

Note: The document outlines and explains the answers to the exam questions. The potential solutions presented here do not claim to be comprehensive. Conversely, a comparable level of detail was not expected. It was not necessary to address all pertinent aspects or reach a depth similar to our explanations in order to obtain a full score. A different examination sequence or analysis framework could also be chosen, insofar as this is objectively and structurally justifiable in relation to the question at issue.

Question 1

M, an international manufacturer of trucks, notices with growing concern that its trucks are heavily used in Myanmar to transport military troops that are used against peaceful demonstrators to suppress protests against the military coup. Several innocent civilians are beaten up or even shot dead. In this tense situation, the company receives a new order from the military in Myanmar. The CEO is worried about legal consequences for her or the company.

You are the General Legal Counsel of M. The CEO asks you for advice regarding her or the company's criminal liability under the Rome Statute. M is incorporated in an ICC state party. Provide a brief response.

In order to clarify the criminal liability of the CEO and the company M under the Rome Statute of the International Criminal Court (hereafter: the ICC Statute), it must first be ascertained whether and to what extent the Rome Statute applies to the activities in question.

In this respect it is advisable to distinguish between actors, localities, and potentially criminal conduct.

Preliminary remarks

According to Art. 11 ICC Statute, the ICC only has jurisdiction over those cases committed after the entry into force of the ICC Statute on 1 July 2002. Basically, if a State accedes to the ICC Statute at a later date, the Court can only exercise jurisdiction in respect of those crimes committed after the Statute entered into force for that State.

Even if the facts of the case do not provide any further information on this, it can be assumed that the time requirement is met.

1. Actors (Jurisdiction *ratione personae*) [2 Points]

The ICC Statute follows the principle of individual criminal responsibility. According to Art. 25 para. 1 ICC Statute, the ICC only has jurisdiction over natural persons. The second paragraph

of Art. 25 ICC Statute further stipulates that only natural persons can be prosecuted as individually responsible and liable to prosecution.

Interim conclusion: Art. 25 of the ICC Statute shows that company M, as a legal person, cannot incur criminal liability under the ICC Statute. By contrast, natural persons, such as the CEO, managers, directors, or employees fall under the jurisdiction of the ICC Statute.

2. Localities (Jurisdiction *ratione loci*) [2 Points]

The jurisdiction of the ICC is limited to offences committed either on the territory or by a national of a contracting state. The ICC Statute thus follows the territoriality principle and the active personality principle for jurisdiction. According to Art. 12 ICC Statute, any State that becomes a party to the Statute automatically recognises the jurisdiction of the ICC.

In casu, the company has its registered office in a state party of the ICC. One may infer from the facts of the case that the CEO and other employees might be nationals of a state party; however, this would need to be determined in each case. Furthermore, impugned actions in M which contribute to ICC crimes would fall under the local jurisdiction of the ICC irrespective of the nationality of the actor.

Myanmar for its part is not a state party.

3. Potentially criminal conduct (international crimes/jurisdiction *ratione materiae*)

The peaceful situation in Myanmar was overturned with the military coup on 1 February 2021. The military has taken power in the country and is suppressing civilian protests. In particular, gatherings of civilian demonstrators are broken up violently and with the use of armed force. Demonstrators are detained, beaten and otherwise abused. As these are potential acts of the state military against its own (unarmed) civilian population, they could constitute crimes against humanity under the ICC Statute.

Company M, as a manufacturer of trucks, has been supplying the Myanmar military since before the outbreak of violence in 2021. In this respect, these actions can be distinguished in terms of time from the military coup as follows:

- Previous deliveries of trucks
- Future delivery of trucks

Especially for the time after the military coup, it seems crucial that the world public (and thus also the CEO of Company M) has learned about the actions of the military in Myanmar.

The ICC only has jurisdiction over the crimes listed in Article 5 of the ICC Statute, i.e. genocide, crimes against humanity, war crimes and the crime of aggression. The individual elements of the crimes are specified in more detail in Art. 6-8bis of the ICC Statute and the ICC's elements of crimes.

The CEO as a natural person could face criminal liability for several crimes within the meaning of Art. 5 of the ICC Statute as a result of doing business with the Burmese army.

In casu, the ICC's jurisdiction could arise on the basis of crimes against humanity. As crimes against humanity, Art. 7 ICC Statute criminalises any of the aforementioned acts committed in the course of a widespread or systematic attack against the civilian population and with knowledge of the attack.

3.1. Actus Reus – Material element

3.1.1. Chapeau Crimes against Humanity [2 Points]

The objective elements of the offence first require the existence of a widespread or systematic attack against the civilian population. An attack is understood to be the multiple commission of acts within the meaning of Art. 7 para. 1 ICC Statute (Art. 7 para. 2 ICC Statute).

The attack must be extensive or systematic, whereby these terms are to be understood alternatively according to Art. 7 para. 1 ICC Statute. "Extensive" in a quantitative sense requires a large number of victims or a large (in terms of intensity and spatial extent) scale of violence. An attack is seen as "systematic" if it is qualitatively expressive based on a specific policy, ideology or planning of the attacker. These two conditions only apply to the attack as a whole; the characteristics do not have to apply to the individual acts; however, there must be a certain functional connection.

In casu, military units use lethal force against unarmed civilian demonstrators. The use of lethal force against peaceful civilians, including women, youths and children, which is taking place over an extended period of time, can prima facie be considered a widespread attack against the civilian population, given the quantity of actions by the military and the casualties. According to the facts of the case, non-lethal force is used by military personnel against unarmed civilian demonstrators as well. Protesters are beaten up by the military. In addition, the military orchestrates the suppression of protests. Due to the context of the military coup, which is defended by armed force of the military, the acts of commission can prima facie also fulfil the policy element of systematic attack, because the attacks are directed against a select category of civilian victims, namely opposition protesters. The context element is thus fulfilled.

The attack must be directed against the civilian population. According to the facts of the case, the acts were directed against peaceful civilians. Taking a realistic view of the facts, the military is therefore acting against opponents of the regime and thus against civilian demonstrators, and not against members of combat forces who are authorised to engage in acts of war (combatants). The victims of the attacks may also belong to different social groups, which would affect the civilian population to a certain extent.

Specific individual offences in casu include, in particular, intentional homicide (Art. 7 para. 1 lit. a ICC Statute), deprivation of liberty or other serious deprivation of physical liberty (Art. 7 para. 1 lit. e ICC Statute), persecution (Art. 7 para. 1 lit. h ICC Statute) and other inhumane acts (Art. 7 para. 1 lit. k ICC Statute).

3.1.2. Individual acts [2 Points]

Additionally, a connection between the individual act and the overall act is required, i.e. the individual act must fit into the overall act in terms of its aim, nature or consequences. In casu, the aim of the attacks is to intimidate the opponents of the regime. The acts, namely killing, injuring and persecuting civilian demonstrators, are suitable to achieve the goal of the overall act (intimidation). Thus, there is a connection between the individual act and the overall act.

Interim conclusion: The objective requirements for the crime against humanity according to Art. 7 para. 1 ICC Statute are fulfilled.

3.1.3. Mode of liability [6 Points]

The extent to which the supply of vehicles to the military regime entails criminal risks under the ICC Statute for the CEO is to be discussed with a view to the forms of participation in Art. 25 ICC Statute. In particular, the aiding and abetting or other assistance in Art. 25 para. 3 lit. c ICC Statute must be addressed as the CEO is not involved as a direct (co-)perpetrator.

The acts of the CEO are not committed for the realisation of a common plan of crime. Taking a close look at the facts of the case, there is no joint consent with the leaders of the military to commit crimes in Myanmar; neither in the past nor in the future.

According to Art. 25 para. 3 lit. c ICC Statute, aiding and abetting is mentioned as a form of assistance. Aiding means that the aider and abettor provides practical or actual support for the principal offence, whereas abetting means moral or psychological support. The decisive factor for the criminal liability of the CEO as an accessory is the extent to which a natural person provides support to the principal offence.

However, Art. 25 para. 3 lit. c ICC Statute does not provide any criteria as to when an act of assistance exists. Therefore, the criteria recognised in the case law of international tribunals and supporting doctrine must be drawn on to substantiate Art. 25 ICC Statute. In terms of ICC jurisprudence, not every completely minimal assistance to the principal offence is sufficient. Ultimately, a substantial contribution to the principal offence is required. It seems questionable whether there was assistance in the sense of the ICC Statute in that a substantial contribution was made by the company and the CEO. In casu, the Myanmar military has been using the international company's trucks for some time; not necessarily for illegal, let alone criminal purposes.

The new order of trucks falls into a period in which the military is carrying out acts against the civilian population that are relevant under international criminal law. It can be assumed that the trucks would be used to commit acts of crimes against humanity. In fact, the trucks not only facilitate troop transport, but are a necessary logistical means to suppress sporadic and unorganised protests with military forces. In this respect, the trucks facilitate the commission of crimes. The delivery of the ordered trucks to the military regime can be seen as the provision of substantial means and, hence, support for committing the crimes.

Interim conclusion: The delivery of trucks fulfils the criterion of substantial contribution to the principal offence in the sense of supporting the principal offence. By contrast, there is no co-perpetration.

3.1.4 Causation [2 Points]

Art. 25 para. 3 lit. c ICC Statute requires a causal connection between material support and individual. This element of liability is not understood in the strict sense of the *condicio sine qua non*. Rather, it is sufficient that the accessory's contribution to the offence has promoted, favoured or facilitated the crime and hence increased the risk of its commission.

In casu, the delivery of trucks would in any case promote, or at least facilitate, the commission of the principal offence. The logistical support would therefore have a beneficial effect on the commission of the crimes against humanity by the main military perpetrators.

However, support contribution must be linked to individual acts. In practice, it may prove difficult for prosecutors to show that the requirement of causation is met with regard to certain individual acts.

3.1.5. Interim Conclusion

Aiding and abetting the principal offence under international criminal law could be fulfilled materially by the delivery of the trucks to the military regime in Myanmar.

3.2. Mens Rea – Mental element [4 Points]

The subjective elements (mens rea) of the offence require general intent within the meaning of Art. 30 ICC Statute and, in the case of crimes against humanity, knowledge of the attack (i.e. the context). Criminal liability for aiding and abetting under Art. 25 para. 3 lit. c ICC Statute requires knowledge of the support of the principal perpetrators. The perpetrator must be aware that her/his conduct promotes the commission of the principal offence. It must be proven that the aider and abettor is aware of the essential features of the principal offence and therefore knows that it will in all likelihood come to pass.

In casu, a differentiation must be made here with regard to temporal aspects.

Taking a true-to-life view, it can be assumed that the CEO for the **past deliveries** of trucks was unaware of the actions of the military. The deliveries were made prior to the political unrest in Myanmar. It is true that Myanmar has a long history of military dictatorship, which only ended in 2015 with free democratic elections. Nevertheless, it could not have been foreseen by a company or a CEO that the military would carry out another coup. In this respect, the necessary preconditions for intent are lacking here.

The situation is different for the **new orders**. Due to the military coup that has become known, it can be assumed that the CEO is well aware that the supply of trucks supports the main perpetrators and that the trucks may play an important role in the military logistics to suppress the peaceful demonstrators. The knowledge of the supporting role and its consequence with respect to actions carried out by the main perpetrators in terms of types and venues of commission could therefore be present and trigger liability.

However, it is questionable whether the threshold of intention to facilitate prescribed by Art. 25 para. 3 lit. c ICC Statute would be met. This is because the provision requires, in addition to knowledge in support of the principal offender, that the act of support is carried out for the purpose of facilitating the commission of the principal offence. The aider and abettor must be concerned with the facilitating effect of their action.

In casu, it can be assumed that the CEO primarily pursues only the economic interests of his company. The commission of the main offence is neither intended nor integrated into an economic agenda. However, two points of connection are ambivalent in this respect.

Firstly, it could be implied that the purpose of facilitating the commission of the principal offence, although not pursued as a primary objective by the CEO, is understood as a **necessary intermediary objective**. An intermediary objective is defined as circumstances which, from the point of view of the contributing actor, are indispensable to the achievement of the ultimate objective. There is therefore a means-purpose relationship between the necessary intermediate goal and the ultimate goal. The intermediate goal could even be undesirable without this excluding the intention. One may therefore argue that facilitating the commission of the principal offence was intended as an undesirable intermediate goal of the CEO in order to ultimately conclude the sales contract for the trucks.

Secondly, it could be argued that the CEO is acting with **wilful blindness**. Wilful blindness means that the CEO deliberately ignores facts and circumstances in order to downplay criminal liability risks. Nevertheless, in view of the descriptions in the facts of the case, it will hardly be possible to withdraw to such ignorance. Rather, it seems plausible that the delivery of trucks with the intermediate goal of facilitating the commission of serious crimes was known and ultimately wanted.

In order to possibly exclude her intent, the CEO could seek assurances from the military regime to prevent deployment in conflict regions. Here, though, it seems central on the one hand that she receives a credible assurance, and on the other hand that consequences are provided for if such an assurance is not given or if the assurance is violated. Otherwise, there is a risk that the CEO's behaviour could be interpreted as wilful blindness.

All in all, there is a considerable risk of prosecution if the CEO pushes business with the military regime in Myanmar without reliable guarantees.

3.3. Grounds for Excluding Criminal Responsibility

No grounds for excluding criminal responsibility are apparent.

3.4. Interim Conclusion

With regard to the conduct of the CEO, a temporal distinction must be made between earlier and future deliveries. The analysis has shown that for the past deliveries there is little to support a criminal case against the CEO. In particular, the mental requirements are lacking. For future deliveries and a continuation of the business practice as before, however, there appear to be

risks under international criminal law. The delivery of logistics to the military could violate international criminal law.

Alternative solution: Supporting Group Crime

Yet, if one were to conclude that the preconditions for aiding and abetting have not been shown, it would be necessary to assess liability for the subsidiary offence of supporting a group crime pursuant to Art. 25 para. 3 lit. d ICC Statute. This is the broadest form of participation in the act of another person.

According to Art. 25 para. 3 lit. d ICC Statute, the subsidiary form of liability requires a completed or attempted crime under the ICC Statute committed by a group. A group means any association of at least three persons acting for a common purpose. Any voluntary contribution to the offence that is not already covered by another form of participation (e.g. aiding) is punishable. The contribution to the offence must represent a significant contribution to the commission of the crime. Overall, this rule covers forms of indirect support for crimes under international law, such as financial support.

In casu, international crimes are committed by members of the regular military in Myanmar. Thus, the quantitative element of the group is present. The supply of logistics is in principle a sufficiently substantial contribution to the commission of the crimes. This is because, as stated above, the trucks facilitate the mobility of the military personnel, who can thus react quickly to spontaneous gatherings of people and demonstrations. A substantial contribution to support the group is present.

Subjectively, however, there are qualified requirements. The contribution to the offence must (i) be made with the aim of deliberately promoting a group crime or the special criminal purpose of the group or (ii) be made with the knowledge of the (special) criminal intention of the group.

In casu, the CEO's sole concern is the economic interest. Thus, the CEO does not pursue the goal of consciously promoting a group crime. However, the alternative mental element of sufficient knowledge related to the special criminal intention of the military could be more problematic. This form of participation under Art. 25 para. 3 lit. d ICC Statute indeed intends to capture contributions in full awareness of criminal risks like financial and other indirect support of international crimes.

Overall, there remains a certain risk of criminal liability under Art. 25 para. 3 lit. d ICC Statute if the company decides to do business with Myanmar.

There are no indications in the text that the CEO or any other employee had intent or knowledge as regards group crimes or criminal group intentions at the time of earlier deliveries.

4. Overall Conclusion

The analysis has shown that the company as a legal entity does not have to fear prosecution by the ICC. For the CEO as a natural person, by contrast, there are certain risks of criminal prosecution. A temporal distinction must be made between past deliveries and future deliveries.

While the risk of prosecution for past deliveries appears to be low, the CEO is advised not to continue with past practice in order to minimise the risk of prosecution.

Question 2

After the killing of its long-time strongman president D, country T experiences a transition to democracy. In this process, the new president wants to address a period of extreme violence and coordinated suppression of unrest by government forces (leaving thousands dead or locked up in detention centres) from 1996-1998. A religious minority was even expelled during this time because the Government saw the group as a persistent security threat and also sought the support of the leaders of the dominant religion. He reckons that T's own court system is still too fragile to deal with these crimes. T has already joined the ICC and now intends to defer this period of extreme violence to the ICC.

Would the ICC have jurisdiction over these alleged crimes? What alternatives could T's president propose to hold perpetrators accountable for these crimes?

1. Jurisdiction of the ICC [2 Points]

The jurisdiction *ratione materiae* of the ICC is limited to core crimes under international criminal law. Prima facie, the ICC could have jurisdiction in this respect, namely for possible core crimes of genocide and crimes against humanity.

However, jurisdiction is in doubt as regards the jurisdiction *ratione temporis*. From a temporal point of view, the jurisdiction of the ICC according to Art. 11 para. 1 and Art. 126 para. 1 ICC Statute only extends to crimes that were committed after the entry into force of the ICC Statute. The ICC Statute entered into force on 1 July 2002, yet the international criminal offences occurred in the period between 1996 and 1998.

Therefore, jurisdiction is excluded *ratione temporis*.

2. Alternatives [18 Points]

There are various options available as alternatives to prosecution by the ICC to hold perpetrators accountable for core crimes.

A first option is the **international prosecution** of those responsible for international crimes and serious human rights violations in other courts. International prosecution may be entrusted to international courts or to mixed national-international courts. Since the jurisdiction of the ICC is unavailable (even after a potential referral) and national prosecution cannot be effectively implemented, T's president could politically commit himself to the establishment of an international tribunal, modelled on the two *ad-hoc*-Tribunals in Yugoslavia and Rwanda, organised under the auspices of the United Nations. These International Criminal Tribunals were established by the UN Security Council under Chapter VII of the UN Charter in response to serious human rights violations. In this respect, T's president would have to lobby politically for a resolution under the UN Statute under Chapter VII. However, the chances of success for

this option of international prosecution are very low. Finally, T's president could politically commit to and lobby for a mixed national-international tribunal (hybrid tribunals), modelled on the Kosovo tribunal, the Special Court for Sierra Leone or the Special Chambers for East Timor. If the international community takes interest, this option has a higher chance of success; in particular since hybrid tribunals offer much more flexibility and come in many different forms.

A second option would be to outsource the judicial prosecution to willing third countries, if perpetrators reside in these states. Such national prosecutions of international crimes in T would be based on the principle of **universal jurisdiction**. This means that the prosecution of offences against universally protected legal interests (as is the case with core crimes) is possible by a national state even if the offence was not committed on its territory, neither by one of its citizens nor against one of its citizens.

A third option would postpone national prosecution in country T until the national jurisdiction is efficient enough to prosecute the perpetrators. For the time being, the establishment of **international fact-finding mechanisms** could prevent impunity. Such mechanisms, like the International Commissions of Inquiry or Fact-Finding Missions, under the auspices of the United Nations Human Rights Council in Iraq, for Libya or Syria etc., could collect information, evidence, secure witness and victims' testimony until the national judiciary is strong enough to honour the results of these investigations in a trial.

A fourth option is to clarify past injustices through so-called **truth commissions**. In truth commissions this is done without the power to punish, because the goal of these commissions is to clarify the injustice (rendering truth instead of punishment) as such. These truth commissions aim to officially recognise the historical injustice and record it for posterity. Truth commissions do generally have a strong victim focus, so that the testimonies of the victims are in the foreground. Nevertheless, statements by perpetrators are equally collected. They are encouraged to testify and take responsibility. Their coming forward may sometimes be rewarded with amnesties or diversion.

A fifth option is to sanction perpetrators outside the criminal law. This could be **disciplinary measures** or dismissals (lustration) of political, economic or military leaders and public service employees of the old order.

Question 3

What is the function of preliminary examinations in the legal process at the ICC? Briefly describe this phase.

1. Preliminary Remarks [4 Points]

The preliminary examination phase is part of the pre-trial process at the ICC. It is considered a formal stage of the proceedings before the actual formal investigation. It is regulated in particular in Art. 15 and 53 ICC Statute, in the ICC Rules in No. 46 et seq. 50 and 104 and in the OTP Regulations under No. 25.

2. Phases of Examination [12 Points]

According to the OTP Policy Paper on Preliminary Examination, the preliminary examination stage basically contains four phases for examining communications and referrals.

1. Screening of the complaint. Here, those reports are filtered out which concern incidents that obviously do not fall within the jurisdiction of the Court.
2. Assessment of the offences that may have been committed in legal and factual terms.
3. Assessment of the admissibility of possible cases from the point of view of the principle of complementarity and gravity under Art. 17 ICC Statute
4. Consideration of the Interests of Justice.

During these phases the OTP has no coercive powers as no formal criminal investigations into particular offences have been initiated at this stage.

After these phases for the examination of complaints have been carried out, a decision is made as to whether investigations under Art. 53 para. 1 ICC Statute are to be initiated or whether the proceedings are to be discontinued.

3. Special requirements for proprio motu proceedings [4 Points]

In principle, the preliminary examination process applies to all three trigger mechanisms at the ICC, i.e. state referral, Security Council referral and proprio motu proceedings). Nevertheless, in proprio motu proceedings under Art. 15 ICC Statute, preliminary investigations will be more extensive and specific mandatory judicial authorisation required before the case can proceed review (Art. 15 para. 3 ICC Statute and Art. 53 para. 1 lit. a to c. ICC Statute).

If there is a reasonable basis for pre-trial proceedings, the Prosecutor in proprio motu proceedings must ask the Pre-Trial Chamber for permission to continue the proceedings (Art. 15 para. 3 ICC Statute). At this stage of the proceedings, victims of the crime may also make submissions (Art. 15 para. 3 sentence 2 ICC Statute as well as ICC Rule 50 para. 3).

If the Pre-Trial Chamber confirms a sufficient basis for investigation, the Prosecutor may begin the actual investigation (Art. 15 para. 4 ICC Statute). However, this is without prejudice to a later decision on the jurisdiction of the ICC and the admissibility of the case.

If the Pre-Trial Chamber does not see a sufficient basis for investigation, the Office of the Prosecutor (OTP) may make a new request based on new facts or evidence (Art. 15 para. 5 ICC Statute).

Question 4

Protecting societies from organised crime, including tackling trafficking in human beings, is a priority under the new EU Security Union Strategy. Trafficking in human beings is a highly profitable crime that brings enormous profit to criminals while incurring a tremendous cost to society.

Human trafficking is defined as recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the

threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

According to a recent study of the EU Commission, the estimated global annual profit from trafficking in human beings amounts to EUR 29.4 billion. Trafficking for sexual exploitation remains the most prevalent form (60%), followed by labour exploitation (15%). 14 145 victims of trafficking in human beings were registered in the 27 EU member states in 2017-2018 alone. Worldwide the number are much higher and most victims come from outside the EU, mostly poor Sub-Saharan African, South Asian, and Southeast Asian countries.

You are a human rights activist. Your group is of the view that EU activities are not enough. Should human trafficking become an international crime? Do you agree with regard to the typical elements that distinguish international crimes from other types of offences?

1. Characteristics of International Crimes [2 Points]

At the beginning of the analysis, a basic distinction between transnational and international criminal law is needed.

International criminal law, by contrast, concerns the international community as such. Thus, in order to identify and classify international crimes, three tests have been developed. The “international element” test relates to the extent to which the crime represents a violation of fundamental tenets of international law. The "conscience shock" test examines the gravity of the crime by assessing the extent to which the crime is shocking to all nations. The "context" test recognizes that international crimes are committed in larger contexts (such as systematic or widespread violence or large-scale disregard of lawful warfare) and that individual acts fit into that context.

ICL must be distinguished from **transnational criminal law** is based on the goal of prosecuting and punishing transnational criminal behaviour through cooperation between states (bilateral) or within the framework of international organizations (multilateral). The most important legal sources for this are international treaties, which set out requirements for criminalization and cooperation obligations for the contracting states. Nevertheless, states are given a great margin of discretion in implementing these obligations into national law. In the end, transnational criminal law is related to national *ius puniendi*.

In order to develop an answer to the question, the characteristics of human trafficking must be illuminated on the basis of the above given information and subjected to the aforementioned tests.

2. The very essence of Human Trafficking [6 Points]

From the perpetrator's perspective, human trafficking is basically committed by private offenders acting either individually or as part of a criminal organisation. Indeed, it is typically an **organised crime** because the perpetrators (often as an organised group) operate by illegal means for monetary gains within sophisticated structures. Thus, the crime aims at the exploitation of the victim for private financial gain. It is true that the offence can in principle be facilitated by state corruption or by the lack of effectiveness of the prosecution of organized crime. Although it is a typical organised crime, experience shows that states can be and are involved in certain regions. **State involvement** varies widely geographically and substantially, ranging from hardly any involvement, to extensive ineffectiveness in combating trafficking (e.g. sex trafficking in Thailand) to normative tolerance of trafficking (e.g. child trafficking in China until the early 2000s).

From the victim's perspective, human trafficking involves serious human rights violations committed by the perpetrators. They violate the victim's fundamental and human rights, such as physical, sexual and mental integrity and personal freedom. In all its facets, human trafficking is an assault on **human dignity**, which is to be equally respected in every human being. Human dignity expresses the claim to the social value and respect of every human being and prohibits reducing human beings to mere objects or subjecting them to treatment that in principle calls into question their quality as subjects. Human dignity is violated by human trafficking because the person is ultimately reduced to an object and a commercial good or commodity.

The international nature of human trafficking stems from its cross-border dimension. Human trafficking is often implemented in practice by trafficking victims across the national borders of one or more countries. In this respect, human trafficking has a transnational characteristic.

Overall, human trafficking is a non-state-related crime whose essence is based on serious violations of basic fundamental and human rights. It often has a transnational nature in practice.

3. Does Human Trafficking contain the Typical Elements of International Crimes?

3.1. Human Trafficking under the ICC Statute [4 Points]

Under certain conditions, human trafficking is already punished under the ICC Statute as a crime against humanity (Art. 7 ICC Statute). In fact, Art. 7 para. 1 lit. c ICC refers to the offence variant of **enslavement** which means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

However, **other offence variants** of Art. 7 ICC Statute may also apply, if human trafficking practices involve severe deprivation of physical liberty (Art. 7 para. 2 lit. e ICC Statute) and sexual violence (Art. 7 para. 2 lit. g ICC Statute).

Finally, human trafficking could also fall within the jurisdiction of the ICC via the general clause in Art. 7 para. 1 lit. k ICC Statute which relates to “**other inhumane acts**” of a similar nature causing great suffering or serious impairment of physical integrity or mental or physical health.

Under certain circumstances, human trafficking is also punishable as a war crime (Art. 8 ICC Statute), as the following examples illustrate. In the context of **sexual exploitation**, Art. 8 para. 2 lit. b (xxii) ICC Statute (for international armed conflict) and Art. 8 para. 2 lit. e (vi) ICC Statute (for non-international conflict) punish certain forms of sexual and sexualized violence. Human trafficking in times of war may also involve **degrading or humiliating treatment** (Art. 8 para. 2 lit. b (xxi) ICC Statute and Art. 8 para. 2 lit. c (ii) ICC Statute). Finally, Art. 4 para. 1 of the Second Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts punishes **enslavement** as a war crime.

This brief overview shows that certain practices of human trafficking are already recognised as international crimes in the ICC Statute. Nevertheless, as an international crime it requires the existence of various preconditions, namely the context of an armed conflict or an attack against a civilian population, encompassing mistreatment of the civilian population and involve multiple commission of acts. Furthermore, it demands a functional nexus, namely, that the act of trafficking be part of a pattern of misconduct. In addition, the attack must pursue to or be in furtherance of a state or organisational policy, i.e. be part of a widespread or systematic practice. For these reasons, human trafficking will not be prosecutable as a stand-alone core crime under the ICC Statute *de lege lata* but only in the rare circumstances described above.

3.2. Human Trafficking as an International Crime? [8 Points]

To answer the question, the information provided on human trafficking (*sub 2.*) must be applied to the ICL tests mentioned at the beginning.

According to the “**international element**” test, the extent to which fundamental human rights or the right to existence have been violated must be determined. Through human trafficking, human beings are deprived of their individuality and treated as material things or property. In this respect, human trafficking can certainly be seen as a serious violation against human dignity, especially since the victims are not seen as human beings but as objects or commodities. The perpetrators are completely indifferent to the fate of the victims and only see financial profit. Such inhumane living conditions, similar to slavery, are already prohibited by different international conventions. Thus, because a large majority of states rightly reject slavery and human trafficking, the “international element” test can be considered fulfilled.

According to the “**conscience shocking**” test, it has to be ascertained to what extent the severity of the crime can shock the international community. Human trafficking exposes people to inhumane living conditions, both at the beginning of the crime (deception, threats and

transportation) and at its completion (exploitation of the victim). It denigrates them (human dignity). However, it is not only in the quality of the crime that shocking elements can be identified, but also the quantity of these crimes, as they come to light in the European Union, shows that it is a serious problem. The “shock the conscience” test can also be affirmed.

The “**context test**”, by contrast, poses some difficulties. International crimes require a context of widespread, systematic, and organized wrongdoing. It is true that this crime involves a high degree of organization and is very widespread in the EU. Nevertheless, it seems difficult to assign the individual crimes of human trafficking, especially in the EU, to the context required by International criminal law. The ICL-context as of now refers in particular to fragile political systems with little protection of the population (failed state scenarios), war or war-like conflicts, and forms of state terrorism (international crimes as state policy). In this respect, international criminal law is directed against macro-criminality presupposing high levels of state involvement. Despite the grave living conditions of the victims, human trafficking does not seem to meet this qualitative threshold. Its overall impact cannot be attributed to a state or network of states. It may be the result of deliberate disregard by states and a lack of implementation of the duty to protect and fulfil (e.g. pursuant to Art. 4 ECHR), but this widespread failure would not be tantamount to trafficking itself. Human trafficking is a problem with multiple causes and multiple agents bearing different shares of responsibility that are not easily moulded into an international crime comparable to Articles 5 et seq. of the Rome Statute.

Thus, while human trafficking perhaps passes two of three tests for classification as an international crime, the context test would not sustain this classification. This specific test should be seen against the background of the **limited capacity** of the ICC to prosecute the most serious crimes against the international community. Human trafficking is recognized as an international crime only in limited contexts (and as such is covered by ICC jurisdiction, *sub 3.1*). Therefore, other instruments of transnational criminal law or human rights approaches would be more appropriate for this crime.

Note: Great discretion in opinion and reasoning was afforded with respect to the evaluation. We considered the development of one’s own standpoint on the basis of sound arguments essential for the evaluation.

Question 5

A is first lieutenant in the regular Afghan army. In late 2013 a blindfolded and hand-cuffed Taliban fighter is brought to his office. A is very upset because he lost three men in a fire fight the night before. He assumes that the captive belongs to the forces that attacked his soldiers. He wants to find out where they hide and recover. But the captive Taliban remains silent. After a series of threats A gives a nod to B, one of the guards, who starts beating the captive with a rubber stick. Yet, he continues to refuse providing information. This treatment continues for three hours until he is heavily bruised and faints. He is brought to a detention facility.

Years later, A ends up in Switzerland and applies for asylum. By accident, video footage of the beating becomes public. You are an internal at the Federal Public Prosecutor's Office

(Bundesanwaltschaft). The head of the war crimes unit tasks you with a summary assessment of A's criminal responsibility for war crimes under the Rome Statute.

1. Preliminary remark

It must be examined whether A's actions constitute a war crime within the meaning of Art. 8 ICC Statute.

2. Actus Reus - Material Element

2.1. International or non-international Armed Conflict [4 Points]

War crimes can only be committed in an armed conflict. An armed conflict exists when there is armed violence between different state or non-state actors.

In casu, both sides of the conflict used military means and force to decide the conflict for themselves. An armed conflict existed in this respect.

2.1.1. Non-international conflict

Furthermore, a distinction must be made between an international and a non-international armed conflict. While an international armed conflict is an armed conflict between two or more states, a non-international conflict takes place on the territory of a state between its own armed forces and non-state armed groups or renegade armed forces or solely between non-state armed groups.

The armed conflict took place within the territory of the Afghan state. The main actors are, on the one hand, Afghan armed forces and, on the other hand, the armed Taliban fighters. The acts were committed on Afghan territory by Afghan state actors (regular Afghan army) against a Taliban fighter being a member of an armed anti-government group. Neither of these groups is under the effective control of a foreign country which could turn the conflict into an international one. Pending further examination, this is a non-international conflict.

2.1.2. Sufficient Intensity (armed)

In the case of a non-international conflict, the intensity of the armed conflict is decisive. It must be of a certain significance in terms of the severity, number, local extent and duration of the armed clashes. Non-international armed conflicts must be distinguished from cases of mere internal unrest and tension or isolated acts of violence.

The armed conflict in which the 2013 acts took place must be seen in the context of the war in Afghanistan, which has been ongoing since 2001. Thus, the armed conflict can be seen as protracted armed violence. Locally, the armed conflict covers almost the entire territory of Afghanistan. The Taliban warriors use guerrilla strategies such as booby traps and assassinations to weaken the regular army. But they also use terrorist strategies such as suicide attacks to weaken the political support for the warring government in Kabul. But most importantly, the Taliban carry out large-scale and smaller-scale military operations to increase

and preserve regional control over larger parts of the country. In this respect, the armed conflict is of significant intensity.

2.1.3. Taliban as Party of the Conflicts

In order to qualify as a non-international conflict, the parties to the conflict must have a sufficient degree of organisation. In the case of state armed forces, this is regularly the case due to a hierarchical command structure and a military degree of organisation. In the case of non-state groups, the decisive factor is the existence of a certain command structure and organisation. On the one hand, it is assumed that an organisation exists that is capable of planning and conducting military operations over a longer period of time. On the other hand, the organisation must be able to exercise discipline and authority over its combatants.

In essence this question has already been answered before. First of all, it should be pointed out that the Taliban field a considerable number of armed fighters. Their number of troops is estimated to amount to tens of thousands, organised in paramilitary units. In this respect, the Taliban fighters are organised hierarchically. They have military logistics and weapons at their disposal. They coordinate their attacks as part of their guerrilla and terrorism strategy. This enables them to weaken the regular Afghan armed forces for decades, despite their superiority in numbers and weapons. The Taliban fighters follow a radical Islamic outlook, which is why military discipline and authority are strengthened by theocratic elements. Sufficient military capabilities and discipline are therefore in place.

Furthermore, it is required that the non-state group controls a sufficient part of the territory to be able to conduct military operations. In casu, the Taliban repeatedly subjugate conquered territories to their rule and already control larger parts of the rural area of Afghanistan. Yet, they not only use the territory for military operations, but also provide public services in the conquered areas in accordance with their ideology like a quasi-state.

2.1.4. Interim Conclusion

A non-international, armed conflict exists.

Note: However, in-depth explanations were not expected here. Only the problem had to be recognised and dealt with succinctly.

2.2. Individual Act [2 Points]

As there is no international conflict, only Art. 8 para. 2 lit. c and lit. e of the ICC Statute are applicable. Art. 8 para. 2 lit. c (i) and (ii) of the ICC Statute could become relevant.

2.2.1. Torture and physical abuse

According to the facts of the case, a Taliban fighter was physically abused, which in principle qualifies as cruel treatment and torture within the meaning of Art. 8 para. 2 lit. c (i) ICC Statute

or as impairment of personal dignity, in particular degrading and humiliating treatment within the meaning of Art. 8 para. 2 lit. c (ii) ICC Statute.

2.2.2. Protected person

With regard to Art. 8 para. 2 lit. c ICC Statute, it is usually necessary that the relevant acts be committed against persons who are not directly participating in hostilities, including those members of armed groups who have laid down their arms and those persons who are out of action through illness, wounding, capture or any other cause.

In casu, the actions of the Afghan army member are directed against a captured Taliban fighter. The capture and ill-treatment is therefore directed at a member of a non-state party to the conflict, who is out of combat due to the capture. Even participants in the conflict enjoy humanitarian protection against ill-treatment after capture. The requirements of Art. 8 para. 2 lit. c ICC Statute are therefore met.

With respect to torture and other attacks against human dignity it should be added that such acts would be criminal irrespective of the combat status of the victim.

2.3. Nexus [2 Points]

A further prerequisite is a connection (so-called nexus) between the armed conflict as an overall act and the individual acts. Such a nexus exists if the crimes are closely related to the hostilities, because they are a manifestation of them or are significantly facilitated by them.

In casu, the interrogations and ill-treatment serve to obtain the desired information from the opponents of the regime. It is therefore precisely about ending the conflict by force. There is thus a nexus between the overall act and the individual act.

2.4. Mode of liability (individual responsibility) [10 Points]

With regard to A's contribution to the offence, the facts of the case state that A implicitly gives an order to his subordinate soldier B and B then beats the Taliban fighter.

2.4.1. Co-Perpetration

According to Art. 25 para. 3 lit. a ICC-Statute, A could have acted in co-perpetration to torture and physical abuse by committing the offence jointly with another person. A co-perpetrator is any person who commits the offence jointly with another person on the basis of a joint plan and by making an individual contribution to the offence. With regard to the joint plan, an informal agreement of wills in order to commit the crime is sufficient. With regard to the individual contribution to the offence, the functional cooperation of the co-perpetrator in the offence is sufficient.

In casu, A as first lieutenant gives B as military guard of the captured Taliban fighter the order to violently abuse the prisoner with a rubber stick. A close look at the facts of the case shows that this behaviour is grounded in an informal agreement of will between A and B to torture

and physically abuse the captured Taliban fighter. This is also supported by the fact that the physical abuse lasts for several hours and is only ended by A when the Taliban fighter loses consciousness. While B carries out the physical assault, A has verbally threatened the Taliban fighter. A functionally-divided behaviour between A and B could therefore be assumed because A makes his contribution to the crime through verbal aggression and B through physical violence.

2.4.2. Alternative Solution: Instigation

If one excludes co-perpetration because A was not physically involved and co-perpetration seemed not entirely convincing due to the hierarchical relationship between A and B, instigation must be examined as the phenomenologically more convincing alternative. Indeed, since A only gives the order but does not strike the Taliban fighter, A could have instigated B to commit the crime under Art. 25 para. 3 lit. b ICC Statute.

Art. 25 para. 3 lit. b ICC provides for criminal responsibility for the person who orders or instigates the commission of a crime under the ICC Statute. In both variants of instigation, the person involved does not commit the crime himself, but induces another to commit it. According to Art. 25 para. 3 lit. b, first variant, ICC Statute, someone is liable to prosecution who orders the commission of a crime under international law. An order presupposes that there is a relationship of subordination between the giver and the recipient of the order. The giver of the order uses his authority and special position to induce another person to commit the crime. The giving of the order does not have to be explicit, but can also happen implicitly.

In casu, A is a first lieutenant of the regular Afghan army, while B is a (simple) guard and thus a military subordinate. As a first lieutenant, A has the authority to command other subordinate soldiers. If the facts of the case are viewed from a realistic perspective, it can be assumed that A is militarily superior to B due to his military rank. In this respect, there is a relationship of subordination between A as the giver of the order and B as the recipient of the order. The giving of the order was implied by A in the form of nodding. The physical abuse lasts for several hours and is only stopped by A when the Taliban fighter loses consciousness. As a result, A has caused the commission of the crime by ordering the physical abuse by B.

3. Mens Rea – Mental Element [2 Points]

The subjective element of the offence requires general intent according to Art. 30 ICC Statute. The perpetrator must at least know the actual contextual circumstances (the existence of an armed conflict) and be aware of the status of the target of the offence as a person protected by international humanitarian law. In addition to the knowledge element, a volitional element is required. He must have acted with intent regarding his actions. In this respect, he must act with knowledge and actual wilfulness with regard to the individual acts and their effects, i.e. more than condoning, and understand the nexus between his act and the contextual element.

A is a first lieutenant in the regular Afghan army and accordingly had authority over his subordinate soldiers. Within the scope of this command, he ordered the abuse and handed over the weapon, a rubber stick, to his subordinate. These organisational acts were intended to obtain

the desired information. He understood the nature of the conflict and knew that the victim was a captured Taliban fighter.

A therefore acted with direct intent and sufficient knowledge.

4. Grounds for Excluding Criminal Responsibility

In casu, no grounds for excluding criminal responsibility are apparent.

5. Conclusion

A's conduct satisfies the elements of criminal responsibility according to Art. 8 of the ICC Statute.