

ANNEX 4 to
Veseli Defence Appeal against Decision on Motions Challenging the
Jurisdiction of the Specialist Chambers

Public

ARTICLE 142**LJUBISA LAZAREVIC
COMMENTARY OF THE CRIMINAL CODE OF FRY
1995, 5TH EDITION
“SAVREMENA ADMINISTRACIJA” BELGRADE****War crime against civilian population
Article 142**

(1) The person who, violating the regulations of international law during war, armed conflict or occupation, orders that attack be performed against civilian population, settlement, individual civilian persons incapable of fight, which had a consequence of death, heavy physical injury or heavy disturbance of the health of the people; attack without selection of the objective hitting civilian population; that murder, torture, inhumane treatment, biological, medical or other scientific experiments, taking tissue or organs for transplantation, causing great suffering or violation of physical integrity or health; displacement or re-settling or forced de-patriation or conversion to another religion; forcing prostitution or rape; application of measures of intimidation or terror, taking hostages, collective punishment, forced taking to concentration camps and other illegal imprisonment, deprivation of the right to correct and impartial trial; forced service in armed forces of the enemy force or its intelligence service or administration; forcing forced labor, starvation of the population, confiscation of the property, looting of the property of the population, illegal and self-willing destroying or taking possession of the property in great scales, which is not justified by military needs, taking illegal and disproportionately large contribution or requisition, devaluation of the value of domestic money, be performed against the civilian population, or the person who performs some of the stated acts,

shall be punishment by at least five years of imprisonment or twenty years of imprisonment.

(2) The person who, violating the regulations of international law during war, armed conflict or occupation, orders: that attack be conducted against facilities specially protected by international law and facilities and structures with dangerous force, such as dams, embankments, and nuclear power plants; that, without selection of the objective, civilian facilities under special protection of international law be hit, undefended places and demilitarized zones; long-term and large-scale damage of natural environment which may harm the health or survival of the population, or the person who performs some of the stated acts,

shall be punished by the penalty from Paragraph 1 of this Article.

(3) the person who, violating the regulations of international law during war, armed conflict or occupation, as occupator, orders or performs the re-settling of parts of his/her civilian population to the occupied territory,

shall be punished by at least five years of imprisonment.

1. Some provisions on the protection of civilian population from the consequences of the war were contained in the Hague Conventions dated 1899 and 1907. The Geneva Convention on the Protection of Civilians During War dated 1949 regulated the position of civilian population during war conflict in a more integral manner. Our country ratified this convention ("Official Gazette of the Presidium of the National Assembly of the Federal People's Republic of Yugoslavia," no. 6/50).

The provisions on wider protection of civilian population during war i. e. armed conflict are also contained in the Supplementary Protocol with the Geneva Conventions on the Protection of Victims of International Armed Conflicts dated 1977 (Protocol I), which our country ratified in 1978 (“Official Gazette of the Socialist Federal Republic of Yugoslavia – International Agreements,” no. 16/78).

2. War crime against civilian population may be performed only during war, armed conflict or occupation.

With regard to the notion of war and armed conflict, see item 3 under v) of the commentary with Article 118.

Occupation is considered to be war occupation, which consists of complete or partial taking of the territory of another state by military force. However, in order to treat the taking of a territory as war occupation according to international law, it is necessary for this territory to be really subjected to the authority of the army of the enemy, i. e. only the territory in which such authorities have been factually determined and are able to be maintained, is considered occupied.

With regard to the notion of occupation and the characteristic of temporary occupation of our territory by the enemy in the conditions of general national defense - see also item 2 of the commentary with Article 115.

3. The law mentions the forms of this criminal act, which is directed against the basic rights of citizens: their life or physical integrity, freedom, property, right to correct and impartial trial etc. Those activities are serious violations of the regulations of international war law towards civilian population during war, armed conflict or war occupation. By the activities that are not included in this Article, war crime against civilian population cannot be performed. However, it will also be possible to qualify the activities incriminated in the law as this criminal act, only if they violate the regulations of international criminal law, which means that those incriminations are actually a blank (blanketna) norm (see section I, item e?) of the commentary with Chapter sixteen).

When mentioning certain forbidden activities, in the law, it is explicitly emphasized that the respective activity is to be contrary to the law, i. e. illegal. This was done for the reason that, according to the international law, the occupation authorities have the right to certain limitations of the rights of the civilian population which is in the occupied territory. For example, forced deportation of the civilian population from the occupied territory, mass-scale or individual, is forbidden, except if it is done for the safety of the population itself, or imperative military needs (in that case, the occupation force is obliged to provide the population with accommodation, food and hygienic conditions necessary for life). Forced labor may be performed in the interest of the population of the occupied territory. Requisition (providing the food supplies, clothes and transport or providing services in labor force) may be requested for the needs of the occupation army but only in local dimensions, and taking into consideration economic power of the country and the needs of civilian population. However, by no means can the population of the occupied area be imposed with the obligation to take part in war operations against its country, nor can the mobilization of the workers to an organization of a military or semi-military character be performed. The requisition shall be illegal unless paid in money, and if this is not possible, the value taken away must be covered by a certificate. The contribution (payment of money beyond the existing taxes and the contributions that the citizens were paying before the occupation) may be requested from the population only for the needs of the occupation army or administration of the occupied territory, but the financial contribution must be in accordance with the economic situation of the country, that is, the occupied area. Furthermore, the occupator may issue money in the occupied territory, but the depreciation of the value of the domestic money is forbidden. The destruction of movable property and real estate of private persons by the occupied authorities is permitted only if it is absolutely necessary in order to perform military operations. Considering this, the procedures implemented during occupation by the occupation force which are not contrary to the

international law, although they do affect the civilian population of the occupied territory, are not a war crime against civilian population.

The legal expression "looting of the property of the population" should be understood as forced (illegible) taking away of the property of greater value or a series of taking away actions and stealing of the items of a smaller value, in case such unlawful taking away of other persons' items is not another activity from this Article (confiscation, contribution, requisition etc.). Under those conditions, it will also be looting in some cases when the property of the population is taken away without implementation of violence (e.g. taking away the property from the houses, the inhabitants of which have taken shelter/refuge-).

War crime against civilian population can also be performed in the conditions of civil war, i. e. when it is a non-international armed conflict. In that case, however, according to the 1949 Geneva Convention and the Supplementary Protocol with the Geneva Conventions on the Protection of the Victims of Non-International Armed Forces (Protocol II), the regulations of international war law are applied in limited scope, i. e. the ban of only some of the activities stated in this Article is stipulated. The ban includes the attacks against the life and physical integrity, in particular murder in all forms, injuries, torture and causing suffering, inhumane treatment, humiliating and diminishing treatment, taking hostages, deprivation of the right to a correct and impartial trial, rape, forced prostitution etc. Other activities from this Article, which are not included in the mentioned convention and the supplementary protocol, could not, in case of a civil war, be qualified as a war crime, but, probably, as another criminal act from the federal or republic legislation. It is necessary to mention here that, according to the Supplementary Protocol with the Geneva Conventions on the Protection of the Victims of War of International Armed Conflicts dated 1977 (Protocol I), also those armed conflicts in which the peoples are fighting against colonial domination and foreign occupation and against racist regimes, using the right of the people to self-determination are considered international armed conflict (and not civil war). The stated regulations on the application of the regulations of international war law to internal conflicts refer only to such armed conflicts which, in their scope and character, can be compared with a war, and they do not refer to the cases of internal unrest, isolated rebellions sabotage actions, and other sporadic acts of violence which represent a violation of the national right of the respective state, and not a violation of the regulations of the international law.

The incriminated activities have been alternatively put in the law, so that the act can be performed by each of the activities. However, if one person performs several identical activities or several different activities incriminated in this Article, this will be only one criminal act of war crime against civilian population, since in this case, it ensues from the very legal description of the criminal act that this is a unique criminal act, regardless of the number of the performed individual activities. According to the verdict of the Supreme Court of Serbia Kz-2539/56, there is one criminal act of war crime against the civilian population, in spite of the perpetrator performing particular acts in different places, against different persons, in longer time periods and in a different manner.

The civilian population is the victim of the criminal act. The criminal-legal protection includes all the civilians in the occupied territory, i. e. both the citizens of the country which is completely or partially occupied, as well as foreigners. The protection also refers to the civilians under the authority of the aggressor also when they are not in the territory of their country (e. g. murder, inhumane treatment, collective punishment and similar, of the civilian population that was taken from its country to international i. e. concentration camps in another country).

4. The manner of performing a war crime contains in ordering the carrying out of forbidden activities or in the implementation of such activities. By the issuance of order, the act has been completed and it is not necessary that there has been an action upon the order i. e. that the order has been implemented. The perpetrator of a war crime is, according to that, a person who has issued an order for performing the activities stated in the law and the person who has implemented this order.

It could be concluded from the expression "who" used in the law that the perpetrator of the act may be any person. However, such a conclusion is obviously not acceptable.

Above all, the issuance of the order for committing a war crime presumes that the ordering party is a person who, considering his official function i. e. duty he is performing, is authorized, or, considering the concrete circumstances of the case, has the real possibility to issue orders to persons to whom he is superior (military superiors, state officials, political leaders, factual commanders of military or other armed groups and similar).

On the other hand, one must bear in mind that for the performing of this act, it is necessary that it is done by violation of the regulations of international law, which obliges the active participants in war, armed conflict i. e. war occupation. For that reason, the perpetrator of this act may be only a member of a military, political or administrative organization of the side in the conflict, as well as each person in its service. A person who would, outside of the organizational system seen this way, perform some of the activities stated in this Article (e. g. murder, plunder of property and similar), would not be held liable for a war crime, but for a respective criminal act, regardless of the act being performed during war, armed conflict or occupation.

According to the above-mentioned, the war crime can also be performed by a person who is in the service of the aggressor, also in the case if he is a citizen of the attacked country. This standpoint is also represented by the practice of our courts. The Supreme Court of Croatia, in the verdict KZ-2787/57, confirmed the already previously accepted standpoint that for the existence of war crime against civilian population it is not necessary for the perpetrator of the act to have been a member of the armed formations, but that this criminal act can be performed by any person who was in the service of the occupator and his domestic accomplices, regardless of whether he was a member of armed formations or any other unarmed organizations. In the verdict of the Supreme Court of Bosnia-Herzegovina Kz-663-53, it is explicitly emphasized that the war crime against civilian population may also be committed against the own population.

5. Considering the nature of incriminated activities, this criminal act, as a rule, may be committed only with direct intention, but in some cases the possible intention shall be sufficient (e. g. with murder or violation of physical integrity i. e. health). The perpetrator need not be aware that with his actions he violates the regulations of the international law. The violation of the international law in the description of this criminal act is an objective condition of liability which particularly determines the character and framework of illegality of this criminal act, in the sense that the act must also be illegal according to international law.

6. The difference between this criminal act and genocide (Article 141) lies in the fact that the war crime against civilian population is directed against one or several citizens, and the genocide against a certain national, ethnic, racial or religious group. Besides, genocide may also be performed in peace time, and war crime only during war, armed conflict or occupation.

7. With regard to no status of limitations of this criminal act, see Article 100.

8. About the responsibility of the organizer and member of the group established to perform this criminal act, see Article 145, Paragraphs 1 to 3.

Regarding the responsibility for calling for or inciting the perpetration of this criminal act, see Article 145, Paragraph 4.

9. With regard to the possibility of pronouncing the penalty of confiscation of property, see Article 156 and 40, Paragraph 2.

10. Positive legislation, with minor editorial amendments, took over the formulation of this criminal act from Article 125 of the Criminal Law/1951.