

Grading guidelines for the final exam in JUS1730 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 each question counts for 1/2 of the total grade. Students would then be well advised to allocate approximately 1,500 words to each question, 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 “general 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 Nils Melzer’s “International Humanitarian Law: A Comprehensive Introduction” (2019). 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 3 on the conduct of hostilities will be important. The exam concerns the legality of attacks against civilian infrastructure or civilian objects, 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 attacks against energy infrastructure. It is formulated as a theoretical question (essay question), but questions from students during the exam period suggest that some have been uncertain about whether it is a case question since it is linked to the facts of 10 October. As long as the relevant rules are addressed, both approaches should be permitted.

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 provides an account of attacks on 10 October 2022. The exam does not necessarily call for an analysis of the legality of these specific attacks, but the facts provide elements that are relevant for the students. The question calls specifically for a discussion of the relevant “principles on the conduct of hostilities”, and good papers should focus on the principles and not only on specific rules.

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 independently 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. Some elements are, however, necessary to include, and it may be useful to address these elements in the following order:

- Students may 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, but since this is also specified in the question, it's not necessary to address. Students who venture into rules pertaining to non-international armed conflicts may, on the other hand, be criticized.
- Is energy infrastructure a legitimate target? Students should address the principle of distinction, and the exam allows for a general discussion of the principle. The important part 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", but the facts don't provide details. Energy infrastructure would be "dual use", ie. used by both civilian and military objects, and students may well conclude that the "use" criterion renders energy infrastructure a military objective. If so, students should also discuss whether it offers an "effective contribution to military action" and whether its destruction offers a "definite military advantage".
- 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. Again, the facts provide little detail, but students should discuss on a general level.
- 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 attacks resulted in civilian casualties, but the facts don't necessarily imply that the attacks were disproportionate. Students need to demonstrate knowledge of the principle. Students should also 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. 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.
- Students may also consider whether energy infrastructure is covered by AP I art. 54 on objects indispensable to the survival of the civilian population.

There is little doubt that many of the Russian attacks on Ukrainian energy infrastructure violate international humanitarian law, but attacks against energy infrastructure are not illegal per se. Students should discuss in a balanced manner.

Question 2 is a case question that must be considered quite easy. Many students on this level may be without legal training, and we should allow for different approaches to the question. In a specific lecture on exam preparation, students were encouraged to use the IRAC method – issue, rule, analysis, conclusion. Students should initially provide a quick qualification of the conflict, establishing that the rules of IACs apply. The crucial point in the question is that it is a pedestrian bridge, and it would almost certainly be considered as a civilian object under AP I art. 52. Students have, however,

been told in the teaching that bridges may be legitimate targets, and I expect many students to discuss “nature, location, purpose or use” under art. 52 para. 2. The facts offer little detail, but the characterization of the bridge as a “symbolic target” should suffice to characterize it as a civilian object that can’t be targeted. For my own sake, I wouldn’t expect further discussions (precautions, proportionality, etc.), but if students discuss this, they should be assessed on whether the discussion suggests a misunderstanding about the application of these principles – a civilian object may not be targeted even if precautions are taken or the attack is proportionate, these principles would only apply if the object was an otherwise lawful target.

The second part of the question asks for an assumption to be made that the attack was illegal, as it asks whether the attack amounts to a war crime. Here, I expect students to go to Melzer’s textbook chapter 7.V on individual criminal responsibility, particularly section 2 on war crimes. The discussion there shows that “serious violations of IHL” constitute war crimes, defined as “grave breaches” of the Geneva Conventions and AP I or other serious violations recognized as war crimes in the ICC Statute or in customary law. In AP I, grave breaches are discussed in art. 85, and neither alternative there fits well for our specific attack. Students applying the ICC Statute encounter the challenge that neither Russia nor Ukraine is a party to the Statute, but Ukraine has accepted *ad hoc* jurisdiction of the ICC for the conflict. I don’t think students need to discuss the jurisdictional issue in-depth. They should anyway find the ICC Statute art. 8, where para. 2(b)(ii) lists intentional attacks against civilian objects as a war crime. We shouldn’t expect much from the discussion here, since the textbook doesn’t provide much details, but students who show that the definition of war crimes differs in the ICC Statute and in AP I should get credit.

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 knowledge of the rules and describe them with a good level of precision, 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.

A revised version of these guidelines will be distributed on 19 December. Please notify me before this if you come across issues in the papers that should be addressed in the guidelines.

Oslo, 9 December 2022
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