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The encirclement and destruction of the Ukrainian city of Mariupol, Donetsk region, by Russia's armed forces - the site of various mass crimes under international law and in particular a case of genocide

I. Location and significance of Mariupol, port city on the Sea of Azov

Mariupol, with (today) about 400,000 inhabitants, is the second largest city in the oblast of the same name after Donetsk. Situated on the Sea of Azov, the city was an important industrial city (steel and coal) and an export port for agricultural products, making it until 2013 "the Donbass gateway to the world" Since 2014/2015, however, Mariupol has only been a shadow of its former greatness as a result of Russia's severe violations of international law, which hit the region blow by blow: this was caused by the annexation of Crimea¹, the construction of the motorway bridge over the Kerch-Yenikale Canal, which strangled the Kerch Strait, and the usurpation of the Sea of Azov (2018)², which Russia effectively facilitated as a result, and finally the covert war waged by Russia against Ukraine and the installation of puppet regimes in the eastern Donbass³. Now, due to the war openly waged by Russia against Ukraine since 24 February 2022, Mariupol as a Ukrainian port city is existentially endangered, more than that: Mariupol and its inhabitants have been threatened with genocide since the beginning of March 2022.

II. The objective facts of the crime of genocide are fulfilled by the actions of the armed forces of Russia

The crime of genocide is defined in Art. II of the United Nations Convention against the Crime of Genocide of 9 December 1948⁴. Both Russia and Ukraine, as successor states to the USSR, have declared the 1954 accession to the Convention by the Soviet Union to be binding on them. The genocide offence is also defined in Art. 6 of the Rome Statute of the International Criminal Court of 17 June 1998 with identical wording to Art. II. of the Anti-genocide Convention. Russia and Ukraine both signed the Statute in 2000, but have not ratified the treaty. For the purpose of this study, however, this is irrelevant, because both

¹ Luchterhandt, Otto: The annexation of Crimea to Russia from the perspective of international law, in: *Archiv des Völkerrechts (AVR)* Vol. 52 (2014), Issue 2, pp. 137-174.

² Luchterhandt, Otto: *Against International Law. The escalation of the conflict in the Sea of Azov*, in: *Osteuropa*, Vol. 69, 2019, issue 1, pp. 3-21.

³ Luchterhandt, Otto: *The Minsk Agreements on the Conflict in Eastern Ukraine (Donbass) from an International Law Perspective*, in: *Archiv des Völkerrechts (AVR)*, Vol. 57 (2019), Issue 4, pp. 428-465.

⁴ Luchterhandt, Otto: *International Law versus Genocide: Significant Progress - Unsolved Problems*, in: *Zeitschrift für Genozidforschung* 9. Jg. (2008), Issue 2, pp. 10 - 67.

states have submitted to the Convention on the Crime of Genocide and have thus recognised the legal validity of the crime of genocide.

(1) The Convention protects the integrity of "groups", namely national, ethnic, racial or religious groups from their destruction. The term, which is to be understood in a broad sense, also includes large human communities such as entire peoples, but also more or less large parts of them, because they are protected from destruction not only "wholly", but also "partially".

Applied to Mariupol, this means that its citizens, by belonging to the people of Ukraine, are a part of the Ukrainian nation and inasmuch are a "national group" within the scope of protection of the Anti-genocide Convention.

(2) As criminal forms of the commission of genocide, in the case of Mariupol, the following three "acts" standardised by Art. II can be considered as criminal forms of genocide:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The determination that point a) is fulfilled is unproblematic, because according to official information from Mariupol's mayor Vadym Boychenko, already well over 1300 people were killed by bombs dropped on the city by Russian forces and missiles fired at it at the beginning of March, with a sharply rising trend. The actual figures are much higher, because due to the constant shelling of the territorially extensive city great difficulties are being encountered when it comes to counting the dead. Bodies are being buried in mass graves.

The determination that point c) is fulfilled also presents no difficulties. The following facts are relevant:

Firstly, since the beginning of March the Russian forces have surrounded Mariupol on the land side, from the west, from the north and from the east, and have also cut off the city to the south, on the side of the Sea of Azov, with gunboats.

Secondly, they have complete air sovereignty over Mariupol, leaving all neighbourhoods of the city virtually defenceless against them.

Thirdly, the Russian armed forces have deliberately destroyed the civilian supply networks of the population - water, electricity, energy, heat and heating systems - leaving the population completely exposed to the persistent winter cold.

Fourthly, the systematic bombing of the residential areas, and that is, the civilian population, according to the mayor, Vadym Boychenko, well over 1000 people have now been wounded. Because of the destruction of the city's supply systems and infrastructure, even basic medical care is in question, all the more so because hospitals and other medical facilities are now not being spared from the bombardments.

Fifthly, due to the blockade of the access roads, the supply of food, medicine and other daily necessities to Mariupol has practically come to a standstill.

Sixth, the population of Mariupol has been driven to hopelessness and despair by the fact that neither the five humanitarian escape corridors from Mariupol to other regions of Ukraine, which were agreed since the weekend of 26/27 February until 12 March 2022, have proved safe and functional, nor have the supply convoys sent to Mariupol by the Ukrainian government been allowed into the city by Russian forces.

In summary, these and other circumstances leave no doubt that the citizens of Mariupol are being deliberately, i.e. consciously, purposefully and intentionally subjected by the Russian armed forces to living conditions which are capable of debilitating their physical health and resilience and destroying them - in one case sooner, in another later. Living conditions within the meaning of Art. II (c), the effects of which are not limited to this, but which, also within the meaning of Art. II(b) are already causing "serious physical or mental harm" to citizens of Mariupol and are doing so even more with each passing day.

The objective element of the crime of genocide on the part of the armed forces of Russia is thus fulfilled.

III. The subjective elements of the crime: Can the "intent" be established on the Russian side, with the acts in question, "to destroy a national... group as such in whole or in part"?

The problems posed by the characteristics of the subjective elements of the crime of genocide and the requirements to be met for its existence have long been regarded by scholars and practitioners of international criminal law as the Achilles' heel of the substantiation and proof of this most serious crime - crime under international law⁵. However, since the "Srebrenica Decision" of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the conviction of the Bosnian Serb General Radislav Krstić (2.8.2001), the first ever conviction for genocide by an international criminal court in Europe, many questions of doubt can be considered clarified⁶. This was followed by further judgements. The following remarks are based on the case law.

- (1) The proof of the "intent to destroy" requires a specific intention: the perpetrator must aim at destroying the protected group as such. Even if the perpetrator only reaches a limited number of people with the genocidal acts, the intent to destroy - going beyond that - must extend to the entire group "as such".

As far as Mariupol is concerned, it follows that the object of the genocidal intent to destroy is not those citizens who have been killed by chance since the beginning of the war, but the citizens of the city in their entirety. As already emphasised at the beginning (see II.1), this is the "national (sub-)group" whose destruction the Russian

⁵ In detail Luchterhandt, International Law versus Genocide (Note 4), p. 32 f.

⁶ Text: www.un.org/icty/Krstic/Trial. Comment: Luchterhandt, Otto: The 'Srebrenica Decision' of the International Criminal Tribunal for the former Yugoslavia and the Armenian Genocide, in: Armenian-German Correspondence Vol. 2007, Issue 3, pp. 27-30. The first ever conviction for genocide by an ICC was by the International Criminal Tribunal for Rwanda in the case of Jean-Paul Akayesu on 2.9.1998.

armed forces have in mind. This can also be proven, and in a quality that meets the requirements of Art. II of the Genocide Convention.

According to the case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, it is not necessary to prove that the murderous acts were carried out by the perpetrator according to a preconceived "plan", nor is it required to definitively prove the intention to destroy by producing any documents. Rather, indirect proof of the intention to destroy is sufficient, i.e. the use and evaluation of (objectively established) facts that allow the clear conclusion of the intention to destroy (as such) the group in question, i.e. in the present case the citizens of Mariupol as a qualified section of the entire Ukrainian nation.

The conclusion from objectively ascertainable and established facts to the subjective intent to destroy of the citizens of Mariupol can only be drawn by way of an evaluative overall view. In the first place, it must - of course - take into account the genocidal "acts" described briefly above in section II, which are defined in Art. II letters a) - (c) of the Genocide Convention (2). However, other facts that speak for a special treatment of the city of Mariupol on the part of Russia's armed forces can also be included (3).

- (2) The situation of the citizens trapped in the destroyed, wintry city of Mariupol, cut off from the supply of essential, livelihood-securing goods, and exposed to constant shelling for weeks, is the proverbial "hell", according to all the news leaking out of the city. The situation of the people is desperate, all the more so because the "humanitarian corridors" supposedly opened by the Russian forces to leave the city have initially proved time and again to be lies and roads to ruin, destroying any hope of rescue that was germinating in Mariupol. The escape corridor allowed by the Russian side to the west towards the city of Berdyansk on 15 March has now proved to be functional for the first time. About 2,000 cars and therefore probably several thousand people were able to leave Mariupol via this corridor. There is no evidence that the escape corridor is permanent or, in particular, that the Red Cross has been involved in its operation. Compared to the total population of Mariupol, however, the number of people who fled via the corridor, as much as their chance of escape is to be welcomed, is vanishingly small. Whether Russia will now abandon its genocidal actions against Mariupol and give the citizens a chance to survive is an open question that cannot be answered at the moment.

Compared to the size of the population of Mariupol, the number of wounded and dead that have been reported so far still seems small, but even the basic living conditions in the city are now so hostile and hopeless that a neutral outside observer can only conclude that the leadership of Russia's armed forces is deliberately condemning Mariupol's citizens to their deaths.

The most terrible reality and at the same time a symbol of the creeping genocide perpetrated against the citizens of Mariupol is the targeted Russian missile strike on

Mariupol's maternity clinic (reddom) on 11 March 2022⁷. The clinic, in which up to 1,700 children were born every year and which since 2017 had been financed by the Swiss Agency for Development Cooperation (SDC), was completely destroyed.

- (3) With their genocidal crackdown, the Russian forces seem to be subjecting the city of Mariupol to special treatment. One gets the impression that a gruesome example is being made of the citizenry. This could be related to the fact that in 2014, forces in Mariupol loyal to the government managed to throw out the separatists, who had initially been successful in taking power in the city,. A prominent role in the resistance at that time was played by the notorious but successful "Azov Battalion" led by right-wing Ukrainian nationalists⁸. The fact that the Russian side is now taking revenge for this is indicated by the fact that Foreign Minister Lavrov, after contradictory official statements, justified the shelling of the clinic because the clinic had long since been cleared and had in fact become a military base of the "Azov Battalion".

IV. Conclusion

Russia's leadership, specifically Russia's President Vladimir Putin, Defence Minister Sergei Shoygu and Chief of the General Staff Valery Gerasimov, are - in that order - by virtue of the Constitution of the Russian Federation and the laws governing its defence, the officials and political leaders responsible for the attack on and the war in Ukraine. They also bear the legal responsibility, or more precisely the responsibility under international criminal law for the war, because they are perpetrators of the crimes listed in Article 5(1) of the Rome Statute of the International Criminal Court: crimes against humanity (Article 7), war crimes (Article 8), the crime of aggression (Article 5(2)), but also the most serious crime known to international criminal law since 1948 - genocide (Article 6). They belong before the International Criminal Court in The Hague.

One would not like to imagine that after a hopefully imminent end to the war against international law, the world will return to everyday political dealings with those main criminals under international criminal law in the style of business as usual.

⁷ Ernst Andreas: The bombed children's hospital in Mariupol in the maelstrom of the information war, in: Neue Zürcher Zeitung, 12.3.2022, p. 3.

⁸ Heinemann-Grüder, Andreas: Hostage-takers or saviours of the state? Irregular Battalions in Ukraine, in: Osteuropa Vol. 69 (2019), Issue 3-4, pp 51 f (58 f).