

Grading guidelines for the final exam in JUS5730 autumn 2022

This is a 10 day home exam, which means that the candidates have had access to all materials, have been able to discuss with other students, etc. The exam has a strict word limit of 3,000 words, and papers above the word limit should be given a “fail” (but if this is the case, please contact the Faculty administration for confirmation of the word count).

The exam gives two questions, and it is indicated that question 1 will count for 2/3 of the total grade while question 2 will count for 1/3. Students would then be well advised to allocate approximately 2,000 words to question 1 and 1,000 words to question 2, but there is no individual word limit for each question.

Both questions concerns core issues about the legality of attacks under international humanitarian law. The course’s learning outcomes require students to have “good knowledge” of, inter alia:

- The principle on proportionality and military necessity, the principle of distinction between military objectives and civilian objects, as well as the prohibition against means of warfare that may lead to unnecessary suffering and superfluous injury
- The scope of application of International Humanitarian Law in different levels of conflict
- The limitations on means and methods of armed conflicts
- Protection of civilians and non-combatants
- The method and sources of international public law in general, and the sources of IHL in particular

The exam questions are clearly covered by the learning outcomes. The most relevant course literature is Dieter Fleck’s “The handbook of international humanitarian law” (4th ed, 2021). Since it’s a home exam, the exam questions are formulated with the aim that they can’t be addressed by reference to a specific section of the literature but rather expect students to draw on larger parts of the literature. However, in particular chapter 4 on general principles and chapter 7 on methods of combat will be important. The exam concerns the legality of attacks against civilian infrastructure, and many students will have found other relevant sources. The use of other literature is permitted, but students will be required to provide adequate references.

In the following, I use these abbreviations:

- “AP I” means Additional Protocol no. I to the Geneva Conventions
- “CIHL” means ICRC’s Customary International Humanitarian Law Study

Question 1 concerns the legality of an actual attack by Russian forces against Ukrainian energy infrastructure on 11 November 2022. The exam specifies that the students will apply only the facts given in the exam, and this means that it will count negatively, *not* positively, if students use other sources of facts in their analysis. The exam also provides an account of other attacks on 10 October 2022. The exam does not call for an analysis of the legality of these attacks, but the facts provide additional elements that are relevant also for the assessment of the attack on 11 November.

Many students may have found Michael Schmitt’s piece from 20 October 2022, “Attacking power infrastructure under international humanitarian law”, <https://lieber.westpoint.edu/attacking-power-infrastructure-under-international-humanitarian-law/>. In preparing the exam question, my assessment was that while students that find this piece may get some inspiration, it is a challenging piece to apply to our specific facts with a narrow word limit, and students may even have had an easier task by relying only on the course literature.

Students may structure their response in several ways, and the facts are rather limited and open for various interpretations. Some elements are, however, necessary to include, and it may be challenging to address these elements in a different order than what I suggest here:

- Students should begin with a quick qualification of the conflict, specifying that it is an international armed conflict and that the rules pertaining to IACs therefore apply.
- Is energy infrastructure a legitimate target? Students may begin with the principle of distinction, but the exam doesn't call for a general discussion of the principle. The important part, which the students should come to rather quickly, is that attacks may only be directed against military objectives (AP I arts. 48 and 52, CIHL rule 7). Students *must* discuss whether energy infrastructure qualifies as a military objective, and AP I art. 52.2 / CIHL rule 8 provide the definition: those objects which by their "nature, location, purpose or use" make an effective contribution to military action and whose destruction offers a definite military objective. Most important for us is "use", and the facts indicate that a weapons factory uses the relevant electricity grid. The infrastructure would be "dual use", and students may well conclude that the "use" criterion renders the power station a military objective. If so, students should also discuss whether it offers an "effective contribution to military action" (which it does) and whether its destruction offers a "definite military advantage" (which it does, but students may here discuss the limited effects the attack had on the weapons factory). The conclusion isn't the important element, but based on the facts it would be most prudent to conclude that the power station qualifies as a military objective.
- Even if the power station is a legitimate target, a number of other factors must be assessed.
- Precautions in attack: Have Russia taken sufficient precautions, AP I art. 57 / CIHL rules 15 ff. The facts specify that no civilians were killed by the attack and that the attack took place at night. Sufficient precautions were probably taken. However, some students discuss art. 57 para. 3 on the choice between different targets. It can be argued that if the aim was to disrupt production at the weapons factory, the factory itself could have been attacked. Some students may make relevant arguments here both concerning precautions and proportionality.
- Proportionality: AP I arts. 51.5.b / CIHL rule 14 prohibit attacks against military objectives if the attack "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". The attack itself was without civilian casualties, but students must discuss the relevance of the following consequences in terms of power loss during the winter – indirect consequences may be relevant for the proportionality assessment if they are foreseeable and have a sufficient causal link, but students should provide a legal basis or a justification for including this.
- It may be relevant here (or somewhere else) to mention the allegation in the facts that the main purpose of the attacks may not have been to obtain a military advantage but to worsen living conditions across the country. Some students stray into a discussion of the attacks against energy infrastructure in general, arguing along the lines that the massive attacks across the country are disproportionate. Students should assess the proportionality of this particular attack alone.
- Students may also consider whether energy infrastructure is covered by AP I art. 54 on objects indispensable to the survival of the civilian population, see below, but the facts don't suggest that this is the case for our specific attack. Some students also discuss AP I art. 56 on protection of works and installations containing dangerous forces, but I don't necessarily see that this is relevant – if it is discussed, students should justify it well.

There is little doubt that many of the Russian attacks on Ukrainian energy infrastructure violate international humanitarian law, but it is not clear whether this applies to the specified attack on 11 November.

Some students continue to discuss whether the attack constitutes a war crime. In my opinion, the exam question doesn't call for this assessment. It should, perhaps, not be held against the students if they include it, but it may take up words that could have been used better for other issues.

Question 2 is a more theoretical question about the legality of attacks against a country's water infrastructure. It addresses many of the same issues as question 1, and students may find it useful to refer to discussions above to save words. Some students have observed that the question doesn't specify whether it concerns only IACs or also NIACs. Both alternatives must be accepted.

The crucial point here is the assessment of legitimate military targets and to see the difference between energy infrastructure and water infrastructure, where the latter to a lesser extent may be considered as military objectives. A difference lies in AP I art. 54 on protection of objects indispensable to the survival of the civilian population, where para. 2 states that it is "prohibited to attack ... objects indispensable to the survival of the civilian population, such as ... drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population ... whatever the motive". Further, para. 3 states that para. 2 doesn't apply to objects used "in direct support of military action", but even then with the disclaimer that "in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement". Fleck's "Handbook" discusses this in section 7.24, which most students will have found.

These guidelines are written before I've read any papers, and it's difficult to predict how students will have responded. I would, however, say that the questions concern fundamental rules and principles under IHL, and it is warranted to set high standards. To obtain the best grade, students should demonstrate good knowledge of the rules and also apply these well to our facts, and also have a good structure. To obtain the lowest "pass" grade, students should also find most relevant rules and be able to apply these to the facts, but a threshold for pass/fail would be whether students demonstrate appropriate knowledge of the fundamental principles. Serious misunderstandings of the principle of distinction or of the definition of military objectives could, for example, point in the direction of an F.

This version of the guidelines is revised on the basis of reading a number of exam papers.

Oslo, 19 December 2022
Kjetil Mujezinović Larsen