

Since World War II, neo-Nazis and other white supremacists continued to use the Tyr rune in a racist context - along with the Elhaz (or Life) rune, the Tyr rune is one of the most common white supremacist appropriations of ancient runic symbols. Its popularity in part stems from the fact that it is considered by many to be the "warrior rune."

Because today the Tyr rune continues to be used by non-racists as well, including members of various neo-pagan religions, one should not assume that use of the symbol is racist but instead should judge the symbol carefully in its specific context.

Additional Images



MORE TO EXPLORE

Hate Edge

No Race Mixing

Fascism

Exhibit AO

Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine
No 6, 5 January 2018

(excerpt, translation)

Excerpts
Translation

Ukrainian Ministry of Defence, Rules of Firing and Fire Control of Ground Artillery (Battalion, Battery, Platoon, Gun), Approved by Order of the General Staff of the Armed Forces of Ukraine No 6, 5 January 2018, available at: <https://sprotyvg7.com.ua/wp-content/uploads/2022/06/%D0%9F%D0%A1%D1%96%D0%A3%D0%92-2018-A5.pdf>.



MINISTRY OF DEFENSE OF UKRAINE

APPROVED
Order of the General Staff
of the Armed Forces of Ukraine
05.01.2018 No. 6

**RULES OF FIRING AND FIRE CONTROL OF GROUND
ARTILLERY (Battalion, Battery, Platoon, Gun)**

[...]

3. When engaging targets in order to inflict a certain level of irreversible damage on them, the objectives of firing may be: elimination, suppression, destruction.

Elimination of a target consists in inflicting such losses (damage) on it that it completely loses its combat capability.

Suppression of a target consists in inflicting losses (damage) to the target and creating conditions under which it temporarily loses its combat capability.

Destruction of a target is to bring it to a state unsuitable for further use.

When hitting targets to prevent the enemy from performing tasks, the firing objectives may include: denial of action, delay or obstruction of movement, prevention of advance, remote mining of terrain, exhaustion, smoke, blinding, and arson.

Denial of action against a target means causing damage to it and creating conditions under which it will not be able to realize its combat capabilities or perform its combat tasks at the required level within a certain period of time.

Delay or obstruction of movement consists of fire on enemy units in order to prevent their advancement, deployment or movement.

Prevention of advance consists of fire on enemy units in order to prevent the advance of attacking (counterattacking) tanks, infantry fighting vehicles, armored personnel carriers and enemy manpower, disrupt their combat orders and create favorable conditions for the defeat of the enemy by concentrated fire using explosive ordnance, high-precision ammunition (HPA) and direct fire.

Remote mining of terrain is the installation of covering and constraining minefields to limit the maneuver of enemy troops.

Exhaustion is the moral and psychological impact on enemy manpower by conducting disturbing fire with a limited number of guns and ammunition for a set period of time.

Smoking the enemy is the installation of smoke screens, smoke on individual targets (firearms, command and observation posts).

Blinding consists of creating a light curtain in front of enemy firepower and observation posts.

Arson consists in creating fires.

During the light support of combat operations of combined arms units and artillery firing at night, the tasks of firing may include: illumination of the area, setting light landmarks (barrels).

During the distribution of propaganda material, the task of firing is to deliver propaganda material to enemy locations.

The list of fire tasks and their division into firing tasks are given in Table 1.

Table 1 - List of fire tasks and firing tasks

No.	Fire Tasks	Firing tasks
1	Engaging targets in order to cause them a certain level of irreversible damage	elimination
		suppression
		destruction
2	Engaging targets in order to prevent the enemy's performance of tasks	denial of action
		delay or obstruction of movement
		prevention of advance
		remote mining of terrain
		exhaustion
		smoking
		blinding
3	The light support of combat operations of combined arms units and artillery firing at night	illumination of the area
		setting light landmarks (barrels)
		delivery of propaganda material to enemy locations
4	Distribution of propaganda material	delivery of propaganda material to enemy locations
5	Creating (shooting) rappers	creating of a rapper
		shooting of a rapper
6	Targeting	marking a target (object, landmark) on the ground terrain

[...]

183. Depending on the importance of the target, the degree of its engineering equipment, the enemy's morale, the availability of ammunition and the time to complete the fire mission, the consumption of shells determined in accordance with the norms may be increased or decreased.

184. If, after a fire attack on an artillery (rocket, mortar) battery (platoon) or individual firepower (tactical missile launcher, cannon), it is determined that the target continues its fire activity, the fire attack is repeated, with adjustments made as necessary.

[...]

278. The decision to perform fire missions is made by the battalion (battery) commander on the basis of clarifying the tasks set by the commander of the combined arms unit and the senior artillery commander and assessing the conditions for their accomplishment.

The decision to perform fire missions on his own initiative is made by the battalion (battery) commander on the basis of studying the targets selected for destruction and the conditions for performing fire missions.

The procedure for the work of the battalion (battery) commander during the execution of fire missions is given in Appendix 9.

[...]

282. The firing mission is determined based on the nature and importance of each target, the task of the combined arms unit, the firepower of the artillery units and the availability of the appropriate types of ammunition.

[...]

551. Attrition fire is conducted on areas where manpower and firepower are located. The duration of attrition is from several hours to several days.

A battalion (battery) is involved in the firing. The fire is conducted in series of rapid bursts combined with methodical fire from specially dedicated guns.

The intervals between rapid fire series and the rate of methodical fire must be different.

[...]

Exhibit AP

The Guardian, *"Precision" airstrikes kill civilians. In Raqqa, we saw the devastation for ourselves* (5 June 2018)

'Precision' airstrikes kill civilians. In Raqqa we saw the devastation for ourselves | Donatella Rovera and Benjamin Walsby

Donatella Rovera

During the [offensive to reclaim the Syrian city of Raqqa](#) from Islamic State rule, US, British and French coalition forces launched thousands of airstrikes and tens of thousands of artillery shells, hitting virtually every street.

We'll perhaps never know [how many civilians they killed](#). Coalition commanders insist on the precision of their airstrikes, but precision airstrikes are only as precise as the information about the targets. Then there's the size of the bombs dropped. Time and again, we saw entire buildings destroyed in Raqqa. When bombs big enough to take out whole buildings are being used, as well as artillery with wide-area effects, any claims about minimising civilian casualties are unsupported.

Coalition commanders emphasise the "incredible lengths" they said they went to in order to avoid civilian casualties. They beamed surveillance drone footage into a control room more than 1,200 miles away, they said, where sometimes they watched a building for 90 minutes before striking it.

But such surveillance apparently didn't detect the thousands of civilians cowering in backrooms or basements, where they thought they had a chance of surviving. Not all those hiding were Isis fighters. In fact, many were also hiding from Isis. Residents told us they hid indoors and only went out to look for food and water. It's what civilians the world over do when trapped in war. It's what we would do, too.

Everyone we spoke to in Raqqa agreed that Isis had to be defeated. But they asked why their families had to be killed and their city destroyed in the process. The coalition remains stubbornly wedded to the notion that precision airstrikes allowed it to defeat Isis with a minimal cost to civilian life. This is wishful thinking, as [Amnesty's research has revealed in Raqqa](#) (and [before that in the Iraqi city of Mosul](#)).

Coalition commanders have previously dismissed our findings out of hand, saying we have "no understanding of the brutality of warfare". They are wrong. We do.

In Raqqa we visited dozens of sites and worked with military experts to examine patterns of destruction. We compared material evidence with the testimonies of survivors and witnesses we interviewed. The coalition could and should have done this too.

Minimising harm to civilians is not just good practice, it's the law. Site visits and interviews with survivors and witnesses are a crucial part of any investigation. Without proper investigations, complying with the laws of war is all but impossible. In Raqqa, we didn't meet a single survivor or

'Precision' airstrikes kill civilians. In Raqqa we saw the devastation f... <https://www.theguardian.com/commentisfree/2018/jun/05/british-us-ai...>

relative of victims who had been interviewed or even contacted by the coalition, nor anyone who was aware of any visits by US, British or French officials to sites of strikes that killed civilians.

Amnesty is urging coalition members to impartially and thoroughly investigate incidents where civilian casualties are alleged to have occurred, and to publicly acknowledge the scale and gravity of the loss of civilian lives and destruction of civilian property in Raqqa.

Anything less denies victims justice and reparation, and risks repeating the same mistakes elsewhere.

Exhibit AQ

Ordzhonikidze District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 22 June 2016

(excerpt, translation)

Excerpts
Translation

Ordzhonikidze District Court of Mariupol, Case No. 265/4773/15-k, Sentence, 22 June 2016, available at:

<https://web.archive.org/web/20211128095111/https://reyestr.court.gov.ua/Review/58450086>



Case No. 265/4773/15-k

Провадження №1-кп/265/67/16

SENTENCE

IN THE NAME OF UKRAINE

city of Mariupol

22 June 2016

Ordzhonikidze District Court of Mariupol, Donetsk region, composed of:

presiding judge - Kozlov D.O,

judges - Melnyk I. G., Shcherbin A. V,

with the secretary - Azarova A.O.,

with the participation of prosecutors - Shurskyi S. V., Lukyanchenko M. V,

- PERSON_1, PERSON_2,

defense counsel - PERSON_3,

the accused - PERSON_4,

having considered in open court in the courtroom the case in criminal proceedings No. 2201505000000299 on the charges of PERSON_4, INFORMATION_1, a citizen of Ukraine, a native of Mariupol, Donetsk region, married, not convicted, not working, having a secondary special education, registered in Mariupol, ADDRESS_2, of committing crimes under Arts. 258-3 Part 1, 263 Part 1 of the Criminal Code of Ukraine,

DETERMINED THE FOLLOWING:

[...]

The accused, PERSON_4, who was interrogated in court and refused to answer questions, using the provisions of Article 63 of the Constitution, and did not fully admit his guilt on the charges against him, stated that he knew PERSON_5 because he was a public assistant in the traffic police unit where the accused worked. After his dismissal from the MoI, in January 2015, he started

talking to PERSON_5 on the phone to discuss the situation in the country. He added that at PERSON_5's request, he gave him false information about the coordinates of the UAF's positions. Further, he did not ask PERSON_5 why he needed such coordinates. He transmitted this information about UAF checkpoints using a Google map from the Internet. At the same time, he noted that the location of such roadblocks was common knowledge. While communicating with PERSON_5, he also met PERSON_7, whose last name he did not know. He confirmed that the information he gave to PERSON_7 was similar to the information provided by him to PERSON_5, which was false. [...]

[...]

ORDERED:

PERSON_4 to be found guilty of committing the crimes stipulated by Art. Art. 258-3, Part 1, 263, Part 1 of the Criminal Code of Ukraine and to sentence PERSON_4 to

under Art. 258-3, Part 1 of the Criminal Code of Ukraine in the form of nine (9) years of imprisonment without confiscation of property;

under Art. 263, Part 1 of the Criminal Code of Ukraine in the form of 3 (three) years of imprisonment.

Pursuant to Part 1 of Art. 70 of the Criminal Code of Ukraine, by absorbing a lesser punishment with a more severe one, PERSON_4 shall be finally sentenced to 9 (nine) years of imprisonment in a closed penal institution without confiscation of property.

The sentence shall be counted from January 24, 2015.

Exhibit AR

Mariupol City, *Mariupol Court Adjourns Trial of Vostochny Shelling Spotter* (16 January 2018)

(translation)

Translation

Mariupol City, *Mariupol Court Adjourns Trial of Vostochny Shelling Spotter* (16 January 2018), available at: https://mrpl.city/news/view/v-mariupole-perenesli-zasedanie-suda-po-delu-navodchika-obstrela-vostochnogo?utm_source=ukr.net&utm_medium=referral&utm_campaign=rss.

Mariupol court adjourns trial of Vostochny shelling spotter

The Primorskiy District Court in Mariupol has postponed the hearing of the case of former police officer Valeriy Kirsanov, who is suspected of correcting the shelling of the Vostochny district, reports MRPL.CITY.

The session was scheduled to start today, 16 January, at 14:30, but one of the three judges, Igor Sarayev, did not show up. The session was attended by representatives of the National Corps who wanted to monitor the development of the situation. Kirsanov's case is now to be considered on 30 January at 13:00.

To remind, on 24 January 2015, militants shelled the Vostochny residential area in the Levoberezhniy District of Mariupol with Grad rocket launchers.

The SBU found that former Mariupol police officer Valeriy Kirsanov was involved in correcting the fire. According to the special service, the militants' main target was military checkpoints near Mariupol, but due to inaccurate coordinates the shells hit a residential area. As a result of the shelling, 30 people were killed and over 100 others were wounded. More than 200 buildings were damaged.

In June 2016, the court sentenced Valery Kirsanov to nine years in prison. But the sentence did not come into force because the defence won an appeal and the case was remitted for further investigation.

Let's remember that the city and the Oblast must help rebuild private homes destroyed in the shelling of Vostochny in Mariupol.

Exhibit AS

MediaPort, *Mariupol shelling: court finds ex-policeman guilty of adjusting fire* (23 June 2016)

(translation)

Translation

MediaPort, *Mariupol shelling: court finds ex-policeman guilty of adjusting fire (23 June 2016)*, available at: <https://www.mediaport.ua/obstrel-mariupolya-sud-priznal-vinovnym-eks-milicionera-v-korrektirovke-ognya>.

Mariupol shelling: court finds ex- policeman guilty of adjusting fire

Author: Dmitriy Neymyrok

A former employee of the Ukrainian Interior Ministry who corrected the shelling of Mariupol by DPR militants in January 2015 has been sentenced to nine years in prison, says the press service of the Donetsk regional prosecutor's office.

The outskirts of Mariupol (Vostochniy Microdistrict) were shelled with Grad multiple rocket launchers in the morning of 24 January 2015. As a result, 30 people were killed, more than 100 were wounded, and some 200 buildings were fully or partially destroyed. According to the Ukrainian security services, the militants wanted to shell an ATO checkpoint, which was about a kilometre away from residential buildings, but missed.

Two days after the shelling, the Security Service of Ukraine reported that former police officer Valeriy Kirsanov was directing the militants' fire. In early February 2015, he was detained along with two suspects suspected of involvement in the shelling.

The SBU also published an intercept of Kirsanov's conversation with one of the fighters (callsign 'Pepel') immediately after the shelling.

Pepel: Yes.

Kirsanov: Alexander, well, it's a lot of overkill. It went to the houses, to the nine-storey houses, to the private sector. Kiev market, in short...

Pepel: Ouch...

On 22 June, a court found Kirsanov guilty of participation in a terrorist group and illegal handling of weapons.

"A militiaman traitor with the callsign Gayishnik was passing information to militants on the locations of military units of the Armed Forces of Ukraine and other military formations participating in the antiterrorist operation in Donetsk Region", the Donetsk regional prosecutor's office said.

According to the investigation, on 24 January 2015 he was correcting fire when Mariupol was being shelled.

"Their main target, according to the investigation, was checkpoints and other places of deployment of the Ukrainian armed forces near Mariupol. However, due to inaccurate coordinates, the militants using Grad units shelled the Vostochniy residential area of the Levoberezhniy District of Mariupol," the Donetsk Region prosecutor's office said in a statement.

Exhibit AT

Donetsk Regional Prosecutor's Office, Press release, *A sentence was passed to the former policeman who directed "Grads" of terrorists during the shelling of the neighborhood "Eastern" in Mariupol (PHOTO) (22 June 2016)*

(excerpt, translation)

Translation

Donetsk Regional Prosecutor's Office, Press release, *A sentence was passed to the former policeman who directed "Grads" of terrorists during the shelling of the neighborhood "Eastern" in Mariupol (PHOTO)* (22 June 2016), available at: https://don.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=187414.

22.06.2016

A sentence was passed to the former policeman who directed "Grads" of terrorists during the shelling of the neighborhood "Eastern" in Mariupol (PHOTO)

The court supported the position of the prosecutor's office of the Donetsk region and found the former policeman guilty of cooperation with the DPR terrorists.

During the court hearings, it was established that in November 2014, a resident of Mariupol, born in 1975, who previously worked in law enforcement agencies, began cooperating with the terrorists of the DPR. The traitorous policeman with the call sign "Gaishnyk" gave information to the militants about the locations of servicemen of the Armed Forces of Ukraine and other military formations participating in the Anti-Terrorist Operation in the territory of the Donetsk region. Further, the terrorists used this information for artillery fire.



Thus, on 24 January 2015, the former law enforcement officer also adjusted the terrorists' fire. According to the investigation, their main target was checkpoints and other places of the deployment of the Armed Forces near the city of Mariupol. However, due to inaccurate coordinates, militants using "Grad" artillery rocket systems fired at the "Eastern" residential neighborhood of the Left Bank district of Mariupol.



As a result of massive shelling, 30 people died, and more than 100 were injured. More than 200 buildings were completely and partially destroyed. This shelling became the largest since the beginning of the Anti-Terrorist Operation.



After the shelling of Mariupol, the SBU officers immediately went on the trail of the offenders, intercepting their telephone conversations. The man who directed "Grads" of terrorists was detained and arrested.

Today, on the 22nd of June, for the commission of criminal offenses provided for in part 1, Art. 258-3 (participation in a terrorist group or organization) and Part 1, Art. 263 (illegal handling of weapons) of the Criminal Code of Ukraine, the court sentenced the former law enforcement officer to 9 years of imprisonment.

Press service of the prosecutor's office of the Donetsk region

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Exhibit AU

Airwars, Report, Credibility Gap. United Kingdom civilian harm assessments for the battles of Mosul and Raqqa, 2018

Airwars

Credibility Gap

United Kingdom civilian
harm assessments for the
battles of Mosul and Raqqa



Contents

Key findings	2
Recommendations	6
Part I: Context for the Battles of Mosul and Raqqa	9
Part II: UK public transparency in the war against ISIS	18
Part III: UK engagement at Mosul and Raqqa, and civilian harm concerns	23
Conclusion	41

Cover page

LIBRARY IMAGE: An RAF Typhoon is refueled by a US Air Force KC-10 tanker during a sortie over Iraq, March 22nd 2017. (US Air Force/SSgt Tyler Woodward)

Charts, tables and maps

- Fig. 1a** Likely and confirmed civilian fatalities attributed to the Coalition, in the Battle of Mosul
- Fig. 1b** Likely and confirmed civilian fatalities attributed to the Coalition, in the Battle of Raqqa
- Fig. 2a** Airwars estimate of civilian fatalities caused by Coalition air and artillery strikes during the Battle of Mosul
- Fig. 2b** Airwars estimate of civilian fatalities caused by Coalition air and artillery strikes during the Battle of Raqqa
- Fig. 3** Airwars modelling shows that casualty allegations against the Coalition in Mosul closely tracked the number of munitions fired
- Fig. 4a** Civilian harm incidents conceded by the Coalition in the Battle of Raqqa are located in high density urban areas
- Fig. 4b** Civilian harm incidents conceded by the Coalition in the Battle of Raqqa are located in high density urban areas
- Fig. 5** The relative transparency and accountability of active Coalition members in the later stages of the war against so-called Islamic State
- Fig. 6** Accuracy of Ministry of Defence public reporting of strike locations for the battles of Mosul and Raqqa
- Fig. 7a** Declared targets in strikes publicly reported by the Ministry of Defence during fighting in East Mosul
- Fig. 7b** Declared targets in strikes publicly reported by the Ministry of Defence during the Battle of Raqqa
- Fig. 8** What are the reasons given by the Coalition when conceding civilian harm at Mosul and Raqqa?

Key findings

- By any measure, the battles for Mosul and Raqqa marked the most significant periods both of destruction and of civilian harm in the four year fight against so called Islamic State (ISIS). According to monitoring groups and detailed field investigations, at least 9,000 civilians were likely killed in Mosul by all parties to the fighting, with an estimated 2,400 or more civilians killed at Raqqa. Much of the Old City of Mosul and almost 70% of Raqqa's entirety have been destroyed or rendered uninhabitable, according to the United Nations.
- ISIS caused significant destruction and civilian harm at Mosul, as did Iraqi Security Forces and associated units. Even so, much of the damage at Mosul resulted from incoming Coalition actions, with at least 29,000 munitions fired by the international allies alone. Strikes were conducted by the US, the United Kingdom, France, Australia and Belgium among international partners, alongside those by Iraqi forces. Sir Michael Fallon declared shortly after the capture of Mosul from ISIS that the UK was "second only to the United States" in having struck 750 targets in the city.
- At Raqqa, lightly equipped Syrian Democratic Forces – and limited ISIS heavy weaponry (e.g. artillery, Vehicle Borne IEDs) – meant that the great majority of destruction appears to have resulted from Coalition (primarily US) actions. Only a relatively small number of strikes were conducted by the UK and France, with the RAF declaring some 216 targets struck.
- Airwars assesses the UK to be the most transparent of all international actors operating in both Iraq and Syria, setting key good practice benchmarks for other states in declaring its actions. However it also assesses the UK to be generally poor on accountability for non combatant harm, with the Ministry of Defence seemingly incapable of detecting civilian casualties from its urban actions.

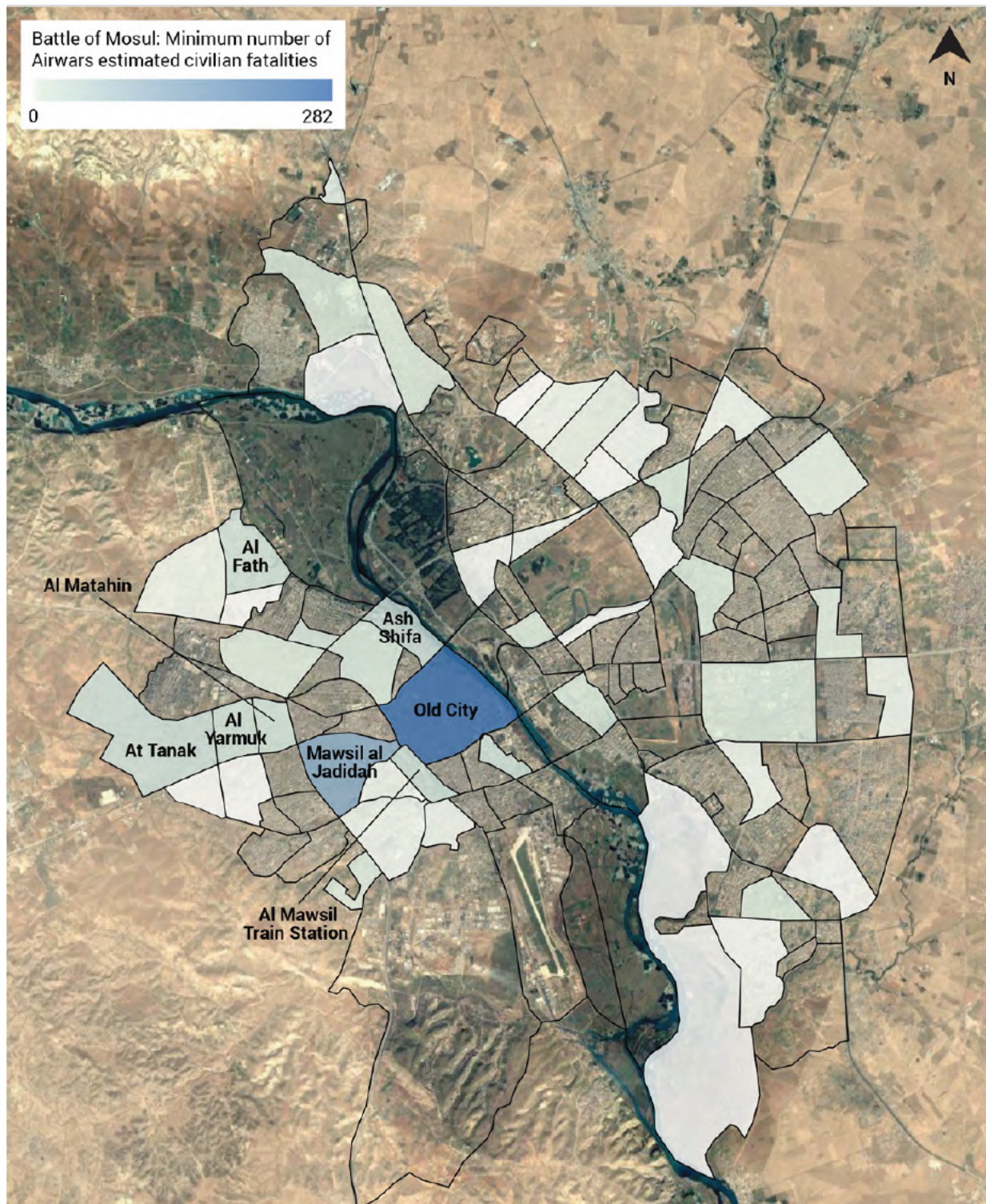
Right

The aftermath of an alleged Coalition strike on Raqqa's Bedo neighbourhood, August 20th 2017 (via Euphrates Post)



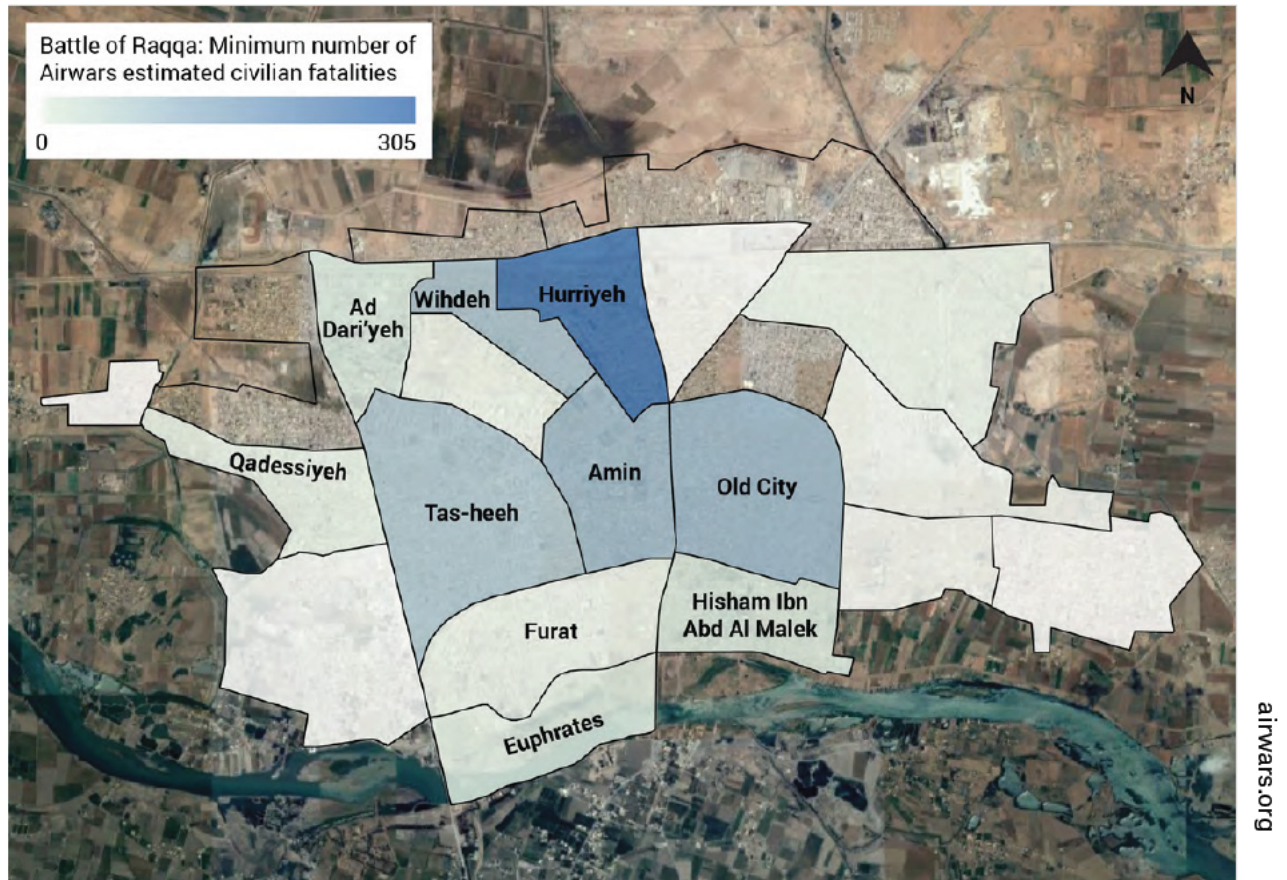
- Senior Coalition military commanders have stated repeatedly that civilian harm at Mosul and Raqqa was inevitable, with Major General Rupert Jones telling the Defence Select Committee for this inquiry that it was “a fool’s errand” to claim otherwise. Even so, the Ministry of Defence has to date conceded zero civilian casualties from either urban campaign.
- Airwars presently assesses that 2,600 or more non-combatants likely died at Mosul and Raqqa as a result of Coalition actions. Yet among the international belligerents, only the United States and Australia have publicly conceded civilian harm to date for these assaults, with the Coalition overall assessing just under 400 reported fatalities to be Credible. The UK, France and Belgium all continue to claim no harm from their actions – much as Russia does for its own urban strikes in Syria.
- The UK’s non-reporting of civilian harm from both urban fighting, and the broader air campaign, appears to be driven by systemic challenges in MoD post strike assessments.
- The majority of credibly reported non combatant fatalities at both Mosul and Raqqa related to the damage or destruction of buildings, where civilians had either lived; had taken shelter; or on occasion had been forcibly detained by ISIS. Mass casualty events were frequent, with large numbers of civilians reported killed and injured when buildings collapsed upon them – often reportedly a result of air and artillery strikes, as well as activity by ISIS.
- Airwars modelling of official RAF strike releases for the battles of Mosul and Raqqa also show that a significant proportion of UK strikes targeted buildings. During the East Mosul campaign between October 2016 and January 2017, 32% of British actions were aimed at buildings. In the Raqqa assault of June to October 2017, the proportion of UK strikes targeting buildings rose to 63%.
- Civilian deaths during urban fighting are by their nature almost always unobservable – with deaths and injuries occurring in spaces where ground spotters, Intelligence Surveillance and Reconnaissance (ISR), and post strike assessments generally could not have identified harm even where it occurred. Yet the UK, and more broadly the Coalition, have failed to conduct on the ground investigations into key incidents of concern.
- This unobservable presence of non combatants in urban settings also poses a significant challenge both for the relative benefits of precision strikes, and for the RAF’s present munition of choice for urban actions – the 500lb bomb.
- Official Coalition data shows a clear bias towards observable events when concessions of civilian harm are made – meaning that the majority of locally reported civilian harm events at both Mosul and Raqqa will not be reflected in Coalition data.
- Even with potentially more restrictive rules of engagement than other allies, the nature and intensity of the urban fighting at both Mosul and Raqqa – and the high reported civilian fatalities from those campaigns – means that the UK’s present assessment of zero civilian harm must be challenged.

Fig. 1a Likely and confirmed civilian fatalities attributed to the Coalition, in the Battle of Mosul



Please note that the map only shows Fair and Confirmed fatalities attributed to the Coalition the Battle of Mosul that Airwars has a location which is at minimum accurate to the neighbourhood. For 15% of the 1,168 fatalities assessed Fair or Confirmed by Airwars, only the city is known. For the purposes of this graphic, these have been excluded. Neighbourhoods in dark blue experienced the highest reported casualties.

Fig. 1b Likely and confirmed civilian fatalities attributed to the Coalition, in the Battle of Raqqa



Please note that the map only shows Fair and Confirmed fatalities attributed to the Coalition the Battle of Raqqa that Airwars has a location which is at minimum accurate to the neighbourhood. For **29%** of the **1,498** fatalities assessed Fair or Confirmed by Airwars, only the city is known. For the purposes of this graphic, these have been excluded. Neighbourhoods in dark blue experienced the highest reported casualties.

Recommendations

British involvement in the anti-ISIS Coalition, culminating in the battles for Raqqa and Mosul, likely represented the most significant and sustained British military action since the Korean War. In the decades since then, international norms and accepted military practices concerning civilian harm have significantly evolved. The UK has changed its own policies in line with this, and conducts operations with the declared intent of minimizing civilian harm.

Airwars commends the Ministry of Defence for its transparency of action; its accessible reporting mechanisms; and the timely response of MoD officials to requests for information regarding specific alleged civilian harm events during the war against so-called Islamic State.

A gap has nevertheless developed between what the UK concedes publicly regarding the level of civilian harm caused by British actions, and the findings of external monitors and investigators.

Based on the close monitoring of military actions in Iraq and Syria since 2014 by Airwars and its own understanding of civilian harm, the following recommendations are made – with the hope that these may build upon and improve official monitoring, understanding and reporting of civilian casualties resulting from British military actions:

- That the Ministry of Defence considers establishing a dedicated civilian harm assessment cell for all future conflicts – to which personnel with key skills (eg geotemporal analysis, local language speakers) might be assigned. This might also offer a clearer point of engagement for pilots and analysts wishing to raise possible issues of concern.¹
- That the MoD enhances its assessment and investigative capacities in order to properly evaluate allegations of civilian harm. Wherever possible this should include a proper review of local claims and associated field investigations by others; communication with victims and witnesses; and on site investigations of suspected harm incidents.
- In light of most locally and credibly reported civilian harm at Mosul and Raqqa occurring within unobservable spaces, that the MoD reviews whether it is presently over reliant upon ISR when determining non combatant harm during urban campaigns.

¹ At present, MoD Operations personnel are temporarily reassigned from other key tasks (for example targeting) in order to conduct civilian harm assessments. Airwars believes that the UK should follow the example of CENTCOM in having a dedicated civilian harm assessment team.

- That in light of significant credibly reported civilian fatalities for both Mosul and Raqqa – and the low fatality numbers conceded by the Coalition – that the MoD urgently reviews the statistical modelling used in its own Collateral Damage Estimates for urban actions.
- The careful use of precision munitions may play a role in reducing battlefield civilian harm. However any such benefits diminish during urban fighting. Precisely targeting a high population area – where the exact location of civilians is often unknown – risks similar effects to those caused by non-precision weapons. Airwars calls on the Ministry of Defence to review its present munitions suite in relation to urban warfare.
- Following due consideration of the above recommendations, that the MoD then undertakes a full and proper assessment of more than 400 civilian harm allegations during the battles of Mosul and Raqqa in which UK forces *might* have been involved.
- That the MoD provides, as a matter of course, compensation or *solatia* payments for victims and/or families affected by UK military actions in which civilian harm is conceded.
- That the MoD provides as much locational detail as possible in its publicly reported strike logs. This will assist external agencies in evaluating potential harm from British strikes – while preventing the UK from being unnecessarily implicated in events where civilian harm was claimed and in which it played no role.
- Airwars commends the Ministry of Defence for providing a civilian harm reporting mechanism for external agencies during the war against ISIS; and for its willingness to engage with concerned NGOs on individual allegations. We call for this be standard good practice in future conflicts.

Below

January 14th 2017: Local people in Mosul remove the bodies of 11 members of the Mahmood family, a month after they were killed in a reported Coalition airstrike on the city (Picture courtesy of family)



Fig. 2a Airwars estimate of civilian fatalities caused by Coalition air and artillery strikes during the Battle of Mosul

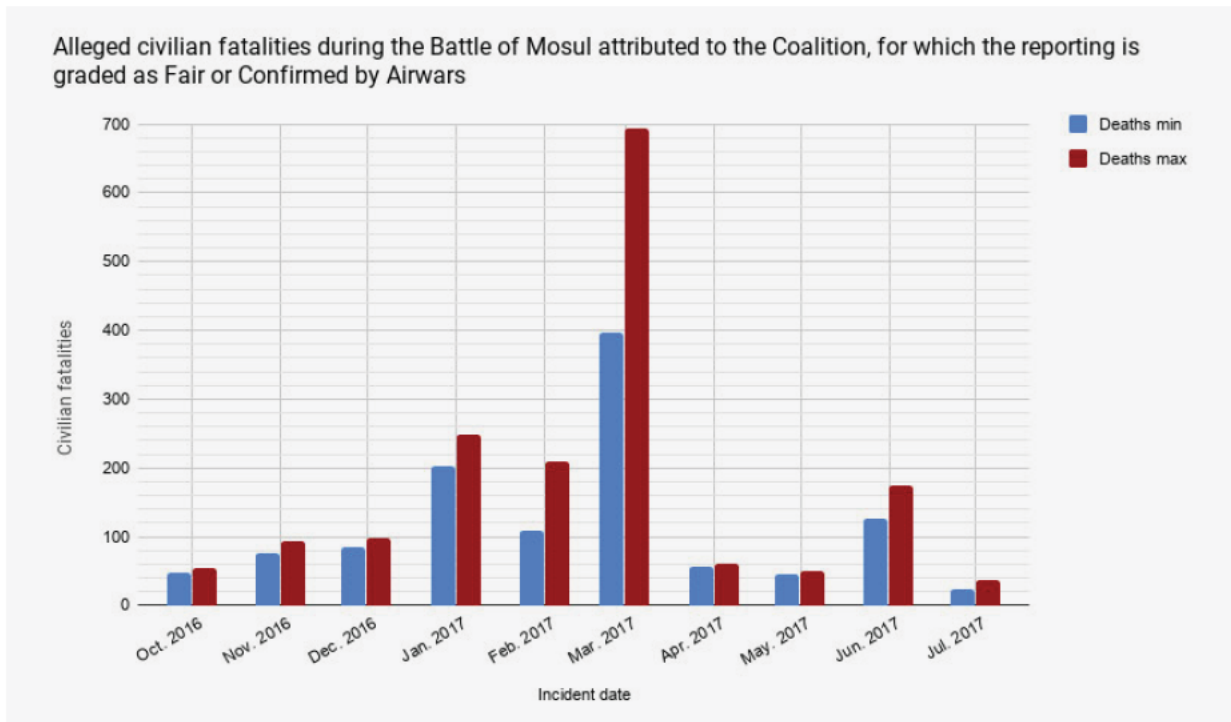
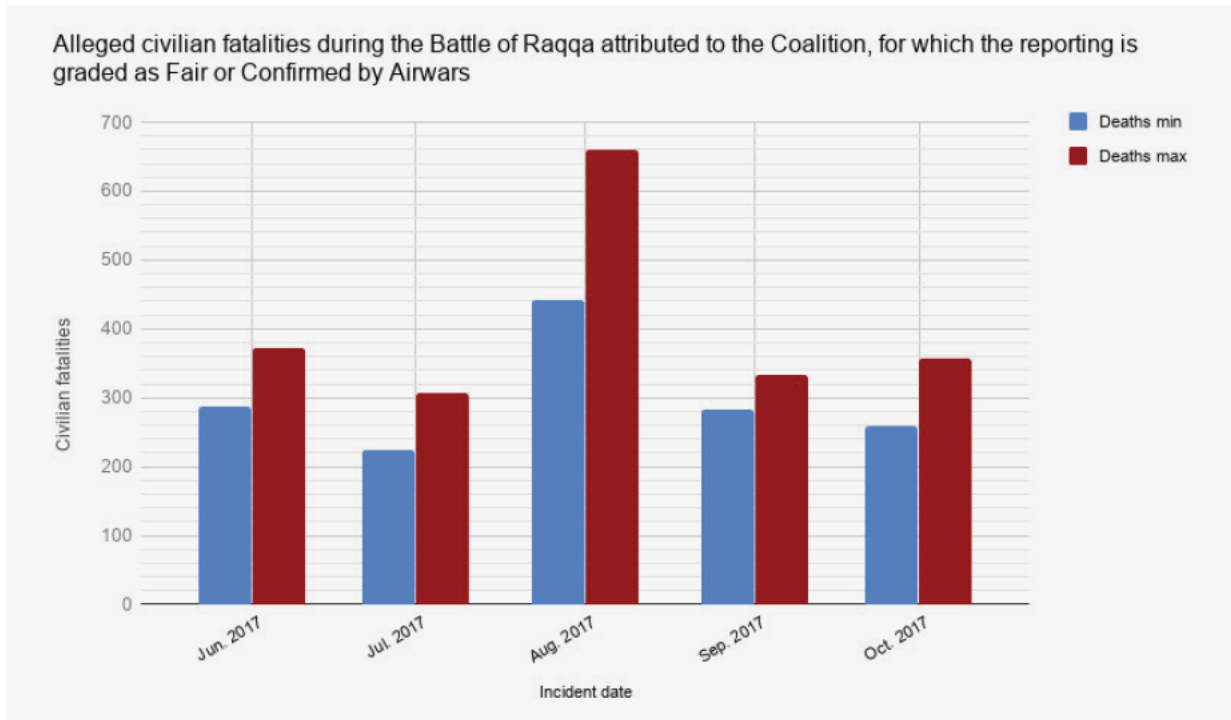


Fig. 2b Airwars estimate of civilian fatalities caused by Coalition air and artillery strikes during the Battle of Raqqa.



Part I

Context for the Battles of Mosul and Raqqa



[Previous page](#)

Nadia Aziz Mohammed looks on as Mosul civil defence officials search for the bodies of 11 family members, killed in a June 2017 airstrike (Photo by Sam Kimball. All rights reserved.)

Airwars and civilian harm monitoring in Iraq and Syria

Based at Goldsmiths University of London, the international NGO Airwars was founded in 2014 to help better understand the public reporting of civilian harm on the modern battlefield. This is achieved primarily by acting as an all-source monitor of local population claims, as well as by tracking related reporting by belligerents. Airwars also seeks to work with stakeholders, including states and militaries, to help improve understanding of conflict casualties with the longer term goal of harm reduction. The Government has positively cited its engagement with Airwars, as indicative of its commitment towards properly assessing potential civilian harm allegations relating to UK forces.²

The US-led Coalition against so-called Islamic State has comprised more than 60 nations. However the declared kinetic contingent of the campaign has featured only 14 countries. The United Kingdom has consistently been the second most active partner in the war, after the United States. Other nations known to have participated kinetically are France; The Netherlands; Belgium; Denmark; Canada; Australia; Turkey; Iraq; the United Arab Emirates; Jordan; Saudi Arabia; and Bahrain. Overall these nations have conducted more than 29,000 airstrikes between them, releasing 105,000 munitions from the air on ISIS positions.

This high intensity conflict has been costly for non combatants. Since 2014, Airwars has tracked more than 2,600 locally alleged civilian fatality events across both Iraq and Syria, which have been linked to possible international Coalition actions in the war against ISIS. In total, these claims allege more than 26,000 non combatant fatalities. Airwars presently assesses that at a minimum, between 6,300 and 9,700 non combatants are likely to have died in Coalition actions overall – approximately 40 percent during the recent battles for Mosul and Raqqa.

² See for example Minister for the Armed Forces Penny Mordaunt MP, Written Answers, February 29th 2016: "Airwars has been proactive in submitting written reports of civilian casualties and we are grateful for its efforts and for the value that they add." Hansard, at hansard.parliament.uk/Commons/2016-02-29/debates/16022911000025/ReportingOfCivilianCasualties

The Battle for Mosul

Civilians faced multiple deadly risks at Mosul. ISIS routinely put civilians in mortal danger, using them as human shields, placing explosives around residential buildings and even reportedly welding non combatants inside their homes.³ Iraqi forces meanwhile fired unguided rockets and mortars into the city, with its actions reportedly becoming less discriminate as the battle progressed.⁴ The Coalition, meanwhile, launched some 29,000 munitions into the city over the course of the battle – employing fighter, bomber and attack aircraft, as well as drones, artillery, rockets and mortars.

At Mosul, the Associated Press would later place the likely overall death toll at between 9,000 and 11,000 civilians, estimating that at least a third of those fatalities were the responsibility of the Coalition and Iraqi forces.⁵ US National Public Radio was additionally able to retrieve nearly 5,000 civilian names on individual death certificates dating to the battle.⁶

Coalition and national officials have deferred inquiries about overall casualty figure at Mosul to national authorities. Iraqi federal authorities however have been slow to grapple with the death toll. At one point, Prime Minister Haider al-Abadi said that at most, around 1,260 civilians had died during fighting.⁷ Yet when federal agencies finally began recovery operations in the city ten months after the fighting ceased, they recovered nearly 1,000 bodies in the first week of searching, according to local reports.⁸

Right
Iraqi forces deploy IRAMs
during intense urban fighting
in Mosul, early 2017.
(Image via Haider Sumeri)



airwars.org

³ 'At Any Cost: The Civilian Catastrophe in West Mosul, Iraq,' Amnesty International, July 1st 2017, at www.amnesty.org/en/latest/campaigns/2017/07/at-any-cost-civilian-catastrophe-in-west-mosul-iraq

⁴ 'Iraq/US-Led Coalition: Weapons Choice Endangers Mosul Civilians,' Human Rights Watch, June 8th 2017, at <https://www.hrw.org/news/2017/06/08/iraq/us-led-coalition-weapons-choice-endangers-mosul-civilians>

⁵ 'Mosul is a graveyard: Final IS battle kills 9,000 civilians,' Associated Press, December 21st 2017, at apnews.com/bbea7094fb954838a2fdc11278d65460/9,000-plus-died-in-battle-with-Islamic-State-group-for-Mosul

⁶ 'More Civilians Than ISIS Fighters Are Believed Killed in Mosul Battle,' NPR, December 19th 2017, at www.npr.org/sections/parallels/2017/12/19/570483824/more-civilians-than-isis-fighters-are-believed-killed-in-mosul-battle

⁷ 'Iraq PM says Mosul abuses not systematic,' Associated Press, September 16th 2017, at www.apnews.com/a4848b07448b4ced9d06a2d17a5073af

⁸ 'Mosul Eye – Facebook Update,' May 20th 2018, at www.facebook.com/MosulEye/posts/1610707879050708

The Battle for Raqqa

The assault on Raqqa began in June 2017, in the waning weeks of operations at Mosul. Hundreds of civilians had already been credibly reported killed in the lead up to the assault. Yet despite those deaths, and reports of heavy casualties in Mosul, the use of force by the Coalition at Raqqa actually increased once fighting moved into the city, according to official data. The Coalition has reported firing at least 21,000 munitions into Raqqa between June and October 2017.⁹

While ISIS employed many of the same abhorrent practices that put civilians in danger at Mosul, its use of wide area effect weapons such as VBIEDs decreased significantly (from over 750 documented incidents in Mosul, to only “around a dozen” in Raqqa, according to the Coalition).

Local monitors have placed the overall civilian toll at Raqqa between June and October 2017 at 2,400 to 3,000 or more killed. Airwars presently estimates that between 1,500 and 2,000 civilians likely perished due to Coalition air and artillery strikes. In April 2018, the UN said that its experts had determined that over two-thirds of the city’s buildings had been destroyed or damaged.¹⁰ Though most of that destruction was likely caused by Coalition attacks, hundreds of civilians have also subsequently been killed or wounded by mines and IEDs left behind by ISIS in residential areas.

Buried informally during the battle, the bodies of over 700 people killed in fighting were recovered by crews working in the first five months of 2018, with hundreds more recovered since.¹¹ The city, which UN officials described as worse off than Aleppo or Homs following fighting there, is considered so dangerous and uninhabitable that UN agencies have at times deliberately slowed the provision of aid to discourage the return of civilians. Nevertheless, more than 100,000 have done so.

⁹ ‘Raqqa: a city destroyed then forgotten,’ Samuel Oakford, Airwars, March 12th 2018, at airwars.org/news/raqqa-a-city-destroyed-then-forgotten

¹⁰ ‘Transcript of Stakeout by UN Special Envoy’s Senior Adviser Jan Egeland,’ April 4th 2018, at www.un.org/sg/en/content/sg/note-correspondents/2018-04-04/note-correspondents-transcript-stakeout-un-special-envoy%E2%80%99s

¹¹ ‘A city full of flies’: The crews digging out bodies in Raqqa,’ Airwars, May 30th 2018, at airwars.org/news/rrc-interview



Above

Recovery teams pull human remains from a mass grave located in the Al-Rashid Stadium, Raqqa in May 2018. (Image courtesy of Raqqa Reconstruction Committee)

Reported and declared civilian harm at Mosul and Raqqa: an overview

As already noted, there are credible indications via local public reporting that 11,000 or more non combatants died during the battles for Mosul and Raqqa – with a significant proportion of those deaths likely the result of Coalition actions according to credible public estimates.¹² The US-led Coalition has itself admitted at least 892 unintentional deaths overall in Iraq and Syria since 2014. Of these, 341 fatalities have been conceded to date for the battle for Mosul, and a further 26 deaths for Raqqa (some 41 percent of all such confirmed deaths in total).

Of the known international Coalition allies to have participated at Mosul, only the United States and Australia have publicly conceded any civilian harm from their actions. The UK, France and Belgium – which each reported Mosul to be their primary target for the duration of the campaign – have all so far failed to identify any civilian harm culpability. It remains possible nevertheless that one or more of these belligerents were responsible for some of the Mosul events classed by the Coalition as Credible, though has chosen not to accept public responsibility for that harm.¹³

For Raqqa, where only the United States, the UK and France participated alongside SDF ground forces, the 26 deaths conceded so far (a very significant undercount in the view of Airwars) have been publicly attributed only to the Coalition, meaning that it is not presently possible formally to attribute those casualties to any one party. However, since both the UK and France have not individually declared any harm in the city, it may be reasonable to assume that the United States was responsible for the confirmed casualties in most or all cases.

¹² 'Mosul is a graveyard: Final IS battle kills 9,000 civilians,' Associated Press, December 21st 2017, at apnews.com/bbea7094fb954838a2fdc11278d65460/9,000-plus-died-in-battle-with-Islamic-State-group-for-Mosul

¹³ In April 2017, the Coalition ceased attributing confirmed civilian harm events to any one ally (effectively always the United States until that point), instead shifting to 'Coalition' admissions.

How and where civilians reportedly died at Mosul and Raqqa

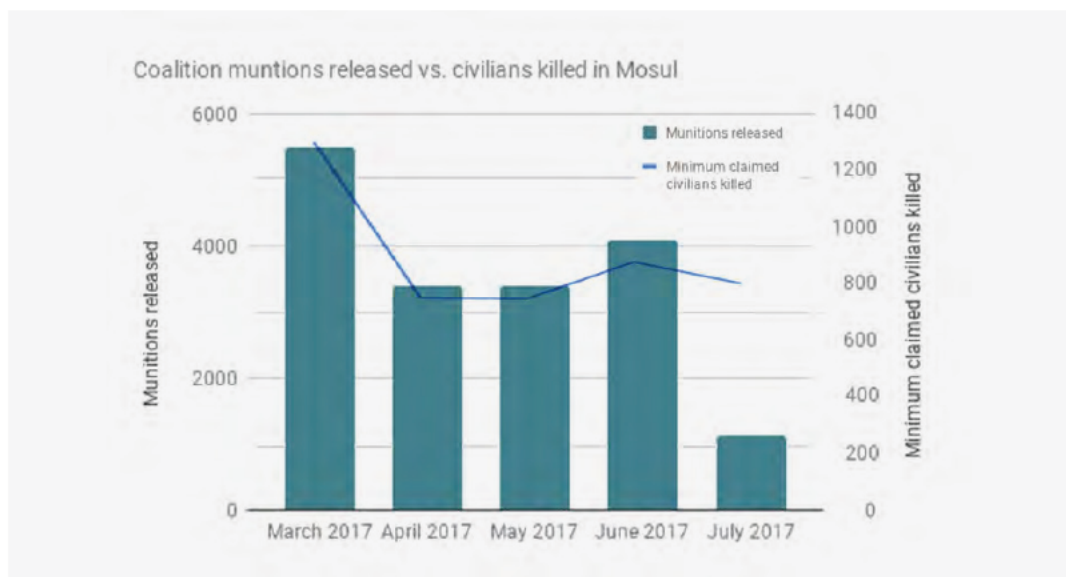
Several years of close monitoring conducted by Airwars, and investigations carried out by others, indicate that the majority of credibly reported civilian casualties during the battles of Mosul and Raqqa were linked to the damage or destruction of buildings, in particular during periods of intense bombardment. This pattern is true not only in areas where the Coalition operated but elsewhere, for instance in Western Syria where Russia conducts extensive military actions.

Civilian harm closely tracked the intensity of strikes

Public civilian casualty claims in both Mosul and Raqqa closely tracked the intensity of Coalition and other belligerent bombardments, as might be expected. That is, the more intensively the Coalition and others bombed populated areas, the higher the reported non combatant toll. As Airwars noted in an earlier Parliamentary submission:

In March, for example, the Coalition reported firing 5,500 munitions; in the same month, local reports alleged 1,308 civilians were killed by Coalition actions. The following month, the Coalition reported 3,400 munitions released, a drop of 38 percent. Also in April, the minimum number of civilians claimed killed in local reports fell by similar proportions – down to 743, a drop of 43 percent.¹⁴

Fig. 3 Airwars modelling shows that casualty allegations against the Coalition in Mosul closely tracked the number of munitions fired



¹⁴ 'Death in the City: high levels of civilian harm in modern urban warfare from significant explosive weapons use' Airwars, submitted to Inquiry of the All Party Parliamentary Group on Explosive Threats, May 21st 2018, at airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf

Civilian harm was most likely to occur in high structural and population density areas

As the bombardment of Mosul and Raqqa intensified, civilians sought shelter in their own homes, or increasingly often as fighting wore on, anywhere they might seek cover. As would also be expected during intense urban fighting, most civilians died where the structural and population density was at its greatest.

The first clue in determining this is the level of damage and destruction to urban structures seen in each city. In Raqqa, more than two-thirds of buildings were destroyed or damaged. In Mosul, nearly 20,000 buildings were destroyed or significantly damaged, according to a November 2017 UN analysis.¹⁵ A separate assessment identified more than 5,500 damaged or destroyed buildings in the Old City of Mosul alone.¹⁶ It is in these areas on the right bank of the Tigris river that fighting, and reports of civilian casualties, were at their highest levels in all of Mosul.

These were not empty buildings. In Raqqa, as many as 100,000 civilians remained trapped inside the city at the start of Coalition operations according to UN estimates. Early on, they received conflicting instructions from the Coalition and SDF about whether to stay in place and shelter, or instead to flee.¹⁷ Thousands were still trapped in the city by October 2017, when the Coalition and SDF fighters pounded an increasingly small and densely packed portion of city blocks.

In Mosul, the humanitarian crisis brought on by operations was greater in practically every way. When the assault began, well over a million civilians remained in the city. By the time fighting moved into the older and more densely populated western half of Mosul, the UN estimated some 750,000 civilians still remained on the right bank of the Tigris River.¹⁸

As fighting intensified, civilians were caught in impossible situations. Trapped on one side by ISIS explosives and cut down by their snipers, residents also faced a hail of fire from Iraqi forces and Coalition strikes. Often sheltering in basements, civilians could have little idea of how close they might be to liberating forces, or whether ISIS was making use of buildings in the area, thereby drawing fire with deadly consequences.

A review of those incidents which were determined by the Coalition itself to be Credible civilian harm allegations against its forces, shows that the overwhelming majority of cases occurred in densely structured and populated areas of Mosul. Though the Coalition has admitted to far fewer civilian harm events in Raqqa, those too are located in neighborhoods with high urban densities.

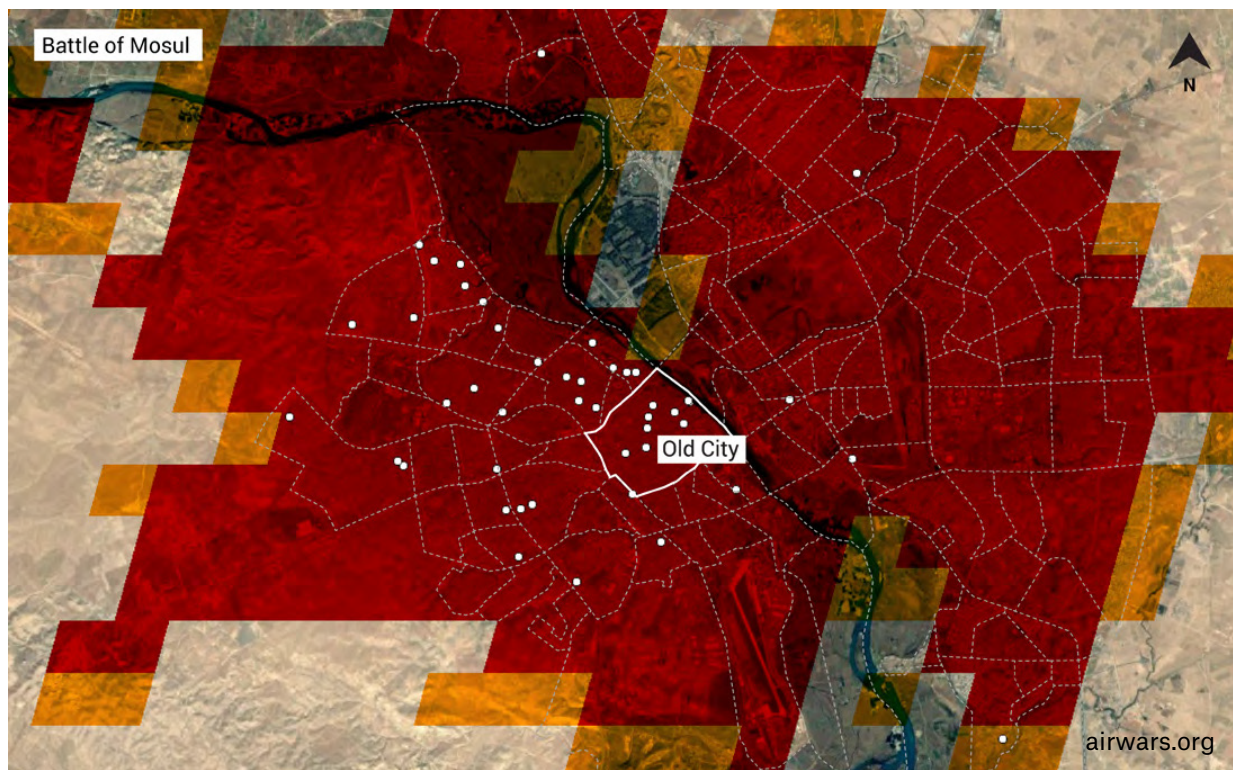
¹⁵ 'Damage assessment of Mosul, Ninawa Governorate, Iraq,' UNOSAT, November 27th 2017 at unitar.org/unosat/map/2738

¹⁶ 'Damage assessment of Old City, Mosul, Ninawa Governorate, Iraq (30 June 2017)', UNOSAT, July 6th 2017 at www.unitar.org/unosat/map/2615

¹⁷ 'Civilians face conflicting instructions as Coalition and SDF assault Raqqa,' Samuel Oakford, Airwars, June 9th 2017, at airwars.org/news/civilians-face-conflicting-instructions-as-coalition-and-sdf-move-to-take-raqqa

¹⁸ 'UN, partners voice deep concern about 750,000 civilians as battle expands to western Mosul,' UN, January 26th 2018 at www.un.org.tr/un-partners-voice-deep-concern-about-750000-civilians-as-battle-expands-to-western-mosul-5

Fig. 4a Civilian harm incidents conceded by the Coalition in the Battle of Mosul are located in High Density Urban areas



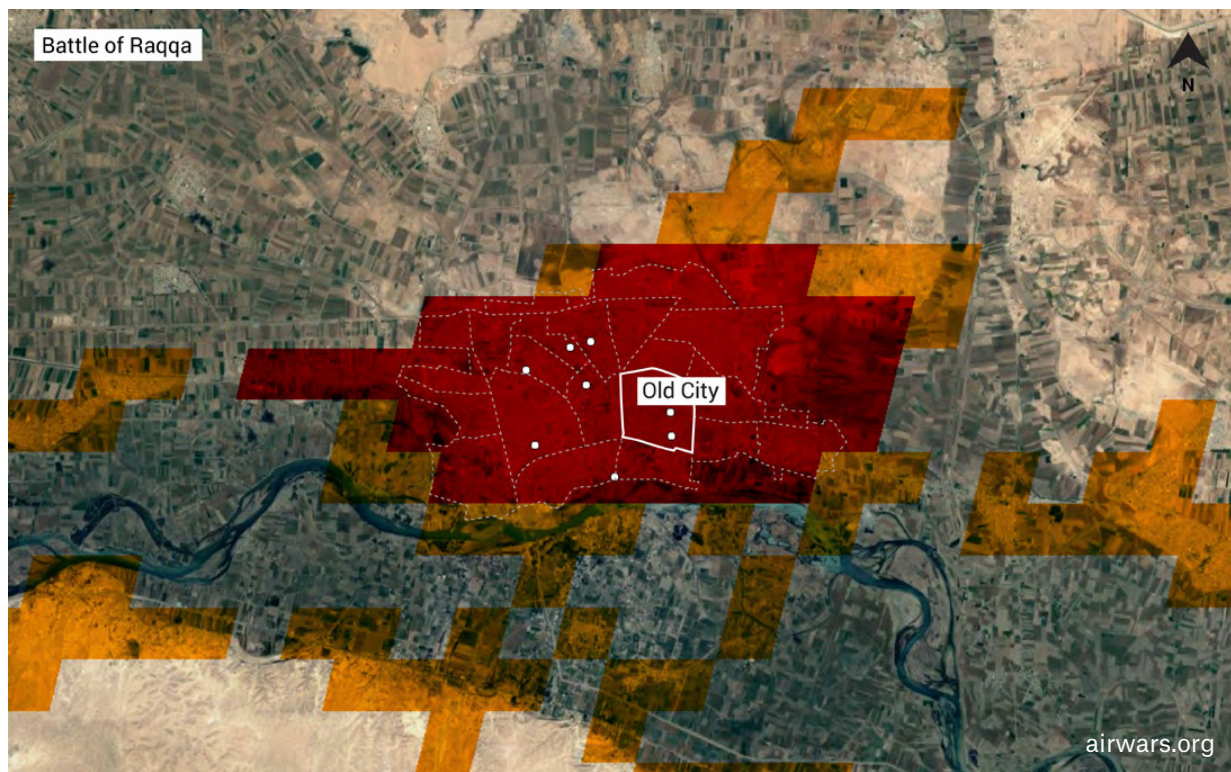
Urban density (1 km resolution)

- Rural
- Low Density Urban
- High Density Urban

airwars.org

Map showing 51 civilian harm incidents in the Battle of Mosul, assessed by the Coalition as Credible and for which Airwars has received Military Grid Reference Coordinates to an accuracy of up to 100 m. Out of the Credible strikes, 47 were in areas of high density population. Only one was low density, and three in rural locations (the latter are not shown in the map). The urban density categories are modelled on the Global Human Settlement Model Grid (GHS-SMOD). ghsl.jrc.ec.europa.eu/data.php

Fig. 4b Civilian harm incidents conceded by the Coalition in the Battle of Raqqa are located in High Density Urban areas



airwars.org

As the maps shown above indicate, the great majority of civilian casualty incidents acknowledged by the Coalition itself in Mosul and Raqqa took place in high population density areas.

The UK, as the second most active member of the Coalition, is not immune to these trends. It therefore remains exceedingly likely, in the view of Airwars, that British aircraft were responsible for civilian casualties during both battles.

Map showing 10 civilian harm incidents in the Battle of Raqqa, assessed by the Coalition as Credible and for which Airwars has received Military Grid Reference Coordinates to an accuracy of up to 100 m. Out of the Credible strikes, eight were in areas of high density population and two in rural locations (not shown on the map). The urban density categories are modelled on the Global Human Settlement Model Grid (GHS-SMOD). ghsl.jrc.ec.europa.eu/data.php

Part II

UK public transparency in the war against ISIS



Previous page

LIBRARY IMAGE: A Royal Air Force Tornado GR4 armed with Paveway IV laser guided bombs (Via Ministry of Defence)

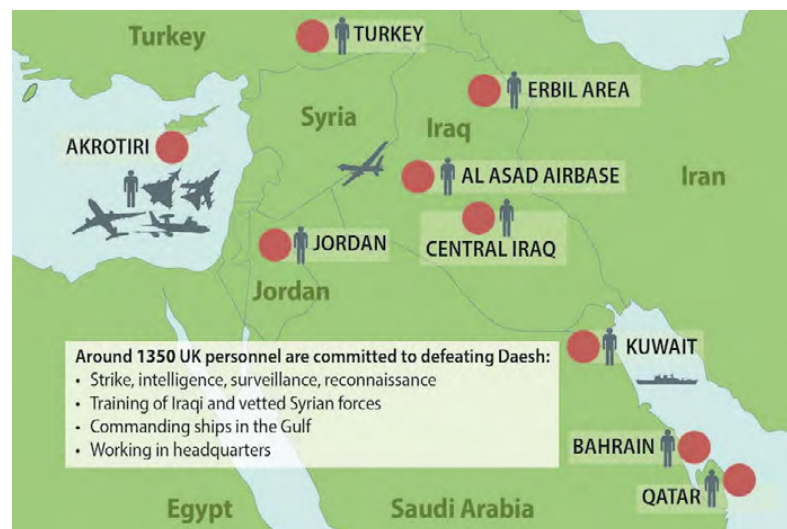
Since August 2014, Airwars has permanently archived all known public releases and statements by both the Coalition, and by all individual allies in the war against so-called Islamic State.¹⁹ It has also monitored transparency and accountability among individual belligerents – better enabling militaries to measure their own openness against that of their allies.

Airwars has consistently assessed the UK to be the most transparent belligerent among the 14-nation kinetic contingent of the Coalition – an approach which has likely been influential in encouraging other states to improve their own transparency. In a comprehensive audit of the alliance published in December 2016, Airwars described British military reporting as follows:

Strike reports are published weekly, which often give significant information about locations and targets, along with the aircraft and munitions used. Additional detail on weapon use, enemy combatants killed and other key metrics has been released in response to parliamentary questions, media enquiries and freedom of information requests.²⁰

Right

Map of UK forces committed to Operation Shader (via Ministry of Defence)



airwars.org

¹⁹ See 'Official Coalition Military Reports 2014–2018', Airwars, archived at airwars.org/daily-reports

²⁰ 'Limited Accountability: a transparency audit of the Coalition air war against so-called Islamic State,' Airwars, December 2016, at airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf

Fig. 5 The relative transparency and accountability of active Coalition members in the later stages of the war against so-called Islamic State

Transparency of action by active Coalition member

	Frequency of reports	Near location given?	Date of strikes given?	Munitions/ strike numbers released	Transparency of civilian harm	Civilian harm conceded?
UK	Weekly	Yes	Yes	Yes	Good	Yes
Australia	Bi-weekly	Yes	Yes	Yes	Good	Yes
US	Occasional	Occasional	Occasional	No	Good	Yes
France	Weekly	Occasional	Within a range	Yes	Poor	No
Belgium	Occasional	Occasional	No	Occasional	Poor	No
The Netherlands	Poor	No	No	Yes	Poor	No

Airwars.org, Nov 2017

Airwars notes in particular the following in relation to UK military transparency in the war against so-called Islamic State:

Release of strike information

The United Kingdom as a matter of routine has publicly released, in reasonable detail and in good order, the dates; approximate locations; and stated targets of more than 1,700 RAF airstrikes aimed at so-called Islamic State.²¹ In addition, in response to both Parliamentary Questions and to Freedom of Information requests, the MoD has released significant data relating to munitions use, estimated enemy casualty figures, and other key metrics.

The release of such information ensures better UK accountability for possible civilian harm events, without (according to MoD officials) compromising operational or national security. Airwars and others are in turn able to check UK actions against civilian harm claims – tagging or discounting events for possible assessment.²²

²¹ The Ministry of Defence reports 1,370 strikes in Iraq and 336 in Syria, to July 5th 2018.

²² An early challenge with UK drone strike reporting in Iraq and Syria (where the MoD gave less public information with regard to remotely piloted operations) was resolved following engagement by Dr Jack MacDonald on behalf of the All Party Parliamentary Group on Drones and Airwars. Both manned and unmanned strikes were subsequently reported by the MoD with equal transparency.

External civilian harm reporting mechanisms and casualty assessment processes

The UK was the first nation within the Coalition to make available, to external agencies such as Airwars, a formal reporting mechanism for civilian harm allegations. This approach was also later adopted by the US State Department; by CENTCOM; and by Operation Inherent Resolve.

This mechanism has in turn been used by Airwars to flag almost 120 incidents of concern to the Ministry of Defence, which were then assessed and responded to in a timely manner by officials. This enabled the MoD to make clear for example that it had not participated in 90 percent of some 111 flagged incidents of concern during 2016. MoD officials also responded (often in detail) to follow up questions from Airwars relating to specific allegations.

While Airwars would challenge the overall UK assessment of zero civilian harm resulting from urban strikes, it nevertheless commends the Ministry of Defence for its transparency of reporting; its accessible reporting mechanisms; and the timely response of MoD officials to requests for information regarding specific alleged civilian harm events.²³

Above
Aerial photo of the destruction in Raqqa. (Raqqa is Being Slaughtered Silently, August 30th, 2018)



airwars.org

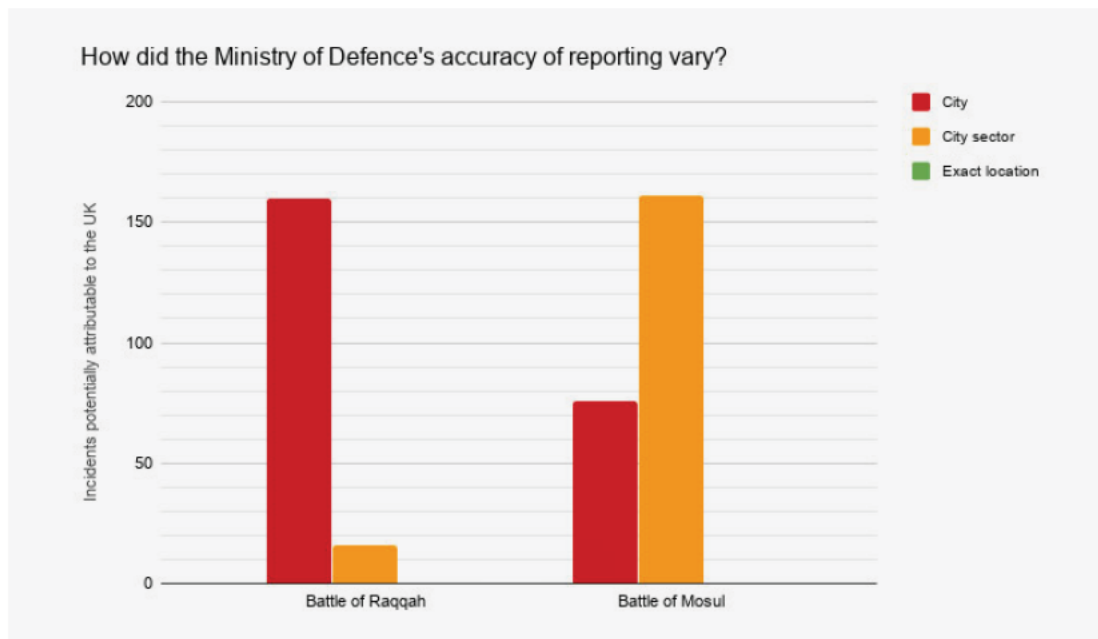
Accuracy of British reporting during Mosul and Raqqa

As noted, for much of the anti-ISIS campaign Britain rated well on transparency among its Coalition partners, issuing reports of where it had bombed with more refined geographic accuracy. This proved helpful not only for locating the strike itself, but also for excluding Britain from suspected involvement in problem events elsewhere.

Unfortunately this level of detail decreased significantly during operations to liberate Raqqa during 2017. While only 17.5 percent of RAF strikes were identified at city level only for Mosul, this proportion rose to 80 percent of actions in Raqqa, according to official MoD strike releases.

²³ Only Canada among the 14 individual Coalition allies demonstrated similar transparency in relation to specific civilian harm claims. The United States was however by far the most accountable nation when it came to declaring civilian harm – while also contributing significantly to broader Coalition transparency processes. US accountability has generally sustained into the new administration of President Donald Trump.

Fig. 6 Accuracy of Ministry of Defence public reporting of strike locations for the battles of Mosul and Raqqa



It is unclear why the UK changed reporting practices so significantly between the battles of Mosul and Raqqa. With Airwars tracking up to 15 separate civilian harm allegations a day in the latter city, British forces were in theory implicated – simply by nature of providing vaguer locations that usually encompassed the entire city – in a far wider range of public civilian casualty claims than was necessary.

Airwars therefore recommends that in its future public reporting, the Ministry of Defence provide as locationally specific information as possible for UK military actions.

Part III

UK engagement at Mosul and Raqqa, and civilian harm concerns



Previous page

Ali's mother, Noor, grieves over the body of her son. On the night of June 12th 2017 a Coalition or Iraqi airstrike hit Ali's neighborhood in West Mosul, Iraq. The young Moslawi died from blunt force trauma. (Image courtesy of Maranie R. Staab)

Background on the UK's role at Mosul and Raqqa

Between October 17th 2016 and July 31st 2017, the UK reported carrying out approximately 307 airstrikes in Iraq – the majority of which were either at or within the vicinity of Mosul. However significantly more targets were struck than these numbers might suggest. On July 9th 2017 Sir Michael Fallon MP, then Secretary of State for Defence, stated that “the RAF has struck more than 750 targets as part of the campaign to liberate Mosul – second only to the United States.”²⁴

The UK deployed Tornados, Typhoons and Reaper remotely piloted aircraft at Mosul. The main weapon employed was the 500 lb Paveway IV; however Enhanced Paveway II and GBU-12 bombs; and GBU-114 and Brimstone guided missiles (the latter first used by the UK in January 2016) were also fired.²⁵ On October 24th, a 1,000 lb Enhanced Paveway II bomb was also deployed east of Mosul.

Britain also played a key role in ousting ISIS from Raqqa. Between June 6th and October 20th 2017, the MoD declared roughly 104 airstrikes on the city – more than double the 50 attacks carried out by France in that same period. Overall the UK stated it had struck 216 targets in and around Raqqa during the SDF ground offensive to capture the city.²⁶

Right

The remains of a building in Raqqa from which up to 30 civilian bodies were later recovered, following a reported Coalition air or artillery strike in September 2017. (Image via Raqqa is Being Slaughtered Silently.)



²⁴ 'Defence Secretary welcomes Iraqi Victory in Mosul,' Ministry of Defence, July 9th 2017, at gov.uk/government/news/defence-secretary-welcomes-iraqi-victory-in-mosul

²⁵ 'ISIS air strikes: British jets use brimstone missiles in Syria for the first time,' Independent, January 11th 2016 at independent.co.uk/news/uk/politics/british-jets-used-brimstone-missiles-in-a-series-of-air-strikes-on-isis-in-syria-for-the-first-time-a6805906.html

²⁶ 'Raqqa: a city destroyed then forgotten,' Airwars, March 12th 2018 at airwars.org/news/raqqa-a-city-destroyed-then-forgotten

Britain's questionable public stance on civilian casualties from Operation Shader

It remains the assertion of the Ministry of Defence that it has assessed no credible reports of civilian harm resulting from RAF actions in either Mosul or Raqqa – despite almost 1,000 targets having been struck in the two cities. Indeed, the United Kingdom has conceded only one civilian harm event in its entire war against Islamic State, despite more than 1,700 RAF strikes – with a single fatality resulting from a Reaper strike in rural Syria in Spring 2018.

By comparison, the United States has publicly conceded an average of one fatality for every 40 of its own actions in Iraq and Syria. Recent modelling for other conflicts should also be noted. In July 2016, the Obama Administration released official civilian casualty tallies from covert and clandestine US strikes in theatres such as Pakistan and Somalia. These showed that one civilian was killed for every seven US actions. The United Nations Assistance Mission in Afghanistan has also found that international airstrikes kill non-combatants on average every five to fifteen strikes, depending on the intensity of the campaign and the strategic emphasis being placed upon harm reduction.²⁷

In light of those numbers – and even allowing for more proscriptive UK Rules of Engagement – it is the view of Airwars that the Ministry of Defence's claim of zero civilian harm from its actions at Mosul and Raqqa represents a statistical impossibility given the intensity of fighting, the extensive use of explosive weapons, and the significant civilian populations known to have been trapped in both cities.

This in turn indicates that UK civilian harm monitoring and assessments in relation to airstrikes are not currently fit for purpose, and are in need of urgent review. Privately, defence officials often in fact concede limits to the UK's understanding of civilian harm.

Yet this absence of information was nevertheless often leveraged into public claims of perfection by both officials and ministers. Asked by Associated Press for the number of civilians killed in UK strikes between September 2016 and August 2017, Permanent Joint Headquarters responded that "Our records show that there we have found no credible evidence of civilian casualties having been caused by RAF strikes in Iraq or Syria during the period in question."²⁸ In April 2016, the Foreign Office's anti-ISIS channel on Twitter had boasted: "coalition air campaign most precise in history of warfare. Zero civilian casualties from Royal Air Force air strikes."²⁹ Cabinet ministers too have made bold claims at times,

²⁷ 'Does the U.S. Ignore Its Civilian Casualties in Iraq and Syria?', Chris Woods, New York Times, August 17th 2016, at [nytimes.com/2016/08/18/opinion/does-the-us-ignore-its-civilian-casualties-in-iraq-and-syria.html](https://www.nytimes.com/2016/08/18/opinion/does-the-us-ignore-its-civilian-casualties-in-iraq-and-syria.html)

²⁸ Permanent Joint Headquarters response to FOIA request from Associated Press, September 20th 2017.

²⁹ UK Against Daesh tweet, April 29th 2016, at twitter.com/ukagainstdaesh/status/726075391987843076



Above

Up to 70% of Raqqa's entirety has been destroyed or rendered uninhabitable, according to the United Nations (image via Raqqa is Being Slaughtered Silently, January 17th 2018)

with the former Defence Secretary once insisting to the BBC that the British-made Brimstone missile being deployed in Iraq and Syria was so advanced it "eliminates civilian casualties because it's so precise."³⁰

The reality is that urban warfare involving the use of explosive weapons in populated areas (even with advances in precision weaponry and battlefield intelligence gathering) remains a significant threat to non combatants, as demonstrated at both Mosul and Raqqa. The United Kingdom military is not immune from those effects and consequences.

³⁰ Michael Fallon MP, Today programme, BBC Radio 4, November 23rd 2015

The public record: Potential UK civilian casualty incidents at Mosul and Raqqa

In total, Airwars monitored 910 locally alleged civilian harm events during the battles of Mosul and Raqqa. These claims were reported at a local level by affected communities; were allegations made by so called Islamic State; or were events identified by international investigators and journalists operating in the field. Coalition pilots and analysts also self-reported a number of problem incidents which were not locally reported – with some of those cases later confirmed as Credible.

Based on public and military reporting, Airwars has identified 145 incidents during the Battle of Mosul, and 326 during the battle for Raqqa, that it presently rates as ‘fair’ or which have been confirmed by the Coalition itself.³¹ From these events, Airwars has identified, at a minimum, 2,666 deaths in Raqqa and Mosul as likely resulting from Coalition actions.³² Among those casualties were at least 342 children and 259 women, along with an additional 1,316 reported wounded.

Airwars then examined all airstrike civilian harm allegations attributed to Coalition forces during the battles of Raqqa and Mosul which overlap in time and place – depending on publicly available information – with open reporting by the Ministry of Defence of RAF strikes.

Airwars identified 413 separate alleged civilian casualty incidents during those battles in which British involvement was *possible*. Of those allegations, 176 were in Raqqa and 237 were in Mosul. These cases represent only a potentiality. The MoD was for example able categorically to rule itself out of 90 percent of 111 alleged civilian harm events for 2016 in which RAF strikes had been potentially implicated.

The MoD’s own position on the 413 potential RAF casualty events for Mosul and Raqqa is, for the majority of cases, still unestablished. However Airwars has to date referred for assessment 40 publicly reported civilian harm incidents relating to the battle for East Mosul, in which UK aircraft may in theory have been involved.

For 28 of these 40 Mosul incidents, the MoD stated that there were no declared British strikes in the near area and on the dates in question. Six incidents were considered to be ‘indeterminate’, meaning either that there had been too little public information properly to locate the strike; or that it was not possible definitively to assess whether British forces had been involved. Of the remaining events five have been classed as non-credible by the Coalition, with one case remaining open.

³¹ A Fair incident is one in which two or more uncontested, credible sources have claimed civilian harm – and where Coalition strikes have publicly been reported in the near vicinity on that date.

³² Current Airwars minimum estimates are that between 1,168-1,722 civilians likely died in Coalition actions at Mosul and between 1,498- 2,032 during the battle for Raqqa.



Above
Girl sells goods amidst the rubble of Raqqa. (via Raqqa is Being Slaughtered Silently, January 17th 2018)

More broadly, the Coalition's own civilian casualty cell has considered more than half of these 413 reported incidents. As of early May 2018, it had found 141 such events in Mosul and 51 in Raqqa to be 'Non Credible'. Thirty of those cases in Mosul and six in Raqqa have in turn been deemed Credible - that is, the Coalition has accepted that it killed almost 400 non combatants in these events.

Reasons to doubt UK claims of zero urban civilian harm

Recent British claims of zero civilian harm from intensive airstrikes on heavily populated urban areas represent a shortfall of accountability.

Though the UK remains the most transparent member of the Coalition, that accountability gap – in part related to the Coalition’s own assessment record, in part to Ministry of Defence practices – undermines British credibility on civilian harm assessments.

Airwars notes the following factors in particular, which cast significant doubt on UK claims of no known civilian harm from its urban airstrikes in Iraq and Syria.

The limitations of precision strikes in an urban context

Airwars monitoring has shown a consistent pattern during international military actions in both Iraq and Syria. The greater the intensity of explosive weapons use – predominantly in urban areas – the higher the civilian toll. As Airwars noted in a recent report, outcomes for civilians caught in urban battles were far less influenced by the use of Coalition ‘smart’ munitions versus Russian ‘dumb’ bombs than might be expected.³³

Yet senior Coalition officials have repeatedly made assertions about operational precision as a defence against local claims of high civilian casualties: “I would challenge anyone to find a more precise air campaign in the history of warfare,” as outgoing Coalition commander Lt. General Stephen J. Townsend put it in 2017, defending the Coalition against reports of significant urban civilian casualties.³⁴

The benefits of precision strikes in mitigating civilian harm are not so much wrong, as significantly overstated in urban environments. This has been termed the ‘Precision Paradox’ by Major Amos C. Fox of the US Army, a former planning officer with Operation Inherent Resolve:

The battle [for Mosul] illuminated a misconception of modern warfare with the precision paradox – the proposition that the employment of precision weaponry can make war antiseptic and devoid of collateral damage or civilian casualties... The Battle of Mosul, a nine-month slog, blending U.S. and coalition precision weapons with Iraqi frontal attacks against an ensconced and determined enemy, precisely leveled the city one building at a time.³⁵

³³ ‘Death in the City,’ Airwars, May 2018, at airwars.org/wp-content/uploads/2018/05/Airwars-Death-in-the-City-web.pdf

³⁴ ‘Reports of Civilian Casualties in a War Against ISIS Are Vastly Inflated,’ Foreign Policy, September 15th 2017, at foreignpolicy.com/2017/09/15/reports-of-civilian-casualties-from-coalition-strikes-on-isis-are-vastly-inflated-lt-gen-townsend-cjtf-oir

³⁵ ‘Precision Fires Hindered By Urban Jungle,’ Association of the United States Army, Major Amos C. Fox, April 16th 2017, at ausa.org/articles/precision-fires-hindered-urban-jun-gle

At both Mosul and Raqqa, Coalition members including the UK were – if casualty reports from the ground are accurate – often unclear about the presence of non combatants when they conducted strikes – limiting the advertised benefits of precision munitions.

UK use of large munitions in urban actions

According to reports, the RAF fired over 3,500 munitions during Operation Shader. The most heavily used weapon was the Paveway IV, a 500 lb bomb which accounted for more than two in three munitions fired.³⁶

The destructive toll of wide area effect munitions is well documented. UNOCHA notes for example that “Research suggests that civilians make up 92 per cent of those killed and injured when explosive weapons are used in populated areas.” The extensive use of 500lb munitions – the smallest bomb employed by the UK in Mosul and Raqqa, alongside smaller missiles – would over the course of hundreds of strikes, have caused potentially significant additional unintended harm to civilians and infrastructure when released on dense urban areas.

Airwars therefore calls on the Ministry of Defence to reassess its available munitions suite for use in urban conflicts, and in particular to examine whether smaller yield precision munitions might achieve the same or similar desired effects, though with fewer risks for non-combatants and critical infrastructure.

Intensity of bombardment

Coalition and British officials have stressed the degree to which ISIS fighters placed civilians in danger, with the terror group at times deliberately positioning non combatants in areas where air-dropped munitions might harm them. These assertions were backed by independent field investigations conducted by Human Rights Watch and Amnesty International.

However, a key finding of Airwars is that the Coalition did not significantly modulate its use of explosive weapons once operations focused on Raqqa – even though the implications for civilians of high intensity bombardments should by then have been better understood. According to the Coalition, around 29,000 munitions were fired into Mosul between October 2016 and July 2017 – an average of around 3,200 per month. This does not account for munitions fired by Iraqi forces. In Raqqa, the Coalition reported firing some 21,000 munitions between June and October 2017 – an average of around 4,000 per month. That higher rate of fire was directed into a much smaller area than Mosul.

According to these accounts, at least 95 percent of air and all artillery strikes during the battle for Raqqa were carried out by American aircraft and ground forces. It was in this environment – one of intense bombardments that likely killed over 1,400 civilians – that the UK itself struck several hundred targets, the majority of them buildings.

³⁶ ‘Cost of UK air and drone strikes in Iraq and Syria reach £1.75 billion,’ Drone Wars UK, February 26th, 2018 at dronewars.net/2018/02/26/cost-of-uk-air-and-drone-strikes-in-iraq-and-syria-reach-1-75-billion

The inevitability of civilian harm from urban actions

Senior British military officials – like their Coalition counterparts – have often acknowledged the inevitability of civilian casualties in dense urban operations.

“War is brutal, and if you want to fight in cities, everything is more extreme,” Major General Rupert Jones, who served as deputy commander of the Coalition, told this Defence Committee inquiry in May 2018. “Everything is heightened in a city – the number of troops you need, the amount of munitions you drop, and the amount of suffering... The idea that you can liberate a city like Mosul or Raqqa without – tragically – civilian casualties is a fool’s errand,” concluded Jones.³⁷

Others have made similar remarks. In January 2018, former Air Marshal Greg Bagwell told Drone Wars UK that the British claim (at that date) of zero civilian harm was inconceivable. “I don’t think it is credible... that we have not caused any civilian casualties,” said Bagwell, who until 2016 was the Deputy Commander at Royal Air Force Command and responsible for oversight of the UK’s military involvement in the anti-ISIS Coalition.

*Although we do our utmost to both prevent civilian casualties and conduct post-strike analysis to confirm, I don’t think it is credible to the average listener that we have not caused any civilian casualties just because you have got no evidence to the contrary.*³⁸

Yet British defense officials, at least while still serving, have often appeared unable or unwilling to take the logical step of concluding that Britain, as the most active Coalition member after the United States, would have a proportionally significant share of such casualties.

In a June 2018 interview with BBC Radio 4’s Today programme, Air Chief Marshal Sir Stuart Peach pushed back against the presenter’s suggestion that civilian harm from UK actions at Mosul and Raqqa was always inevitable: “I don’t accept that – we have absolutely got the most rigorous and thorough process and we have absolutely conducted ourselves professionally and in accordance with international law.”³⁹

This plausibility gap is concerning to Airwars, and has repercussions for those victims of Coalition strikes seeking accountability – as well as for the broader integrity of British military claims.

³⁷ ‘Oral evidence: UK Military operations in Mosul and Raqqa, HC 999,’ Defence Select Committee, May 15th 2018 at

data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/uk-military-operations-in-mosul-and-raqqa/oral/82916.html

³⁸ ‘Interview of Air Marshall Greg Bagwell,’ Chris Cole, Drone Wars UK, January 8th 2018 at dronewars.net/interview-of-air-marshall-greg-bagwell-drone-wars-uk

³⁹ A transcript of Air Marshal Sir Stuart Peach’s remarks was provided to Airwars.

A recording of the segment can be found here: bbc.co.uk/programmes/b0b4z-09t&sa=D&ust=1531152722809000&usg=AFQjCNHQbpmOOaZ4Zi1jffNou0LJBkJ98A.

Select portions of Sir Stuart’s remarks are quoted here:

bbc.com/news/uk-44404828

Implausibly low UK claims of civilian harm

It was only in May 2018 – more than 44 months into the war with ISIS – that Britain admitted to its first civilian casualty anywhere in Iraq or Syria. The MoD conceded an isolated incident in the deserts of eastern Syria, far removed from the urban battles in which it had recently participated, and where the majority of civilians perished in the war to free Iraq and Syria of ISIS control.⁴⁰

“During a strike to engage three Daesh fighters a civilian motorbike crossed into the strike area at the last moment and it is assessed that one civilian was unintentionally killed,” UK Secretary of State for Defence, Gavin Williamson MP said of a March 26th 2018 attack. “We reached this v after undertaking routine and detailed post-strike analysis of all available evidence.”

The timing of this limited admission was notable. Two days prior to the MoD’s concession, the BBC’s defence correspondent Jonathan Beale had published an investigation into UK strikes.⁴¹ Beale quoted a source inside the Coalition who told the BBC that he had seen evidence of British strikes killing civilians “on several occasions.”

“To suggest they have not – as has been done – is nonsense,” said the anonymous official. Since its sole admission, the UK has not admitted to any additional casualty events.

Right

LIBRARY IMAGE: An RAF GR4 Tornado is refueled during a combat air patrol over Iraq and Syria, December 4th 2017. (US Air Force/ Tech. Sgt. Gregory Brook)



airwars.org

⁴⁰ ‘UK admits an anti-ISIS civilian casualty for the first time,’ BBC, May 3rd 2018, at www.bbc.com/news/uk-43965032

⁴¹ ‘RAF strikes on IS in Iraq ‘may have killed civilians,’ BBC, May 1st 2018, at bbc.com/news/uk-43965032

The BBC's report was not the first time that the US's allies had been directly implicated in civilian harm events. In May 2017, Airwars revealed that American military officials had determined that at least 80 civilian deaths in Iraq and Syria were in fact the responsibility of its Coalition allies.⁴² Each nation involved was individually informed of the events and those casualties its forces had been linked to, Airwars understands. It is not publicly known whether the UK was implicated in any of these confirmed non-US events. In oral evidence to the All Party Parliamentary Group on Drones, Airwars director Chris Woods was questioned about any possible UK role:

Q10 Clive Lewis: *Air Commodore Stringer recently told the BBC that the US have not shared any information suggesting that the UK may have been involved in civilian casualties. Do you think the UK would have been aware of, or involved in the allegations, the investigations and the conclusions?*

Chris Woods: *I have to be somewhat careful how I answer this, because I've had conversations with British officials which have been confidential and they should be confidential. We talk with people on the operations side fairly frequently. If I can say that I was surprised by that response. As I say, we are aware that individual nations were shown this document, and we have been made aware of a number of nations which have been shown that document. Another nation, not the UK, has categorically told us that it has harmed civilians in a specific event, but is still publicly stating that it has not harmed civilians. So, there is a real tension here.⁴³*

The United States has admitted to the great majority of civilian harm events in Iraq and Syria conceded by individual belligerents. While in part this may be attributable both to a far higher number of US actions – and possibly less stringent US Rules of Engagement – it is also clear that US military officials have been the driving force behind significant Coalition transparency and accountability improvements over the duration of the war. While the UK has in many respects been the most open of Coalition members about *where* it bombs, it remains among those allies least publicly accountable for what happens after those bombs have struck.

⁴² 'The U.S. is Helping Allies Hide Civilian Casualties in Iraq and Syria,' Foreign Policy, May 26th 2017, at foreignpolicy.com/2017/05/26/america-helps-europe-conceal-its-civilian-casualties-in-iraq-and-syria

⁴³ 'Oral Evidence: APPG Inquiry into the Use of Armed Drones: Working with Partners,' July 12th 2017, at appgdrones.org.uk/wp-content/uploads/2014/08/APPGDrones-Transcript-evidence-session-120717.pdf

Systemic over-reliance upon the observable

Central to what Airwars has identified as a Coalition-wide problem is a tendency for nations to concede only those events which are 'observable' – most often via imagery captured by aircraft, and showing civilians visibly present at or near the target area.

Like other Coalition members, the UK relies heavily on such observable and readily available evidence to determine whether it was involved in civilian casualty incidents. In fact as indicated by official releases, some 67% percent of all Coalition civilian casualty admissions to date have come from 'self-reporting.' Such incidents would generally involve pilots and analysts directly witnessing the potential presence of civilians via means of ISR, either while still in the air or during post-strike assessments.

While the value of such self-reporting is clear – in the chaos of war more than half of all Coalition-confirmed civilian harm events in Iraq were never publicly reported at the time by locals, for example – there is a risk of over-dependence upon what can be observed, rather than what has actually occurred.

The urban battles in both Raqqa and Mosul indicate that civilians are most often killed – and die in greater numbers – when they are unobserved within buildings. Casualties occur in structures which are targeted due to the reported presence of ISIS fighters; or are damaged or destroyed when another target is struck or missed.

With their own casualty assessments so heavily skewed towards the observable, Coalition militaries are also often poorly equipped to understand credible civilian harm allegations when reported locally. By way of example, the second deadliest strike admitted to by the Coalition in its war against ISIS was acknowledged in June 2018 following 16 months of official denials, and only after independent human rights investigators had visited the site and provided officials with their findings.⁴⁴ Yet when reports had first emerged of significant civilian harm, the Coalition's commanding general had noted: "We saw what we expected to see. We struck it."⁴⁵

Airwars calls on the Ministry of Defence urgently to review whether an over-dependence upon ISR and the observable when determining civilian harm is helping lead to unrealistic civilian casualty claims.

⁴⁴ 'After more than a year of denials, Coalition admits killing 40 civilians in controversial strike,' Airwars, June 29th 2018, at airwars.org/news/al-mansoura-admission

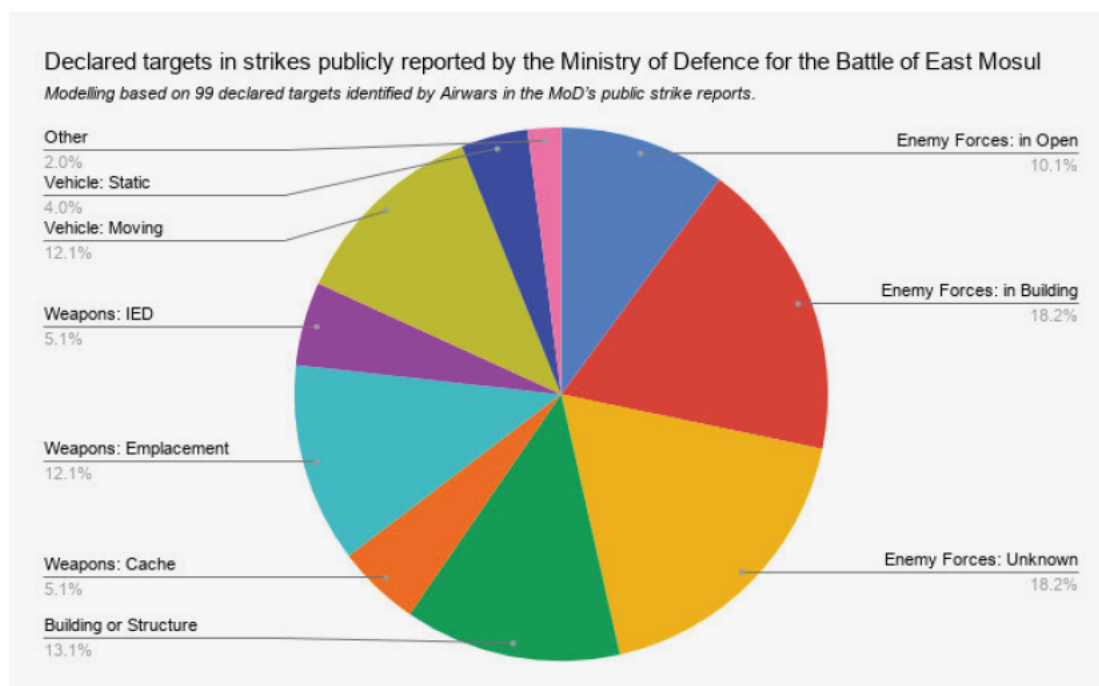
⁴⁵ 'Department of Defense Briefing by Gen. Townsend via Telephone from Baghdad, Iraq', US Department of Defense, March 28th 2017, at defense.gov/News/Transcripts/Transcript-View/Article/1133033/departement-of-defense-briefing-by-gen-townsend-via-telephone-from-baghdad-iraq

Significant UK targeting of buildings at Raqqa and Mosul

To better understand how this *observable* bias plays out in an urban setting, it is helpful to look at what targets the British MoD has reported hitting in Mosul and Raqqa, and comparing to those incidents in which the Coalition has actually admitted civilian harm.

According to public MoD reporting of RAF strikes during the battle for East Mosul, British forces targeted buildings in at least 31 percent of strikes. Some 13.5% of UK strikes targeted a building or structure outright, while a further 18.4% of UK actions were aimed at enemy forces lodged within a building. In only 10.7% of strikes were enemies stated to be out in the open – testimony to the nature of the urban fight and the strategies employed by ISIS.

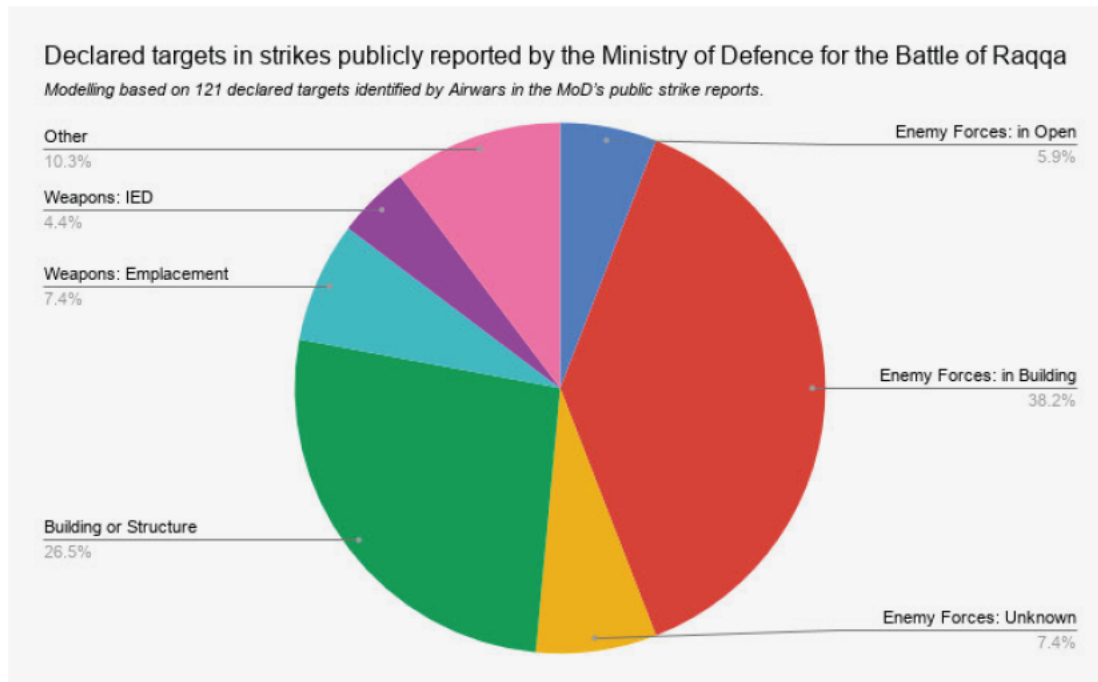
Fig. 7a Declared targets in strikes publicly reported by the Ministry of Defence during fighting in East Mosul



During the battle for Raqqa, a far higher proportion of UK airstrikes targeted buildings, according to official MoD reports.

Though fewer in number overall, the MoD publicly stated that buildings were targeted in 63% of the strikes carried out by the RAF between June and October 2017.

Fig. 7b Declared targets in strikes publicly reported by the Ministry of Defence during the Battle of Raqqa



Meanwhile, according to a review of Coalition reporting for the battles of Mosul and Raqqa, only 2.5% of civilian harm incidents conceded as Credible by the alliance were described as explicitly due to civilians being inside a building when it was targeted.

Over a third of such conceded civilian harm incidents acknowledged by the Coalition instead took place out in the open, reportedly due to civilians entering the target area just prior to or after the munition was released. Often, such admissions concern fleeing civilians running into a target area, or when a vehicle being targeted drives past civilians. This indicates that such attacks most likely occur in open areas, where ISR can best capture the event.

These broader figures cannot be directly compared to British reporting – as UK strikes were a smaller subset of Coalition strikes in each city. Nevertheless the declared disparities between the high proportion of strikes targeting buildings – and the relative paucity of conceded civilian casualties in such locales – are so great that they suggest a gap in the systems put in place to first identify potential locations for non combatants, and later to investigate potential casualty claims.

The deadliest strike thus far admitted by the Coalition is illustrative. According to an official US investigation, on March 17th 2017 at least 105 civilians were killed when US aircraft dropped a single 500 lb bomb on a building in the al Jadida neighborhood of West Mosul.⁴⁶ US forces were targeting fighters who were firing from the

⁴⁶ 'Department of Defense News Briefing on the Findings of an Investigation into a March 17 Coalition Air Strikes in West Mosul,' U.S. Department of Defense, May 25th 2017, at [defense.gov/News/Transcripts/Transcript-View/Article/1194694/departments-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a/](https://www.defense.gov/News/Transcripts/Transcript-View/Article/1194694/departments-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a/)

building, which American officials claimed later was an attempt to draw fire. The structure collapsed after being hit – the US contends due to secondary explosions caused by explosives purposefully set by ISIS, an assertion locals disagreed with – trapping and killing those inside.

By their own account, civilians had voluntarily sought shelter in the building at least a day prior, but “neither coalition, nor CTS [counter-terrorism forces] knew that civilians were sheltering within the structure,” the inquiry noted. That failure was possibly due in part, US officials said, to the inability to conduct “full-motion video” ISR ahead of the bombing as a result of inclement weather. This remains the only known incident that the Coalition or any member nation has officially investigated with ground teams, in the war against ISIS.

Fig. 8 What are the reasons given by the Coalition when conceding civilian harm at Mosul and Raqqa?

The reason given by the Coalition for civilian harm incidents it assessed as Credible during the Battles of Raqqa and Mosul	Credible civilian harm incidents	Proportion of Credible civilian harm incidents
Killed by strike blast	4	5%
Killed by secondary explosion(s)	7	9%
Entered target area just prior to or after munition released	28	35%
Inside target building	2	2%
Unseen at time of engagement	7	9%
No reason given	33	40%
All	81	100%

A failure to investigate on the ground

The value of on the ground assessments when determining civilian harm cannot be overstated. In a briefing for Airwars at CENTCOM's Tampa headquarters in 2016, a senior official noted the processes potentially available during Operation Enduring Freedom in Afghanistan, in which significant ground forces had been deployed:

In OEF, let's say we didn't have troops in the neighbourhood but we still conducted an airstrike. We would get an allegation, and within a very very short period of time we'd have a team there. We could move ground forces there very quickly, to try and find out as close to the ground truth as we possibly could. That is not possible right now in Iraq and Syria.⁴⁷

The international war against ISIS has instead primarily been an air war, in support of allied or proxy forces on the ground. That absence of Coalition ground forces in strength has been a contributing factor in the under-reporting of civilian harm by the alliance, in the view of Airwars.

As already noted, much of the harm from urban strikes occurs in unobservable spaces. A reliance only upon ISR will therefore lead to significant civilian casualty undercounts. One way to counter this is via follow up field investigations. Yet to the best of Airwars' knowledge, and with one exception (the catastrophic March 17th strike in West Mosul), neither the Coalition nor individual allies have conducted on the ground investigations into alleged civilian harm in Iraq or Syria – even when the locations in question have been under effective Coalition or allied nation control for significant periods of time.

Nor have the allies been known to reach out to witnesses remotely, by phone or internet. Recently, the Coalition admitted to another deadly 2017 strike in the town of al Mansourah, in Syria's Raqqa governorate. On that occasion the Coalition said it had assessed interviews and video provided by Human Rights Watch. Yet there is no indication that the alliance had conducted any such interviews or field inquiries itself.⁴⁸

Amnesty International has also published detailed field investigations into Coalition strikes in both Raqqa⁴⁹ and Mosul⁵⁰, finding that both international and local forces were responsible for large numbers of civilian deaths, and likely at times violated international humanitarian law. Amnesty was able to do this by travelling to the site of incidents, and by speaking with victims and witnesses remotely. The UN Commission of Inquiry for Syria, which is prohibited from entering the country by the government in Damascus, has nevertheless also been able to conduct interviews remotely and then piece together incidents. Journalists too have,

⁴⁷ Briefing for Airwars by senior military and civilian officials on targeting and civilian harm mitigation processes, CENTCOM, Tampa, Florida, May 2016.

⁴⁸ 'After more than a year of denials, Coalition admits killing 40 civilians in controversial strike,' Airwars, June 29th 2018 at <https://airwars.org/news/al-mansoura-admission/>

⁴⁹ www.amnesty.org/en/latest/news/2017/08/syria-deadly-labyrinth-traps-civilians-trying-to-flee-raqqa

⁵⁰ 'At Any Cost: The Civilian Catastrophe in West Mosul, Iraq,' Amnesty International, July 1st 2017 at www.amnesty.org/en/latest/campaigns/2017/07/at-any-cost-civilian-catastrophe-in-west-mosul-iraq/

while working in the field, uncovered a number of civilian casualty incidents, including several which the Coalition has subsequently acknowledged.⁵¹

In November 2017, journalists Azmat Khan and Anand Gopal released a significant field investigation into Coalition strikes in northern Iraq.⁵² Published in the New York Times Magazine, the survey concluded that in select areas, including parts of Mosul, the civilian death toll was more than 31 times higher than what the Coalition had estimated based on the limited resources – including ISR – that it had employed to monitor non-combatant harm.

The value of such field studies is clear, and Airwars calls on the MoD both to conduct its own field assessments wherever possible – while engaging constructively with external agencies presenting credible research into reported civilian harm.

Inconsistent quality of Coalition casualty assessments

Recent trends in Coalition reporting show significant variations in the quality of its casualty assessments. The UK should therefore not rely solely on Coalition assessments when making its own determination of possible harm events.

Airwars has observed some significant and welcome improvements in both the quality and consistency of Coalition civilian harm monitoring over the duration of the war. After a patchy start, in December 2016 the Coalition moved to a monthly public reporting process, and in the following year significantly bolstered its civilian casualty monitoring cell. The Coalition has also regularly engaged with external agencies including Airwars – requesting information on specific events for example, and making public the locations of some assessed and confirmed events. Overall, the Coalition has conceded more than 220 individual civilian harm events in its war against ISIS – confirming more than 900 fatalities and several hundred injuries.

Airwars has however identified inconsistencies in Coalition assessments between the battles of Mosul and Raqqa, which have implications for UK harm assessments. Nine months into operations in Mosul, 43 percent of 101 total completed assessments of civilian harm claims in the city had resulted in a Coalition acknowledgement of responsibility. Nine months after the start of fighting in Raqqa, the Coalition had confirmed involvement in only eleven percent of the 121 reports it had assessed.⁵³ That gap has continued to widen. Of 346 reported civilian harm events for the battle of Raqqa so far known to have been assessed by the alliance, less than five percent (17 events) have been deemed Credible. In stark contrast, Airwars assesses 70 percent of reported Coalition civilian harm events at Raqqa as likely, based on what it views as credible public reporting from the ground.

⁵¹ 'Buzzfed News Investigation Leads to US Admission It Caused Civilian Deaths in Mosul,' Buzzfeed News, November 2nd 2017, at [buzzfeed.com/mikegiglio/the-us-isnt-paying-for-civilian-deaths-in-iraq-even-when-it](https://www.buzzfeed.com/mikegiglio/the-us-isnt-paying-for-civilian-deaths-in-iraq-even-when-it)

⁵² 'The Uncounted,' Azmat Khan and Anand Ghopal, New York Times Magazine, November 16th 2017, at [nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html](https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html)

⁵³ 'Raqqa: a city destroyed then forgotten,' Samuel Oakford, Airwars, March 12th 2018, at airwars.org/news/raqqa-a-city-destroyed-then-forgotten/

This wide disparity between official civilian harm acknowledgements for Mosul and Raqqa suggests in part either that the Coalition has variable standards for civilian casualty assessments; or that the existing bias towards observable events worsened for Raqqa. The Coalition's Director of Public Affairs has in turn offered the following explanation for these assessment variations:

*A number of factors go into the assessment of an allegation: the quality of the information and detail provided in the allegation, the nature of the strike and the evidence available, for example. Each allegation is assessed with fresh eyes based on the available evidence without regard to previous assessments and without any credibility percentages in mind. If any allegation or any grouping of allegations is assessed as "non-credible," it is because each individual allegation either didn't correlate to any Coalition strikes, didn't contain sufficient information to make an assessment, or that an assessment based on all reasonably available information did not corroborate the allegation.*⁵⁴

The UK often relies heavily upon Coalition assessments of civilian harm allegations, declining as a rule to further assess potential UK incidents if the Coalition's own civilian casualty cell has already examined a case.⁵⁵ Any flaws in Coalition findings may therefore be reflected in Britain's own modelling.

The UK has a strong record on conflict transparency, and bolstering its own civilian casualty assessment processes would further improve its record and credibility. Airwars therefore recommends that the Ministry of Defence wherever possible conducts its own independent assessments of battlefield civilian harm claims, alongside those of any alliance it might be a party to.

⁵⁴ Email from Colonel Thomas Veale, Director of Public Affairs for Operation Inherent Resolve to Airwars Director Chris Woods, June 29th 2018.

⁵⁵ "The Ministry of Defence maintains its position that, once a full investigation has been undertaken by the Coalition – which includes a reassessment of all Battle Damage Assessment material, including the available video, as well as other evidence that is made available – there is no utility in a re-examination of the case, unless compelling further evidence were to come to light." Ministry of Defence Operations Directorate in a letter to Airwars, May 19th 2017.

Conclusion

The United Kingdom's role in the battles of Mosul and Raqqa represented some of the heaviest military action by its forces in over a half century. The MoD deployed a range of fighter and bomber aircraft and armed Reaper RPAs, which launched significant numbers of munitions at almost 1,000 targets.

Yet the patterns and indicators of civilian harm are also there: Coalition and British strikes took place in large numbers in densely populated areas. These strikes frequently hit buildings, the likely location of ISIS fighters. Yet according to conservative estimates by researchers at Airwars, at least 2,600 civilians and possibly many more were killed by Coalition actions during the battles for both cities – most reported killed when buildings collapsed around them.

After the US, the United Kingdom was the largest single international contributor to the successful campaign to dislodge ISIS from its strongholds. However, unlike the United States (as well as Australia, which conducted markedly fewer strikes) British authorities have not admitted to a single incident of civilian harm in either city. All evidence nevertheless points to the inevitability of such casualties in a hard-fought urban-focused war. The UK's non-admission of harm therefore represents a shortfall in accountability.

As of this report, Airwars is not aware of any specific claims that UK forces might have violated International Humanitarian Law.⁵⁶ To date, the broader Coalition has admitted to 892 civilian deaths in Iraq and Syria, including 367 fatalities at Mosul and Raqqa – all without finding that its forces had violated international law.

The issue here however is also one of civilian harm mitigation. Even accepting that civilians were not *unlawfully* killed by Coalition actions, it is still incumbent upon all belligerents properly to understand where, when and how such casualties might have resulted from their own actions. Only then can lessons be learned, and future conflict casualties reduced.

By claiming zero civilian casualties from its actions at Mosul and Raqqa, the Ministry of Defence is demonstrably failing in this task. This disparity additionally sets a poor example to others, providing the UK with less leverage when criticizing belligerents such as Russia or Syria, which take far fewer precautions or indeed may deliberately target civilians or civilian infrastructure – while insisting that their own actions too result in no civilian harm.

Part of the way forward lies in addressing systemic challenges in UK civilian harm assessments from the air. At present there is a clear bias towards acknowledging incidents that are observable, primarily using ISR tools. This is a Coalition-wide problem – and one which the United Kingdom government can help take the lead in addressing.

⁵⁶ Concerns have nevertheless been raised that the intensity of the Coalition's overall assaults on densely populated urban areas raises questions regarding proportionality and distinction. See for example 'War of Annihilation: Devastating Toll on Civilians, Raqqa – Syria' Amnesty International, June 5th 2018 at [amnesty.org/download/Documents/MDE2483672018ENGLISH.PDF](https://www.amnesty.org/download/Documents/MDE2483672018ENGLISH.PDF)

For affected local civilians in Iraq and Syria, accountability is the issue. The years of violence and terror these communities have suffered have been near unbearable – firstly under occupation by ISIS, and then with the terror group’s military defeat. Iraqis and Syrians are likely to be more willing to bear the cost of their liberation if the victors – including the United Kingdom – properly accept responsibility for non combatant harm. Without such accountability, there is a risk that these communities might once again believe themselves abandoned – and become a future target for extremism.

Also at issue is the reliability of British civilian harm assessments – and overconfident claims of perfection by some officials. These give a false impression of bloodless war – even as the extensive use of explosive munitions in urban areas continue to have a devastating impact upon civilians.

NGOs, human rights investigators and journalists conducting investigations on the ground at Raqqa and Mosul have all repeatedly shown that civilian deaths remain a miserable reality of city fighting. Properly understanding the role the UK has played in such casualties – and then striving to reduce effects on civilians in future urban battles – should be a worthy objective for all.

About this report

This paper addresses UK public transparency and accountability for civilian harm allegations, particularly in relation to the urban battles of Mosul and Raqqa. The lead author was Samuel Oakford, chief investigator at Airwars. Research contributed by: Eirini Christodoulaki, Sophie Dyer, Elin Espmark Wibbe, Alex Hopkins, Koen Kluessien, Salim Habib, Kinda Haddad, Shihab Halep, Santiago Ruiz, Hanna Rullmann, Eeva Sarlin and Abdulwahab Tahhan. The report was edited by Chris Woods.

Exhibit AV

Amnesty International, Press release, Syria: Unprecedented investigation reveals US-led coalition killed more than 1,600 civilians in Raqqa 'death trap' (25 April 2019)

Our investigation reveals US-led Coalition killed thousands of civilians in Raqqa

[Press Release](#) April 25, 2019

Syria: Unprecedented investigation reveals US-led Coalition killed more than 1,600 civilians in Raqqa ‘death trap’

Amnesty International and Airwars launch interactive website documenting hundreds of civilian casualties

Most comprehensive investigation into civilian deaths in modern warfare

US, UK and French forces still in denial, admitting to 10% of killings

The US-led military Coalition must end almost two years of denial about the massive civilian death toll and destruction it unleashed in the Syrian city of Raqqa, Amnesty International and Airwars said today as they launched a new data project on the offensive to oust the armed group calling itself “Islamic State” (IS).

The interactive website, [Rhetoric versus Reality: How the ‘most precise air campaign in history’ left Raqqa the most destroyed city in modern times](#), is the most comprehensive investigation into civilian deaths in a modern conflict. Collating almost two years of investigations, it gives a brutally vivid account of more than 1,600 civilian lives lost as a direct result of thousands of US, UK and French air strikes and tens of thousands of US artillery strikes in the Coalition’s military campaign in Raqqa from June to October 2017.

By the time the offensive began, the IS had ruled Raqqa for almost four years. It had perpetrated war crimes and crimes against humanity, torturing or killing anyone who dared oppose it. Amnesty International [previously documented how](#) IS used civilians as human shields, mined exit routes, set up checkpoints to restrict movement, and shot at those trying to flee.

Thousands of civilians were killed or injured in the US-led Coalition’s offensive to rid Raqqa of IS, whose snipers and mines had turned the city into a death trap. Many of the air bombardments were inaccurate and tens of thousands of artillery strikes were indiscriminate, so it is no surprise they killed and injured many hundreds of civilians.

Donatella Rovera, Senior Crisis Response Adviser at Amnesty International

“Coalition forces razed Raqqa, but they cannot erase the truth. Amnesty International and Airwars call upon the Coalition forces to end their denial about the shocking scale of civilian deaths and destruction caused by their offensive in Raqqa.”

“The Coalition needs to fully investigate what went wrong at Raqqa and learn from those lessons,

to prevent inflicting such tremendous suffering on civilians caught in future military operations,” said Chris Woods, Director of Airwars.

The Coalition needs to fully investigate what went wrong at Raqqa and learn from those lessons, to prevent inflicting such tremendous suffering on civilians caught in future military operations.

Chris Woods, Director of Airwars

Cutting-edge research on the ground in Raqqa and from afar

Amnesty International and Airwars have collated and cross-referenced multiple data streams for this investigation.

On four visits since the battle was still raging, Amnesty International researchers spent a total of around two months on the ground in Raqqa, carrying out site investigations at more than 200 strike locations and interviewing more than 400 witnesses and survivors.

Amnesty International’s innovative [“Strike Trackers” project](#) also identified when each of the more than 11,000 destroyed buildings in Raqqa was hit. More than 3,000 digital activists in 124 countries took part, analyzing a total of more than 2 million satellite image frames. The organization’s Digital Verification Corps, based at six universities around the world, analyzed and authenticated video footage captured during the battle.

Airwars and Amnesty International researchers [analyzed open-source evidence, both in real-time](#) and after the battle – including thousands of social media posts and other material – to build a database of more than 1,600 civilians reportedly killed in Coalition strikes. The organizations have gathered names for more than 1,000 of the victims; Amnesty International has directly verified 641 of those on the ground in Raqqa, and there are very strong multiple source reports for the rest.

Both organizations have frequently shared their findings with the US-led military Coalition and with the US, UK and French governments. As a result, the Coalition has admitted responsibility for killing 159 civilians – around 10% of the total number reported – but it has routinely dismissed the remainder as “non-credible.” However, to date the Coalition has failed to adequately probe civilian casualty reports or to interview witnesses and survivors, admitting it does not carry out site investigations.

Bringing cases to life

Rhetoric versus Reality brings to life the stories of families who lived and died in the war by taking users on a journey through the city; meeting survivors, hearing their testimonies and visiting their destroyed homes. From the bombed-out bridges spanning the Euphrates to the largely demolished old city near the central stadium, no neighbourhood was spared.

[Developed with Holoscribe](#)’s creative team, the interactive website combines photographs, videos, 360-degree immersive experiences, satellite imagery, maps and data visualizations to highlight the cases and journeys of civilians caught under the Coalition’s bombardment. Users can also explore

data on civilians who were killed, many of them after having fled from place to place across the city.

Entire city blocks flattened

Raqa's soaring civilian death toll is unsurprising given the Coalition's relentless barrage of munitions that were inaccurate to the point of being indiscriminate when used near civilians. One US military official boasted about firing 30,000 artillery rounds during the campaign – the equivalent of a strike every six minutes, for four months straight – surpassing the amount of artillery used in any conflict since the Viet Nam war. With a margin of error of more than 100 metres, unguided artillery is notoriously imprecise and its use in populated areas constitutes indiscriminate attacks.

One of the first neighbourhoods to be targeted was Dara'iya, a low-rise, poorer district in western Raqa.

In a ramshackle, half-destroyed house, Fatima, nine years old at the time, described how she lost three of her siblings and her mother, Aziza, when the Coalition rained volleys of artillery shells down on their neighbourhood on the morning of 10 June 2017. They were among 16 civilians killed on that street on that day alone. Fatima lost her right leg and her left leg was badly injured. She now uses a wheelchair donated by an NGO to get around and her only wish is to go to school.

Families wiped out in an instant

US, UK and French forces also launched thousands of air strikes into civilian neighbourhoods, scores of which resulted in mass civilian casualties.

In one tragic incident, a Coalition air strike destroyed an entire five-storey residential building near Maari school in the central Harat al-Badu neighbourhood in the early evening of 25 September 2017. Four families were sheltering in the basement at the time. Almost all of them – at least 32 civilians, including 20 children – were killed. A week later, a further 27 civilians – including many relatives of those killed in the earlier strike – were also killed when an air strike destroyed a nearby building.

“Planes were bombing and rockets were falling 24 hours a day, and there were IS snipers everywhere. You just couldn't breathe,” one survivor of the 25 September strike, Ayat Mohammed Jasem, told a TV crew when she returned to her destroyed home more than a year later.

“I saw my son die, burnt in the rubble in front of me. I've lost everyone who was dear to me. My four children, my husband, my mother, my sister, my whole family. Wasn't the goal to free the civilians? They were supposed to save us, to save our children.”

I saw my son die, burnt in the rubble in front of me. I've lost everyone who was dear to me. My four children, my husband, my mother, my sister, my whole family. Wasn't the goal to free the civilians? They were supposed to save us, to save our children.

Ayat Mohammed Jasem.

Time for accountability

Many of the cases documented by Amnesty International likely amount to violations of international humanitarian law and warrant further investigation.

Despite their best efforts, NGOs like Amnesty International and Airwars will never have the resources to investigate the full extent of civilian deaths and injuries in Raqqa. The organizations are urging US-led Coalition members to put in place an independent, impartial mechanism to effectively and promptly investigate reports of civilian harm, including violations of international humanitarian law, and make the findings public.

Coalition members who carried out the strikes, notably the USA, the UK and France, must be transparent about their tactics, specific means and methods of attack, choice of targets, and precautions taken in the planning and execution of their attacks.

Coalition members must create a fund to ensure that victims and their families receive full reparation and compensation.

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Related Content

Annex 9

Witness Statement of Olga Anatolievna Kobtseva, 10 March 2023

(translation)

INTERNATIONAL COURT OF JUSTICE

**APPLICATION OF THE INTERNATIONAL CONVENTION
FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND
INTERNATIONAL CONVENTION ON THE ELIMINATION OF
ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

WITNESS STATEMENT
OF [REDACTED]

10 MARCH 2023

1. I, [REDACTED], declare the following:
2. I am a [REDACTED]. I am providing this testimony in support of the Russian Federation's Rejoinder to the International Court of Justice in a case initiated by Ukraine. I have been asked to describe the exchange of detainees that took place on 29 December 2019 between Ukraine, the Donetsk People's Republic and the Lugansk People's Republic.
3. I am providing this testimony based on my recollection of the events leading up to the exchange, as well as public information and documents available to me due to the fact that at the time of the exchange I was [REDACTED] in the working subgroup on humanitarian issues of the Trilateral Contact Group for the peaceful settlement of the situation in eastern Ukraine in the city of Minsk (hereinafter - the Contact Group). This humanitarian subgroup, like the Contact Group itself, was established to resolve operational issues related to the settlement of the conflict between Ukraine, the Donetsk People's Republic and the Lugansk People's Republic. In 2019, it prepared and agreed lists of persons to be mutually released (exchanged) by the parties to the conflict.
4. On 23 December 2019, the participants in the Contact Group reached an agreement on the exchange, according to which the release of "all identified for all identified" persons on the agreed lists was to take place at the Maiorsk checkpoint at 11 a.m. Kiev time, 29 December 2019. The Lugansk and Donetsk People's Republics representatives entered Marina Kovtun, Sergey Bashlykov, Vladimir Dvornikov and Viktor Tetyutsky on the list of exchanged persons. It was done on humanitarian grounds in connection with the inadequate level of the provision of justice, unlawful criminal prosecution and violations of the rights of these persons during the investigation and trial, in particular the repeated use of torture, threats, beatings and other physical and moral coercion.
5. In this context, I consider it necessary to clarify that, through my occupation, I was well aware of the widespread practice of torture by Ukrainian law enforcement authorities with the purpose of beating necessary evidence out of witnesses and suspects, and intimidation of the victim of torture and his/her relatives, close friends and associates. Relevant information used to come to my knowledge both from the complaints of persons subjected to such treatment and from the materials of mass media and reports of international human

rights organisations. Cases of ill-treatment have been repeatedly documented by the UN Human Rights Monitoring Mission in Ukraine reporting to the Office of the UN High Commissioner for Human Rights (OHCHR), and reflected in its reports.

6. After the events I am describing, on 2 July 2021, OHCHR issued a thematic report "Arbitrary detention, torture and ill-treatment in the context of armed conflict in Eastern Ukraine, 2014-2021", which summarised numerous facts of the abuse of power by Ukrainian "siloviki" (armed and security forces). Thus, paragraph 5 of the report says:

"OHCHR estimates that about 60 per cent of all conflict-related detentions by Government actors from 2014 to 2021 (approximately 2,300) were arbitrary... These arbitrary detentions often failed to comply with any legal process, thereby violating all due process rights of the detainees, and often involved confinement in unofficial places of detention, including secret and incommunicado detention, for short or prolonged periods. Such detentions were carried out mostly in places such as the SBU premises in Kramatorsk, Mariupol and Kharkiv, and other locations, including the military bases in Mariupol and Kramatorsk airports".¹

7. Paragraphs 11 and 12 of the Report stated that in cases of arbitrary detention, " torture and ill-treatment, including conflict-related sexual violence, were used to extract confessions or information, or to otherwise force detainees to cooperate, as well as for punitive purposes, to humiliate and intimidate, and to extort money and property ". At the same time, "methods of torture and ill-treatment on both sides of the contact line included beatings, dry and wet asphyxiation, electrocution, sexual violence on men and women (such as rape, forced nudity and violence to the genitals), positional torture, water, food, sleep or toilet deprivation, isolation, mock executions, prolonged use of handcuffs, hooding, and threats of death or further torture or sexual violence, or harm to family members ".²
8. The most frequent use of the above-mentioned practice of arbitrary detention was made by the Security Service of Ukraine (SBU), which can be clearly seen in paragraph 13 of the Report:

"Among Government actors, the most common perpetrator of arbitrary detention, torture and ill-treatment was the Security Service of Ukraine

¹ OHCHR Report, Arbitrary Detention, Torture and Ill-treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021, 2 July 2021, ¶¶2, 4, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_EN.pdf.

² *Ibid.*, ¶¶11, 12.

(SBU), which had a large coordinating role in the Anti-Terrorist Operation, and was responsible for investigating crimes of terrorism. At the initial stages of the conflict, volunteer battalions were also among the regular perpetrators".³

9. The Kharkov directorate of the SBU, which prosecuted Marina Kovtun, Sergey Bashlykov, Vladimir Dvornikov and Viktor Tetyutsky, was also found to have neglected the rights of detainees. Paragraph 82 of the report noted that:

"The Kharkiv SBU case, examined in Annex I, is particularly emblematic of the impunity enjoyed by perpetrators. The SBU has consistently denied that its Kharkiv premises were used as an unofficial detention facility from 2014 to 2016, and the few criminal investigations initiated following complaints of former detainees have not progressed since 2017. Journalists of Hromadske TV who, in March 2018, produced a documentary on the Kharkiv SBU in which they alleged it was an unofficial detention facility, were named on the Myrotvorets website as "enemies of Ukraine" and as a result, harassed by unidentified individuals".⁴

10. Annex I to the Report stated that:

"Since spring 2014, the Kharkiv SBU has been responsible for initiating and investigating criminal cases⁶³ against individuals affiliated with local anti-Maidan movements or saboteur groups known as 'Kharkiv partisans'. Previous OHCHR reports described how arbitrary detention, enforced disappearances, torture and ill-treatment of such conflict-related detainees were common practice of SBU in Kharkiv city and the region, with victims often held on the premises of the Kharkiv SBU. A former Kharkiv SBU officer explained, "For the SBU, the law virtually does not exist as everything that is illegal can be either classified or explained by referring to state necessity".⁵

11. Below I provide more detailed information on each of the individuals mentioned above.

A. MARINA KOVTUN

12. Marina Anatolievna Kovtun was detained on a far-fetched suspicion of involvement in the explosion of the Stena rock-pub in Kharkov on 9 November 2014. She was charged under Article 110(1) (*Encroachment on the territorial integrity and inviolability of Ukraine*), Article 28(2) (*Commission of a criminal offence by a group of persons, a group of persons by prior collusion, an organised group or a criminal organisation*); Article

³ *Ibid*, ¶13.

⁴ *Ibid*, ¶82.

⁵ *Ibid*, Annex I, ¶3.

113 (*Sabotage*); Article 27(5) (*Types of complicity*); Article 258(2) (*Terrorist act*); Article 258-3(1) (*Establishment of a terrorist group or terrorist organisation*); Article 28(2) (*Commission of a criminal offence by a group of persons, a group of persons by prior conspiracy, an organised group or a criminal organisation*); Article 32(1) (*Recidivism of criminal offences*); and Article 263(1) (*Illegal handling of weapons, ammunition or explosives*) of the Criminal Code of Ukraine.

13. Marina Kovtun's sister, Larisa Bozhko, contacted the law enforcement agencies of the Lugansk People's Republic and reported Marina's unlawful persecution. Based on Larisa Bozhko's statement, I carried out an analysis of all the circumstances surrounding the detention and criminal prosecution of Marina Kovtun, from which I understand that physical and psychological violence was repeatedly used against her to obtain a confession. Her teeth were knocked out when she was being apprehended.⁶ Physical injuries on her face were visible at the trial.⁷ Marina Kovtun reported ill-treatment herself, stating that she had been tortured, threatened and blackmailed.⁸ She retracted her earlier confessions given under torture and repeatedly went on hunger strikes.⁹
14. Based on the information received from Larisa Bozhko and information from open sources, I have a reasonable suspicion of falsification of evidence and fabrication of the criminal case against Marina Kovtun. Thus, the law enforcement bodies of Ukraine illegally searched the flat and other premises that belonged to her,¹⁰ entered false information in the materials of the criminal case regarding the process of apprehension, searches and other investigative actions, and the manner of the service of notice of criminal proceedings initiation. Testimonies against her was apparently given under

⁶ Ukraine ru, *11 Years for a Note. Political Prisoner Kovtun Convicted in Kharkov on Falsified Evidence* (10 October 2019), available at: <https://ukraina.ru/20191010/1025278110.html> (Annex 83).

⁷ Korrespondent net, *SSU Has Tortured Marina Kovtun Accused of Blowing up Stena Rock Pub for Three Years* (22 November 2017), available at: <https://blogs.korrespondent.net/blog/events/3909377/> (Annex 80).

⁸ 5.ua, *The terrorist attack in the Stena pub in Kharkiv: Prosecutors ask for 12 years in prison for the accused - details* (27 September 2019), available at: <https://www.5.ua/ru/rehyoni/terakt-v-pabe-stena-v-kharkove-prokuratura-prosyt-12-let-tiurmi-dlia-obvyniaemoi-podrobnosti-199997.html> (Annex 216).

⁹ Antifascist, *Kharkov Political Prisoner Marina Kovtun Will Be Sentenced on 7 October. Prosecutor's Office Asks for 12 Years in Prison* (2 October 2019), available at: <https://antifashist.com/item/harkovskoj-politzaklyuchennoj-marine-kovtun-7-oktyabrya-oglyasyat-prigovor-prokuratura-zaprosila-12-let-lisheniya-svobody.html> (Annex 85).

¹⁰ Ukraine ru, *11 Years for a Note. Political Prisoner Kovtun Convicted in Kharkov on Falsified Evidence* (10 October 2019), available at: <https://ukraina.ru/20191010/1025278110.html> (Annex 83).

torture by persons against whom criminal cases were also fabricated in Ukrainian courts. Moreover, the information that she was a member of the Kharkov Partisans is denied by her relatives.¹¹

15. In view of the above, I was aware that there was a high risk that the evidence gathered by the prosecution would in no way confirm either Marina Kovtun's involvement in the explosion at the Stena pub, or the terrorist nature of the explosion itself. However, based on this evidence, on 7 October 2019, Marina Kovtun was found guilty under Article 263(1) (*Illegal handling of weapons, ammunition or explosives*) and Article 258-3(1) (*Establishment of a terrorist group or terrorist organisation*) of the Criminal Code of Ukraine.
16. The above facts were a substantial ground for including Marina Kovtun in the list of persons to be exchanged on humanitarian reasons.

B. SERGEY BASHLYKOV

17. Sergey Bashlykov was detained on 26 February 2015 following an explosion during the Dignity March on 22 February 2015 outside the Palace of Sports in Kharkov. He was also charged with crimes under Article 258(3) (*Terrorist act*) and Article 263(1) (*Illegal handling of weapons, ammunition or explosives*) of the Ukrainian Criminal Code.
18. As far as I know, Sergey Bashlykov's father, Alexander Bashlykov, contacted the Commissioner for Human Rights in the Donetsk People's Republic Darya Morozova by phone, reporting the illegal detention of his son. According to the father, Sergey Bashlykov had been "at the wrong place at the wrong time", and he had serious reasons to believe that his son's confession had been obtained through the use of physical and psychological violence. Thus, based on the appeal of his relatives and on humanitarian grounds, Sergey Bashlykov was also included in the list of persons to be exchanged.
19. I became aware of the relevant information because [REDACTED], at the time when the lists of released persons were being prepared.

¹¹ *Ibid.*

C. VLADIMIR DVORNIKOV

20. The Ukrainian law-enforcement agencies charged Vladimir Dvornikov with committing crimes under Article 27(5) (*Types of complicity*), Article 258(3) (*Terrorist act*) and Article 263(1) (*Illegal handling of weapons, ammunition or explosives*) of the Ukrainian Criminal Code. According to the Ukrainian investigation, he allegedly acted as an accomplice to Sergey Bashlykov I mentioned earlier.
21. I received a statement from Mr. Reznikov who had been released earlier as a result of a similar exchange in 2017. Mr. Reznikov claimed that he had been detained in the same cell with Vladimir Dvornikov.
22. As far as I know, Vladimir Dvornikov went on hunger strike on 15 February 2018 declaring that the Kharkov investigative detention facility (SIZO) where he was held had grossly violated his rights, as well as those of Sergey Bashlykov and Viktor Tetyutsky. Later, at the court hearing, he stated, in particular, that they had been arbitrarily put in a punishment cell. Besides, no one from the staff of the investigative detention facility cared to conceal the fact that such decisions were a direct order from the administration, and pretexts were invented arbitrarily. In the punishment cell, Vladimir Dvornikov had no access to materials, paper and pen to get ready for court hearings. In addition, after the punishment cell he was placed in a new cell, which was searched every day to create a conflict situation. Vladimir Dvornikov's complaints and statements about the violations described above were not accepted by the administration of the detention centre. It should also be noted that at the time of the court hearing, at which Vladimir Dvornikov drew the court's attention to his hunger strike in protest to abuse of power by the investigative detention facility staff and investigators, he had been holding it for 25 days already, and in all that time he was not once allowed to see a doctor for examination.
23. I am also aware that Vladimir Dvornikov was repeatedly subjected to physically abuse by the staff of the investigative detention facility. Thus, on 9 January 2019, Vladimir Dvornikov reported being beaten, which prompted an investigation by the prosecutor's office. However, it did not lead to any result, and on 9 September 2019, Vladimir Dvornikov was brought to the court hearings with obvious signs of bodily injuries. His defence counsel Dmitriy Tikhonenkov drew the attention of the court and the prosecution to the Vladimir Dvornikov's multiple broken bones, in particular his ribs, as well as

bruises, abrasions and other injuries resulting from the repeated use of physical violence against him.¹² His other defence counsel Igor Nagorny informed the court that Vladimir Dvornikov had been subjected to torture even on the day of his detention, as serious injuries were visible on his face when he was giving his testimony.¹³ Dmitriy Tikhonenkov and Igor Nagorny subsequently provided that information to me.

24. Based on the above information, Vladimir Dvornikov was also included in the list of persons to be exchanged on humanitarian grounds.

D. VIKTOR TETYUTSKY

25. Tetyutsky was also detained on 26 February 2015 on charges of allegedly organising the above-mentioned explosion in Kharkov in complicity with Sergey Bashlykov and Vladimir Dvornikov. He was charged with crimes under Article 27(5) (*Types of complicity*), Article 258(3) (*Terrorist act*) and Article 263(1) (*Illegal handling of weapons, ammunition or explosives*) of the Ukrainian Criminal Code.
26. Viktor Tetyutsky was considered as a person subject to exchange after an application had been filed by his wife Ms. Degtyareva. On the basis of the information that I had analysed regarding the circumstances of his detention and criminal prosecution, it became evident to me that he had been repeatedly physically and psychologically abused. Thus, on the day of his apprehension, he was kicked, beaten with rifle butts and a metal pipe on the head, back, and legs; he had a gas mask put on his head with a hose dipped into the water, which caused Viktor Tetyutsky to choke; he was doused with water and then electroshocked, to increase the effect of the shock; he was threatened with shooting having a gun put to the back of his head.¹⁴ He lost consciousness many times during tortures. Tortures were used repeatedly during the subsequent months of Tetyutsky's stay in the investigative detention centre.

¹² Antifascist, *'Activists' Dictate Sentences to Courts and Prosecutors. Lawyer Dmitriy Tikhonenkov Discusses Peculiarities of Ukrainian 'Hybrid' Justice* (1 November 2017), available at: <https://antifashist.com/item/aktivisty-diktuyut-prigovory-sudam-i-prokurature-advokat-dmitrij-tihonenkov-ob-osobennostyah-ukrainskogo-gibridnogo-pravosudiya.html> (Exhibit A).

¹³ Kharkovtoday, *Sentence to Persons Charged with Terrorist Attack at Sports Palace Will Be Announced on Saturday* (26 December 2019), available at: <https://2day.kh.ua/ru/news/prigovor-obvinyaemym-v-terakte-vozdorca-sporta-oglasyat-v-subbotu> (Exhibit B).

¹⁴ Korrespondent net, *Beatings, Torture, Threat of Castration: SBU Crimes in Kharkov* (11 October 2017), available at: <https://blogs.korrespondent.net/blog/events/3895141/> (Exhibit C).

27. All of the actions described above were aimed at forcing Viktor Tetyutsky to sign a confession. As a consequence, after several hours of physical and psychological violence during one of the interrogations, Viktor Tetyutsky confessed his guilt.
28. Multiple injuries were documented by emergency ambulance, temporary detention facility (IVS), and SIZO.¹⁵ Tetyutsky's attorney Dmitriy Tikhonenkov was able to obtain medical certificates confirming torture of his client.¹⁶
29. Viktor Tetyutsky repeatedly filed applications and complaints about illegal physical abuse, but all his attempts were fruitless. The Dzerzhinskiy District Court in Kharkov refused to consider an appeal against the decision of an investigator of the military prosecutor's office of the Kharkov garrison to close the criminal case initiated as a result of Viktor Tetyutsky's application reporting torture and abuse of power by SIZO and SBU officers.¹⁷ Despite the fact that the court of appeal overturned the decision of the Dzerzhinsky district court, there was no progress on the complaint up to the very day of the exchange. It was obvious that there would be no justice regarding the use of violence against Viktor Tetyutsky.
30. It is important to emphasise that the prosecutor representing the prosecution side in the criminal case against the three defendants mentioned above, Vladimir Lyamar, was aware of torture being committed against Viktor Tetyutsky, Sergey Bashlykov and Vladimir Dvornikov. Not only did he fail to take action to prevent torture, but he facilitated its continuation, and used evidence obtained by violence throughout the trial. On this basis, the defendants filed a motion for the disqualification of the prosecutor, which was rejected by the court.¹⁸

¹⁵ Grati, *Terrorist Attack during Dignity March in Kharkov. How Three Defendants Were Given Life Sentences and Immediately Released* (29 December 2019), available at: <https://graty.me/terakt-vo-vremya-marshadostoinstva-v-harkove-kak-troim-obvinyayemym-dali-pozhiznennyj-srok-i-srazu-zhe-otpustili/> (Exhibit D).

¹⁶ Antifascist, *'Activists' Dictate Sentences to Courts and Prosecutors. Lawyer Dmitriy Tikhonenkov Discusses Peculiarities of Ukrainian 'Hybrid' Justice* (1 November 2017), available at: <https://antifashist.com/item/aktivisty-diktuyut-prigovory-sudam-i-prokurature-advokat-dmitrij-tihonenkov-ob-osobennostyah-ukrainskogo-gibridnogo-pravosudiya.html> (Exhibit A).

¹⁷ Polit Navigator, *How Testimonies Were Knocked out from Kharkov "Terrorists"* (18 November 2019), available at: <https://politnavigator.news/kak-vybivalis-pokazaniya-iz-kharkovskikh-terroristov.html> (Exhibit E).

¹⁸ Telegraf, *Defendants in Kharkov Terrorist Attack Demanded the Prosecutor's Recusal* (1 October 2015), available at: <https://telegraf.com.ua/ukraina/mestnyiy/2095681-obvinyayemye-po-teraktu-v-harkove-trebovali-otvoda-prokurora.html> (Exhibit F).

31. Besides, Viktor Tetyutsky was not provided with the qualified assistance of a defence lawyer guaranteed by the criminal law of Ukraine. He was not allowed access to a lawyer at many stages of the investigation into the crime, with regard to which, attorney Alexander Shadrin appointed by the Centre for Free Secondary Legal Aid, for example, filed a complaint for obstruction of a defense lawyer's activities.¹⁹ As far as I am aware, it was not considered either. Moreover, at one time Viktor Tetyutsky was defended by Igor Ustimenko who not only failed to take necessary actions to record the physical violence and file complaints against the actions of SBU officers and the detention centre, but also threatened the family of the defendant and tried to extort a large sum of money from his relatives.

E. PREPARATION FOR EXCHANGE

32. In summary, the above-mentioned facts, namely falsification of evidence, fabrication of criminal cases, illegal prosecution, gross and repeated violations of human rights, systematically inflicting psychological and physical harm, and constant torture were the grounds for including Marina Kovtun, Sergey Bashlykov, Vladimir Dvornikov and Viktor Tetyutsky in the list of exchanged persons.
33. Let me remind that the description of torture and ill-treatment of these individuals was later included in the relevant UN thematic report.²⁰
34. It should be noted that up to 28 December 2019, i.e. for almost four years, the criminal case against Sergey Bashlykov, Vladimir Dvornikov and Viktor Tetyutsky was at the trial stage. In that time, more than 40 court hearings took place that never resulted in a conviction. Only after the exchange agreements had been reached, they were sentenced to life imprisonment with confiscation of property on the basis of the verdict of the Frunzenskiy Court of the city of Kharkov dated 29 December 2019. And they were not the only persons who were convicted on the last day before the exchange, there were seven others.

¹⁹ Polit Navigator, *How Testimonies Were Knocked out from Kharkov "Terrorists"* (18 November 2019), available at: <https://politnavigator.news/kak-vybivalis-pokazaniya-iz-kharkovskikh-terroristov.html> (Exhibit E).

²⁰ OHCHR Report, *Arbitrary Detention, Torture and Ill-treatment in the Context of Armed Conflict in Eastern Ukraine, 2014-2021*, 2 July 2021, Annex I, ¶¶9-14, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UkraineArbDetTorture_EN.pdf.

35. Such lengthy trials, the illegal collection of evidence and the use of torture on the defendants in order to obtain confessions have led to reasonable doubt that Sergey Bashlykov, Vladimir Dvornikov, Viktor Tetyutsky and Marina Kovtun had anything to do with the crimes they were charged with. They themselves have repeatedly said that they were not involved in any terrorist attacks, that there is no evidence to prove their guilt, and that the preventive measure in the form of detention, which the defendants have repeatedly, and unsuccessfully, challenged (for example, appeals of three of the defendants were declined by Decisions of the Frunzenskiy District Court of Kharkov dated 27 December 2017 and 31 October 2018), had become a measure of coercion accompanied by constant torture. All that demonstrates the fabrication of the cases of the explosions during the Dignity March²¹ and at the Stena rock pub, and the falsification of evidence in them.
36. Such actions were undertaken by the Ukrainian authorities in order to replenish the so-called "exchange fund". Thus, in May 2014, a large number of persons expressing their position against the war in Donbas were detained in the city of Odessa. Some of them were subsequently transferred to the territory of the Donetsk and Lugansk People's Republics for the exchange of detainees with Ukraine.
37. I am aware that many arbitrarily detained persons were subjected to torture. Subsequently, examples of ill-treatment were described in various interviews of the Office of the High Commissioner for Human Rights, included in the UN Report I have mentioned. For example, the Office constantly received reports of incidents of beatings, strangulation, rape, forced undressing, numerous death threats, etc.
38. Thus, when we (and in the case of Sergey Bashlykov, our colleagues from the DNR) included the four previously named persons in the exchange list, we were guided by humanitarian considerations and sought to stop the numerous tortures and ill-treatments which had taken place before, and, evidently, could take place after their verdicts. We sought to save their lives. Given our conviction that there had been unlawful criminal prosecutions, human rights violations and the impossibility of fair justice, it was decided

²¹ Polit.ru, "*Kharkov Partisans*" Disclaim Responsibility for Terrorist Attack in Kharkov (23 February 2015), available at: https://m.polit.ru/news/2015/02/23/no_responsibility/ (Annex 79); Polit.ru, *The head of Donetsk People's Republic Admits SBU Involvement in Terrorist Attack in Kharkov* (23 February 2015), available at: https://m.polit.ru/news/2015/02/23/kharkiv_zakharchenko/ (Exhibit G).

that Marina Kovtun, Sergey Bashlykov, Vladimir Dvornikov and Viktor Tetyutsky should have been exchanged.

Witness



Moscow, 10 March 2023

LIST OF EXHIBITS

Number:	Name of exhibits:
Exhibit A	<i>Antifascist, 'Activists' Dictate Sentences to Courts and Prosecutors. Lawyer Dmitriy Tikhonenkov Discusses Peculiarities of Ukrainian 'Hybrid' Justice</i> (1 November 2017).
Exhibit B	<i>Kharkovtoday, Sentence to Persons Charged with Terrorist Attack at Sports Palace Will Be Announced on Saturday</i> (26 December 2019).
Exhibit C	<i>Korrespondent.net, Beatings, Torture, Threat of Castration: SBU Crimes in Kharkov</i> (11 October 2017).
Exhibit D	<i>Grati, Terrorist Attack during Dignity March in Kharkov. How Three Defendants Were Given Life Sentences and Immediately Released</i> (29 December 2019).
Exhibit E	<i>Polit Navigator, How Testimonies Were Knocked out from Kharkov "Terrorists"</i> (18 November 2019).
Exhibit F	<i>Telegraf, Defendants in Kharkov Terrorist Attack Demanded the Prosecutor's Recusal</i> (1 October 2015).
Exhibit G	<i>Polit.ru, The head of Donetsk People's Republic Admits SBU Involvement in Terrorist Attack in Kharkov</i> (23 February 2015).

Exhibit A

Antifascist, 'Activists' Dictate Sentences to Courts and Prosecutors. Lawyer Dmitriy Tikhonenkov Discusses Peculiarities of Ukrainian 'Hybrid' Justice (1 November 2017)

(translation)

Translation

Antifascist, 'Activists' Dictate Sentences to Courts and Prosecutors. Lawyer Dmitriy Tikhonenkov Discusses Peculiarities of Ukrainian 'Hybrid' Justice (1 November 2017), available at: <https://antifashist.com/item/aktivisty-diktuyut-prigovory-sudam-i-prokurature-advokat-dmitrij-tihonenkov-ob-osobennostyah-ukrainskogo-gibridnogo-pravosudiya.html>.

“Activists” Dictate Sentences to Courts and Prosecutors. Lawyer Dmitry Tikhonenkov Discusses Peculiarities of Ukrainian “Hybrid” Justice – ANTIFASHIST

Antifashist.com

Dmitry Tikhonenkov, the lawyer of Viktor Tetyutsky who is suspected of a terrorist attack committed in February 2015 at the Sports Palace in Kharkov, said that the investigators are unfortunately considering only one version – that recognising the detained guys as criminals.

In his personal opinion, the current trial is a kangaroo court rather than a fair trial since there is simply no evidence showing that Viktor Tetyutsky, Vladimir Dvornikov and Sergey Bashlykov are really guilty. Dmitry Tikhonenkov told about all this in an interview with Antifashist.

Antifashist: “Dmitry Anatolievich, what is currently happening in the trial against Mr. Tetyutsky, Mr. Bashlykov and Mr. Dvornikov? Has any of your motions been granted or, as usual, judges and prosecutors just reject everything?”

Mr. Tikhonenkov: “Our motion to summon an explosives expert for providing explanations was recently granted. It was filed by Vladimir Dvornikov’s lawyer Mr. Shapovalov. An explosive examination was earlier carried out in the case, which resulted in probabilistic and presumptive expert opinions, so we want to ask the expert a number of questions”.

Antifashist: “In other words, the expert did not answer your questions unequivocally?”

Mr. Tikhonenkov: “No, the expert gave no unequivocal answers, but, nevertheless, the prosecutor’s office refers to the expert examination as an important proof of guilt of the accused. We had many questions to this expert. By the way, this is a rare case that our motion was granted. As a rule, the Court dismisses our motions. Moreover, the Court’s rulings do not reflect our arguments, are formal and in fact constitute a runaround. Our motions are dismissed even when the evidence is manifestly inadmissible to such extent that it is obvious to any unbiased observer of the proceedings. When it is almost impossible to dismiss our motion, the panel of judges just postpones its consideration until they departure to the conference room for sentencing”.

Antifashist: “Can you give any example?”

Mr. Tikhonenkov: “There are many such examples. One example is when Viktor Tetyutsky’s house was searched on the 26th of February 2015. No search warrant was received from the investigating judge to carry out this investigative action.

There was only a report from a criminal intelligence detective dated 25 February 2015 that some explosives are probably stored at the place of our client's residence. The pre-trial investigators had one whole day to apply to request a search warrant from the investigating judge but did not do that".

***Antifashist:* "In other words, they only relied on a criminal intelligence detective's report to enter into Mr. Tetyutsky's apartment?"**

Mr. Tikhonenkov: "Article 233 of the Criminal Procedure Code of Ukraine provides for only two grounds for urgently entering an individual's home: where it is necessary to save lives or property or to directly pursue somebody. As I have already said, "information" on the presence of some explosives became available as early as one day before, and, of course, there was no direct pursuit. Thus, these procedural actions were taken without a court permission or proper grounds. Therefore, the search record in respect of Viktor Tetyutsky's apartment constituted inadmissible evidence pursuant to Article 87 of the Code of Criminal Procedure of Ukraine, and we have repeatedly stated that in the Court".

***Antifashist:* "And how was the search carried out?"**

Mr. Tikhonenkov: "Early in the morning on 26 February 2015, Viktor Tetyutsky and his family were asleep. Suddenly, someone began to break through the door. Viktor went to open the door but did not have time to do so. The door was broken apart, and he was thrown down onto the floor and handcuffed. Since he had just woken up, he was in his underpants. They allowed him to get dressed hastily and took him somewhere. On the way, they stopped and said they were going to shoot him. They put a bag onto Viktor's head so that he could see nothing and only heard gunshots over his head. He later realised the shootings were false and intended to suppress his will in order to make him confess.

In fact, Viktor was detained in the morning at the place of his residence in the Kharkov Region, and the detention report stated the detention took place at 11:50 AM in Kharkov. It also stated that at 01:00 PM they called his wife to inform her about his detention. That call was just a formality as his wife was there at the time he was arrested and during the search after he had been taken away. The Tetyutsky family lives in a one-room apartment. A grenade and TNT were found in the morning after incomprehensible people in masks had entered the apartment on the table where his daughter did her homework in the evening. Interestingly, no search was carried out at all in the kitchen, in the corridor, in the utility rooms and on the balcony. Mr. Tetyutsky had the right to be present during the search but was prevented from doing so. No examination was conducted to find any traces of his fingers or other traces showing that he came into contact with these things.

The search report states the "pursuit of a criminal" as the ground for entering Mr. Tetyutsky's apartment, although the criminal intelligence detective's report stated another ground. The investigating judge of the Kyiv District Court of Kharkov retroactively issued a ruling saying nothing about the "pursuit of a criminal", although such "pursuit" was stated in the search report as the ground for entering Mr. Tetyutsky's apartment. Speaking before the Court, Mr. Golovkov, the lawyer of the victims, expressed an idea that a "pursuit" begins when criminal proceedings are initiated and continues during the entire pre-trial investigation period. That would be funny if it were not so sad".

Antifashist: “What happened next?”

Mr. Tikhonenkov: “What happened next was, as Viktor Tetyutsky and the other defendants, Vladimir Dvornikov and Sergey Bashlykov, said before the Court, that they were tortured and had to sign all the documents without looking at them just to survive. I made requests to the emergency hospital and the temporary and pre-trial detention facilities. I obtained medical certificates evidencing that Viktor Tetyutsky had multiple injuries, although he did not have a scratch at the time of his arrest. During the pre-trial investigation, only one version was actually considered. The investigation was completed before the two months deadline. And during the trial it turned out there was no real evidence of the guilt of the accused, except for their own confessions obtained under torture.

The Military Prosecutor’s Office of the Kharkov Garrison has initiated criminal proceedings on the use of violence”.

Antifashist: “As far as I know, Mr. Dvornikov had his ribs broken. Is it true?”

Mr. Tikhonenkov: “Yes, and not just that. All the three accused were subjected to a psychological and physical coercion. As I have already said, the Military Prosecutor’s Office of the Kharkov Garrison has initiated criminal proceedings in that regard. Those proceedings are on and on with no real results. The defendants themselves have repeatedly stated before the Court that they were tortured and signed all the documents without looking at them. The Court can only rely on the testimony obtained directly during the trial. The defendants have not yet testified but have repeatedly stated that they were tortured and do not admit their guilt”.

Antifashist: “Please tell me, do mass media cover the facts you mentioned?”

Mr. Tikhonenkov: “Unfortunately, they distort information. Basically, they state the position of the prosecutor’s office and the victims’ lawyer Mr. Golovkov. They do not reflect my position and just quote my phrases out of context, so it is just impossible to understand the essence of what is happening. Viktor Tetyutsky and Vladimir Dvornikov have repeatedly raised the question of proper information during the trial. Mr. Dvornikov even coined the term “hybrid justice”. It consists in the fact that, first of all, the so-called “activists” initially considering our clients criminals come to the court. During and after the hearings, they use their mobile phones to disseminate distorted information that often runs contrary to reality. The judges are under the pressure imposed by those “activists” and the information realm they create.

For example, when the power of attorney of the victims’ lawyer Mr. Golovkov expired at a hearing, Sergey Bashlykov’s lawyer Mr. Shadrin drew the Court’s attention to that fact. Naturally, Mr. Golovkov was told he was not eligible to participate in that hearing. The hearing lasted from morning to evening. Closer to 05:00 PM, Mr. Golovkov presented his new power of attorney and was admitted to the trial. He said a couple of inconsequential phrases. However, those phrases got on the TV and in the media. They just ignored all the motions, statements and complaints made by the accused and their lawyers”.

Antifashist: “I have a question about the timing of what happened to Mr. Tetyutsky’s car. In other words, the terrorist attack occurred on Marshal Zhukov Avenue near the Sports Palace. But his car was somewhere else”.

Mr. Tikhonenkov: “At present, I cannot answer this question because our defence tactics require us to voice all our arguments on this matter before the Court. We will not do that until the Court starts examining the eighth [case] volume; currently, it has only reached the fifth volume. We plan to question a number of witnesses about the location of the car. They had already been interrogated before I entered the proceedings. Furthermore, the composition of the panel of judges changed, so the trial was started again from the very beginning, and the Court will allow us to question the witnesses after examining all the written and electronic materials of the case”.

***Antifashist:* “Could you please tell me what terms of imprisonment are provided for by the [Criminal Code] articles those guys are accused under?”**

Mr. Tikhonenkov: “Article 258(2) (act of terror) and Article 263(1) (illegal handling of weapons, ammunition or explosives) of the Criminal Code of Ukraine carry a punishment of up to life imprisonment, i.e. up to the maximum penalty”.

***Antifashist:* “Is there a chance that the real culprits will be sought?”**

Mr. Tikhonenkov: “No, the investigators developed only one version, and the Court is only examining the “evidence” of Mr. Bashlykov’s, Mr. Tetyutsky’s and Mr. Dvornikov’s guilt”.

***Antifashist:* “Are the victims really confident those guys are guilty?”**

Mr. Tikhonenkov: “It seems so. Certainly, they want to know the truth, and I have no right to comment on their anxieties and attitudes because they have lost their loved ones. Let the Court answer all questions. Of course, if it is a FAIR TRIAL rather than a lynching or a kangaroo court”.

Exhibit B

Kharkovtoday, *Sentence to Persons Charged with Terrorist Attack at Sports Palace Will Be Announced on Saturday* (26 December 2019)

(translation)

Translation

Kharkovtoday, *Sentence to Persons Charged with Terrorist Attack at Sports Palace Will Be Announced on Saturday (26 December 2019)*, available at: <https://2day.kh.ua/ru/news/prigovor-obvinyaemym-v-terakte-vozle-dvorca-sporta-oglasyat-v-subbotu>.

Sentence to Persons Charged with Terrorist Attack at Sports Palace Will Be Announced on Saturday

By Kharkov Today



Each of the persons charged with the terrorist attack, Tetyutsky, Dvornikov and Bashlykov, pleaded not guilty.

A verdict to the persons charged with the terrorist attack at the Sports Palace will be announced on the 28th of December.

The defendants in the criminal case are Vladimir Dvornikov, an ex-officer of the Berkut special forces unit who activated the mine, and his accomplices, Viktor Tetyutsky and Sergey Bashlykov. All three face life imprisonment, and all three pleaded not guilty.

Viktor Tetyutsky says he must be acquitted. “The charge is groundless, unproven and fabricated. The evidence raises doubts and proves we are innocent. I must be acquitted,” Mr. Tetyutsky said.

The accused said that his involvement in the crime had not been proven: “On the night when the device was planted, none of the accused was at the crime scene. Mr. Dvornikov and Mr. Bashlykov were on the other end of the town, while I was in another place and at another time. The investigators have not proven the fact of my involvement in the terrorist attack. The prosecutor’s lies have been documented; the witness changed his story four times, and my car

was not at the crime scene. Assuming that a similar car was in that yard, the question of whose car it was and who was in it still remains”.

Igor Nagorny, the lawyer for the defendant Vladimir Dvornikov, asks to acquit his client and release him from custody.

“On the day of his apprehension, the accused received injuries that he had not had at the time of apprehension. This case was unexpectedly closed. We don’t really know what happened there. Torture cannot be ruled out. While giving his testimony, Mr. Dvornikov was in such a state that his face was entirely smashed. Psychiatric examination shows that Mr. Dvornikov’s testimony is impartial. But it doesn’t say if he was beaten. I ask for acquittal and release from custody,” Nagorny said.

Sergey Bashlykov, the third defendant, says that neither he nor his comrades have anything to do with the attack. “The case files prove that [the investigators] were not even looking for real perpetrators. The prosecutors did not look into other scenarios. SBU officers decided we are to be charged and forced us, by torture, to sign statements in which we incriminate ourselves. I ask the Court to acquit us as we did not commit the crime,” Mr. Bashlykov said.

After the session, Prosecutor Volodymyr Lyamar said that he had expressed and carefully substantiated his demands in the closing argument.

“My demand to change the restraining order has been filed to comply with the President’s arrangement for an exchange of prisoners of war. It is not related either to the evidence or to the validity of the charge. I sought for a sentence of life imprisonment and I believe it is justified. This is a well-deserved punishment. However, there are certain circumstances which made me demand a change of the restraining order. I am very sorry, it was very hard for me to look in the faces of the victims today, but we need do this. The judge retreated into chambers to make a decision and pronounce his verdict. I do not know what the verdict is going to be, so let’s wait for the Court’s decision. The Court will rule what decision should be taken after evaluating my closing argument. According to law, these people cannot be released from custodial arrest until the Court announces the judgment,” explained Mr. Lyamar.

Oleg Golovkov, the lawyer for the victims, said that they were psychologically ready for the Prosecutor’s demand.

“There were certain grounds to believe that it would happen. The victims think that it is a crime to include these persons on the exchange lists. It is a crime committed by state officials, and a crime against my clients, the victims. If the lists have been approved by the President, I cannot rule out that his actions contain the attributes of an offence. It doesn’t matter who it was, but it matters who was the signatory to a document approving these particular men. These people are not a subject of the Minsk negotiations, so they do not fall under any category. If we follow suit, we’ll have convoys of rapists or someone else going to the Russian Federation tomorrow,” Mr. Golovkov said.

As *Kharkov Today* wrote on the 22 February 2015, a march in support of the unity of Ukraine took place in Kharkov to celebrate the anniversary of the victory of the Revolution of Dignity. The march began near the Sports Palace where the activists formed a column and moved on to Svobody Square. They hardly walked a hundred metres when the blast occurred.

Four people were killed; namely, Ihor Tolmachov, 52 years old, a Euromaidan activist, Danya Didik, 15 years old, Nikolay Melnichuk, 18 years old, and police lieutenant colonel Vadym Rybalchenko.

More than ten others were injured by the blast. According to experts, it was a radio-controlled anti-personnel mine. A criminal case was opened under Article 258 of the Criminal Code of Ukraine (a terrorist attack causing casualties).

We want to remind the readers that the Prosecutor asked for a life sentence for those accused of the terrorist attack at the Sports Palace but requested to release them from custodial arrest so that they can get prepared for a POW exchange.

Exhibit C

Korrespondent.net, *Beatings, Torture, Threat of Castration: SBU Crimes in Kharkov*
(11 October 2017)

(translation)

Translation

Korrespondent.net, *Beatings, Torture, Threat of Castration: SBU Crimes in Kharkov* (11 October 2017), available at: <https://blogs.korrespondent.net/blog/events/3895141/>.

Beatings, Torture, Threat of Castration: SBU Crimes in Kharkov

Korrespondent.net

The trial in the case of the terrorist attack at the Sports Palace in Kharkov that took place on 22 February 2015 has been dragging on for more than two and a half years with little progress. Case records, investigation details, prosecutor's petitions were blatantly fabricated, while confessions were forced by torture from the detainees charged with a bomb attack that killed four people.

Following the trial, we contacted one of the accused who told us how a confession of guilt had been obtained from him.

Let me remind you that on that day, 22 February 2015, the nationalists decided to celebrate, if I may say so, an anniversary of Viktor Yanukovich's ousting from the country, by holding several events. One group, contrary to the public opinion, decided to start a "march" from the Sports Palace on Marshal Zhukov Avenue. Just a couple of minutes after a small column of the marchers moved on, a blast went off. As it was later established, the explosive device was hidden near the roadway and controlled remotely.

Field investigators apprehended several people on the same day. No one was bothered by the fact that the time of their alleged apprehension differed from the timestamp on the video footage of this operation. Again, to this day no one has bothered to ask where exactly the detainees were taken to and who they were. The police and the SBU apparently did this to calm down the local public and buy themselves time to find some "scapegoats" who actually were arrested three days after the blast.

Viktor Tetyutsky found himself among the accused because of his past as a Berkut officer and involvement in the "Russian Spring" in Kharkov. He is one of those anti-Maidan activists who got out of bed literally half an hour after the nationalists' threats in February 2014 and went to defend the Lenin monument on Freedom Square; he then spent several months taking part in the protest movement. In an interview that we published, Mr. Tetyutsky said that he "*simply couldn't stand watching the guys burn on Maidan as I hate the Ukrainian fascist scum and the delirious ideas enforced by them*".

Back to our subject, Victor said that unidentified armed men in masks broke into his apartment at 6:40 in the morning on the 26th of February. Let me remind you that the reason for his apprehension was an alleged "threat to the safety of people". Note that the forced entry warrant and the search warrant provide different grounds for action; the pursuit of a perpetrator and a security threat. Therefore, the apprehension was clearly illegal, and the appropriate documents were later fabricated.

"Without introducing themselves or presenting any documents, in the presence of my wife and my child, they hit me in the stomach with the butts of their assault rifles and threw me onto the

floor, my face down. Then they tied by hands with a plastic cord, put a bag over my head, took me out of the apartment and put in a car with four armed men in it”.

According to Victor’s story, what followed was one of the most difficult and painful periods in his life.

Any attempts to talk to the abductors were cut off with cruelty. Sometime later, the car suddenly stopped, Victor was dragged out of it and put on his knees in the snow. For about half an hour, they kicked him and hit him with the butts of their guns demanding that he confess to the crime. He did not understand what the crime was and why they got him, so he stubbornly kept silent on all their questions.

“After that, they put a gun to the back of my head and told me to confess everything, or else they would shoot me. I didn’t say anything because I did not understand what they were talking about. After a few seconds of silence, a shot rang out. Then, they pulled me up to my feet and pushed me back into the car, spouting obscenities at me all the time”.

The next stop was the SBU Chief Directorate for the Kharkov Region. Once the car pulled into the yard, Mr. Tetyutsky was yanked out of it and taken to a shooting gallery in the basement.

“I could hear them saying that there were six to eight other people in the room besides me, and they began beating on me randomly with their hands and feet, all over my body. This went on for about 40 minutes and was accompanied by threats against me and my family”.

Viktor was finally told what he was supposed to confess to committing a terrorist attack on the 22nd of February, but he said he didn’t know anything about it and the beating was resumed.

“It felt like they hit me with a metal pipe on my hands and feet, and with the butts of their assault rifles on the spine and the back of my head. It lasted for about an hour. Then they took me by the arms to the other side of the room (I was no longer able to walk) and told me not to move. After a while, handgun shots were fired and I could hear the bullets clearly hitting paper targets next to me”.

The torturers then talked quietly among themselves and informed Mr. Tetyutsky that he would be shot in the knee if he did not cop out. Victor remained silent, so a shot was fired over his ear and a metal pipe struck his knee, apparently imitating a bullet hit. The beating was resumed again and at some point he fell unconscious.

He recovered in another room, on the floor, without a bag on his head.

“There were masked people standing around me, about six of them, and one of them was pouring water on me. I was asked again if I was ready to cop out or else they’d turn me into a cripple. I refused. Then they put a bag on my head again and continued pouring water. At the same time, they put something against my neck, and I felt a very strong electric discharge”.

Victor was tortured again until he lost consciousness. When he recovered, the SBU men were happy to tell him there was no more need for torture, because a certain “doctor” became available who would soon give him an injection that would make him split his guts, though there was a “99% chance he would become an idiot”. After a long period of waiting for the “doctor” the tormentors apparently became bored, so they took the abuse to a new level.

“They took the bag off me and put a gas mask over my head, placing the end of its hose into a bucket of water. One man was holding the hose while two others were holding me, and another one started kicking me on my body. When I choked, they would take the hose out of water, give me a break, and then start everything all over again”.

Half an hour later, Viktor was told he had five minutes to make a decision, otherwise the torture would be resumed.

All the time Mr. Tetyutsky was in the room, he heard screams and cries coming from adjacent rooms. As it became known later, the other defendants in this case, Sergei Bashlykov and Vladimir Dvornikov, “confessed” to the terrorist attack in the same way.

“They put me face down, one of them stepped onto my feet, and another one began lifting my hands, cuffed behind my back, up to my head, trying to reach the floor and twisting my shoulder joints”.

Sometime later, the “doctor” came into the room and began placing surgical tools (scalpels, clamps, etc.) on a small table for intimidation.

“He said I’d better cop out or he would do to me what he had done to his previous “patient” whose screams I heard and whose testicles he had cut off”.

Victor said that he decided to make the confession, being unable to tolerate the torture any longer and realising that those people would do anything to get a confession from him. After the “agreement”, he was taken back to the shooting range and given a short rest for an hour and a half. According to Mr. Tetyutsky, he was not alone in the room, an unknown person was lying next to him and moaning in pain.

“After an hour and a half, someone came up to me, they placed me on the floor and cut off the plastic cord that was tied around my hands. They replaced it with metal cuffs. It turned out I couldn’t walk, so they grabbed me under the arms and carried me upstairs without removing the bag from my head”.

Then Victor was brought to an investigator who was waiting patiently for the “client” to “get ripe” and take the blame for the crime. The investigator was in the room with another man, an SBU officer, who warned Mr. Tetyutsky that if he refused he would be taken to a new “tour” to the basement.

“The investigator gave me the papers and showed me where I had to sign. I did not know what these documents were, I did not read them”.

A few hours later, Victor was taken for a kind of interrogation where he was asked questions to which he only had to answer “yes” or nod his head.

After that, Victor was left alone for a while; however, realising that they probably went too far on the night of the 27th of February, the tormentors decided to take him to hospital after a warning not to tell anything to the doctors. The hospital, fortunately, documented some of the injuries Viktor later referred to in his complaint to the military prosecutor, and provided some medical assistance as well.

“So, under a strong psychological and physical coercion from the Kharkov SBU officers, I was forced to incriminate myself because I believed there was a real threat to my life and health, as well as the life and health of my family”.

Interrogations continued for another month and a half, using similar, albeit milder, methods. During his “visits” to the investigator Mr. Tetyutsky was not given any food or water, and he was constantly reminded that new tortures awaited him should he refuse to “cooperate”. From time to time, when Victor tried to refuse to sign any document, every such attempt was followed by a “preventive talk”.

“Also, the prosecutor of Department 04/4 of the Prosecutor’s Office for the Kharkov Region, Counsellor of Justice Volodymyr Lyamar, who now appears in court for the prosecution, would attend interrogations from time to time; he saw and understood what “procedures” I had been taken through before they brought me to the investigator. However, he did not do anything to stop the SBU officers from torturing me, and, therefore, because of his tacit consent, he is their accomplice”.

At this time, the trial in the case of the terrorist attack at the Sports Palace is virtually at a dead point as the only evidence the prosecutors had was the confessions of the accused, forced out of them by torture, which they later withdrew. All other arguments were totally smashed by the defence lawyers.

“Why is the trial taking so long? Because they (prosecutors – Ed.) have no proof. Naturally, when we examine a document we draw attention to this fact, and we file a petition. Of course, the trial is being delayed, but it’s not our fault. They were staging this complicated act for a month and a half, investigating only one scenario, not even looking at any others. Although there were other people and other cars at the crime scene... To put it briefly, this entire case is based on confessions, they failed to see that the judges only accept testimonies that are given in court, and the guys said right away that their confessions were forced from them by torture,” Dmitry Tikhonenkov, Mr. Tetyutsky’s lawyer, commented.

I would like to note that Viktor’s statement about the torture that he had to endure is being considered by military prosecutors, and a criminal case has been opened on it, but the chances of an objective assessment are negligible. Unfortunately, I have to say this, judging by the situation in the country and the outcome of other similar cases.

“By and large, the guys (Vladimir Dvornikov and Sergey Bashlykov who are the other defendants in this case – Ed.) had to go through the same thing. The fact is that the three of us simply were too visible on Maidan, or rather among its enemies, and had active roles in various anti-Maidan actions. My past as a Berkut officer has also played a role, making me an ideal candidate for an “enemy of the state”. But I keep my chin up! Everything will be fine!” said Mr. Tetyutsky in a private conversation.

Well, one can only envy the tenacity of a man who has gone through the circles of hell as Victor has. We wish him to get free as soon as possible and have a chance to hug his family.

Exhibit D

Grati, Terrorist Attack during Dignity March in Kharkov. How Three Defendants Were Given Life Sentences and Immediately Released (29 December 2019)

(translation)

Translation

Graty, Terrorist Attack during Dignity March in Kharkov. How Three Defendants Were Given Life Sentences and Immediately Released (29 December 2019), available at: <https://graty.me/terakt-vo-vremya-marsha-dostoinstva-v-harkove-kak-troim-obvinyaemym-dali-pozhiznennyj-srok-i-srazu-zhe-otpustili/>.

Terrorist Attack during Dignity March in Kharkov. How three defendants were given life sentences and immediately released - Graty

For almost five years, a court in Kharkov has been hearing the case of the terrorist attack near the Palace of Sports, which took place on 22 February 2015 during a march marking the anniversary of the Euromaidan victory. A landmine explosion killed four people, including a minor, and injured around ten others. Those accused of committing the attack - Vladimir Dvornikov, Viktor Tetutskiy and Sergey Bashlykov - denied guilt and insisted on an investigation into torture by the SBU prosecutor and investigators.

There have been occasional reports of the possible release of Dvornikov, Tetutskiy and Bashlykov as part of an exchange with Russia and the self-proclaimed republics. Relatives of the victims and the public have spoken out against it. On 26 December, the Frunzenskiy District Court of Kharkov moved to debate, and on 28 December it passed a verdict. All the accused were sentenced to life imprisonment. And they were immediately released from custody - the next day they participated in a prisoner exchange. Their release, the prosecutor said, was Russia's principled position.

"One explosion and he was dead"

On 22 February 2015, a rally and march to mark the first anniversary of Euromaidan's victory was planned in Kharkov. Several thousand people gathered in front of the Palace of Sports at around 12 noon. Organisers launched helium balloons with portraits of Vladimir Putin, Viktor Yanukovych, Gennadiy Kernes and Mikhail Dobkin into the air. The participants then lined up in a column, unfurled the national flag and marched towards the city centre. They chanted: "One, united, unified Ukraine!". The protesters had managed to walk about 100 metres when an explosion rocked the city centre.

"At the time of the terrorist attack I was holding a 50-metre flag of Ukraine," Leonid Onishchenko, one of the coordinators of the Kharkov Euromaidan, recalled in a conversation with "Graty".. - I was walking next to Igor Tolmachev, my friend, and we were talking. His phone rang, and he took five steps forward to avoid shouting in my ear. One explosion and he was dead.»

The mine, hidden in a snowdrift near the Sports Palace, was activated when the activists were marching near it. Some of the shrapnel was received by a passing Gazelle. Eleven people were injured - participants in the march and members of the Kharkov-1 battalion who were guarding the action. Euromaidan activist Igor Tolmachev and police lieutenant colonel Igor Rybalchenko, died on the spot. Daniel Didik, 15, and Nikolay Melnychuk, 18, were seriously injured and died in hospital.

On 26 February, the SBU detained three Kharkov residents - Vladimir Dvornikov, Viktor Tetutskiy and Sergey Bashlykov. Investigators call them supporters of the Kharkov-based non-governmental

organisation "Oplot", which local activists link to attacks on Euromaidan participants. The investigation also claims that the detainees have "pro-Russian sentiments" and that one of them, Viktor Tetutskiy, is a former officer of the "Berkut" unit of the Russian Ministry of Internal Affairs.



Accused Victor Tetyutsky, Sergey Bashlykov and Vladimir Dvornikov (from left to right). Photo: Anna Sokolova, Graty

The day after their arrest, during an investigative experiment, Dvornikov, Tetyutsky and Bashlykov confessed to the crime. An indictment was drawn up, according to which the three detainees had committed a terrorist act commissioned by the Russian intelligence services. According to the investigation, in late 2014 Vladimir Dvornikov travelled to Russia to establish contact with representatives of the intelligence services, who in early February 2015 gave him instructions for an anti-personnel mine. For \$10,000, Dvornikov was to organise a terrorist attack. Two of his acquaintances, Sergey Bashlykov and Viktor Tetyutsky, agreed to help for a fee of \$1,000 each.

According to the indictment, Dvornikov learned about the Euromaidan activists' march planned for 22 February, informed representatives of the Russian intelligence services about his plans to commit a terrorist act during this action, and received their approval. Through a stash, he took a mine, bought a mobile phone and converted it into a detonator. On the night of February 22, Dvornikov planted a mine in a snowdrift near the Palace of Sports; Tetyutsky and Bashlykov accompanied him. They agreed that Tetyutsky and Bashlykov would observe the march and inform Dvornikov when the activists approached the place where the explosives were laid. After the signal, Dvornikov called from his phone to the number connected to the mine detonator. At around 1pm, an explosion was heard.

"Lone Guerrillas"

In April 2015, the case went to trial. Already at the first hearing, when the prosecutor announced the indictment, Dvornikov, Tetyutsky and Bashlykov declared that they were innocent and confessed under torture. A year after the attack, the victims' representative in court, Oleg Golovkov, published the results of a covert investigation - a wiretap of Dvornikov in a pre-trial detention centre, where he told his cellmate about the crime. In April 2017, due to changes in the composition of the court, the case was reopened.



The victims' representative Oleg Golovkov. Photo: Anna Sokolova, Graty

In court, after the defendants retracted their initial testimony, they began to talk about the possible involvement of the Ukrainian intelligence services in the attack. "How could the terrorists even know when and where to plant the bomb and when to explode it, if the activists themselves didn't know until the very last moment whether they were planning to march near the Shevchenko monument or near the Palace of Sports, or whether they would ever do so. Only the operative services accompanying the event could have this information," Dvornikov said during a trial in October of this year. - "In favour of the Security Service's involvement in the organisation of this terrorist act is ... Why didn't dogs and canines find the bomb during the survey and why didn't the taxi that was standing in front of the bomb site interest SBU investigators? Having analysed the chronology of the incident, it becomes clear that everything has been done to ensure that the attack took place under any circumstances. And no lone guerrilla can do that".

In October, prosecutor Vladimir Lyamar once again read out the indictment. The details of the preparation of the attack were added to it, but the classification of the crime was not changed. Dvornikov, Tetyutsky and Bashlykov are charged with crimes under Part 3 of Article 258 and Part 1 of Article 263 of the Criminal Code - terrorist acts by prior conspiracy of a group of persons, resulting in death and storage of explosives and ammunition. The maximum sentence under the articles is life imprisonment.

"Abuse of power"

Back in 2015, Vladimir Dvornikov, Viktor Tetyutsky and Sergey Bashlykov filed complaints of torture by prosecutor Vladimir Lymar and SBU investigators. The court opened criminal proceedings under the articles "abuse of power or official authority by a law-enforcement officer" and "violation of the right to defence". In May this year, the court closed the proceedings, but in November the defendants challenged this judgement in an appeal. The complaint was sent to a review to the military prosecutor's office.



Victor Tetyutsky. Photo: Anna Sokolova, Graty

"Tetyutsky was detained early in the morning. The SBU published a fragment of the arrest video. It displays that Tetyutsky shows no resistance, he is in his pants and there are no injuries on his body. Then he was taken to the SBU building," Dmitriy Tikhonenkov, Tetyutsky's lawyer, told "Graty" - Then he was taken to the temporary detention facility, where a doctor documented his injuries. He was taken to hospital where he was also recorded as injured. When he was taken to a pre-trial detention centre, bodily injuries were also recorded, which were not on the video when he was arrested.

According to Dmitriy Tikhonenkov, SBU investigators tortured Viktor Tetyutsky with electric shocks, poured water on him and imitated an execution by a firing squad. Vladimir Dvornikov and Sergey Bashlykov also reported ill-treatment. According to the lawyer, the torture case interferes with the main case.

"If a verdict is passed, but there is still an unsolved case of torture, it will raise doubts, Tikhonenkov said. - The prosecutor keeps referring to what the defendants said during the investigative experiment. But they said this under torture".

However, in a comment to "Graty", prosecutor Vladimir Lymar noted that the investigation has evidence supporting the words of the accused during the investigative experiment and the court has already examined them.

"Genocide of the Russian-speaking population"

Dvornikov, Bashlykov and Tetyutsky have been in pre-trial detention since 2015. Every two months, their detention has been extended. They have challenged these decisions on appeal and each time they have been rejected. "Staying in the pre-trial detention centre is a fact of genocide of the Russian-speaking population on originally Russian territory", Dvornikov said during one of the court hearings.

He claims that every two months he and the other defendants are prolonged "on absolutely formulaic grounds" and blames Ukrainian intelligence services and nationalists, among others, for this. He says that during the trial, the defendants, their families and lawyers are under pressure from the "anti-people intelligence service and gangs controlled by them, affiliated with a certain paramilitary organisation, the "Azov" Regiment, against which the US Congress has launched a procedure to recognise it as a terrorist organisation". Speaking about "Azov", he glanced expressively at representatives of the "National Druzhina", who regularly come to the hearings.



Prosecutor Vladimir Lymar. Photo: Anna Sokolova, Graty

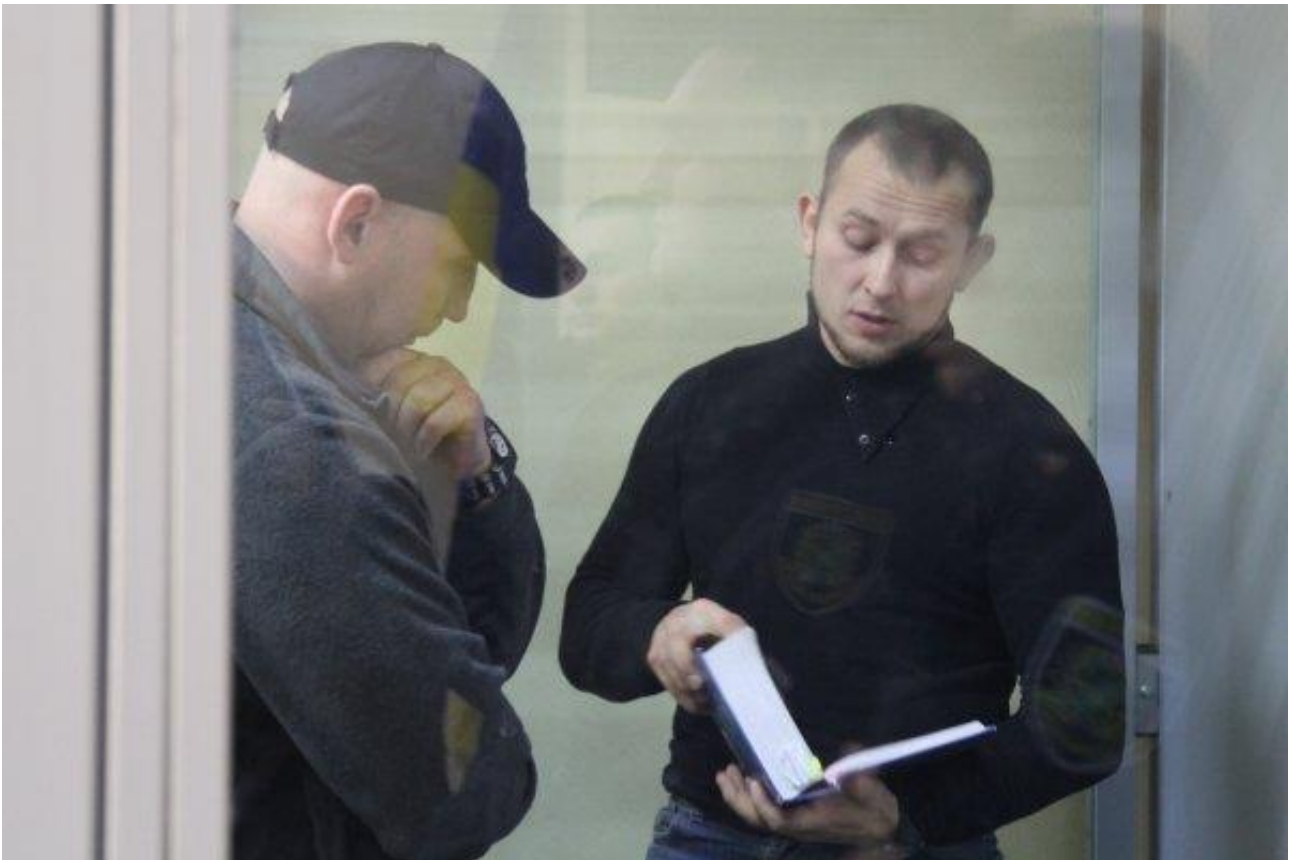
Prosecutor Vladimir Lymar, the victims and their representative Oleg Golovkov have each spoken out against the release of the accused from custody. "Taking into account the distance to the Russian Federation and the ineffective border control, we do not rule out the transfer of the accused to the Russian Federation. Tetyutsky's family moved to the Russian Federation, now he has no social ties here," says Golovkov and adds that the accused may influence witnesses.

"A negative verdict is quite expected"

From February 2019, the court moved on to the motions by the defendants and their defence lawyers. Since then, almost every hearing has started with their complaints about the conditions in the courtroom and pre-trial detention centre, requests for a table and an interpreter from Ukrainian to Russian. In July, two hearings did not take place - one of the defendants, Sergey Bashlykov, complained about his health and asked for an ambulance to be called. The same thing was repeated in December: Bashlykov asked to call an ambulance, medics recorded high blood pressure or fever, and the defendant demanded that the hearing be postponed. Both prosecutor Vladimir Lymar and victims' representative Oleg Golovkov argue that the defendants and their defence lawyers are delaying the trial.

"They believe that a negative verdict for them is quite expected and are trying to use the provisions of the so-called Savchenko law, which halves their detention period. This is the first benefit," Oleg Golovkov commented to "Graty". - And the second benefit, which they have never concealed, is that they believe that the proceedings are only politically motivated, which means that if the political course in the country changes, they can count on a change of attitude towards them before the verdict".

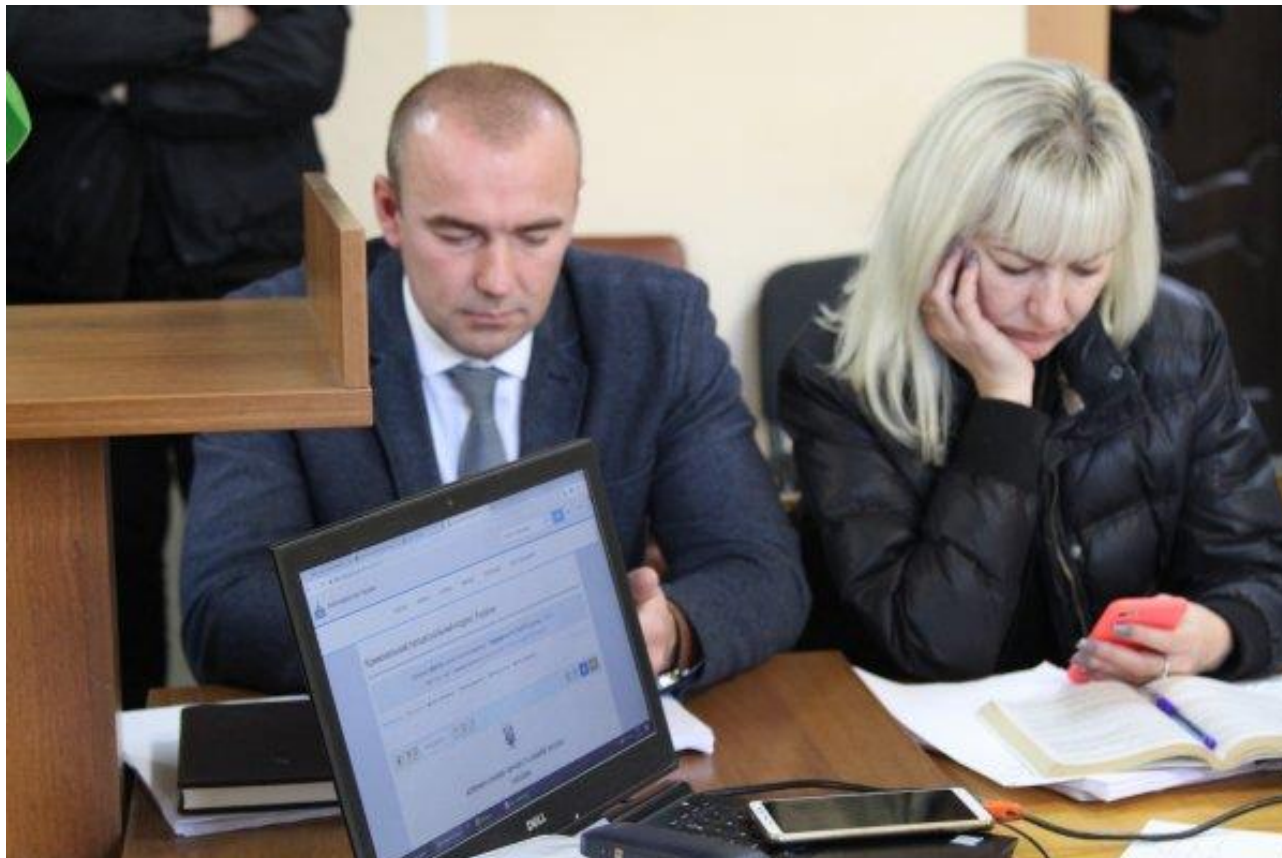
At the same time, according to the lawyer, the court in such cases cannot affect the speed of the process. "European law is trying not to limit the freedom of defense as much as possible. For example, today, the court will limit the right of the defendants to speak many long monologues and say: "Guys, the motion is not more than five minutes. And tomorrow, the European Court of Human Rights will say that the time limit is a violation," said Oleg Golovkov. By this he explains the court's tolerance to the defendants' motions.



Viktor Tetyutsky and Sergey Bashlykov (left to right). Photo: Anna Sokolova, Graty

"Quite a tense relationship"

Since the beginning of October, Tetyutsky has had several defence lawyers. On 9 October, the defendant withdrew his lawyer Dmitriy Tikhonenkov, who had been handling his case for about four years. Tetyutsky requested that he and the other defendants be released from the transparent plastic box or provided with a desk. The court did not grant this request, to which Tetyutsky responded by refusing his lawyer because, according to the defendant, "in such conditions" Tikhonenkov could not provide him with a defence.



Anton Shevchenko and Diana Dugina, from left to right, defenders of Viktor Tetyutsky and Sergey Bashlykov. Photo: Anna Sokolova, Graty

Tetyutsky was appointed a free public defender - Anton Shevchenko. He, in turn, has refused the defendant on several occasions. "My relations with him (with Tetyutsky - G') are rather strained," confirms the lawyer. The next free government lawyer recused herself because she was friends with the policeman who was killed in the terrorist attack. After that, Miroslava Dyumina became Viktor Tetyutsky's new lawyer. She several times asked to postpone the hearing, as she had no time to get acquainted with the case materials.

From time to time the defendants demanded recusal of the panel of judges, which, in their opinion, was biased. "For four and a half years the direct dependence of this collegium of judges on the body of pre-trial investigation and the prosecutor's office can be clearly traced...", Viktor Tetyutsky read out almost every motion he made for at least ten minutes.

The prosecutor answered briefly: there were no grounds for the recusal of the panel of judges, and the defendant was abusing his procedural rights. The judge agreed with him.

"No exchange without a verdict"

In late September, lawyers for the accused said they did not rule out the release of their clients during the next prisoner exchange.

"That such a question was raised, that they tried to include them there, is a fact. What are the lists now? Nobody knows that." Dmitriy Tikhonenkov, who was defending Victor Tetyutsky at the time, told reporters. - There is a high probability, let's say, that this can happen". Vladimir Dvornikov's lawyer Igor Nagorny confirmed that all three defendants are on the exchange lists.



Listeners. Photo: Anna Sokolova, Graty

A few days after the lawyers' statement, several dozen people, including representatives of the nationalist organisations "Right Sector", "National Corps", "Tradition and Order" and "Freikorps", gathered outside the building of the Kharkov Court of Appeal. They demanded that the defendants not be released until the verdict is passed. The activists chanted the slogan "A verdict for terrorists" and left tyres and a broken matryoshka doll under the court door as a symbol of a Russian trace in the case.

Since the beginning of October, activists have been attending court hearings more often, confirms Valentin Bystrichenko, one of the organizers of the actions. They came with state flags and posters "Terrorists are a threat to everyone", "No exchange without a verdict" and "Unpunished evil returns". At one of the hearings, activists pasted stickers with the demand "A verdict for terrorists" on the floor of the court corridor.

"Terrorists must be sentenced, and only then can they be exchanged, Valentin Bystrichenko told "Graty". - Those who commit crimes as part of pro-Russian terrorist groups in the Donbass must also be aware that they will pay for any crime afterwards. We are here to support this opinion.

The relatives of the victims are also waiting for the verdict and do not allow an exchange before the court's decision. "They (the accused - G') were already quite frustrated people who were willing to commit a crime for money. And I think that four and a half years in the detention facility did not add to their professional skills. So when they are released they will be people ready to be used by the FSB (Russian Federal Security Service). Who can guarantee that they will not do it again?" - Andrei Didik, father of Daniel, 15, who was killed in the attack, told "Graty".

Unlike the lawyers, the defendants themselves were skeptical about the exchange, when asked by journalists if they were aware of an exchange, Viktor Tetyutsky said during one of the hearings: "No one even theoretically offered me anything. What kind of exchange are we talking about if we are really innocent? To exchange one prison for another? What are you talking about?" outraged Sergey Bashlykov.

"We need peace and reconciliation"

From mid-November public interest in the case waned, with fewer and fewer attendees at the hearings. On 18 December, the defendants continued to file motions. Prosecutor Vladimir Lymar prematurely requested an extension of the defendants' detention, as he said he feared a disruption of the next hearings. Vladimir Dvornikov's lawyer Igor Nagorny argued in response that the defendants should be released from custody: "We have to look at the rhetoric of politicians, it has changed, they say that peace and reconciliation are needed".

"I support the lawyer," Dvornikov replied. - Although I didn't understand everything he said, because I don't quite understand the Ukrainian language, and I was not given an interpreter."

The court granted the prosecutor's motion - the defendants remained in the pre-trial detention centre until 14 February. "While you were announcing the verdict, I fainted several times," Sergey Bashlykov addressed the judge afterwards. In fact, he was sitting on the bench with his eyes closed, and when his snoring sounded in the hall, the other defendants laughed and started waking him up.

On 21 December, information about a possible exchange resurfaced. Representatives of the nationalist organisation "Freikorps" were the first to write about it. Its head Georgiy Tarasenko said in a commentary to the "Graty" that he learned about the possible exchange from his sources in the enforcement agency, but he did not specify which ones.

Many journalists and activists of nationalist organisations came to the hearings on 24 December because of the information about the possible exchange. The hearings lasted longer than usual. "There is a clear sense that the process is being forced and there is a desire to end the trial in two sessions", - Vladimir Dvornikov was indignant.



Panel of judges. Photo: Anna Sokolova, Graty

The judge rejected numerous motions by the accused in order to hear the defendants' evidence and proceed directly to the debate. Victor Tetyutsky read out a list of 545 names with contact details for about an hour and then asked the court to question them - he said they could all confirm his alibi.

"You are abusing your procedural rights," the judge interrupted Tetyutsky. "This is simply a disruption of the trial," the prosecutor agreed with him.

Tetyutsky demanded a recess for confidential communication with his lawyer, whereupon Dvornikov's lawyer Igor Nagorny asked for the hearing to be adjourned. The reason - the defendants wanted to eat.

The next day, on 25 December, relatives of the victims and activists held a protest outside the Kharkov regional state administration. They spoke categorically against the release of Dvornikov, Tetyutsky and Bashlykov as part of the exchange. A similar rally was held outside the presidential office in Kiev.

"Declared in principle"

The next hearing on 26 December began with the prosecutor's announcement of the closure of the torture case, in which Dvornikov, Tetyutsky and Bashlykov are being held as victims. The judge asked the defendants to testify, but Sergey Bashlykov intended to finish his motions. The defendant took a marker pen out of his backpack and started drawing dots and arrows on the wall of the "aquarium". The judge, not understanding what he was doing, asked him "not to work for the media".

"I want to prove that the phone, which the prosecutor claims was attached to the mine, was elsewhere," replied Bashlykov. But nothing is clear from his drawing anyway.

The court dismissed Bashlykov and moved on to the testimony of the defendants. Victor Tetyutsky was the first to speak: "I think everyone has the right to go crazy in their own way: whether by jumping on the Maidan, or by participating in the chorus of the anthem during the march, or by wrapping themselves in a yellow and blue sheet during court hearings".



Viktor Tetyutsky and Vladimir Dvornikov. Photo: Anna Sokolova, Graty

When Tetyutsky starts insulting the Euromaidan participants and the Ukrainian military, the head of the nationalist organisation "Freikorps", Georgiy Tarasenko, shouts out from the audience: "Bitch, damn it, shut your mouth".

Vladimir Dvornikov spoke next: "Turchinov and Avakov, with money from American monopolists, started a bloody human butchery in Donbass in order to provoke the Russian Federation to retaliate...". Sergey Bashlykov refused to testify. All three pleaded not guilty and the court moved swiftly to debate.

Prosecutor Vladimir Lymar reiterated that the guilt of the accused was fully supported by evidence and asked for the maximum punishment for them - life imprisonment. At the same time, he applied for their release from custody on personal recognisance.

"Unfortunately, I have to state that the Russian side, among others, in principle declared Bashlykov, Dvornikov and Tetyutsky, accused of these crimes, which once again confirms the actions of the accused to undermine the situation in Ukraine", Lymar said, "We have all witnessed the convincing evidence of the guilt of Bashlykov, Dvornikov and Tetyutsky in the incriminated offences".

Exhibit E

Polit Navigator, *How Testimonies Were Knocked out from Kharkov "Terrorists"*
(18 November 2019)

(translation)

Translation

Polit Navigator, *How Testimonies Were Knocked out from Kharkov "Terrorists"* (18 November 2019), available at: <https://politnavigator.news/kak-vybivalis-pokazaniya-iz-kharkovskikh-terroristov.html>.

How Testimonies Were Knocked out from Kharkov "Terrorists"

By Alexey Kuschin

The governmental propaganda used the explosion near the Kharkov Sports Palace on the 22nd February 2015 to the maximum extent to equate any opponents of the Maidan to terrorists.

For all these years, only one point of view has been thrown into the information space, that is the one voiced by the prosecution. However, the picture of the terrorist attack as painted by the prosecution was entirely based on the testimonies knocked out from the suspects Bashlykov, Dvornikov and Tetyutsky immediately after their arrest. The supporters of the accusatory version just ignored everything else, including the fact that the detainees were tortured and that they retracted their testimonies as soon as the trial began.



We have already acquainted the readers with details of this case and allowed the wife of Viktor Tetyutsky, a former Berkut SWAT officer and a participant of the anti-Maidan movement, to speak.

On the 18th of October, after this interview with Yana Tetyutskaya was released, the Dzerzhinsky District Court of Kharkov considered a complaint against the decision made by an investigator of the Military Prosecutor's Office of the Kharkov Garrison to close the criminal proceedings instituted based on Mr. Tetyutsky's statement of torture and abuse of power by the Security Service of Ukraine (SBU).

Investigating judge Tatiana Shtykh of the Dzerzhinsky District Court of Kharkov dismissed Mr. Tetyutsky's complaint. Nevertheless, those proceedings were resumed by order of the Court of Appeal the other day.

And today there is an opportunity to publish the point of view of Mr. Tetyutsky himself. He is sure that justice in Ukraine is still in a poor condition, and it is difficult not only to count on justice but even expect that your opinion will be heard.

"We can only guess what motivated the judge of the Dzerzhinsky District Court when she dismissed my complaint against the closure by the Military Prosecutor's Office of its criminal proceedings for torture and abuse of power", Mr. Tetyutsky writes in one of his messages from the prison. "In making that decision, the military prosecutors ignored some key aspects of this case. They ignore the fact that some unknown people in military uniform with no identification marks but with weapons and in masks abducted me at the place of my residence at about 6:40 AM on 26th of February 2015. They rushed into my apartment in droves, put me on the floor, my face down, and rest the barrel of their assault rifle against the back of my head. They did so in the presence of my wife and young child. Then they tied up plastic cords on my hands and took me out of the apartment with a bag on my head. After that, they pushed me into a car and took me to an unknown destination".

As turned out later, the people who broke into Mr. Tetyutsky's apartment were SBU officers. But when they carried Viktor with a bag on his head, he did not understand who had kidnapped him.

"The car drove to the right off the road and stopped after 150 or 200 metres. Then they took me out of the car, put me on my knees in the snow, rest the barrel of an assault rifle against the back of my head and threatened me with shooting if I did not agree to confess to committing the terrorist attack. I refused to do that. Then I heard a single shot from an assault rifle above my ear, with the first barrel still resting against the back of my head. Then they started beating me with kicks, hands and assault rifle butts. The torture went on for about 10 to 15 minutes".

Then Mr. Tetyutsky was again loaded into the car, which returned to the city. He was put into a basement, which turned out to be a shooting gallery. Other Kharkov political prisoners who were kept in the SBU's prison also mentioned that shooting gallery.

"They kept me in that shooting gallery located in the territory of the SBU's Kharkov Regional Office at 2 Myronositskaya Street for several hours", Mr. Tetyutsky says. "During all that time, they subjected me to most brutal tortures. SBU's officers tried on me a variety of their "techniques" – from death threats to banal beatings by a crowd. It finally became clear to me that nothing would stop them, and I had no chance to survive. So I gave them my verbal consent to sign whatever they wanted. They left me alone for a while. Less than one hour later, I was picked up under my arms and carried upstairs to the investigator's office. When they carried me out of the shooting gallery, I could clearly hear another man moaning in the corner. Perhaps, it was his screams that I heard from the adjacent washroom. It was clear that I was not the only one who was being tortured there. In the investigator's office, they warned me several more times that if I refused to sign the papers, they would return me to the shooting gallery where I would probably be killed".

Viktor Tetyutsky drew the Court's attention to the fact that the materials of the criminal proceedings on the explosion at the Sports Palace contains not a single page written by his hand. He stated that everything set forth in the case, from "a" to "z", had been invented and written by the SBU, and he was forced to sign it under a direct threat to his life and under torture.

"The procedural case was signed without a lawyer", Mr. Tetyutsky continues. "Lawyer Alexander Shadrin assigned by the Centre for Free Secondary Legal Assistance was not allowed to visit me by on a direct instruction from prosecutor Lymar. All this was done in order to hide the traces of torture, which were visible to the naked eye".

Mr. Tetyutsky reports that the prosecutors are also trying to soft-pedal the fact that his lawyer was prevented from performing his professional duties. Criminal case No. 420152207500001107, which was instituted upon request of Mr. Shadrin, has not yet been investigated.

"Instead of the lawyer assigned to me, they appointed lawyer Igor Ustimenko, an "alco-marathon" mate of prosecutor Lymar, who had been fraudulently pulling money out of my family for the work he allegedly did for seven months", Mr. Tetyutsky says. "In addition, on demand of prosecutor Lymar, this lawyer extorted \$10,000 from my wife for helping close the proceedings against me. Throughout the so-called "performance" of his duties, this lawyer actually committed sabotage. He simply prevented me from filing any applications or motions, including when a preventive measure was chosen for me. Ustimenko openly stated that if I want to survive, I had to remain silent – and before the Court, too. And SBU's officers took me to their shooting gallery several times more during a month following my arrest to carry out "preventive work" with the use of force".

Mr. Tetyutsky repeatedly asked lawyer Ustimenko – with no positive result – to collect certificates from the city clinical emergency hospital, the detention centre located at 35 Ivana Kamysheva Street, and Pre-Trial Detention Centre No. 27, who examined him and recorded numerous traces of beatings. The apology for a lawyer assured him that he had submitted requests for such certificates but received no answers...

One month after his arrest, Mr. Tetyutsky, contrary to the intrusive recommendations of lawyer Ustimenko, said during the trial before the Court that SBU's officers and prosecutor Lymar had subjected him to torture. Then Viktor saw TV news showing his lawyer explaining to journalists that his client had never complained to him about torture. Outraged by such shameless lies, he refused to continue using lawyer Ustimenko's services at the next hearing before the Court.

Then lawyer Dmitry Tikhonenkov engaged in the proceedings. In just one week, he managed to collect all necessary certificates confirming that Mr. Tetyutsky had been beaten and showed signs of torture.

The defendants and lawyer Dmitry Tikhonenkov

Based on the application filed by Mr. Tetyutsky, the Military Prosecutor's Office of the Kharkov Garrison opened criminal proceedings recognising him as a victim.

“Later, upon request of lawyer Tikhonenkov, the Military Prosecutor’s Office ordered a forensic medical examination, which confirmed my bodily injuries”, Mr. Tetyutsky writes. “Then military prosecutor Kharkevich, in the presence of forensic expert Danilchenko, conducted an investigative experiment confirming my injuries resulting from blows delivered with an assault rifle butt and a metal pipe to the back of my head and to my thoracic spine”.

However, as we can see, the criminal proceedings on torture and abuse of authority by SBU’s officers have not moved forward. Since 2015, those proceedings have been slowed down, closed and reluctantly resumed after complaints and appeals despite the fact that the tortures have been confirmed by doctors’ testimonies, certificates from the 4th emergency hospital, certificates of bodily injuries from the detention and pre-trial detention facilities, a forensic medical examination report on bodily injuries, and Viktor Tetyutsky’s and his wife’s testimonies. Furthermore, Mr. Tetyutsky says the materials of the criminal proceedings on the terrorist attack at the Sports Palace (case file vol. 8, paged 75 and 76) also contain evidence of torture – a video showing traces of torture on the faces of the suspects.

Exhibit F

Telegraf, *Defendants in Kharkov Terrorist Attack Demanded the Prosecutor's Recusal*
(1 October 2015)

(translation)

Translation

Telegraf, *Defendants in Kharkov Terrorist Attack Demanded the Prosecutor's Recusal* (1 October 2015), available at: <https://telegraf.com.ua/ukraina/mestnyiy/2095681-obvinyaemyie-po-teraktu-v-harkove-trebovali-otvoda-prokurora.html>.

Defendants in Kharkov Terrorist Attack Demanded the Prosecutor's Recusal

By Elena Kravchenko

Those accused of a terrorist attack requested at the Kharkov Sports Palace in February to challenge the Prosecutor in a trial before the Frunzensky District Court of Kharkov, a Court's official told *Ukrinform's* correspondent.

"The defence requested to challenge Prosecutor Volodymyr Lymar for not responding to claims of the torture allegedly undergone by the defendants. The Court dismissed that challenge as no such claims had been previously received from the defendants. Nor had any evidence of the prosecutor's omission to act been provided", the Court's official said.

The Court reportedly referred claims of torture for verification to the military and regional prosecutors' offices.

"The next hearing is in fact scheduled for the 2nd of October", the Court's official added.

According to Prosecutor Volodymyr Lymar, the motion challenging him is "far-fetched and clearly designed to delay the proceedings".

As *Ukrinform* reported earlier, an explosion occurred on Marshal Zhukov Avenue near the Sports Palace in Kharkov on the afternoon of the 22nd of February. Four people were killed on site, including a 15-year-old schoolboy and an 18-year-old student, and nine more were injured. The explosion was made remotely with the use of a mine filled with destructive elements.

On the 26th of February, three Kharkov residents, Volodymyr Dvornikov, Sergey Bashlykov, and Viktor Tetyutsky, were detained. They were charged under the Criminal Code articles "Act of Terror Resulting in Human Death(s)" and "Illegal Handling of Weapons", which carry a punishment of up to life imprisonment.

On the 6th of August, the Court extended their arrest as a preventive measure until the 17th of October.

Exhibit G

Polit.ru, *The head of Donetsk People's Republic Admits SBU Involvement in Terrorist Attack in Kharkov* (23 February 2015)

(translation)

Translation

Polit.ru, *The head of Donetsk People's Republic Admits SBU Involvement in Terrorist Attack in Kharkov* (23 February 2015), available at: https://polit.ru/news/2015/02/23/Kharkiv_zakharchenko/.

The head of Donetsk People's Republic Admits SBU Involvement in Terrorist Attack in Kharkov - POLIT.RU

The head of the self-proclaimed Donetsk People's Republic, Aleksandr Zakharchenko, has admitted the involvement of the Security Service of Ukraine in the terrorist attack in Kharkov, "Interfax" has reported.

Zakharchenko told journalists: "As for Kharkov, when the SBU finds everyone so quickly, it feels like they are doing it (staging a terrorist attack - Polit.ru commentary) themselves.

On 22 February, there was an explosion in the centre of Kharkov during the Dignity March in support of Ukraine's unity, which killed three people. According to the Ministry of Internal Affairs of Ukraine, the local group "Kharkov Partisans" is suspected of organizing the blast.

A representative of the pro-Russian organisation "Kharkov Partisans", Filip Ekozyants, denied the accusations and said that the explosion was organised on the order of Ukrainian Minister of Internal Affairs Arsen Avakov so that Kiev could impose an anti-terrorist operation regime in Kharkov Region.