Upper Tribunal
(Immigration and Asylum Chamber)

PK and OS (basic rules of human conduct) Ukraine CG [2020] UKUT 00314 (IAC)

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 3 and 4 June 2020 via *Skype for Business*	
	……

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

PK and OS
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr A. Metzer, QC, and Ms J Norman, Counsel, instructed by Sterling Lawyers
For the Respondent:	Mr Z. Malik, Counsel, instructed by the Government Legal Department

1. Acts contrary to the basic rules of human conduct

a. Where a person faces punishment for a refusal to perform military service that would or might involve acts contrary to the basic rules of human conduct, that is capable of amounting to "being persecuted" on grounds of political opinion for the purposes of the Refugee Convention.

b. *The term "acts contrary to the basic rules of human conduct" refers to the core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular civilians, the wounded and prisoners of war. It includes, but is not limited to, the indicative examples listed in Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69 at [30] to [36].*

c. *In order to engage the Refugee Convention, the conduct in question must be committed on a systematic basis, as the result of deliberate policy or official indifference to the widespread actions of a brutal military. In practice, the term conveys an elevated threshold.*

d. *It is not necessary for there to be specific international condemnation of the conflict in question for the conduct of the military to be categorised as engaging in acts contrary to the basic rules of human conduct. The international community of states as a whole has already condemned conduct which is contrary to the basic rules of human conduct through its recognition of the existence of international norms from which no derogation is possible, and through the adoption of international legal instruments recognising the prohibitions against such conduct.*

e. *However, where there is specific international condemnation of such acts, that is likely to provide an evidential basis for concluding that it is reasonably likely that the military force in question is engaging in acts contrary to the basic rules of human conduct on a widespread and systemic basis.*

f. *The individual concerned must demonstrate that it is reasonably likely that their military service would involve the commission of acts contrary to the basic rules of human conduct, or that it is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of such acts.*

g. *The political opinion of the person concerned must be to oppose the commission of acts contrary to the basic rules of human conduct. In practice, it is unlikely to be necessary for a person to adduce significant evidence that their political opinion is to oppose such conduct. It is only where there is evidence to the contrary that any real doubt is likely to arise, for example where there is evidence that the individual concerned has previously and voluntarily been responsible for acts contrary to the basic rules of human conduct. Such an individual may well fall foul of the exclusion clauses in the Refugee Convention in any event.*

h. *There must be no other way to avoid military service, for example through the individual concerned availing him or herself of a conscientious objector process.*

i. *Where a causal link exists between the likely military role of the conscript or mobilised reservist, the commission of or participation in acts contrary to the basic rules of human conduct, and the punishment to be imposed, punishment including a fine or a non-custodial sentence will be sufficient to amount to "being persecuted" for the purposes of the Refugee Convention, provided it is more than negligible.*

2. Country guidance: the conduct of the Ukrainian military in the conflict in the Anti-Terrorist Operation Zone ("the ATO")

a. *Elements of the Ukrainian military engage in the unlawful capture and detention of civilians with no legal or military justification. The detention of some detainees will be justified by military necessity or otherwise permissible under international humanitarian law ("IHL"), but a large number of detentions feature no such justification and are motivated by the need for "currency" for prisoner exchanges with the armed groups.*

b. *There is systemic mistreatment of those detained by the Ukrainian military in the conflict in the ATO, which is in the east of the country. This involves torture and other conduct that is cruel, inhumane and degrading treatment contrary to Article 3 of the ECHR. Even where such detainees are eventually transferred into the judicial detention process, there is likely to be official indifference to the mistreatment they have received.*

c. *There is an attitude and atmosphere of impunity for those involved in mistreating detainees. No one has been brought to justice. Pro-Kyiv militia have been rewarded for their work by formal incorporation into the military. Lawyers are afraid of taking on cases due to the risk of retribution.*

d. *The systemic and widespread detention practices of the Ukrainian military and law enforcement officials involving torture and Article 3 mistreatment amount to acts contrary to the basic rules of human conduct.*

e. *The Ukrainian military has had to engage with armed groups that have embedded themselves in towns, residential areas, and civilian installations along the contact line. Legitimate military targets are often in close proximity to areas, buildings or people protected by IHL. The Ukrainian military's adherence to the principles of distinction, precaution and proportionality when engaging with such targets has been poor, despite that being a task which calls for surgical precision, especially in the context of a conflict in which legitimate military targets have been embedded within civilian areas, properties and installations. The widespread civilian loss of life and the extensive destruction of residential property which has occurred in the conflict will, in part, be attributable to poorly targeted and disproportionate attacks carried out by the Ukrainian military, but the evidence does not suggest that it is reasonably likely that there was targeting of civilians on a deliberate, systemic and widespread basis.*

f. *Water installations have been a particular and repeated target by Ukrainian armed forces, despite civilian maintenance and transport vehicles being clearly marked and there being an established practice of negotiating "windows of silence" on some occasions, and despite the protected status such installations enjoy under IHL. The background materials suggest a continued focus on water and similar civilian installations, but the evidence does not demonstrate that those targeting decisions were part of a policy and system. Often such installations serve both sides of the contact line, militating against the conclusion that government forces sought to deprive armed group territory of basic services through the prosecution of the strikes and attacks.*

g. *Most civilian casualties have been from indirect fire rather than specific targeting.*

h. *Civilian casualties continue to fall.*

i. *Damage to schools appears to have been collateral or accidental rather than intentional.*

j. *It is not clear whether Ukraine was responsible for laying any of the anti-personnel mines documented in the background materials. Mines are no longer deployed by either side, and Ukraine is committed to complying with its international legal obligations under the Ottawa Convention to clear mines that are in areas under its jurisdiction.*

k. *While regrettable, we do not consider the use of civilian property without payment or reparation, or looting, to amount to acts contrary to the basic rules of human conduct.*

l. *Ukraine has begun steps to establish a register of missing persons. It is not an act (or omission) contrary to the basic rules of human conduct not to have established that register with greater success or resolve.*

m. *There is no evidence that the Ukrainian military is engaged in the forced movement of civilians.*

3. Country guidance: conscripts and mobilised reservists in Ukraine

a. *The Ukrainian military relies upon professional soldiers in its conflict with Russia-backed armed groups in the east of the country, in the Anti-Terrorist Operation zone ("the ATO"). Forced conscripts or mobilised reservists are not sent to serve on the contact line in the ATO and play no part in the conflict there. It is not reasonably likely that conscripts or mobilised reservists would provide indirect support to the Ukrainian military effort in the ATO, for example through working in an arsenal.*

b. *It remains the case that, at the current time, it is not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act. The guidance given by VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) remains in force.*

c. *Although the Ukrainian criminal code provides at Articles 335 and 336 respectively for sentences of imprisonment for conscripts and reservists who have unlawfully avoided military service, absent some special factor, it is highly unlikely that a person convicted of such an offence will be sentenced to a period of imprisonment.*

d. *It is not reasonably likely that conscripts and mobilised reservists who have avoided military service would be identified as such at the border. Where a person has been convicted and sentenced in absentia, the guidance given in VB concerning their likely treatment at the border remains applicable.*

e. It is possible to defer military service as a conscript on grounds of ill health, under Article 14 of the 1992 law, or on one of the bases set out in Article 17 of the 1992 law. Whether those exceptions would be available as a fact-specific question.

f. There is no evidence that it is reasonably likely that the ID card system introduced in 2016 will lead to an increased risk in a draft evader or mobilised reservist being prosecuted.

g. It is highly unlikely that a draft evader would be detained pending trial at the border, given that the enforcement focus is on fines, rather than custody.

DECISION AND REASONS

A	**Previous country guidance**	3
B	**Legal framework and applicable legal principles**	6
	Summary of legal principles	104
C	**Background materials and expert evidence**	105
D	**Compulsory military service in Ukraine**	191
E	**Background materials and the evidence of Professor Bowring**	237
F	**Country Guidance – conclusions on the conduct of the Ukrainian military**	274
G	**Conscripts and mobilised reservists, enforcement of draft evasion**	275
H	**Country guidance – conscripts and mobilised reservists**	287
I	**The individual appeals**	288

INTRODUCTION

1. These appeals have been heard as country guidance cases. The agreed questions for us to address are as follows:

> 1. Whether military service by the appellants in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?
>
> 2. If the answer to issue (1) is "yes", whether the appellants, who are draft-evaders, are refugees for that reason alone?
>
> 3. If the answer to issue (2) is "no", whether:
>
> a) the appellants, on return to Ukraine, would be subjected to prosecution for draft evasion?
>
> b) if so, whether the appellants would receive any punishment following that prosecution, such as, fine, probation, suspended sentence or a custodial sentence?
>
> c) whether the prospect of that prosecution or punishment means that the appellants are refugees?

2. The appellants are citizens of Ukraine. They are obliged under Ukrainian law to serve in the Ukrainian military. They have claimed asylum on the basis that the Ukrainian armed forces engage in systemic and widespread "acts contrary to the basic rules of human conduct", with which they would be associated or otherwise required to participate. Any punishment in Ukraine for draft evasion in those circumstances would amount to persecution on grounds of their political opinion, they submit. They also claim to be at risk of cruel, inhumane or degrading treatment contrary to Article 3 of the European Convention on Human Rights ("ECHR") in the event of their detention for draft evasion upon their return. We set out the details of each appellant's case, including our application of the country guidance principles to each, in Part I. In the case of PK, his case has been remitted to the Upper Tribunal by the Court of Appeal, having previously had his appeal dismissed by the Upper Tribunal: see PK v Secretary of State for the Home Department [2019] EWCA Civ 1751, which set aside PK (Draft evader; punishment; minimum severity) Ukraine [2018] UKUT 241 (IAC).

PART A: PREVIOUS RELEVANT COUNTRY GUIDANCE

3. In PS (prison conditions; military service) Ukraine CG [2006] UKAIT 00016, the Asylum and Immigration Tribunal considered whether the conditions of military service in Ukraine gave rise to a real risk of Article 3 ECHR ill-treatment, specifically with reference to an informal initiation practice known as "*dedovshchina*". It held that there was insufficient evidence to establish that conscripts and new recruits would be at a real risk of the practice. This issue is outside the scope of the country guidance issues for consideration in the present matter.

4. In VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC), following hearings on 31 October and 1 November 2016, the following country guidance was issued:

    1. At the current time it is not reasonably likely that a draft-evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act, although if a draft-evader did face prosecution proceedings the Criminal Code of Ukraine does provide, in Articles 335, 336 and 409, for a prison sentence for such an offence. It would be a matter for any Tribunal to consider, in the light of developing evidence, whether there were aggravating matters which might lead to imposition of an immediate custodial sentence, rather than a suspended sentence or the matter proceeding as an administrative offence and a fine being sought by a prosecutor.

    2. There is a real risk of anyone being returned to Ukraine as a convicted criminal sentenced to a term of imprisonment in that country being detained on arrival, although anyone convicted in absentia would probably be entitled thereafter to a retrial in accordance with Article 412 of the Criminal Procedure Code of Ukraine.

    3. There is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to a breach of Article 3 ECHR.

5. In VB, one of the issues that had initially been identified for country guidance was whether a draft evader who had been imprisoned would be required to perform post-imprisonment military service upon their release from custody and, if so, what would be the conditions of such military service? Paragraph [7] of the decision explains that, embedded within the concept of "conditions" to which a post-imprisonment military conscript would be exposed, was consideration of "whether those conscripted or mobilised into the Ukrainian army were at real risk of being required to commit acts contrary to international humanitarian law." The Upper Tribunal, using the term "international humanitarian law" as a proxy for acts contrary to the basic rules of human conduct, did not address that issue, as there was insufficient country of origin material before it. It is precisely that issue which lies at the heart of these proceedings.

PART B: LEGAL FRAMEWORK

Introduction

6. Since the country guidance questions identified for resolution require us to assess the conduct of the Ukrainian armed forces against the standard of "the basic rules of human conduct", it will be necessary to address what is meant by that term. We will approach that issue in the context of refugee law, returning initially to first principles.

7. The 1951 Convention Relating to the Status of Refugees ("the Convention"), as amended by the 1967 Protocol, provides at Article 1A(2) that a "refugee" is a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…"

8. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") makes provision to define "acts of persecution". Article 9(1) provides:

> "Acts of persecution within the meaning of Article 1A of the Geneva Convention must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

9. The directive provides indicative, non-exhaustive examples of acts of persecution at Article 9(2):

"2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature."

10. At the heart of the definition of "refugee" in Article 1A(2) of the Convention is persecution ("being persecuted"). It is, as Lord Bingham noted in Sepet and Bulbul v Secretary of State for the Home Department [2003] UKHIL 15 at [7], a "strong word". In Horvath v Secretary of State for the Home Department [2001] 1 AC 489 at 495, Lord Hope of Craighead relied on the definition of the term in Professor Hathaway's 1991 edition of *The Law of Refugee Status*, which summarised the concept in these terms, at page 112:

> "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

11. Accordingly, the scope of the Convention is defined, and thereby limited, to those who have a well-founded fear of being persecuted for one of the five Convention reasons (or "core entitlements", in the words of Professor Hathaway). There will be other well-founded fears which an individual may suffer, such as an epidemic, natural disaster or famine, but such fears are not capable of giving rise to a fear of being persecuted on a Convention ground.

12. The scope of the Convention is further limited by Article 1F:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

13. The conduct encapsulated by Article 1F is anathema to the humanitarian principles espoused by the Convention, and those who have committed such crimes, or are guilty of such acts, do not enjoy the ability to be recognised as refugees, even if they otherwise meet the criteria in Article 1A(2).

14. Exclusion clauses in similar terms feature in Article 12(2) of the Qualification Directive, which appear to correspond directly with Article 1F (albeit with the inclusion of some additional conduct in Article 12(2)(b)):

> "2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
>
> (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."

Application of the Convention to draft evasion

15. In many countries, military service is compulsory, and non-performance of compulsory military service is punishable by law, either through administrative or criminal proceedings. Even where military service is not compulsory, desertion by those who have voluntarily enlisted in the military is nevertheless often an offence.

16. The question then arises as to when, if at all, those facing prosecution and possible punishment under those circumstances are entitled to refugee status, particularly when their refusal to perform military service was attributable to a conscientious objection, or political opinion, to adopt the terminology of the Convention.

17. A distinction must be drawn between prosecution and persecution. While prosecution, or other sanctions for non-compliance with the law relating to the draft, or desertion, may amount to persecution if the Convention criteria are met, without more, the mere fact of prosecution for draft evasion or desertion does not amount to persecution. Situations where a refusal to perform military service may lead to persecution include scenarios where the punishment for draft evasion would be grossly disproportionate or excessive, or if the military conditions themselves would amount to persecution. In those circumstances, the criteria for recognition as a refugee are likely to be satisfied, provided a nexus to a Convention reason exists.

18. There is a further potential basis upon which an individual may be recognised as a refugee having evaded military service, and it is this issue which lies at the heart of the first question identified for our resolution in these proceedings: where the

individual objects to performing military service on the basis that it "would or might involve acts which are contrary to the basic rules of human conduct".

Acts contrary to the basic rules of human conduct

19. The conduct encapsulated by the term "acts contrary to the basic rules of human conduct", and its relation to refugee status, has been summarised and paraphrased in different ways throughout the authorities, with different emphases.

20. The most senior domestic judicial consideration of the concept remains that contained in Sepet (quoted at paragraph 9, above). The House of Lords considered whether the appellants, Turkish citizens of Kurdish origin, faced being persecuted on account of their refusal to perform compulsory military service. Both appellants disagreed in profound terms with the Turkish government's policies towards the Kurdish people and feared that they would be required to engage in military atrocities against them; that was the basis of their conscientious objection. In unchallenged findings of fact, the special adjudicator found that those views were genuinely held, but that it was not reasonably likely that either would be required to engage in, or be associated with, acts offending against the basic rules of human conduct. Both, found the adjudicator, would face charges and likely imprisonment upon their return, and would be required to perform their military service in any event. The agreed facts were that the punishment would not be disproportionate or excessive, and that draft evaders in Turkey were liable to prosecution and punishment irrespective of the reasons prompting their refusal: see [4]. There was no suggestion that the punishment would be more severe on account of the appellants' Kurdish ethnicity.

21. It was contended on behalf of the appellants that where an individual, motivated by genuine conscientious grounds, refused to undertake such military service, and the state offered no civilian or non-combative alternative, the prospect of that individual's punishment for evading the draft would, if carried out, amount to persecution for a Convention reason within Article 1A(2). The House found no support for the appellants' core contention that there was a recognised human right to conscientious objection: see [11] to [20]. The appeals were dismissed. As such, the focus of the operative part of the judgment in Sepet was whether there existed, under international law, a fundamental and internationally recognised right to refuse to undertake military service on grounds of conscience, in circumstances were there was no risk of engagement in acts contrary to the basic rules of human conduct.

22. Of significance in Sepet is the following *obiter* extract from Lord Bingham's opinion, at [8]:

> "There is compelling support for the view that refugee status should be accorded to one who has refused to undertake compulsory military service on the grounds that such service **would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community**, or where refusal to serve would earn grossly excessive or disproportionate punishment: see, for example, *Zolfagharkhani v Canada (Minister of Employment and Immigration) [1993] 3 FC 540* ; *Ciric v Canada (Minister of Employment and Immigration) [1994] 2 FC 65* ; *Canas-Segovia v Immigration and Naturalization Service (1990) 902 F 2d 717* ; *UNHCR*

Handbook on Procedures and Criteria for Determining Refugee Status , paras 169, 171. But the applicants cannot, on the facts as found, bring themselves within any of these categories…" (emphasis added)

23. Lord Bingham's terminology ("would or might require him to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community") features different constituent elements: (i) "would or *might* require him to commit"; (ii) "atrocities or human rights abuses"; (iii) "or participate in a conflict"; (iv) "condemned by the international community".

24. We recall that there was no question that the appellants in Sepet would be required to engage in such conduct, and that the House did not explore this issue in depth. Caution is required, therefore, before attempting to parse Lord Bingham's opinion as one would construe black letter law. It appears that by referring to the commission of "atrocities" or "gross human rights abuses", or the participation in an internationally condemned conflict, His Lordship was paraphrasing the "basic rules of human conduct" test, given he referred to the concept throughout his opinion, and the term had featured heavily in the decisions below. At [3], he noted that the special adjudicator had reached findings of fact that there was no reasonable likelihood that the first appellant would be required to engage in military action contrary to the basic rules of human conduct. In relation to the second appellant, he noted, at [4], that the special adjudicator had reached similar findings.

25. At [12], Lord Bingham quoted extensively from the United Nations High Commissioner for Refugee's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1, re-edited January 1992). Paragraph 171 provides, with emphasis added:

> "170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.
>
> 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, **with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct**, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution."

The basic rules of human conduct: international condemnation?

26. In paragraph 171 of the *Handbook*, and at [8] of Sepet, there appears to be a qualification to the above principle, namely that the conduct of the military must be accompanied by an element of some form of international condemnation, in order to reach the Convention threshold. The second limb of Lord Bingham's summary of the view for which he considered there was compelling international support was that

the putative refugee would be required to "participate in a conflict *condemned by the international community*". In paragraph 171 of the *Handbook*, the "military action" must be "*condemned by the international community* as contrary to the basic rules of human conduct".

27. The international condemnation requirement was considered in Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69. The case concerned whether a Russian deserter who objected to the conduct of the Russian military in the Chechnyan conflict in the late 1990s was entitled to refugee status. The adjudicator held that there was no evidence that the Chechnyan conduct had been condemned by the international community, as would be required for the appellant to have succeeded. The Court of Appeal held that the international condemnation element was satisfied by the conduct in question falling foul of the requirements of international law, in the sense of amounting to crimes recognised and thereby condemned by the international community or amounting other gross human rights abuses. The international community condemned the conduct by its recognition of the minimum standards of behaviour from which no derogation was possible. There was no need, as had wrongly been held by the Immigration Appeal Tribunal below, for there to have been separate and specific international condemnation of the conduct or military campaign in question. The applicability of the 1951 Refugee Convention was not conditional upon the vagaries and responsiveness of shifting international alliances and diplomacy.

28. The court in Krotov cited the Immigration Appeal Tribunal's judgment in B v Secretary of State for the Home Department (reported as VB (Desertion-Chechnya War-Hamilton) Russia CG [2003] UKIAT 00020) extensively, with approval: see [26]. Included within the extract cited was [45] of B:

> "…the reference to 'the basic rules of human conduct' has a distinct legal meaning within international law governing armed conflicts: see e.g. L.C. Green, The Contemporary Law of Armed Conflict (1996) p. 16; C Greenwood, 'Scope of Application of Humanitarian Law' in Handbook of Humanitarian Law in Armed Conflicts, C Dieter Fleck (ed) 1995. Used interchangeably with *ius cogens* the term has been identified to mean 'principles that the legal conscience of mankind deem(s) absolutely essential to coexistence in the international community' (UN Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Subcommittee of the Whole at 294: UN doc. A/CONF./39/11 (1969) (statement of Mr Suarez (Mexico))."

29. We observe that the UN document A/CONF./39/11 forms part of the *travaux préparatoires* to the Vienna Convention on the Law of Treaties 1969, and the discussion referred to by the IAT in B was an extract of the negotiations concerning what was originally Article 50 of the International Law Commission's *Draft Articles on the Law of Treaties*. Article 50 was amended during negotiations and became Article 53 in the Final Act (A/CONF. /39/11). Article 53 of the 1969 Treaty provides:

> "Article 53.
>
> TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("*JUS COGENS*")

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

30. The UN Conference noted that the draft article did not feature a definition of *jus cogens*. And nor did the Final Act; the statement of the Mexican delegate highlighted by the IAT in B observed, in the preceding paragraph of his speech to that quoted by the Court of Appeal in Krotov, that:

> "Although no criterion was laid down in article 50 for the determination of the substantive norms which possessed the character of *jus cogens*—the matter being left to State practice and to the case law of international courts—the character of those norms was beyond doubt." (UN doc. A/CONF./39/11 (1969) (statement of Mr Suarez (Mexico), page 294 at [6])

31. It follows, therefore, that the discussion of what is actually meant by conduct which falls foul of the "basic rules of human conduct" must be approached in light of the Vienna Convention's approach to *jus cogens*, albeit while recognising that the conferences of UN Member States which led to the Treaty chose not to define *jus cogens* norms, on the basis that their character was "beyond doubt". As the Vienna Convention states:

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".

32. At [30] of Krotov, the Court of Appeal then summarised what it considered the conduct captured by the concept of "basic rules of human conduct" to include, in these terms:

> "In this respect, there is a core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular, civilians, the wounded and prisoners of war. They prohibit actions such as genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill-treatment of prisoners and the taking of civilian hostages."

At [31] to [36], the court outlined a series of instruments and materials concerning international humanitarian law ("IHL") which it considered to articulate, in concrete terms, what is included in "acts contrary to the basic rules of human conduct". They included the following.

a. Common Article 3 to the Geneva Conventions of 1949, concerning the humane treatment of those taking no active part in non-international armed conflict, including prohibition of violence to life and person, including murder, mutilation, cruel treatment and torture; hostage taking; outrages upon personal dignity, including humiliating and degrading treatment. See [32].

b. Article 147 of Convention (IV), which prohibits wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation, transfer or unlawful confinement of protected persons, the taking of hostages and extensive destruction and appropriate of property not justified by military necessity and carried out unlawfully. See [33].

c. Article IV of the Additional Protocol II of the 1949 Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts, under the heading "Humane Treatment", which concerns the respect for, and humane treatment of, those not taking direct part in hostilities, and imposes similar prohibitions to those imposed by Common Article 3 to the 1949 Conventions. See [34].

d. The decision of the International Court of Justice in the *Case Concerning Military and Paramilitary* Activities *in and Against Nicaragua (Nicar v U.S.) (Merits) 1986 I.C.J* Report 14, at paras 218-220, which referred to some of the obligations contained in the Geneva Conventions as "fundamental principles of humanitarian law", applicable to international conflicts. At [218], the ICJ categorised the prohibitions that featured in Common Article 3 as a "minimum yardstick", recalling that it had previously held in the *Corfu Channel* case (ICJ Reports, 1949, 4) that the rules reflect "elementary considerations of humanity". See [35].

e. In *Prosecutor v Tadić*, 2 October 1995[1], the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia (commonly referred to as the International Criminal Tribunal for the former Yugoslavia, or "ICTY"), adopted the approach taken by the ICJ in *Nicar v U.S.*, at [93] to [98]. See [36].

33. At [37] of Krotov, the Court of Appeal added that:

> "…the crimes listed above, if committed on a systemic basis as an aspect of deliberate policy, or as a result of official indifference to the widespread actions of a brutal military, qualify as acts contrary to the basic rules of human conduct in respect of which punishment for a refusal to participate will constitute persecution within the ambit of the 1951 [Refugee] Convention…"

34. Accordingly, the "international condemnation" requirement is reflected the international community's prior condemnation of conduct having the character of the crimes outlined above, rather than any specific and additional requirement for there to be contemporary international consensus condemning the conflict in question. As Rix LJ noted in his concurring judgment at [58], international condemnation of the conflict in question may assist in providing the necessarily evidential confirmation that acts contrary to the basic rules of human conduct have

[1] The Court of Appeal judgment refers to the date of the judgment in Tadić as being 20 October 1995. It was, in fact, 2 October 1995.

taken place. Specific international condemnation may form part of the evidential landscape but is not a constituent element of the threshold to be met for recognition as a refugee on this basis.

35. In BE (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 540, the Court of Appeal considered the extent to which IHL, which applies in a conflict paradigm, was capable of informing the standards applicable in peacetime. The appellant deserted the Iranian army on account of being required to lay anti-personnel landmines close to densely populated civilian areas in the Baneh area of Kurdistan. The placement of the mines appeared to be such as indiscriminately to kill and maim civilians, with no apparent military justification. There was no state of war or insurgency in Iranian Kurdistan at the time, but the government was said to deploy the mines as a border protection measure, and to protect from terrorists and smugglers. Iran was not a signatory to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction ("the Ottawa Convention" or the "Mine Ban Treaty") outlawing anti-personnel mines, and their use was not prohibited under its domestic law.

36. The court noted the widespread condemnation, by many members of the international community, of the use of anti-personnel mines; three quarters of the world's states had signed and ratified the Ottawa Convention. In 2005, Iran itself had claimed no longer to be using or making mines, although it did not sign the Ottawa Convention. It was common ground that, had Iran been engaged in a conflict to which international humanitarian law would apply, the use of such devices could readily have contravened many of the provisions of international law cited in Krotov. The prohibition against the use of anti-personnel mines was described by the Court of Appeal as an "emerging" norm of international law (see [29]). That it was an emerging, as opposed to a settled, norm of international law was significant, for it meant that customary international law could not form the source of any prohibition against their indiscriminate use.

37. The court recalled the ICJ's Corfu Channel case, observing that the requirements of "elementary considerations of humanity" had been described by the ICJ as "even more exacting in peace than in war…" There was no reason why the law of war could not have at least an analogical bearing, held the court: [31].

38. Against that background, the Court of Appeal noted at [33], Iran signed and ratified the International Covenant on Civil and Political Rights ("the ICCPR") in 1968 and 1975 respectively. By Article 6, the states parties guaranteed every human being the right to life, and the prohibition against the arbitrary deprivation of the right to life. Article 7 forbids cruel or inhuman treatment, with no derogations permitted.

39. The court noted that nothing could be more "arbitrary" than the deprivation of life through indiscriminate, recklessly laid, non-militarily justified anti-personnel mines laid during peacetime. The court found that the orders to the appellant to lay mines in these circumstances amounted to a "grave violation of human rights", which the court was prepared to categorise as "gross" if necessary (see [35]).

40. In BE (Iran), the court concluded at [40] that:

> "…once it is established that the individual concerned has deserted rather than commit a sufficiently grave abuse of human rights, whatever punishment or reprisal consequently faces him will establish a well-founded fear of persecution for reasons of political opinion."

41. A theme that emerges from the above authorities' approach to "acts contrary to the basic rules of human conduct" in conflict scenarios is the articulation of the concept by reference to specific provisions of key IHL instruments relating to gross breaches of international norms, such as the prohibition of violence to life and person, hostage taking, outrages upon personal dignity, and other humiliating and degrading treatment, or the incorporation of the approach of the International Court of Justice to broader concepts such as the "fundamental principles of humanitarian law" or the "elementary considerations of humanity", as in the *Nicaragua* and *Corfu* cases. See the summary at paragraph [32], above. Significantly, the Court of Appeal and Supreme Court, and indeed the International Court of Justice and the ICTY, do not appear to have approached the concept of "the basic rules of human conduct" (or the equivalent concept, differently defined) by reference to "simple" breaches of the central requirements of IHL.

42. The requirements of IHL relating to the use of force within international and non-international armed conflicts, such as precaution, distinction and proportionality (which form part of the *jus in bello*), are not the focus of the discussion in the authorities cited to us, although the some of the background materials, and the appellants' submissions, do address such requirements. IHL is an extensive and complex body of law and we do not purport to summarise the full spectrum of its requirements here. However, the IHL principles relied upon by the appellants include:

    a. Distinction, whereby the parties to a conflict are required to distinguish between the civilian population and combatants, and civilian objects and military objects, and accordingly to direct their operations only against military objectives (see Article 48 of the Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; "the Additional Protocol").

    b. Proportionality, which would be breached where an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of the above, would be excessive in relation to the concrete and direct military advantage anticipated (see Article 51(5)(b) of the Additional Protocol).

    c. Precaution, whereby in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

43. Breaches of the above principles may amount to acts contrary to the basic rules of human conduct, if committed on a systemic basis as an aspect of deliberate policy or official indifference to the widespread actions of a brutal military.

44. When considering whether the threshold of acts contrary to the basic rules of human conduct has been met, we consider that some evidential difficulties can arise. It may be difficult to extrapolate from an examination of the consequences of particular military action the conclusion that the attack entailed breaches of the principles of, for example, precaution, distinction and proportionality. Knowing *what* took place is distinct from knowing *why* something took place, and with IHL, the *why* question is as relevant as the *what* question.

45. The Court of Appeal had to engage with similar issues in R (on the application of the Campaign Against the Arms Trade) v Secretary of State for International Trade [2019] EWCA Civ 1020 when considering the lawfulness of a decision to grant arms export licences in favour of Saudi Arabia. Central to the lawfulness of the export licence was the likely compliance by Saudi Arabia with IHL in its military campaign in Yemen, the assessment of which involved a retrospective analysis of its past compliance. The Court of Appeal outlined significant IHL-based concerns arising from certain incidents in which civilians and hospitals appeared to have been targeted. A significant amount of detailed information was available to the court, including from some of the same NGOs which have produced the background materials relied upon by the appellants in these proceedings (for example, Amnesty International), from the Secretary of State, and from a UN Panel of Experts. Significantly for present purposes, the court said at [134]:

> "In the very crudest terms, the NGO and UN Panel evidence often establishes *what* happened, but the further information available to the Secretary of State could assist as to *why* events of concern had happened. Both may of course be highly relevant to whether a violation of IHL had taken place and to the risk of future violations." (Emphasis added)

In the context of those proceedings, through diplomatic and military cooperation channels, the Secretary of State had available to him detailed information about the Saudi campaign which, held the court, cast some light on *why* such events had taken place. In many protection claims, no such detail will be available. Only *what* happened is often all that is available. That is the position in these proceedings.

46. Accordingly, when considering whether an appellant is at risk of engaging in, being associated with, or being required to perform "acts contrary to the basic rules of human conduct", it may be more helpful to focus on grave breaches of international humanitarian law, for example by reference to the provisions summarised at paragraph [32], above, rather than isolated instances of events which appear to have fallen foul of the *jus in bello*. While breaches of those principles could form part of the evidential landscape when determining whether a military force engages in acts contrary to the basic rules of human conduct, examples, even a pattern of examples, of collateral damage to, for example, civilian infrastructure, will not necessarily reach the elevated threshold. Regrettably, even examples of civilian deaths will not automatically call for the conclusion that acts contrary to the basic rules of human

conduct have taken place. International humanitarian law reluctantly tolerates the loss to civilian life and property, provided the striking force sought to distinguish between those directly participating in hostilities and those who were not, used proportionate force, and all feasible precautions were taken to minimise the loss to civilian life and infrastructure. It does not necessarily follow that military action resulting in civilian deaths amounts to a breach of IHL, still less to an act contrary to the basic rules of human conduct.

47. Even where there have been breaches of those key IHL principles, it is only where it may be said that there have been widespread breaches as a result of a policy and system that the possibility of categorising such breaches as acts contrary to the basic rules of human conduct arises: see Krotov. For military service potentially to entitle an individual to refugee status on the basis that such service would entail the commission of or participation in acts contrary to the basic rules of human conduct, there is, in practice, an elevated threshold, in the sense that "simple" breaches of certain obligations imposed by IHL will be insufficient to be categorised as acts contrary to the basic rules of human conduct, unless there is evidence of a policy or system to deploy such tactics on a widespread basis, or they are permitted to occur as the result of official indifference.

48. Of course, a persistent pattern of (for example) direct targeting of occupied residential dwellings, with no warnings and no apparent military justification, may lead to the conclusion, particularly when assessed to the lower standard of proof applicable to protection proceedings, that a party has engaged in breaches of IHL pursuant to a policy and system to do so on a widespread basis. There may also be specific condemnation from the international community, and such condemnation can assist with the evidential question as to whether the armed forces engaged in acts contrary to the basic rules of human conduct, as observed by Lord Justice Rix in Krotov. The overall attitude of a party to compliance with international legal obligations may be a relevant factor; absent other facts, flagrant breaches of the requirements of international law in area (e.g. detention) may suggest that other apparent breaches were, in fact, actual breaches of IHL. In such circumstances, the policy and system of the attacking forces may well demonstrate that the gross and wilful disregard for the core principles of *jus in bello* amounts to acts contrary to the basic rules of human conduct. Even so, in such circumstances, scrutiny of the conduct of the attacking forces pursuant to the Krotov approach to analysing the international legal obligations summarised at [32] is likely to be more helpful.

49. In contrast to the difficulties that arise when considering whether breaches of the *jus in bello* amount to acts contrary to the basic rules of human conduct, where the conduct in question involves "genocide, the deliberate killing and targeting of the civilian population, rape, torture, the execution and ill-treatment of prisoners and the taking of civilian hostages" (c.f. Krotov at [30]), a conclusion that there have been acts contrary to the basic rules of human conduct will more readily follow.

50. Support for the elevated threshold approach is provided by Article 9(2)(e) of the Qualification Directive, which provides that prosecution for a refusal to perform military service in a conflict, where doing so would "include crimes or acts falling under the exclusion clauses set out in Article 12(2)."

51. The exclusion clauses contained in Article 12(2), which is quoted at [12], above, correspond to Article 1F of the Convention itself. The wording of the Convention and the Qualification Directive are in unison on this point. Significantly for present purposes, the "crimes or acts" set out in the exclusion clauses are referred to as "a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes…" Neither instrument frames the relevant conduct by reference to straying beyond the principles of precaution, distinction and proportionality, or other similar concepts. As set out above, while we accept that where there are widespread and systemic breaches of those and other *jus in bello* principles, it is likely that such conduct will amount to acts contrary to the basic rules of human conduct, it is necessary to recall the approach of the Qualification Directive, and the domestic and international authorities, to articulating what amounts to acts contrary to the basic rules of human conduct.

52. In light of the above discussion, for a working, non-exhaustive, definition, we rely on that adopted by the Court of Appeal at [30] of Krotov: see [32], above.

53. The Krotov question of whether there is a "policy or system" of the armed forces to engage in conduct of this nature is both a substantive and an evidential question. Whether there is a such a policy or system in force is one consideration that goes to the issue of whether military service by the conscript or mobilised reservist "would or might" involve acts contrary to the basic rules of human conduct. Widespread commission by a military force of acts contrary to the basic rules of human conduct tends to suggest that there is a policy or system of deploying such tactics. In turn, the existence of such policy or system is one factor to consider when looking ahead to the likely role of the conscript or mobilised reservist. Without evidence of the policy or system, or official indifference, the claim must fail. But if there is policy or system, that is not the end of the equation. Much turns on the likely profile and role, within the military, of the individual concerned, which brings us to the next stage of our analysis.

The role of the conscript or mobilised reservist

54. Just as the "basic rules of human conduct" test has been expressed differently by the authorities, so too has the criterion relating to the role of the individual conscript or mobilised reservist within the military's commission of such acts, in order to qualify for refugee status.

55. The first country guidance question formulated for our consideration asks if the appellants' military service "would or might *involve*" acts which are contrary to the basic rules of human conduct. By contrast, paragraph 171 of the UNHCR Handbook uses the terminology of military action "with which an individual does not wish to be *associated*".

56. In dismissing the appeals in Sepet, the House of Lords upheld the Court of Appeal's judgment. At [61], Laws LJ had expressed the role of the conscript or mobilised reservist in terms which correlate with the UNHCR Handbook:

> "Next I should emphasise that it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where the military service to which he is called involves acts, *with which he may be associated*, which are contrary to basic rules of human conduct; where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe. I am here addressing the case where none of these additional factors is present." (Emphasis added)

57. In Sepet, Lord Bingham spoke in terms of the individual being required to "*commit* atrocities" or "*participate* in a conflict…". This appears to be a more stringent test than the mere "association" with such conduct, which is a concept that could be used to describe a number of different scenarios not including direct commission, participation or support.

58. In Shepherd v Bundesrepublik Deutschland (Case C-472/13) ECLI:EU:C:2015:117, the Court of Justice of the European Union underlined the need for there to be a causal nexus, in the context of Article 9(2)(e) of the Qualification Directive, between the likely military role of the asylum seeker and the "acts which constitute war crimes". It said, at [38]:

> "…although the enjoyment of international protection is not limited to those who could be led to commit acts which constitute war crimes personally, such as combat troops, that protection can be extended only to those other persons whose tasks could, sufficiently directly and reasonably plausibly, lead them to participate in such acts."

59. For those who do not "commit" such acts directly, the requirement that protection can only be extended to those whose roles "*sufficiently directly and reasonably plausibly*" lead them to participate in such acts appears to reflect the fact that not all conscripts or mobilised reservists will be assigned tasks which could lead them to participate in acts contrary to the basic roles of human conduct. A forward-looking assessment must be conducted to assess the likely military activities of the person concerned. Advocate General Sharpston observed at [44] of her opinion that the assessment to be performed:

> "…is difficult because it requires those authorities to consider acts and the consequences of actions that have not yet taken place. The question then becomes, is it plausible that the acts of the person concerned *would* make it possible for war crimes to be committed?" (Emphasis supplied)

60. The court expressed its conclusions in the following terms, in the operative part of the judgment, and also at [46]. It held that Article 9(2)(e) of the Qualification Directive must be interpreted as meaning that:

> "…it covers all military personnel, including logistical or support personnel;
>
> - it concerns the situation in which the military service performed would itself include, in a particular conflict, the commission of war crimes, including situations in which the applicant for refugee status would participate only indirectly in the commission of such crimes **if it is reasonably likely that, by the performance of**

his tasks, he would provide indispensable support to the preparation or execution of those crimes;"

[…]

- the factual assessment which it is for the national authorities alone to carry out, under the supervision of the courts, in order to determine the situation of the military service concerned, must be based on a body of evidence capable of establishing, in view of all the circumstances of the case, particularly those concerning the relevant facts as they relate to the country of origin at the time of taking a decision on the application and to the individual position and personal circumstances of the applicant, that the situation in question makes it credible that the alleged war crimes would be committed;"

[…]

- the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, and, consequently, if he did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) of Directive 2004/83 is excluded, unless that applicant proves that no procedure of that nature would have been available to him in his specific situation." (Emphasis added)

61. Accordingly, it must be reasonably likely that the individual concerned would make an essential material contribution ("provide indispensable support") to the acts contrary to the basic rules of human conduct, if not involved in the commission of such acts directly. Mere membership of armed forces which, elsewhere and separately, engage in acts contrary to the rules of human conduct with which the conscript or mobilised reservist would not be involved would not be sufficient to meet this threshold.

Convention nexus

62. It is unlikely to be necessary for a person seeking recognition as a refugee on this basis to adduce significant evidence that their "political opinion" is to oppose acts contrary to the basic rules of human conduct, where there is evidence that there is a widespread and systemic recourse to acts contrary to the basic rules of human conduct by the military force in question which they too would be required to commit or provide indispensable support to. By their very nature, *the basic* rules of human conduct are values that many, if not most, will hold. Pursuant to Article 10(1)(e) of the Qualification Directive, it is not necessary for an individual to have acted upon those beliefs previously. The catalyst for manifesting political opinion that opposes acts contrary to the basic rules of human conduct may well be the requirement to perform military service which would or might involve conduct contrary to such basic rules.

63. Although not binding upon us, we note that Advocate General Sharpston delivered an opinion in EZ v Federal Republic of Germany, represented by the Bundesamt für Migration und Flüchtlinge Case C-238/19 on 28 May 2020, concerning the need for a causal link between an act of persecution under Article 9(2)(e) and the reasons for persecution under Article 10(1)(e) of the recast Qualification Directive 2011/95/EU.

The United Kingdom does not participate in that directive but the material provisions for present purposes are identical to the 2004 Qualification Directive, meaning that the Advocate General's analysis is of persuasive force. She said at [78]:

> "If the applicant's home country is actively engaged in conducting a war and there is — as here — evidence that the war is prosecuted in breach of international humanitarian law and involves systematic and repeated incidents of war crimes documented by reputable sources, that is powerful objective material in support of a claim for refugee status based on Article 10(1)(e)."

64. We add that we consider that it is only likely to be where there is evidence to the contrary that any real doubt will arise as to whether such a person genuinely opposes the military commission of acts contrary to the basic rules of human conduct, for example, where there is evidence that the individual concerned has previously and voluntarily been responsible for such acts. In practice, those in relation to whom there are likely to be such doubts may well fall foul of the exclusion clauses, with the result that the Convention (and the analysis to be conduct pursuant to it) is not capable of being engaged in the first place. See, for example, R (on the application of MBT) v Secretary of State for the Home Department (restricted leave; ILR; disability discrimination) [2019] UKUT 414 (IAC) at [24].

65. Similarly, the refusal of the individual concerned to perform military service must be the only means available to them to avoid participating in or providing support to acts contrary to the basic rules of human conduct. If, for example, there is a procedure for obtaining conscientious objector status which would enable the individual concerned to avoid military service that would or might involve acts contrary to the basic rules of human conduct, a failure to obtain objector status under that procedure will negate the causal link between the refusal to perform military service and persecution for a Convention reason. See Shepherd at [45].

Punishment threshold

66. We must determine whether there is a minimum threshold of punishment which must be passed in order for an obligation to perform military service which would or might involve the commission of or participation in acts contrary to the basic rules of human conduct. In remitting PK's case back to this tribunal, the Court of Appeal observed at [31] that,

> "The question whether a draft evader facing a non-custodial punishment for failing to serve in an army which regularly commits acts contrary to IHL is entitled to refugee status, is one of overarching importance."

The court added at [32] that:

> "This question has not received proper analysis."

67. In light of Shepherd at [38], and the Court of Justice's operative conclusions, the Court of Appeal in PK at [31] must have been referring to a draft evader in relation to whom it could properly be said that the tasks they would be assigned, if they were to perform their military service, could "sufficiently directly and reasonably plausibly"

lead them to participate in such acts. Additionally, the court must have assumed, as we do, that such a person's "political opinion" would be in opposition to engaging in such conduct. By definition, the question of "overarching importance" identified by the Court of Appeal does not arise in the case of a conscript or mobilised reservist where it is not reasonably likely that they would be required to engage in such acts, or where, if it is reasonably likely, the individual concerned does not object to engaging in such conduct.

68. We assume for the analysis that follows that such a link exists. We also assume that it would be reasonably likely that the individual concerned would face some form of prosecution and eventual punishment on their return. Those are, of course, fact-specific questions, to be addressed in light of the country guidance we give in Part F.

69. In his closing submissions, Mr Malik sought to draw an analogy with the approach taken by refugee law to those seeking asylum on grounds of their sexual orientation. He submitted that, just as it is necessary for those seeking recognition as refugees on account of their sexual orientation to demonstrate that the law prohibiting such conduct would be enforced, so too it is necessary for those evading the draft to demonstrate that they would be reasonably likely to be punished, by sanctions of sufficient severity.

70. Mr Malik also submitted that the Court of Appeal had not "disturbed" the conclusions of this tribunal in PK's case in its earlier reported decision, cited at [1], above, when it was set aside by that court. In the impugned decision, a different constitution of this tribunal held in the judicial headnote as follows:

> "(i) A legal requirement for conscription and a mechanism for the prosecution or punishment of a person refusing to undertake military service is not sufficient to entitle that person to refugee protection if there is no real risk that the person will be subjected to prosecution or punishment.
>
> (ii) A person will only be entitled to refugee protection if there is a real risk that the prosecution or punishment they face for refusing to perform military service in a conflict that may associate them with acts that are contrary to basic rules of human conduct reaches a minimum threshold of severity."

71. Resisting Mr Malik's submissions, Mr Metzer for the appellants sought to draw a distinction between a compulsion to engage in acts contrary to the basic rules of human conduct, and the prohibition of certain sexual activity. He put the matter in these terms, in his written closing submissions:

> "…sexual activity or indeed the absence of it is not something which could reasonably cause serious mental anguish which would amount to persecution. Compulsion to lend one's hand, against one's conscience, to a military breaching IHL, is where we say the persecution lies, and it will be submitted in due course that this is the only compatible reading of Shepherd…"

It is beyond the scope of this decision to determine whether the absence of sexual activity "could reasonably cause serious mental anguish which would amount to

persecution", other than to observe that this broad brush statement appears to be at odds with settled law concerning asylum claims based on sexual orientation, where the modification of sexual behaviour to avoid persecution is accepted as falling squarely within the Convention. However, we consider there to be some merit in the distinction Mr Metzer seeks to draw arising from the nature of the conduct at issue, and the character of the underlying legal obligations and norms that would be infringed by the putative persecution.

72. We recall that the situation facing the putative refugee is one whereby he or she will be subject to a *positive legal obligation* to engage in conduct which is anathema to the broad humanitarian objectives which lie at the heart of the Convention, and the norms of international law from which no derogation is possible. So much is clear from the terms of the Convention itself. The Convention does not apply to those caught by the exclusion clauses in Article 1F, reflecting its abhorrence at such conduct. The Convention was drafted and agreed as a response to the international condemnation which followed the atrocities of the Second World War, where there was widespread practice of "acts contrary to the basic rules of human conduct".

73. While it is well established that there are no hierarchies of protection amongst the Convention reasons for persecution, when determining the level and nature of the conduct which may amount to persecution, the assessment is necessarily context-specific. So much is clear from Minister voor Immigratie en Asiel v XYZ (United Nations High Commissioner for Refugees intervening) (Joined Cases C-199/12 to C-201/12) which considered whether refugee status should be accorded on the basis of sexual orientation in circumstances where there was no risk of enforcement of the criminal law prohibiting such conduct in the country from which protection is sought.

74. The issues in XYZ related primarily to whether there needs to be a real risk of the criminal law prohibiting homosexual activity being enforced. The CJEU held that the mere criminalisation of homosexual activity was insufficient. But where a term of imprisonment "was actually applied", that would amount to persecution. See the second operative paragraph of the judgment:

> "Article 9(1) of [the Qualification Directive], read together with article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution."

This appears to be the line of authority Mr Malik seeks to rely on to establish the parallels he sought to draw.

75. The CJEU noted at [51] of XYZ that Article 9(1)(a) requires "acts of persecution" to be "sufficiently serious" by their nature or repetition "so as to constitute a severe violation of *basic human rights*, in particular the rights from which derogation cannot be made…" (emphasis added). That the court highlighted that there was a subset of

human rights, "basic human rights", from which no derogation is possible pursuant to Article 15(2) of the ECHR, was significant. Article 15 of the ECHR concerns derogations from that convention in times of emergency. Paragraph (2) provides that there are certain obligations under the ECHR from which no derogation is possible, even in times of emergency:

> "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."

The only permissible derogation from Article 2 relates to lawful acts of war. By definition, the acts of war with which we are concerned in this decision are not lawful, with the effect that the non-derogable character of the underlying human rights remains relevant.

76. Against that background, the court held that not all violations of human rights would be sufficient to cross the threshold of severity inherent to Article 9(1); see [53]:

> "Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness."

77. The significance of the above analysis of the CJEU is twofold.

78. First, by commencing its analysis with the caveat that "not all violations of fundamental rights" will cross the threshold of severity, the court was nevertheless recognising that the mere existence of legislation criminalising homosexual activity was, as a state of affairs, a violation of the fundamental human rights of those targeted by the legislation, albeit an insufficient violation to lead to refugee status, when taken in isolation. It is hardly surprising that the court considered the mere existence of legislation attaching penal sanctions to homosexual activity to be a violation of some fundamental rights. A legal prohibition targeting the sexual identity, orientation and expression of certain persons plainly interferes with their rights to private and family life and non-discrimination, whether viewed through the lens of the ECHR, or the Charter of Fundamental Rights of the European Union, even where it is not enforced. A person caught by such legislation would know that conduct which they consider as going to the heart of their identity is, in fact, criminalised by the state. The existence of such condemnatory legislation could fuel and endorse a range of discriminatory behaviour to which the individual concerned would be subject in many different facets of their life. The list could go on.

79. That the mere existence of such legislation can amount to a violation of a fundamental right is significant because it goes to the issue of whether the existence of a legal obligation prohibiting or mandating certain conduct may itself be sufficient to constitute a violation of a fundamental right (albeit, in the context of asylum claims based on sexual orientation with no risk of enforcement, a violation at the lesser end of the spectrum of severity). Applied by analogy to a legal obligation mandating an individual to perform military service that would or might involve acts contrary to the basic rules of human conduct, the mere existence of such an obligation is, in principle, sufficient to amount to a violation of a fundamental right.

80. The second reason the approach of the CJEU to "sufficiently serious" violations was significant is as follows: drawing on Article 9(1)(a) of the Qualification Directive, the court drew a distinction between violations of fundamental rights from which a derogation was possible, on the one hand, and those from which there may be no derogation, on the other. It held at [54]:

> "…it must be stated at the outset that the fundamental rights specifically linked to the sexual orientation concerned in each of the cases in the main proceedings, such as the right to respect for private and family life, which is protected by article 8 of the Human Rights Convention , to which article 7 of the Charter corresponds, read together, where necessary, with article 14 of the Human Rights Convention, on which article 21(1) of the Charter is based, is not among the fundamental human rights from which no derogation is possible."

81. It is significant in sexual orientation asylum cases that the underlying fundamental and human rights (Articles 8 and 14 ECHR; Article 7 and 21(1) of the Charter of Fundamental Rights) infringed by discriminatory or persecutory behaviour are of capable of being the subject of a derogation. So much is clear from the approach of the CJEU at [55], with emphasis added:

> "*In those circumstances,* the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the [Qualification Directive]."

The "circumstances" referred to by the court related to the derogable nature of the underlying fundamental rights at play in those proceedings. In that context, for there to be an interference with "*basic* human rights" (to adopt the CJEU's terminology) sufficient to amount to persecution, there must be a corresponding risk of some enforcement and punishment.

82. That is in stark contrast to the fundamental human rights and norms which underpin the international prohibition against engaging in acts contrary to the basic rules of human conduct, which is the paradigm of the present matter. Where, as here, no derogation is possible from the underlying norms of international law which govern the elementary considerations of humanity (Nicar v. U.S.), and which prohibit acts contrary to the basic rules of human conduct, different considerations apply when determining what amounts to a "sufficiently serious" violation of fundamental rights.

83. Transposed to the questions we must address, the approach of the Court of Justice suggests that the mere existence of legislation which is offensive to a person's identity and protected characteristics is, in principle, capable of amounting to a violation of fundamental rights. That is not to say that there need not be *any* prospect of punishment, even in a military case, but it is a factor which informs the threshold which such punishment should or could pass in order to amount to persecution, especially where the violations of "basic human rights" would be concerned. We consider that the nature of the conduct under consideration calibrates

the threshold of punishment which must be met in order to amount to the individual concerned "being persecuted".

84. Against that background, we note that the indicative examples of acts of persecution given in Article 9(2) of the Qualification Directive draw a distinction between "prosecution or punishment, *which is disproportionate or discriminatory*" (Article 9(2)(c)), on the one hand, and "prosecution or punishment" for refusal to perform military service in a conflict for acts which would fall within Article 12(2) (Article 9(2)(e)), on the other. Under Article 9(2)(e), there is no requirement that prosecution or punishment be disproportionate or discriminatory, and there is no indication of a threshold of punishment, in contrast to the position with prosecution or punishment for other types of offences, which must be disproportionate or discriminatory in order to be categorised as an act of persecution.

85. While we recall that Article 9(1) requires acts of persecution to "be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights…", we do not consider that that provision, when viewed in the purposive context of the Refugee Convention, excludes the possibility that *any* legal requirement enforced by penal or other punitive sanctions to perform military service which would or might involve the commission or participation of acts contrary to the basic rules of human conduct could amount to "sufficiently serious" persecution.

86. Returning to Shepherd, in its discussion of the engagement of Article 9(2)(e) of the Qualification Directive from [30] to [46], the CJEU did not import into its analysis any consideration of a minimum threshold for punishment. That is in stark contrast to the court's separate consideration of the eighth question posed by the referring court, which concerned the circumstances in which punishment for the evasion of military service would engage Article 9(2)(b) of the Qualification Directive (legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner) and 9(2)(c) (disproportionate or discriminatory prosecution or punishment). The court addressed this question after identifying the need for a causal nexus between the military service of the individual concerned and the likelihood of engaging in war crimes from [30] to [46]. It said, at [48], that by asking the eighth question:

> "…the referring court must be regarded as linking the present question only to the hypothesis that the national authorities responsible for examining the application for refugee status of the applicant in the main proceedings consider that it is not established that the military service he refuses to perform would include the commission of war crimes."

Put another way, it was only when there was no prospect of "the commission of war crimes" that questions relating to the severity of punishment were engaged.

87. We are reinforced in this approach by that of Lord Bingham in Sepet, who, at [8], did not suggest that there was a punishment threshold in order for refugee status to be accorded to one who has refused to undertake compulsory military service on the

grounds that such service would or might require him to commit atrocities or gross human rights abuses.

88. In Krotov, the Court of Appeal appeared to adopt a similar approach. At [51], it held:

> "If a court or tribunal is satisfied (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, has reached a position where combatants are or may be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community, (b) that they will be punished for refusing to do so and (c) that disapproval of such methods and fear of such punishment is the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict, then it should find that a Convention ground has been established."

We note that the reference to "punishment" is not accompanied by any threshold of minimum severity, although the appellant in that case was a deserter who fled battle in Grozny, Chechnya, in January 2000 during live conflict, and so would have been likely to face a significant custodial sentence.

89. We were taken to the Scottish case of Davidov v Secretary of State for the Home Department 2005 1 S.C. 540, which considered the Court of Appeal's approach in Krotov. At [17], Lord Hamilton, giving the lead opinion on behalf of the First Division of the Inner House held:

> "…it is plain, in particular from Krotov (para 51), that, if condition (a) is satisfied, condition (b) requires only that there should be punishment for refusal to act, not that the punishment should itself be grossly excessive or disproportionate or otherwise constitute persecution or infringement of the individual's human rights. That is, where condition (a) is satisfied, punishment for refusal to serve itself constitutes persecution for the purposes of the Convention…"

90. In his closing submissions, Mr Malik submitted that we should not follow the Davidov approach. It is not binding on this tribunal, he submitted, and is at odds with the minimum persecutory threshold inherent to refugee law, as reflected by the Qualification Directive's requirement that acts of persecution be sufficiently severe. That was a different approach to that set out in his skeleton argument, which stated at [56], that "The UT can safely conclude that Lord Hamilton could not have intended to say any punishment (a reprimand, caution or fine) would be sufficient."

91. We accept that punishment or prosecution must be sufficiently serious in order to amount to persecution for the purposes of the Convention. Everything turns on what amounts to "sufficiently serious" in this unique context. We have set out above how the thresholds which must be met for punishment to amount to persecution vary according to the purpose and context of the punishment, and the nature of the underlying fundamental rights engaged by the circumstances in which the punishment will be imposed.

92. In the case of military service that would or might involve acts contrary to the basic rules of human conduct, an individual faces punishment for the prospect of refusing to comply with a positive obligation to engage in conduct from which no derogations are possible, and which offends the elementary considerations of humanity. It is difficult to imagine a more offensive and abhorrent legal obligation to be subject to. Where a person's "political opinion" (to adopt the Convention terminology) is to object to such conduct by refusing to perform the military service which would or might involve it, any punishment that is more than negligible will amount to persecution. It would be anathema to the humanitarian objectives of the Convention to expel an individual to a country which would subject them to that obligation, on pain of any punishment.

93. In the present context, the character of the persecution is the legal obligation, imposed by the conscripting or mobilising state, upon a person to engage in military conduct that would involve the commission of, or be reasonably likely to provide indispensable support to, the preparation or execution of acts contrary to the basic rules of human conduct. The mere prospect of *any* punishment for failure to comply with a legal obligation imposed by the State to engage in such conduct amounts to persecution. There is no minimum threshold, provided that the punishment is causally linked to the individual's refusal to perform military service which itself would involve the commission of or participation in acts contrary to the basic rules of human conduct.

94. Ancillary administrative or criminal punishments are unlikely to be sufficient unless discriminatory or disproportionate, for they will lack the necessary causal link to the underlying obligation to engage in acts contrary to the basic rules of human conduct. If, for example, the punishment would be limited to an administrative fine for a failure to report to a draft office, with no reasonable likelihood of further punishment such as a criminal sanction for refusing to perform military service, a persecution scenario is less likely to be present.

95. However, where the punishment is anchored to the refusal or failure to engage in military service, even a fine or a non-custodial sentence would place the individual concerned at odds with the conscripting or mobilising state, potentially for the rest of their lives. Such a punishment would be a formal sanction from the state for refusing to engage in conduct which would be anathema to the Convention. It could affect the individual's employment prospects, eligibility for state assistance, as well as have an external impact, such as having to be declared to other states in, for example, a visa application.

96. Just as the Convention does not expect people to lie to the state authorities about, for example, their *sur place* or other political activities when questioned at the border upon their return, so too we cannot see how it expects a putative refugee to be returned to a life of defiance in the face of a positive legal obligation to engage in conduct which is contrary to international norms and from which no derogation is possible, with the likely ensuing consequences, even if those consequences "only" entail a suspended sentence or similar. The applicant for asylum would be returned to face the invidious choice of performing military service that would or might

involve acts contrary to the basic rules of human conduct, or, alternatively, submitting to punishment and all that that would entail for refusing to do so.

97. In Krotov at [39], the Court of Appeal spoke of such a person returning with "no choice" but to perform military service entailing the commission of international crimes. The court cannot have meant that there would literally be no choice, for it was not addressing a situation whereby recruits would be detained and forcibly conveyed to the battlefield. The context of the discussion was an individual facing punishment for the refusal to engage in such conduct. Thus the individual faced with "no choice" at [39] of Krotov is, in reality, the same individual faced with what we have termed the "invidious choice" of responding to the call-up or mobilisation, on the one hand, or facing punishment for refusing to do so, on the other. Whether the individual is described as facing "no choice" or facing an "invidious choice", it would be a state of affairs which would, in our judgment, amount to persecution.

98. We consider this approach to be consistent with that taken by the respondent in her *Country Policy and Information Note Ukraine: Military Service*, version 6.0, March 2020. In the "policy" section of the document, under the heading *Basis of claim*, the note states, at [1.1.1]:

> "Fear of persecution or serious harm by the state because of:
>
> (a) the general treatment and/or conditions likely to be faced by the person during compulsory military service duties; and/or
>
> (b) a person being required to perform military service during emergency mobilisation, despite their stance as a conscientious objector; and/or
>
> (c) treatment likely to be faced by the person during compulsory military service due to the person's sexual orientation; and/or
>
> (d) the penalties likely to be faced by the person's refusal to undertake, or their desertion from, military service duties; and/or
>
> (e) prison conditions if a draft evader convicted in absentia is held in detention on return to Ukraine."

As may be seen, in the respondent's own guidance, there is no requirement for punishment of a minimum threshold. Sub-paragraph (b) of the policy focusses on the *requirement* to perform military service, rather than the punishment for non-compliance with the requirement.

99. We consider that, in practical terms, the punishment must be real and must relate to the individual's refusal to perform the military service. If the "punishment" is so negligible so as to amount to no punishment at all, it cannot be said to amount to persecution. Even if punishment is not negligible, if it is imposed for some other reason than the individual's refusal to perform military service, or if the individual failed to avail him or herself of a conscientious objector procedure that was otherwise available, the punishment will lack the necessary nexus to persecution being for a Convention reason.

100. We reiterate that this conclusion applies only in relation to those whose personal conduct would either involve the commission of acts contrary to the basic rules of human conduct, or those in relation to whom it is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of acts contrary to the basic rules of human conduct. Where there is no such likelihood, it would be necessary for the punishment to be disproportionate or discriminatory.

101. In the Ukraine context, as we demonstrate below, the background materials and the expert evidence demonstrates that it is not reasonably likely that a conscript or a mobilised reservist would engage in acts contrary to the basic rules of human conduct, absent some case-specific reason why the individual concerned would be exposed to duties of that nature. In turn, the prospect of a common or garden draft evader being punished for refusing to perform military service in circumstances where it may properly be said that the reason for the punishment is the individual's refusal to be associated with acts contrary to the basic rules of human conduct, is very low.

102. While every case will be fact-specific, in the Ukraine context, in light of our findings below that conscripts or mobilised reservists are not sent to the front line, we consider there would have to be some special factor, perhaps due to the prior qualifications or military experience of the individual concerned, in order to merit a finding that the individual would engage in acts contrary to the basic rules of human conduct, were they to perform their military service. In turn, such a person would, if prosecuted, be more likely to receive punishment of a more severe nature than a fine or suspended sentence, as it is likely that such an individual would have some special characteristic, such as enhanced military skills, training or prior experience, which would amount to an aggravating feature: see VB, Headnote (1).

103. It follows that the prospect of an individual being recognised as a refugee as a result of the prospect of a non-custodial criminal or administrative disposal is correspondingly very low and is a scenario that is likely to arise more in theory than in practice.

Summary of legal conclusions

104. Drawing together the above analysis:

a. Where a person faces punishment for a refusal to perform military service that would or might involve acts contrary to the basic rules of human conduct, that is capable of amounting to "being persecuted" on grounds of political opinion for the purposes of the Refugee Convention.

b. The term "acts contrary to the basic rules of human conduct" refers to the core of humanitarian norms generally accepted between nations as necessary and applicable to protect individuals in war or armed conflict and, in particular civilians, the wounded and prisoners of war. It includes, but is not limited to, the indicative examples listed in Krotov v Secretary of State for the Home Department [2004] EWCA Civ 69 at [30] to [36].

c. In order to engage the Refugee Convention, the conduct in question must be committed on a systematic basis, as the result of deliberate policy or official indifference to the widespread actions of a brutal military. In practice, the term conveys an elevated threshold.

d. It is not necessary for there to be specific international condemnation of the conflict in question for the conduct of the military to be categorised as engaging in acts contrary to the basic rules of human conduct. The international community of states as a whole has already condemned conduct which is contrary to the basic rules of human conduct through its recognition of the existence of international norms from which no derogation is possible, and the adoption of international legal instruments recognising the prohibitions against such conduct.

e. However, where there is specific international condemnation of such acts, that is likely to provide an evidential basis for concluding that it is reasonably likely that the military force in question is engaging in acts contrary to the basic rules of human conduct on a widespread and systemic basis.

f. The individual concerned must demonstrate that it is reasonably likely that their military service would involve the commission of acts contrary to the basic rules of human conduct, or that it is reasonably likely that, by the performance of their tasks, they would provide indispensable support to the preparation or execution of such acts.

g. The political opinion of the person concerned must be to oppose the commission of acts contrary to the basic rules of human conduct. In practice, it is unlikely to be necessary for a person to adduce significant evidence that their political opinion is to oppose such conduct. It is only where there is evidence to the contrary that any real doubt is likely to arise, for example where there is evidence that the individual concerned has previously and voluntarily been responsible for acts contrary to the basic rules of human conduct. Such an individual may well fall foul of the exclusion clauses in the Refugee Convention in any event.

h. There must be no other way to avoid military service, for example through the individual concerned availing him or herself of a conscientious objector process.

i. Where a causal link exists between the likely military role of the conscript or mobilised reservist, the commission of or participation in acts contrary to the basic rules of human conduct, and the punishment to be imposed, punishment including a fine or a non-custodial sentence will be sufficient to amount to "being persecuted" for the purposes of the Refugee Convention, provided it is more than negligible.

PART C: BACKGROUND MATERIALS AND EXPERT EVIDENCE

Terms defined

105. The Ukrainian government has termed the conflict region in the east of the country "the Anti-Terrorist Operation zone", or "ATO". It is the term Professor Bowring used in his reports. By contrast, many of the background materials refer to the conflict in the east of the country. In this decision, we refer to the ATO and the conflict in the east of the country interchangeably. The focus of hostilities is also referred to as the "contact line", particularly by the OHCHR.

106. Where we refer to the "Ukrainian military", we are referring to all Ukrainian armed forces, and the institutions that support them. Where the context requires, references simply to "Ukraine" are to the Ukrainian side in the conflict, encompassing the Ukrainian military and supporting infrastructure.

The expert evidence and background materials

107. The appellants relied on several background materials, plus the reports and oral evidence of Professor William Bowring, a barrister and professor of law at Birkbeck, University of London, and an established expert in matters relating to Russia and Ukraine. Professor Bowring's evidence has been accepted as authoritative in a number of matters before the courts concerning matters in the region, and was instrumental in the previous country guidance, VB. Professor Bowring authored two expert reports, dated 8 and 28 April 2020, and gave oral evidence before us.

108. The background materials included in the appellants' and respondent's bundles are listed in Annex A to this decision. We have considered those materials in their entirety.

109. In addition, during Professor Bowring's evidence on 3 June, those representing the appellants appeared to conduct some additional online research, in Russian, the product of which Professor Bowring was invited to comment upon (and in one case, interpret) after a short adjournment. We have listed the new documents at paragraph 228 and following. Very fairly, Mr Malik was content for us to admit the new documents into evidence, despite the lateness of the hour, on the basis that he was concerned to ensure that we had available to us the most comprehensive selection of background materials, lest it be said that our decision had been reached without consideration of otherwise relevant documents.

Ukraine – the political and security situation

110. Before addressing the specific issues for consideration, we must set out the background context within which our analysis must take place.

111. The recent history of Ukraine has been dominated by significant disruption. In November 2013, in what was widely perceived at the time to be a sudden and unexpected move, the government of Ukraine announced that it was suspending negotiations concerning the conclusion of an Association Agreement with the European Union. Negotiations were at a relatively advanced stage, and the

agreement was hoped by some to be a precursor to a formal roadmap for Ukraine's eventual accession to the European Union. Commentators attributed the government's decision to pressure from neighbouring Russia, which was said to be reluctant for Ukraine to conclude a formal alliance with the European Union, at the cost of a potential loss of Russian influence. The abandonment of the negotiations triggered widespread citizens' protests against the government, and a subsequent crackdown by the authorities against the unrest. The focal point of the anti-government protests was Kyiv's Independence Square. The movement catalysed by the protests became known as the "Euromaidan" or "Maidan" protests or movement.

112. The Euromaidan protests also demonstrated against the government's adoption of "anti-protest" laws, on 16 January 2014. Demonstrations continued and the clashes between government forces and demonstrators escalated. Several unarmed protestors were killed by sniper fire, for which responsibility is yet to be established. The then Prime Minister resigned. President Yanukovych claimed to have reached an agreement with the opposition to secure some political resolution and reconciliation, yet fled shortly afterwards, eventually for exile in southern Russia. The Ukrainian parliament voted to remove him from his post on 22 February 2014, and 25 May was set as a date for a special election to identify his replacement. A warrant was also issued for the (by now) former president's arrest, accusing him of "mass killing of civilians". Professor Bowring opines at [14] of his first report that these events had major political consequences, arising from the emergence of a political vacuum and transition of power at the highest levels.

113. In parallel to the domestic unrest caused by the Euromaidan movement, the Russian Federation annexed the Crimean Peninsula, following its occupation by Russian forces. Fighting broke out in the east of Ukraine between the Ukrainian government and self-declared separatist territories in Donetsk, Luhansk and other locations. Opponents of the new Kyiv government occupied buildings belonging to local administrations and law enforcement, demanding increased local autonomy or independence from Ukraine, and closer ties with Russia. The newly-formed armed separatist groups, which many in the international community consider to be backed by Russia (see, e.g., "*You don't exist" – Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine*, page 10; United States Department of State ("USDS") *Ukraine 2017 Human Rights Report* at page 14; Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities for 2019* at [277]), justified their actions by raising concerns about the rights of the region's minority of Russian-speaking residents. Russia-backed separatists continue to hold substantial territory in Donetsk and Luhansk Oblasts, with the areas in question now purporting to be the "Donetsk people's republic" and the Luhansk people's republic."

114. An initial peace agreement was signed in 2014, in Minsk. Fighting continued, and a further ceasefire agreement was agreed in 2015. Again, fighting continued. At a conference held in Paris attended by France, Germany, Ukraine and Russia, a further agreement was reached, under which the parties agreed to implement the ceasefire in full and disengage military forces in three additional regions by the end of March 2020.

115. At [26] of his first report, Professor Bowring writes that:

> "Armed conflict continues, but not on the scale of the earlier years. Ukraine now has a much more professional and capable army, which is gradually making inroads into separatist held territory.

116. Professor Bowring goes on to explain that Russian-led forces mounted ten attacks on Ukrainian positions in Donbas on 21 March 2020. One Ukrainian soldier was wounded in action. However, since 23 March 2020, Russian invaders had been observing the ceasefire and no army casualties had been reported since then, he writes.

117. The government response to the protests, and the conflict in eastern Ukraine and Crimea has led to well-documented allegations of human rights abuses, breaches of international humanitarian law, and allegations of war crimes by all participants to the conflict. The allegations include cruel, inhumane and degrading treatment and torture during detention, extra-judicial killing, and breaches of the principles of distinction, precaution and proportionality under international humanitarian law.

118. The strain on the military from the ongoing conflict has thrown into sharp relief the Ukrainian law and practice concerning the compulsory conscription of new recruits, and the mobilisation of reservists.

Unrest and hostilities: international reaction

119. In Resolution 1988 (2014), the Parliamentary Assembly of the Council of Europe said that it "deeply regrets" the events of the Euromaidan protests, stating that the "unprecedented escalation of violence" was "largely the resulted of the increasingly hard-handed approach of the authorities". The resolution condemned the use of snipers and live ammunition against the protesters, stating that there should be a full and effective investigation, and there could be no impunity for human rights abuses, regardless of who committed them.

120. On 27 March 2014, the UN General Assembly adopted Resolution 68/262 titled the "Territorial integrity of Ukraine", which recalled the prohibition under international law against the forced acquisition of territory from one state by another. The operative provisions of the resolution affirmed the internationally recognised borders of Ukraine and called upon states not to recognise any alteration of the status of Crimea from part of Ukrainian sovereign territory. The resolution also called for all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means.

Background materials: conduct of the Ukrainian military

121. Professor Bowring's first report drew heavily on many of the background materials listed in Annex A concerning the conduct of the Ukrainian armed forces in the ATO, and the ongoing conflict, as well as outlining his opinion on various matters. We are grateful to Professor Bowring for drawing our attention to those materials, and for his commentary upon them. We will turn to Professor Bowring's oral evidence, and

the additional documents upon which he was invited to comment by Mr Metzer, once we have surveyed the landscape of the background materials relied upon in his reports, and by the respondent.

122. The background materials we have been taken to are from a number of respected and independent non-governmental organisations, the Office of the United Nations High Commissioner for Human Rights ("OHCHR"), the USDS, the respondent's own *Country Policy and Information Note Ukraine: Military Service*, and her *Response to an Information Request Ukraine: Military service,* 11/19-034, 15 November 2019.

123. The methodology adopted by the authors of OHCHR reports entails field visits to territory controlled by the government or separatist forces (although access to the latter is typically denied). The earliest OHCHR report we were invited to consider was its *Report on the human rights situation in Ukraine 16 August to 15 November 2017*. The report is based on information collected by the UN's Human Rights Monitoring Mission Ukraine ("HRMMU") through interviews with victims, witnesses, lawyers, government representatives and others. For that report, 290 such interviews were conducted, and site visits were made to territory held by both sides of the conflict. The OHCHR and HRMMU appear to have enjoyed much greater access to government-controlled territory than to rebel-held territory, with the consequence that, in relation to the reports' conclusions concerning government-held territory, we can necessarily have a high level of confidence.

124. The standard of proof adopted by the authors of the report is described as the "reasonable grounds to believe" standard. That term is defined at [16] of the *Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020* as being a situation:

> "where, based on a body of verified information, an ordinarily prudent observer would have reasonable grounds to believe that the facts took place as described and where legal conclusions are drawn, that these facts meet all the elements of a violation…"

125. In that report, the authors conducted 52 field visits, which included 15 places of detention, 118 trial hearings, eight assemblies and interviews with 129 victims or witnesses of alleged human rights violations, their relatives, lawyers, government representatives, members of civil society and other interlocutors. The authors state that they draw on information obtained from court records, official records, open sources, and other relevant material.

126. The methodology adopted by the OHCHR in the November 2019 to February 2020 report is typical of that it adopts in each of its regular reports. The respondent herself relies on the OHCHR's findings in her *Country Policy and Information Note Ukraine: Military Service*, and in the *Response to an Information Request Ukraine: Military service,* 11/19-034, 15 November 2019. We readily accept that the OHCHR's findings carry weight. We do not understand the respondent to contend anything other than the findings and analysis of all OHCHR reports should be treated with similar respect.

127. We pause to observe that, although the terminology is similar to the "reasonable likelihood" standard applicable in protection proceedings, elements of the OHCHR's "reasonable grounds" standard appear to impose a higher, more stringent standard than what is understood as the lower standard domestically. For example, there is no requirement when substantiating a protection claim to provide a "body of verified information", given the absence of any requirement for corroboration under international law.

Acts contrary to the basic rules of human conduct

128. Before considering whether the appellants "would or might" be involved in acts contrary to the basic rules of human conduct, we must first determine whether the Ukrainian armed forces engage in such activity. To do this we will examine the background materials collated by Professor Bowring, as well as his oral evidence, and all other background materials to which our attention has been drawn.

129. In following the thematic approach adopted by the appellants in their presentation of the background materials, we have necessarily had to refer to some of the materials more than once, where they are relied upon to establish two separate propositions. On other occasions, the same incident is relied upon by the appellants to demonstrate different facets of the misconduct of the Ukrainian military, for example, to demonstrate disregard for both civilian life and civilian installations. This, of course, reflects the fact that the same incident may raise concerns on a number of different fronts; collateral damage to civilian infrastructure, civilian deaths, interruption to basic services, etc.

Arbitrary detention, torture, and ill-treatment of conflict detainees

130. Amnesty International's May 2015 report, *Breaking Bodies: Torture and Summary Killings in Eastern Ukraine* outlines the detailed accounts given by those detained by Ukrainian and separatist forces in the conflict in the east of the country concerning arbitrary detention, torture and extra-judicial killing. Reports of torture and other cruel, inhumane, and degrading treatment characterise the experiences of those featured in the report. At page 5, the authors state:

> "The evidence overwhelmingly indicates that both Ukrainian forces and pro-Kyiv militia on the one side and separatist forces on the other have committed the war crime of torture on persons in their custody."

The report highlights a particular feature of the Ukraine conflict, namely the use – by both sides – of irregular militia groups, aligned with either the Ukrainian or separatist sides. There is "compelling evidence" suggesting that prisoner abuse was frequent and widespread, the report states (page 6). The misconduct was not limited to any particular police or military unit, separatist force or irregular armed group, although the authors note that certain groups, namely those outside the official or *de facto* chains of command on both sides, appear to be more lawless and violent in their treatment of prisoners of war than others. The evidence suggested that those held by pro-Kyiv forces were "eventually" brought before a judge and moved into the regular criminal justice system. Even in those cases, the report states, the responses

of judges to clear signs of prisoner abuse had been disappointing. Prisoners reportedly showing clear signs of abuse, such as bruised faces, split lips and black eyes, did not lead to judicial concern or investigation.

131. By May 2016, matters had not improved, Amnesty reported. In an article entitled *No justice for eastern Ukraine's victims of torture* originally published in *Newsweek*, Amnesty's Senior Director of Research recounted in vivid detail an account she had been given by a survivor of Ukrainian detention and torture. The detainee, a 55 year old gas board employee, recounted how Ukrainian forces raided her home situated 20 kilometres from Donetsk. She was dragged away and beaten severely, on account of being a suspected radio operator and spotter for separatist forces. She was beaten with a rubber hammer, thrown against walls, not fed, not allowed to go to the toilet, and kept on a bare concrete floor for two weeks. She suffered a broken nose, jaw and cheekbones, her medical records confirmed. Her experience, said the article, was "far from unique". Accounts of this nature are peppered throughout the background materials; this is far from an isolated occasion.

132. In their joint 2016 report, "*You don't exist*" – *Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine*, Amnesty International and Human Rights Watch ("HRW") outline nine real-life case studies involving arbitrary detentions at the hands of the Ukrainian authorities. In most cases, pro-government forces conducted the initial detention, before handing the detainee to the Security Service of Ukraine ("the SBU") for a further period of detention. There was usually an onward transmission of the detainee to the regular criminal justice system. The examples record the SBU as holding detainees for periods ranging from six weeks to 15 months.

133. The report comments on the phenomenon of prisoner exchanges, which have been said by the HRMMU to accompany many of the allegations of arbitrary detention and torture. The practice of prisoner exchanges was sanctioned by the Minsk II peace agreement, primarily on the assumption that combatants would be exchanged. However, the practice has catalysed further detentions. The parties to the conflict, and their proxy actors, are incentivised into capturing additional detainees, in order to provide bargaining capital for the exchange of prisoners held by the other side at a later date. Many such detentions by are recorded the HRMMU as having taken place without any form of due process, with no official record or legal oversight. For the detaining authority or military force, the prospect of releasing an individual within the confines of the murky world of prisoner exchanges presents an attractive prospect when compared with the paper trail that would have to be established in the event that the individual's detention were maintained through official channels. The practice fuels clandestine detention without authority and oversight.

134. Impunity is another theme that emerges from the background materials. In the *Breaking Bodies* report and the *No Justice* article, accounts are given of how volunteer militia loyal to both sides were able to commit such atrocities with impunity. In many cases, militia responsible for such conduct were formally incorporated into military and law enforcement structures. Seeking redress was said to be risky; few lawyers wanted to take on the cases, fearing retaliation themselves.

135. The OHCHR report covering May to August 2019 states the following concerning impunity, at [8] of the Executive Summary:

> "The Government failed to conduct effective investigations and prosecutions of members of Ukrainian forces alleged to have perpetrated grave human rights violations, undermining the victims' right to effective remedy. Accountability for killings and violent deaths during the Maidan protests and in Odesa on 2 May 2014 also remains outstanding, more than five years after the events."

136. The reports outlined above do not document isolated incidents. The theme of torture coupled with impunity is underlined by OHCHR reports from the outset of the conflict to the present day.

137. Against that background, the November 2019 to February 2020 OHCHR report states at [49] that, "[c]ases of arbitrary detention, torture and ill-treatment continued to be documented by OHCHR, both in Government-controlled territory and in territory controlled by the self-proclaimed 'republics'." In relation to Ukrainian territory, the SBU appears to be the main culprit of arbitrary detention, torture and mistreatment, often "taking over" detention following an initial period of detention (and mistreatment) at the hands of unidentified actors.

138. At [128], the November 2019 to February 2020 OHCHR report records its global conclusions on this topic. Here one finds confirmation that the practice of arbitrary detention and torture is a systemic problem, which, despite repeatedly being highlighted and condemned by the OHCHR, persisted: "OHCHR notes that a number of concerns highlighted in past reports have not been addressed. This includes the impact of the conflict on economic and social rights, such as access to basic services, reports of arbitrary detention and torture…" Annex 1 to the report specifically addresses the topic of arbitrary detention of conflict-related detainees, "as exemplified by individuals simultaneously released under the Minsk agreements on 29 December 2019", and thus provides a recent and contemporary picture of the continuing practice of arbitrary detention and punishment. At [4], responsibility was primarily attributed to the SBU. Mis-treatment in detention included sexual violence, threats of violence, beatings, asphyxiation, electric shocks, positional torture, food deprivations, and mock executions.

Alleged breaches of international humanitarian law concerning in-conflict conduct

139. The appellants contend that the Ukrainian military regularly and systemically breaches the principles of distinction, proportionality and precaution, and in doing so, engages in acts contrary to the basic rules of human conduct. It does so, Mr Metzer submits, through placing civilians in the line of fire, and by positioning military objectives near to water facilities, schools and residential areas, and near objects otherwise protected by IHL, when engaging in conflict with the Russia-backed separatist militia in the east of the country. Civilian property is requisitioned and used for military objectives without compensation or reparation. Large numbers of civilians have been killed. The appellants cite background materials which they contend demonstrate that the Ukrainian military has additionally: looted property with impunity; denied civilians access to basic services, including electricity and

water; refused to give account for missing persons in violation of customary international legal norms; continues to engage in the use of landmines, and other booby traps; violated ceasefires in civilian areas; and engaged in the forced movement of civilians, in prohibition of international law.

140. At [19] of his first report, Professor Bowring quotes the following extract from the Human Rights Watch *World Report* for 2020

> "2019 saw a significant decrease in civilian casualties. The leading causes [of the remaining casualties] were shelling by artillery and mortars, fire from light weapons, landmines, and explosive remnants of war.
>
> Between January and May 2019, attacks on schools on both sides of the contact line tripled compared with the same period in 2018. Throughout six years of conflict, 147 children were killed."

Although this extract does not engage with the source materials, or details concerning attacks on schools, we accept that this respected human rights organisation's summary of attacks "on" schools, and the overall number of children killed, gives rise to cause for concern.

141. In its *Ukraine 2017 Human Rights Report*, the USDS commented at page 15 that:

> "In its September report, the HRMMU noted, 'the placement of military objectives in densely populated areas through military occupation and use of civilian property *continued* to heighten the risk of [*sic*] civilian lives on both sides of the contact line.'" (emphasis added)

142. The appellants also rely on the *Report on Preliminary Examination Activities 2019* of the Office of the Prosecutor at the International Criminal Court. The Office of the Prosecutor summarised its own views about the conflict in these terms:

> "279. Based on its preliminary assessment of subject-matter jurisdiction, the Office has concluded that the information available provides a reasonable basis to believe that, in the period from 30 April 2014 onwards, at least the following war crimes were committed in the context of the armed conflict in eastern Ukraine: intentionally directing attacks against civilians and civilian objects, pursuant to article 8(2)(b)(i)-(ii) or 8(2)(e)(i); intentionally directing attacks against protected buildings, pursuant to article 8(2)(b)(ix) or 8(2)(iv); wilful killing/murder, pursuant to article 8(2)(a)(i) or article 8(2)(c)(i); torture and inhuman/cruel treatment, pursuant to article 8(2)(a)(ii) or article 8(2)(c)(i)); outrages upon personal dignity, pursuant to article 8(2)(b)(xxi) or article 8(2)(c)(ii); rape and other forms of sexual violence, pursuant to article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute.
>
> 280. In addition, if the conflict was international in character, there is a reasonable basis to believe that the following war crimes were committed: intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated (disproportionate attacks), pursuant to article 8(2)(b)(iv); and unlawful confinement, pursuant to article 8(2)(a)(vii) of the Statute."

143. At [288] of the report, the Office of the Prosecutor states that during 2020 it will finalise its assessment of the admissibility of potential cases that would likely be the focus of any investigation, in order to assist a determination under Article 15(3) of the Rome Statute of the International Criminal Court.

144. Article 15(3) of the Rome Statute provides that, if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she must submit to the Pre-Trial Chamber a request for authorisation of an investigation. The process requires any supporting material gathered by the prosecutor during the pre-investigation phase to be provided to the Pre-Trial Chamber, and there is a process to accommodate any representations made by victims. If the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it, according to Article 15(4), shall authorise the commencement of the investigation.

Placing civilians in the line of fire, disregard for the principles of distinction, precaution and proportionality

145. In its February to May 2019 report, the OHCHR report recorded at [23] that civilian property and critical civilian infrastructure continued to be "damaged, often in disregard for the principles of distinction, proportionality and precaution." At [24], the report said that the "placement" of military positions in and near residential areas puts civilians and civilian objects at "increased risk" of being affected and "may" amount to a violation of IHL. The November 2018 to February 2019 report recorded at [18] that exchanges of fire across the contact line continued to impact residential areas, with continued damage of the sort outlined above, attributable to the placement of military positions in immediate proximity to residential areas, and the decreasing distances between the positions of Ukrainian forces and armed groups.

146. At [21] of the November 2018 to February 2019 OHCHR report, an account is set out of three workers of the Voda Donbasa water pumping station receiving injuries when their vehicle was hit by a shell, *en route* to or having arrived at (it is not clear) the Vasylivka water pumping station in January 2019. The pumping station was located near a region controlled by armed groups.

147. At [36] of the August to November 2018 OHCHR report, concerns are recorded that civilians continued to be subject to "heightened risk" as government forces and armed groups continued to advance along the contact line. That lead to a division of villages, and the use and damage of civilian property and displacement. On the same page, the report gives an example of forces from both sides advancing into the Zolate-4 area, dividing it. Armed groups from the "Luhansk people's republic" (i.e. armed militia opposing the government) forcibly evicted 13 families from their homes, without adopting measures to minimise their displacement and its adverse effects.

148. At [18] to [28] of the February to May 2018 OHCHR report, further accounts of incidents involving civilians are provided. At [19], the report states:

> "While most civilian casualties from shelling – and shooting – appeared to occur indirectly in incidents that did not specifically target civilians, the conflict's civilian toll remains a serious concern."

Continued damage to civilian homes, civilian infrastructure and educational facilities is noted at [20].

149. In its February to May 2018 report, the OHCHR records at [22] its deep concerns at four instances where small arms fire emanating from government controlled territory appeared to target civilian workers in clearly-marked Voda Donbasa water pumping station vehicles, leading to a suspension of water pumping for five days while security guarantees were sought for civilian staff. The OHCHR categorises this attack as intentional. The pumping station serves both sides of the conflict. The report said that, "OHCHR emphasizes that both the intentional targeting of civilians and indiscriminate attacks are serious violations of international humanitarian law and war crimes."

150. The May to August 2018 OHCHR report records, at [22] to [24] the civilian casualty toll during that reporting period, noting that 50.5 per cent of those casualties, all of which were caused by shelling or light weapons fire, were attributable to the government. All incidents occurred in residential neighbourhoods, including the victims' houses, or other areas regularly frequented by civilians. Two examples are given at [23]. A teenage girl was struck by shrapnel and instantly killed outside a residential home in government-controlled territory. Secondly, a shell landed next to a civilian bus as it entered Holubivske village, which is located in the rebel-held Luhansk region. Seven people were injured.

151. At [21] of the summary of the August to November 2017 report, the OHCHR records the documentation by the Special Monitoring Mission of the Organisation for Security and Cooperation in Europe (OSCE) of the "repeated use" of weapons with a wide impact area, such as artillery and mortars, or those with the capacity to deliver multiple munitions over a wide area, such as multiple rocket launch systems. We have not been provided with the OSCE source report. Footnote 11 on page 4 of the report records multiple rocket launch systems being moved within government-controlled territory on 15 September 2017. The OHCHR opines that the use of such weapons in densely populated civilian areas:

> "can be considered incompatible with the principle of distinction and may amount to a violation of [IHL] due to the likelihood of indiscriminate effects. During the reporting period, HRMMU documented civilian casualties and damage to civilian property caused by heavy weapons."

152. At [22], the report states:

> "The risk to civilian lives has been further heightened by the contamination of highly-frequented areas with mines and IEDs, as well as the presence of ERW [explosive remnants of war]. The parties to the conflict continued the practice of placement of IEDs and anti-personnel mines in populated areas and near objects of civilian infrastructure. OHCHR notes that placement of such victim-activated explosive devices, which, by their nature, cannot differentiate between civilians and combatants,

> in densely populated areas and areas frequently attended by civilians may amount to an indiscriminate attack in violation of the principle of distinction enshrined in international humanitarian law. Further, OHCHR recalls that parties to a conflict must take all precautionary measures to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects."

153. At [28] of that report, the OHCHR records the use of a "self-modified" commercial drone deployed over a rebel-controlled village in the Donetsk region. Two civilians were injured. The report urged drone operators to abide strictly by the rules of distinction, proportionality and precaution.

Landmines and similar munitions

154. Landmines have clearly been used in the conflict. The November 2019 to February 2020 OHCHR Report records at [24] that there were ten civilian casualties from mines and explosive remnants of war during the reporting period, including one death and four injuries in government-controlled territory.

155. The August to November 2019 OHCHR report records at [26] four deaths in government-controlled territory during the reporting period. A total of 20 casualties on both sides were recorded during that period. Not all deaths and casualties reported resulted from mines; some deaths were recorded through the inadvertent triggering of, for example, hand grenades, or other unidentified explosives: see [27]. At [30], the OHCHR said that it recorded 58 civilian casualties from 1 January to 15 November 2019, with 17 killed and 41 injured. It observed that that was a 51.3 per cent decrease compared with the same period in 2018, in which 34 were killed and 85 injured, and noted that "mine/ERW [explosive remnant of war] clearance and education in the conflict zone is still necessary."

156. The May to August 2019 report records at [24] that there were 12 civilian casualties during the reporting period; three civilians were killed, and the remainder were injured. One of the deaths and four of the injuries were recorded as having taken place in government-controlled territories. We observe that these figures must have been included in the 1 January to 15 November 2019 figures reviewed by the OHCHR at [30] of the August to November 2019 report: 58 civilian casualties; 17 killed, 41 injured from mine-related incidents and ERW handling.

157. At [26] of its November 2018 to February 2019 report, the OHCHR recorded 119 civilian casualties (34 killed and 85 injured) resulting from mine-related incidents and the handling of explosive remnants of war. The report observed that that was a 50 per cent decrease compared with 2017 when 238 civilian casualties (64 killed and 174 injured) were recorded as being attributable to mine-related incidents and ERW.

158. At [25] of its August 2018 to November 2018 report, the OHCHR records that mine-related incidents accounted for 34 per cent of civilian casualties during the reporting period; 17 killed, and 11 injured. Most of those incidents occurred in the proximity of the contact line. Some casualties were of those attempting to repair a broken electricity line in "no man's land" or maintain water facilities connecting rebel-held Horlivka with government-controlled Toretsk, both of which are in the Donetsk region.

159. At [26] of the above report, the OHCHR records as a positive development the fact that Ukraine submitted a request for an extension under Article 5(3) of the Ottawa Convention. Article 5(1) of the Convention concerns the undertakings by State parties to the Convention to destroy or ensure the destruction of all anti-personnel mines in mined areas under their jurisdiction, within ten years after the entry into force of the Convention for that State party. Article 5(3) permits State parties to request an extension of the time within which to comply with their Article 5(1) undertakings, if the state "believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period…" The extension may be for a further period of ten years. This is what the OHCHR said in relation to that extension request:

> "On 1 November, Ukraine submitted a request for extension under Article 5.3 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. OHCHR welcomes this step as helping to comply with Ukraine's obligations under the Convention. Another positive development was the adoption in the first reading of the draft law, which would create the legal framework for enhanced mine action activities in Ukraine."

160. In the May to August 2018 report, at [25], the OHCHR recorded that mine-related incidents accounted for 13.3 per cent of all casualties recorded during the reporting period (3 killed, 11 injured). Handling of ERW accounted for 26.7 per cent of civilian casualties (1 killed; 27 injured).

161. In its February to May 2018 report at [25], the OHCHR recorded that mines and ERW account for 13 deaths and 19 injured civilians, which comprised 39.5 per cent of all civilian casualties during the reporting period. Ten casualties resulted from mines specifically, which was a significant increase on the previous reporting period, during which only 2 casualties were recorded. However, overall, there was a 79.2 per cent decrease when compared with the same period in 2017. At [26], the OHCHR said that it remained concerned about the risk of further civilian casualties in the future due to remaining mines, ERW (particularly unexploded ordinance), and victim-activated booby traps.

162. At [17] of its November 2017 to February 2018 report, the OHCHR noted that, of the 73 conflict-related civilian casualties during the period, there had been an overall 16 per cent decrease when compared with the previous reporting period, when 87 casualties were recorded. It noted that the decrease was due to fewer civilian deaths and injuries resulting from mine-related incidents and incautious handling of ERW. However, at [21], the report noted that there were more fatalities caused by "leftover devices" than shelling during the reporting period. The detonation of booby traps had injured three male civilians during the reporting period. While there were signs warning of the presence of such mines, the OHCHR considered that they did not always clearly indicate where the mines were and were not considered reliable by the local population: [22].

163. In the same report, the OHCHR recorded concerns about the risk to civilian lives arising from the contamination of highly frequented areas with mines and IEDs, as well as the presence of ERW. During the reporting period, the parties to the conflict

continued in their placement of IEDs and anti-personnel mines in populated areas and near objects of civilian infrastructure. The OHCHR expressed concern that such devices are unable to differentiate between civilians and combatants, and may, therefore, violate the principles of distinction and precaution: see [22].

164. At [95] of the August to November 2017 report, the OHCHR records security incidents at or in the vicinity of the crossing points used by civilians to transit between government-controlled and rebel-held areas. Many mines had been laid near the crossing points, which posed a "serious threat" to many civilians who used the crossing points on a regular basis. Some of the crossing points themselves are dangerous, such as the dilapidated wooden bridge which forms the sole crossing point into part of the Luhansk region. While many elderly or disabled people reluctantly choose not to cross into government-controlled territory (often forgoing their pensions or disability allowances, which must be claimed in person in the government-controlled territory), others attempt to cross at other points. Other areas are likely to be mined, as demonstrated by the instant death of a man who attempted such a crossing in November 2017 when he activated a mine.

Positioning military objectives near to water facilities, schools, and residential areas

165. In its August to November 2019 report, the OHCHR records its concerns that ongoing hostilities "continue to affect educational establishments located in close proximity to military positions and/or the contact line" (see [25]). At least four functioning schools and two functioning kindergartens were damaged by small arms and light weapons fire. All incidents occurred when no children or personnel were present, and the damage was moderate, mostly damaged windows.

166. The preceding May to August 2019 report noted at [19] that civilian objects, including educational facilities and private property, "continued to be damaged". The report noted that a recommitment to the "unlimited" ceasefire from 21 July 2019, agreed by the Trilateral Contact Group in Minsk, resulted in a decrease of hostilities and a substantial reduction in civilian casualties. The same report gives more (and consistent) detail at [28].

167. In its February to May 2019 report at [23], the OHCHR recorded observations of trenches being dug approximately 15 meters from the nearest inhabited house. This "may" amount to a violation of IHL, noted the report. Concerns are recorded that civilian property and critical infrastructure continues to be damaged, "often in disregard for the principles of distinction, proportionality and precaution". This, understandably, is relied upon by the appellants. But the authors of the report do not address the basis upon which it concludes that those military operations were conducted in defiance of the applicable principles of IHL; as authoritative as the OHCHR is, the mere assertion at the heart of this paragraph is unsupported by analysis of the sort necessary to merit the conclusion drawn. Paragraph [24] offers a more nuanced approach, noting that the military activity described "*may* amount to a violation of [IHL]".

168. In its November 2018 to February 2019 report at [18], the OHCHR records that exchanges of fire across the contact line continued to impact residential areas and

resulted in civilian casualties, causing damage to civilian property and infrastructure. That, said the report, subjected civilian residents to heightened risk and disrupted their ways and means of coping with the effects of conflict on their lives. During the reporting period, approximately 36 per cent of civilian casualties were attributable to Ukrainian forces, having occurred on rebel-held territory. At [24], the report gives further detail on the deaths and injuries that took place; a mother and daughter killed by a mortar shell in rebel-controlled Zolote-5; a male inmate killed by shelling while held in an rebel-controlled detention facility, the first such death since August 2016.

169. At [18] of the same report, the OHCHR records the consequences of exchanges of fire between both sides to the conflict, and the impact of the decreasing distance between the two advancing sides.

170. In the executive summary of its August to November 2018 report, the OHCHR records at [6] that civilian casualties continued to decline during the reporting period, "in keeping with the established trend in 2018…" Nevertheless, noted the report at [7], "clashes and localised exchanges of fire contributed to enduring insecurity." The practice of both parties to the conflict of positioning themselves and advancing within populated areas continued, the report noted.

171. At [30] of its May to August 2018 report, the OHCHR records that it documented seven incidents of shelling of schools resulting in damage to the facilities between mid-May and the end of June that year. The examples given in the report include an attack on an occupied school in government-controlled territory, and a boarding school in rebel territory that was damaged by shelling in late June 2018. As a result, the school management and parents cancelled the summer programme and closed the school.

172. At [20] of its November 2017 to February 2018 report, the OHCHR again underlined its concerns that the parties to the conflict were using indirect weapons, or those with wide area affects, such as "multiple launch rocket systems" (MLRS), in areas populated and used by civilians. This raised the prospect of breaches of IHL, the report noted, recalling events in December 2017 in which shelling hit the central area of Novoluhanske, a town in government-controlled territory of nearly 3,500 residents. Two shells landed close to a school and the third in a school yard, while 20 children were present. Another hit an empty kindergarten. Both educational facilities were situated 120 meters from a dormitory used by the Ukrainian armed forces.

173. Also in December 2017, records the November 2017 to February 2018 report, the Donetsk Filtration Station came under shelling on eight occasions. There were delays in negotiating "windows of silence" for repairs and maintenance. One shelling episode lasted 24 hours, with heavy machine gun fire. At the same time, the Russian Federation withdrew its representatives from the Joint Centre for Control and Coordination, which was a vehicle for the negotiation of "windows of silence". See [24] and [108] of the November 2017 to February 2018 report. These paragraphs of this report are also relied upon by the appellants as evidence of denial of access to basic facilities such as water and electricity.

174. Paragraph 24 of the November 2017 to February 2018 report records ten incidents affecting water facilities in conflict-affected areas. Several pumping stations, including those serving the South Donbas water pipelines, the Donetsk Filtration Station, and the Verkhnokalmiuska Filtration Station, appeared to have been targeted. As well as each of the latter two pumping stations serving hundreds of thousands of civilians, the pumping stations stored hundreds of tons of chlorine gas. Had chlorine been present, "it could have had 'devasting consequences' for the population in Donetsk city, Makiivka and Avdiivka", said the OHCHR, in reliance upon an assessment from UN experts (see footnote 26 at page 6 of the report).

175. As well as the concerns over possible breaches of the principles of distinction, precaution and proportionality summarised at [150] and following, above, the August to November 2017 OHCHR report records, at [23], that the parties maintained their heavy military presences, on both sides of the contact line, in densely populated civilian areas. The report added that,

> "Locating military positions and equipment within or near residential areas and objects indispensable for the survival of the civilian population falls short of taking all feasible steps to separate military objectives from the civilian population, contravention to international humanitarian law. OHCHR notes that where such presence is justified due to military necessity, the parties must protect the resident civilian population, including by providing alternative accommodation.

Denial of access to basic facilities

176. The appellants highlight the OHCHR's reports of basic services being withheld from civilians, or otherwise interrupted.

177. The OHCHR report for August to November 2019 records at [41] that approximately 18 residents in the village of Novooleksandrivka have lost access to basic services. Electricity to the village has been cut off since the beginning of the conflict and the roads have been blocked. Ambulances cannot reach the village and there are no hospitals, pharmacies, or public transport in the village.

178. The November 2018 to February 2019 OHCHR report summarises the widespread humanitarian impact of the conflict: see [7]. Over five million people have been affected in total, including 1.3 million registered internally displaced persons (IDPs). The hardship they endure, considers the report, is exacerbated by the lack of access to basic services, social support, as well as remedies and reparations for injured persons and relatives of those killed and for destroyed property. During the harsh Ukrainian winters, a lack of adequate heating is one of the main challenges for civilians, especially those living along the contact line. Further detail is provided at [42].

179. The government has failed to implement court decisions in favour of individuals who have lost access to their pensions and continues to link access to pensions to IDP registration. Those living in rebel-held areas have to attend government premises in government-controlled territory in order to do so, necessitating long queues at checkpoints when leaving and re-entering the self-declared republics. See [7] and [35] and following of the November 2018 to February 2019 report.

180. Paragraph [40] of the August to November 2018 OHCHR report records the difficulties civilians experience when exercising freedom of movement within Ukraine. During the reporting period, there had been over a million crossings of the contact line through the five available routes, one of which was the "dilapidated wooden footbridge that is the only crossing route in Luhansk region" referred to above. The OHCHR noted that both sides had undertaken actions to expand access to shelter, sanitation and heating at the entry-exit checkpoints along the crossing routes, however, as at 15 November 2018, the Cabinet of Ministers was yet to adopt a draft resolution concerning the movement of persons and the transfer of goods across the contact line. The Ukrainian "Joint Forces Operation" had also taken steps to minimise cross-border training, which "may have a negative impact on access to markets and food…" The OHCHR considered at [41] that those measures that both sides had taken were, "fundamentally insufficient to address the disproportionate restrictions on freedom of movement and the needs of individuals to access their social entitlements, pensions, visit relatives, and look after their property, further isolating residents of armed group-controlled territory and risking to antagonise them…"

181. The August to November 2017 OHCHR report, as well as documenting the impact of shelling on key civilian infrastructure (see [173], above), gives further details concerning the impact upon living conditions of people living in conflict-affected areas. See [111] to [113] of the report. Electricity and gas supplies have been severely affected by the conflict. Many homes relied on gas for their heating needs, with electric heaters as a backup. In the absence of both forms of energy, civilians were forced to rely on limited humanitarian assistance in order to secure other forms of heating. In addition to the well-documented conflict-related difficulties with water filtration stations, [113] of the report notes that much of the key water infrastructure is located in "no man's land", where the security situation poses serious obstacles for the performance of maintenance and repairs.

Information to account for missing persons

182. The August to November 2019 OHCHR report records, at [55], that the Commission on Persons Missing due to Special Circumstances, established in April 2019, was yet to launch its work. There had been, however, a "step forward" in ensuring the implementation of the law on missing persons, in the form of an approval by the Cabinet of Ministers, in August 2019, of a regulation on the management of the register of missing persons, although the regulation itself was yet to be implemented by the Ministry of Justice.

183. The context for the above developments was set out at [31] of the August to November 2017 report, which recorded that the draft law "On the legal status of missing persons", which foresaw the establishment of the Commission on Persons Missing, was still pending before Parliament. The report recorded at [32] and [33] that there remained large numbers of missing persons. While many were presumed dead, the OHCHR noted that it "cannot exclude [the possibility] that some individuals reported missing may currently be held *incommunicado* either by the Government or by armed groups…" The report added that access by independent

monitors to detention facilities, particularly those controlled by armed groups, was crucial.

Use of civilian property

184. At [42] of its November 2019 to February 2020 report, the OHCHR records that there was extended military use of civilian properties without lease agreements and/or compensation. Such use has generated utility bills which had been received by the properties' owners. A similar account is provided at [34] of the preceding OHCHR report, for August to November 2019. However, in that report it is recorded that the Ukrainian government had provided compensation and/or adequate housing on a temporary basis through local authorities to a limited number of affected families. It had not been done in a regular or consistent manner. The Cabinet of Ministers made a commitment, which was welcomed by the OHCHR, to amend a 2013 resolution to improve the access of affected members of the population to compensation. A comprehensive, and non-discriminatory State policy of restitution and compensation for damaged and destroyed housing and property was "still lacking", noted the report.

185. The May to August 2019 OHCHR report records at [19] that, "civilian objects, including educational facilities and private property continue to be damaged…"

Ceasefires in civilian areas

186. In the November 2019 to February 2020 report, the OHCHR noted that a ceasefire agreed between the parties on 21 July 2019, for which they reiterated their concern on 29 December 2019, was not the subject of full compliance: see [20]. However, the OHCHR noted that "the reporting period was marked by an overall decrease in the number of ceasefire violations if compared with the previous reporting period." On 20 November 2019, Ukraine joined the "Safe Schools Declaration", which notes the OHCHR at footnote 12:

> "By [participating in the Safe Schools Declaration], Ukraine engages itself to, inter alia, collect data on attacks on educational facilities and related victims and on military use of schools and universities, to provide assistance to victims in a non-discriminatory manner, to seek to ensure the continuation of education during armed conflict, to support the re-establishment of educational facilities and to facilitate international cooperation and assistance to programmes working to prevent or respond to attacks on education."

187. At [18] of its November 2018 to February 2019 report, the OHCHR notes that the OSCE Special Monitoring Mission to Ukraine recorded a decreasing number of ceasefire violations during the reporting period. There remained exchanges of fire across the contact line, which caused civilian casualties and damaged civilian property and infrastructure referred to above: see [168], above.

188. At [15] of the February to May 2018 report, the OHCHR records concerns that the parties persisted in their violation of the Minsk agreements, including through the use of indirect and/or explosive weapons. There had been a 9 per cent increase in

casualties when compared with the previous reporting period, but a 59.7 per cent decrease when compared with the same period in 2017.

189. In its August to November 2017 report at [6], the OHCHR "repeats its call for all parties to the conflict to immediately adhere to the ceasefire and to implement all other obligations committed to in the Minsk agreements, including the withdrawal of heavy weapons and disengagement of forces and hardware…" The report recalled that during the previous reporting period (the details of which we have not been taken to and did not feature in the background materials provided to us), a renewed ceasefire commitment, termed the "harvest ceasefire", resulted in a decrease in ceasefire violations and a notable decrease in civilian casualties.

Forced movement of civilians

190. The appellants have drawn our attention to [51] to [53] of the August to November 2019 OHCHR report (page 235 of the background materials bundle) as authority for the proposition that the Ukrainian military engages in the forced movement of civilians. The examples given in that extract of the report relate to the unlawful abduction, detention and movement of civilians by the Russia-backed federal militia, sometimes on the basis that the individual concerned had cooperated with the SBU, the Ukrainian Security Service: see [52]. We see no basis for concluding, on the basis of these materials, that there is any risk of forced movement in contravention of IHL on the part of the Ukrainian military or government. As such, this aspect of the background materials to which the appellants have invited us to have regard need not play any further role in our analysis.

PART D: COMPULSORY MILITARY SERVICE IN UKRAINE

Compulsory military service in Ukraine

191. The following summary is taken primarily from the reports of Professor Bowring and the description of compulsory military service in VB.

192. There are two categories of persons in Ukraine liable to perform compulsory military service, and a distinction must be drawn between them. There are those who are conscripted into the military, mainly based on their age, which is currently 20 to 27 years old. Alternatively, there are military reservists who may be mobilised. Reservists are, according to the oral evidence of Professor Bowring, those who have served as officers previously and remain on reserve lists, and thus are liable to be recalled into the military. Both conscripts and reservists enjoy the ability to defer their military service, but on different grounds.

193. Conscription in Ukraine features in Article 65 of the Constitution. A 1999 law provides for the length of military service to be 18 months; unless service is in the navy, in which case it is 24 months. The length of service is reduced to 12 months for those who have completed higher education. Conscription takes place in distinct waves or phases. In response to the conflict in the east of the country, the Ukrainian military reinstated a general draft, which applied to men aged between 20 and 27.

194. According to the May 2017 report of the Austrian Federal Office for Immigration and Asylum, *Fact Finding Mission Report – Ukraine*, Article 35 of the 1996 Constitution of Ukraine makes provision for conscientious objectors to military service to be offered an alternative, non-military duty:

> "If performance of military service is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) duty."

195. There has been a pattern of each wave failing to secure the desired response, by a significant margin. At [69] of VB, the failure to answer call-up papers was described as "historically a major problem". For example, in September 2014, the authorities stated that during partial mobilisations in 13 regions, over 85,000 of those summonsed did not report: see [30] of the first Bowring report.

Relevant Sections of the Penal Code and Administrative Code

196. The criminal code provides that conscripts who avoid the draft may be punished by up to three years' imprisonment (Article 335), and the avoidance of mobilisation is punishable for a term of imprisonment between two and five years long (Article 336).

197. The Code of Administrative Offences of Ukraine at Article 210 provides for administrative fines to be levied for the discreet act of failing to attend the reporting office.

198. We have taken the following extract of the legal framework from [30] and following of VB; the parties did not submit that the criminal or administrative legal framework for draft evasion has since been amended.

> **Chapter XIV.**
> **CRIMINAL OFFENSES RELATED TO THE PROTECTION OF STATE SECRETS, INVIOLABILITY OF STATE BORDERS, CONSCRIPTION AND MOBILIZATION**
>
> **Article 335.** Avoidance of conscription for active military service
>
> Avoidance of conscription for active military service, - shall be punishable by restraint of liberty for a term up to three years.
>
> **Article 336.** Avoidance of mobilization
>
> Avoidance of mobilization, - shall be punishable by imprisonment for a term two to five years.
>
> **Article 337**. Avoidance of military registration or special assemblies
>
> 1. Avoidance of military registration by a person bound to military service after notification by an appropriate military commissariat, - shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labour for a term up to two years, or arrest for a term up to six months.

2. Avoidance of military training or special assemblies by a person bound to military service, - shall be punishable by a fine up to 70 tax-free minimum incomes, or arrest for a term up to six months.

Chapter XIX.

CRIMINAL OFFENSES AGAINST THE ESTABLISHED PROCEDURE OF MILITARY SERVICE (MILITARY OFFENCES)

Article 409. Evasion of military service by way of self-maiming or otherwise

1. Evasion of military service by a military serviceman by way of self-maiming or malingering, or forgery of documents, or any other deceit, - shall be punishable by custody in a penal battalion for a term up to two years, or imprisonment for the same term.

2. Refusal to comply with the duties of military service, - shall be punishable by imprisonment for a term of two to five years.

3. Any such acts as provided for by paragraph 1 or 2, if committed in state of martial law or in a battle, - shall be punishable by imprisonment for a term of five to ten years.

The Code of Administrative Offences of Ukraine
Article 210. The violations of the law by military service staff or subjects on general Military Duty and Military Service.
- For failing to appear in the military recruitment office without good reason or late submission of information on change of residence, education, employment, position, and also violations of the order of educational meetings (sessions) are punishable by a fine of 85-119 UAH.

Article 210 of the Administrative Code concerns the discrete administrative offence of a person subject to mobilisation requirements failing to attend the recruitment office.

199. In May 2014, the Administrative Code was supplemented by an aggravated administrative offence of violating legislation concerning mobilisation, with much higher fines.

"Article 210-1. Violation of legislation on defence mobilization preparation and mobilization:
- Violation of legislation on defence mobilization preparation and mobilization entails a fine of up 170-510 UAH, and for officials - 510-1700 UAH. If the violation is repeated within a year then the penalty increases to 510-1700 UAH for citizens and for officials to 1700-5100 UAH."

200. At the time of writing, 1 Ukrainian Hryvnia (UAH) is worth approximately £0.02689. The maximum fine of 5100UAH is the equivalent of around £137.14.

201. Article 14(10) of the Law of Ukraine "On military duty and military service" of 1992 ("the 1992 law") provides:

"10. According to the results of medical examination of a citizen of Ukraine and taking into account the level of his/her educational training, personal qualities, type of activity and specialty, the commission on registration may make one of the following decisions:

- fit for military service and previously assigned to service in the Armed Forces of Ukraine or other military unit;
- temporarily unfit for military service, in need of medical treatment;
- to be referred for additional medical examination and repeated medical examination (indicating the date of the examination);
- unfit for military service in peacetime, restricted in wartime, subject to military registration;
- unfit for military service with exclusion from military registration, subject to exclusion from military registration; be subjected to the military registration of servicemen as previously convicted to imprisonment, restraint of liberty, arrest, correctional labour for committing a crime of small or medium gravity, including with release from serving a sentence;
- shall be subject to exclusion from military registration as having been previously sentenced to imprisonment for a serious or particularly serious crime."

202. Article 17 of the Law of Ukraine "On military duty and military service" of 1992 provides:

"Article 17. Deferment of conscription for military service

1. Deferment of conscription for military service is provided to conscripts by decision of the district (municipal) conscription commission in accordance with this Law due to family circumstances, for health reasons, in order to enter education and continue professional activity.

[Part 1 of Article 17 with amendments made in accordance with the Law Act No. 1169-VII of 27.03.2014, No. 116-VIII of 15.01.2015]

2. Deferment of conscription for military service due to family circumstances is granted, at their request, to conscripts who have:

1) a disabled father and mother or single disabled father (or mother), or disabled individuals who were under guardianship or dependency of the conscript, or individuals over whom the conscript is responsible for guardianship or care, and if they do not have other able-bodied individuals who are Ukrainian citizens obliged in accordance with the legislation of Ukraine to support them. Disability of these individuals is determined in the manner prescribed by legislation;

2) underage siblings, (full or half) brothers and sisters, or disabled (full or half) brothers and sisters, regardless of their age, if they do not have other able-bodied individuals besides the conscript obliged in accordance with the legislation of Ukraine to support them;

3) a single father or mother with two or more dependent minor children, until the oldest child comes of age, subject to official employment of the conscript;

[Clause 3 of Part 2 of Article 17 with amendments made in accordance with the Law Act No. 116-VIII of 15.01.2015]

4) a child under the age of three or a child older than three years who is being brought up without his/her mother in connection with her death, or on the decision of a court;

[Clause 4 of Part 2 of Article 17 with amendments made in accordance with the Law Act No. 589-VII of 19.09.2013]

5) two or more children;

6) a disabled child;

[Clause 6 of Part 2 of Article 17 as amended by the Law Act No. 2581-VIII of 02.10.2018]

7) a disabled wife;

[Clause 7 of Part 2 of Article 17 as amended by the Law Act No.2581-VIII of 02.10.2018]

8) a pregnant wife.

3. Deferment of conscription for military service due to family circumstances may be granted, at their request, to a conscript who is an orphan or a child deprived of parental care.

[Clause 3 of Article 17 with amendments made in accordance with the Law Act No.116-VIII of 12.08.2014]"

The italicised words in square brackets featured in the original translation provided to us.

203. During Professor Bowring's re-examination, Mr Metzer sought to rely on Articles 22 and 23 of the same law, which deal with the mobilisation of reserve officers.

204. Paragraph [5] of Prof Bowring's second report proffered the following partial translation of Article 23:

"**Article 23. Terms of military service**

1. The terms of conscription in the calendar calculation shall be established:

- for soldiers and sailors, sergeants and sergeants undergoing conscripts in the Armed Forces of Ukraine and other military formations, up to 18 months;
- for persons who hold a Master's degree at the time of conscription, up to 12 months…"

205. It is unfortunate that the parties did not provide us with a full translation of all relevant provisions. The best evidence we have concerning the entirety of those articles may be found in the Austrian *Fact Finding Mission Report*, referred to above, which summarises Article 22 and 23 at page 26 and following.

206. According to the Austrian report, there are four different levels of mobilisation:

"At the lowest and first stage, are summoned to the army: 'volunteers; reserve officers and sergeants that served in the army or other force structures and who have military specialties that are currently in demand; as well as reserve regular soldiers with wartime experience'. Are summoned during the second stage: 'reserve officers and sergeants of all military specialties are summoned; the regular reserve army of all military specializations with military experiences; the higher officers of all military specialties'; during third stage: '18-year-old soldiers, women who may serve (field doctors, nurses, technical specialists); as well as those who have not served but have no 'white ticket' are mobilized. The fourth and last stage, which can only be implemented if fierce war has been underway for a long time, amounts to full mobilization, with all those capable of holding weapons joining the army"

207. Page 32 of the report summarises Article 22 in the following terms:

"Part IV, Article 22, of the Law on Mobilization Preparation and Mobilization provides that: 'Citizens who are in the reserve are pre-registered with military units (appointed) to carry out military service in wartime or are employed in the Armed Forces or other military formations'. According to the White Book 2015 of the Ministry of Defense [*sic*] of Ukraine, reservists are posted to the positions in those military units where they served.

In June 2016 representatives of the Ministry of Defense of Ukraine asserted that the French military provided expertise for setting up the procedure for reserve service. They pointed out that 'it was a pity to see a great number of men with combat experience leaving the armed forces' and that 'people with good experience and good reputation were enlisted in the reserve'; according to them, the latter will be the first to be mobilized in case of hard times.

According to the military advisor of the European Union Delegation in Ukraine, 'mobilized personnel who were dismissed from the mobilization go back to the reserves'; those 'with experience and good conduct are enlisted in the first line of the reserves, which means that, in case of need, they would be the first ones to be mobilized again". According to Part IV, Article 22, of the Law of Ukraine on Mobilization Preparation and Mobilization, 'During mobilization and wartime, those who "have the reserve status and were not called for military duty, can be recruited for the execution of defense [*sic*] work'."

208. At page 27, the report states:

"Article 23 of the Law also provides that the following categories will not be subject to a call up during mobilization: those among the persons predisposed for military service who are 'reserved for a period of mobilization and wartime for the Executive, Local Self-Government, as well as for companies, institutions and organizations in accordance with the procedure established by the Cabinet'; 'Men with five or more children younger than 16 years old (these men can volunteer for call up and shall serve near their household)'; 'Women with children younger than 16 years old (these women can volunteer for call up and shall serve near their household)'; 'Citizens who take care of persons requiring constant care according to the legislation of Ukraine – in case there is no substitution for them'; 'Citizens who are Deputies of the Verkhovna Rada of Ukraine and the Verkhovna Rada of the Autonomous Republic of Crimea'; 'Other persons predisposed'"

The next unnumbered paragraph continues:

> "On 24 July 2015, the relevant legislation was amended to include "full-time students and students pursuing postgraduate degrees, teaching and research staff at universities and scientific institutions who have post-graduate degrees and teaching staff at other educational institutions such as high school teachers". Failing to appear without valid reasons is considered as draft evasion and punishable as a crime, in application of Article 336 of the Criminal Code of Ukraine… Contrary to regular conscription, conscientious objection and alternative service is not foreseen by the Ukrainian legal framework for individuals drafted through emergency mobilization."

Enforcement of draft evasion

209. In his first report, Professor Bowring provided the following summary of the enforcement of conscription and mobilisation:

a. A 2015 *Guardian* article reported that Ukrainian men aged between 25-60 were eligible for conscription. 75,000 had been called up, of which approximately 60 per cent would enter service. Preference was given to men with military experience. A government decree regulated foreign travel for those subject to mobilisation, meaning people could be arrested at the border, with those guilty of draft-dodging facing up to five years in prison. Another article published in 2015 quoted a practising lawyer as stating that, for convictions under Article 336 of the Criminal Code, the court might impose a sentence of two years' imprisonment with a year's probation, and in the absence of aggravating circumstances, a suspended sentence, or a single year's probation and no further punishment. [31]

b. An August 2016 *Kyiv Post* article reported that the most recent draft at the time, the sixth, had been controversial because it was the first time people with no military experience had been eligible to serve. Only 60 per cent of those targeted were successfully conscripted. Of those called up, 26,800 had failed to report for service. Nearly 1,500 criminal investigations were opened. [32]

c. An April 2016 news report said that in 2015 military prosecutors had investigated 14,894 criminal cases relating to 18,731 draft dodgers, of which 2,500 had been "sent to court". Only 337 people had been apprehended. [33]

d. Reports in May 2016 suggested that 17,000 young men would be called up. Those called up would not be required in to serve in the armed conflict in eastern Ukraine. [34]

e. On 25 June 2016, the then president, President Poroshenko, announced that to an increasing extent, contracted professional soldiers would take the place of conscripts. [35]

f. An August 2019 news report stated that, "only military contract service personnel are at the front…" [43]

g. In January 2020, it was reported that President Zelensky had signed a degree to reduce the call-up age to 18. The 2020 draft campaign will last from April to June, and from October to December. The age ceiling remains at 27 for conscription. [36]

h. A March 2020 article addressed the position of reservists. It suggested that those under the age of 43 who "did not serve but have graduated from the military departments would be subjected to conscription…" The article added that "there is no reason for panic either because the reserve officers are not involved in the Joint Force operation. Unless, of course, they sign a contract." [41]

210. Addressing the likely military service of the appellants in the present matter, at [21] of his first report, Professor Bowring states:

> "Since June 2016, as I show below, Ukraine has increasingly moved away from sending conscripts to the war zone (ATO [Anti-Terrorist Operation Zone] as it is known in Ukraine) and instead sending professional, contracted, soldiers."

He continues, at [26]:

> "Armed conflict continues, but not on the scale of the earlier years. Ukraine now has a much more professional and capable army, which is gradually making inroads into separatist held territory."

211. At [41] of his first report, Professor Bowring quoted an article from the 112.international website entitled *Reserve officers would be called up for military service: what does that mean for Ukraine?* The article addresses the ongoing attempts by the government and military in Ukraine to improve the response to the draft. It outlines the position of both conscripts and reserve officers stating, "In any case, there is no reason for panic… Because the reserve officers are not involved in the Joint Force operation."

212. At [44] of his first report, Professor Bowring addresses specific questions that he had been instructed to answer.

213. Question (a) was whether military service by the appellants in Ukraine would or might involve being associated with acts which are contrary to the basic rules of human conduct? The answer given was:

> "As I have shown above it is highly unlikely that the Appellants if they returned to Ukraine and answered the call-up or were obliged to do so, would be sent into the combat zone, the "line of contact" (OSCE), or Anti Terrorist Operation (ATO). In any event, the armed conflict now has a rather different nature, not least because only professional soldiers are now sent into action."

214. In his supplementary evidence in chief, Professor Bowring was asked by Mr Metzer whether the appellants would be sent to the ATO, where the conflict in the east of Ukraine is focussed, or an arsenal. Professor Bowring said that the appellants, as conscripts or mobilised reservists, would not be sent either to the ATO, or to an arsenal within the ATO, but that they could be sent anywhere else in Ukraine.

215. Under cross-examination from Mr Malik, Professor Bowring said that it would be "extremely unlikely" that the appellants would be sent to the combat zone. When asked specifically whether that meant that the appellants would not be required to engage in acts contrary to the basic rules of human conduct, Professor Bowring agreed, adding once again that the appellants would not be in active combat. Professor Bowring struggled (to adopt the terminology of Mr Metzer's intervention at the time) to answer a question from Mr Malik as to whether the appellants would be required to participate in activity that goes against the Charter of the UN and its purposes. Professor Bowring said that he had been asked to speak to the basic rules of human conduct, not the UN Charter.

216. Question (b) addressed by Professor Bowring at [44] of his first report concerned whether the appellants, upon their return to Ukraine, could be subjected to prosecution for draft evasion, and whether, if so, either could receive any punishment following the prosecution, such as a fine, suspended sentence or a custodial sentence.

217. At [44.b], Professor Bowring said there was a "real possibility" that the appellants could be prosecuted, and that the most likely punishment would be a fine. He added that a prison sentence would be a possibility, given both appellants fled Ukraine soon after the Maiden events of 2014; the reaction of the court could not be predicted with any certainty. The judicial system was in chaos. There was a new – and very controversial – chief prosecutor. In cross-examination, Professor Bowring expanded upon what he meant by describing the chief prosecutor as controversial; she had never been a prosecutor before, although was a lawyer by training. She had been a parliamentarian in the same party as the president. In 2015, she made an unsuccessful application to the Supreme Court. Professor Bowring was not aware of anything the new chief prosecutor had said or done concerning draft evasion. The Professor's suggestion that prison was a "possibility" for these appellants must be read alongside the contents of the preceding paragraph of his first report, [43], in which he referred to the prospect of imprisonment for these appellants as being "highly unlikely".

218. At [44.c], Professor Bowring addressed whether a new computerised system at the border would identify draft evaders at port. He wrote:

> "I have no evidence that this has happened, but it is well known that Ukraine now has sophisticated modern data systems and it is likely in my opinion that draft evasion would be one matter to be flagged at border control."

219. As to whether, if identified as a draft evader at port, the appellants would be detained, and if so, for how long, the Professor wrote at [44.d]:

> "I do not want to speculate. I do not have evidence or examples. But it is likely, in view of the Appellants' previous flight from Ukraine, that they might be held pending trial in a SIZO, or pretrial detention prison. On the other hand the relatively lenient punishments could mean release on bail, perhaps with electronic tagging."

220. At [44.e], Professor Bowring addressed whether there is a *propiska* registration system in Ukraine. *Propiska*, explained the Professor, was the Soviet system of

internal passports, "designed to prevent peasants from leaving their villages." There is now a system of compulsory ID cards, which holds the data that would previously have been held by the old *propiska* system of internal ID cards. Carrying ID cards is compulsoryhe said, and an ID card is needed to access a wide range of state services. The first ID cards were issued from 1 January 2016; 280,000 were issued in 2016, 1.1 million on 2017, 1.3 million in 2018 and almost 1.6 million in 2019, he wrote.

221. This, opined Professor Bowring, "makes it much harder to evade the draft". In response to a question from the Bench, Professor Bowring said that the ID cards, and the state databases that they link to, meant that he would "be surprised if previous draft evasion is not present" in the state databases associated with the bearers of such cards. Professor Bowring stressed that that was his opinion, and that he could not point to evidence. As to why the new ID card system had not led to more draft evaders being prosecuted, Professor Bowring said that he would be surprised if the vast majority of draft evaders had not been conscripted when they would have faced death on the front line. "People may well have sought to evade the draft then", he said, adding that ID cards have been introduced subsequent to the first waves of call-up notices being issued and that, putting the two together, "it is not an unreasonable conclusion that there are fewer people seeking to evade the draft."

222. At [44.f], Professor Bowring addressed the punishment for draft evasion the appellants would be likely to face, in the event of prosecution. He considered that the most likely penalty would be a fine; a sentence of imprisonment would be unlikely. In cross-examination, when asked to expand on the reasons for his opinion, the Professor referred to the information available in 2016 (when he gave evidence in VB), and to the materials cited at [40] of his first report, in which, in reliance on a report on a news website, he said that the fine likely to be imposed for draft evasion would be a multiplier of between five and seven, or 10 to 15 times the "tax-free minimum incomes of citizens".

223. Professor Bowring's second report addressed a number of supplementary questions raised by the respondent. He was asked to address whether it is open to an individual to avoid military service in Ukraine on the grounds of ill-health or disability, and to outline the circumstances under which a person may avoid military service on those grounds. At [3] of his second report, Professor Bowring outlined Article 14 of the 1992 Ukrainian law quoted above, noting that military service may be avoided depending on the result of the medical examination. He noted that Article 16 of the 1992 law made provision for an Appeal Commission but noted that the commission's proceedings and determinations are not, to his knowledge, published.

224. At [4] of his second report, Professor Bowring opined that, even in cases of disability, it is likely that there would be a penalty for failing to answer the call-up. Only a medical examination could determine whether a medical condition or disability was such to trigger an exemption or deferment under Article 14.

225. The Professor confirmed under cross-examination that, in reaching his written opinion that there was a "real possibility" that the appellants would be prosecuted (first report, [44.b]), he had not taken into account the health conditions of PK. Those

details had not been in his instructions, he said, adding that everything of relevance that he had been alerted to was highlighted in his reports. He had been asked to opine in his second report on the potential impact of an individual's disability, but had not been asked to do so in the context of specific concerns about the health of either appellant.

226. In cross-examination, Professor Bowring was asked to comment on Article 17 of the 1992 law, which sets out additional circumstances in which a person may defer their military service. Paragraph (2) makes provision for deferment on the grounds of family circumstances. The Professor was unable to go into detail on this article, as, he stated, it was not what he had been asked to opine on in either report. He stressed that he had only been asked to opine on exemptions from military service on grounds of ill health or disability, and that it was the first time he had been asked about the question. He had not considered Article 17(2) when drafting his reports. When Mr Malik highlighted the fact that each of the appellants in these proceedings has two children each, Professor Bowring said that all he knew about the appellants is what he had outlined in paragraphs [2] to [4] of his first report. Those paragraphs are silent as to whether either appellant has children. Eventually, when pressed by Mr Malik to engage with the terms of the article that was before him, the Professor accepted that "clearly" the article provides that having two or more children is a ground for deferment.

227. Professor Bowring had not found any evidence since VB which demonstrated that prosecutions were now more likely; Mr Malik pressed him on this point, and he confirmed that he had not found any materials which demonstrated that prosecutions for draft evasion were now more likely. The Professor maintained that was because the media report on more serious allegations. Although he knew of Ukrainian draft evaders in this country, he was not aware of any prosecutions for draft evasion in Ukraine.

228. As indicated at paragraph 109, above, during Mr Malik's cross-examination, those representing the appellants conducted additional research online, and found five articles which, Mr Metzer contended, appeared to suggest that some prosecutions for draft evasion had and would take place, despite Professor Bowring having emphasised only moments earlier that his own research had been unable to discover any examples. We were a little surprised at this development and consider it to reflect a lacklustre approach to the procedural rigour required in this tribunal. Nevertheless, adopting the realistic approach of Mr Malik, we too were concerned to ensure there was no material of potential relevance that we did not consider, even if it did entail allowing the appellants to ambush the tribunal (not to mention their own expert) part way through the hearing.

229. As such, Professor Bowring was asked by Mr Metzer asked to comment upon, and where relevant, translate the articles into English. We were subsequently provided with electronic copies of the articles, and with what appears to be an automated English translation of at least one of them. We understand that the article titled, *For evasion of conscription a man is before the court*, 12 July 2019, from the website unn.com.ua, was in Russian. The translated version provided to us retained the original formatting and photographs of the original web page, in a way which, in our

experience, rarely if ever features in a certified translation. Secondly, there is no reference on the translated document to the identity of the translator, nor any indication as to their skills, experience or qualifications, nor any certification as to the accuracy of the translation. Nevertheless, as we have had the benefit of Professor Bowring acting as translator, and have been able to verify his account of contents of the documents with the English versions subsequently presented to us, we are content to treat the translations as being of sufficient accuracy to allow us to consider the contents of the documents, putting to one side the clunky turns of phrase in some of the articles. We do not know whether more of the articles were in Russian originally, or whether only the article referred to above was in Russian.

230. The first article, *Seven residents of Lviv region face criminal liability for evading conscription*, is dated 29 November 2018 and published by a website called *zaxid.net*. A named official from the Lviv Regional Commissariat is quoted as stating that 800 citizens had evaded military service; 38 had been sent to alternative military service. According to the article, seven criminal and 400 administrative cases had been registered in response.

231. Although Professor Bowring did not translate the following sentence in his oral evidence, the translated version we were later provided with also stated:

> "Citizens whose doctrine does not allow them to take up arms and who have collected the relevant documents three months before the call-up, service twice as long as usual (in housing and communal services and hospitals)."

232. The second article, *Since the beginning of the year, more than 300 evasion proceedings have been registered*, is dated 12 July 2019, and is from the website unn.com.ua. It states that, since the beginning of 2019, 342 criminal proceedings have been registered in Ukraine under draft evasion provisions. It then appears to state that a total of 460 proceedings were brought, of which 118 were "closed". Professor Bowring provided the figure of 460 in his oral evidence; the figure is obscured in the post-hearing digital version provided to us. In five years, 1940 criminal proceedings for draft evasion were commenced. The translation states, "Drafted and sent troops to 17 thousand. 370 people [*sic*]"[2], adding that the plan for the spring draft was 18,752. It appears that the article sought to convey that 17, 370 military conscripts reported for duty.

233. The third article, *A man will stand trial for evading military service*, 12 July 2019, gives an account of a man being prosecuted for failing to report to the Chernigov Joint City Military Commissariat. The article adds, without referencing, that "since the beginning of the year, more than 300 draft evasion proceedings have already been taken into account."

234. The fourth article is titled *How many Ukrainians were punished for evading the army in 2019*, 22 December 2019. The root website which features at the foot of the page is mi100.info. We have not been provided with any additional information about the provenance of the website. It states:

[2] This is an example of what appears to be the product of an automated, rather than certified, translation.

> "According to the Opendatabot platform, 280 convictions for evading conscription were handed down in the last year. For evasion from military registration or special fees – 129 people and 12 – for evasion from mobilisation… Some of those who evade are still wanted. Most of them evade the mobilisation call – 45 people.
>
> Sanctions are applied as an administrative penalty for non-appearance at the military registration and enlistment office: a fine of 85 to 119 hryvnias for the first violation, a fine of 170-255 hryvnias for repeated violations."

We have not been provided with any further evidence concerning the "Opendatabot" platform which reportedly was the source of the data. At paragraph 3 of his second report, Professor Bowring states that Article 16 of the 1992 Law provides for an Appeal Commission, adding that, "the proceedings and determinations of Appeal Commissions are not published as far as I know. Certainly not online."

235. The fifth article, *Zelensky proposes to fine Ukrainians for evading mobilization*, is dated "29 May", without a year. It was published on a website called glavcom.ua. It reports that a draft law proposes to increase the fine for "non-arrival" at the "place of collection" for mobilization training from 1700 to 5100UAH. It records that a call has been issued for reservists, and that reserve officers under the age of 43 will be called up from the reserve for military service within two months. The conscription age will be lowered to include those aged 18 to 19.

236. Mr Malik asked Professor Bowring whether any of the articles stated that any persons had actually been prosecuted and convicted. The Professor replied that it was characteristic of Ukrainian media reports to "tell you lots of things, but not what you want". He said he was unable to offer a view as to whether, in the vast majority of cases, draft evaders are not prosecuted. When Mr Malik highlighted the conclusions of VB that the "overwhelming majority" of over 100,000 draft evaders had appeared to face no consequences for their actions at all", Professor Bowring said that "the authors of these articles seem to have different sources". He added that he would need to look again at the reports he prepared for VB, but said that "the draft has changed completely since then, so that nobody who is drafted is sent to the front."

PART E: ANALYSIS OF BACKGROUND MATERIALS AND THE EVIDENCE OF PROFESSOR BOWRING

237. We did not reach the following findings until having considered the entirety of the materials provided to us, in the round, to the lower standard. Although we have approached the allegations levied against the Ukrainian military by the appellants on the same thematic basis adopted by the appellants in the presentation of their case, we have considered the allegations holistically.

Conduct of the Ukrainian military

238. Arbitrary detention, torture and extra-judicial killing: In the round, the above materials provide a compelling basis for us to conclude that those elements of the Ukrainian military and security services involved in military operations in the east of

the country targeting the self-declared, suspected Russia-backed, separatist "republics" regularly engage in arbitrary detention, and subsequently use torture and engage in other cruel, inhumane and degrading treatment against those in their detention. This is a systemic problem which has been condemned by the OHCHR and other members of the international community since monitoring began in light of the conflict.

239. Significantly, despite regular and detailed criticism in the form of the quarterly OHCHR reports, each of which provides specific recommendations for the Ukrainian authorities to adopt in order to stamp out the practice, progress has been slow. There is a general downward trajectory in the Ukrainian authorities' use of torture against conflict detainees, but the practice has by no means been eliminated, nor has it diminished to the extent that it may no longer be regarded as systemic. Prisoner exchanges continue to provide an incentive for both sides to the conflict to bring many more into detention than operationally necessary or permitted by the law, for detainees have become the currency of choice to release those detained by the opposing party. The systemic pattern of detentions and exchanges suggests that many are detained simply to secure the release of those on the other side who themselves have been detained for the purposes of similar prisoner exchanges. There has been a mutually-assured rise in detentions on all sides. The clandestine nature of unofficial detentions has fuelled an atmosphere of impunity. Not only has there been no accountability for those on the Ukrainian side involved in the practice, the practice is sanctioned by the executive and, through its acquiescence, the judiciary.

240. Accordingly, we find that the torture, mistreatment and extra-judicial killing of those detained by or for the Ukrainian armed forces amounts to acts contrary to the basic rules of human conduct. We have no reason to doubt the compelling and detailed background materials concerning this issue, as outlined previously in this decision. Such conduct falls within the prohibitions listed at [32], above.

241. We recall at this point that non-military prison and detention conditions are not within the scope of the country guidance questions identified for our consideration, and that the position remains as identified by the tribunal in VB. We were invited by the respondent to consider a decision of the UN Human Rights Committee, *Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2570/2015*, in which a Ukrainian citizen resident in Italy sought to challenge his extradition to Ukraine for an offence of robbery, on the basis that conditions of detention in Ukraine would violate the International Covenant on Civil and Political Rights ("the ICCPR"). The Committee declared the complaint to be inadmissible under Article 2 of the Optional Protocol to the ICCPR. We consider the decision of the Committee to shed minimal light on the issues for our consideration. It simply demonstrates that the materials relied upon by the author of the "communication" to the Committee did not demonstrate, with the required specificity, a risk of irreparable harm such as that contemplated by Article 7 of the ICCPR, which corresponds in broad terms to Article 3 of the ECHR. It is not authority for any proposition that prison conditions in Ukraine are satisfactory, nor that they have dropped to sub-VB levels, as Mr Metzer suggested. The conclusions of VB concerning conditions of detention and imprisonment remain untouched.

242. Alleged breaches of international humanitarian law concerning in-conflict conduct (e.g., distinction, proportionality and precaution): We recall that it is necessary for there to be a "policy or system" on the part of the Ukrainian military or government, or widespread official indifference, concerning disregard of the principles of IHL such that they may properly be said, to the lower standard applicable to these proceedings, to amount to acts contrary to the basic rules of human conduct.

243. By way of a preliminary observation in our analysis of this issue, we consider that it is necessary to have regard to the geographical context in which the Ukraine conflict takes place. In this respect, we adopt the summary at footnote 17 in the May to August 2018 OHCHR report:

> "Due to the geographic location of the contact line, areas adjacent to it in territory controlled by armed groups are built-up residential and urban areas in many places, whereas areas adjacent to the contact line in territory controlled by the Government are mainly fields and smaller villages."

This was a footnote to the following sentence, which features in the context of recording the total number of civilian casualties in the reporting period:

> "All of the incidents occurred in residential neighbourhoods, including the victims' houses, or other areas regularly frequented by civilians."

244. The Russia-backed separatist militia have occupied towns and cities by force as part of their continued establishment of the self-proclaimed Donetsk people's republic and the Luhansk people's republic. The nature of the ongoing conflict means that legitimate military targets will, by definition, exist adjacent to, or even within, civilian installations and residential areas, as recognised by the two quotes in the preceding paragraph, and the geographical reality of the conflict. While that reality cannot have the effect of negating Ukrainian responsibility for targeting errors or indiscipline, nor can it diminish the importance of the principles of distinction, precaution and proportionality (on the contrary: the need for compliance with such principles is reinforced in this context), it does provide some explanation for the proximity of military targets to otherwise protected locations and civilians.

245. We accept that some of the targeting decisions which appear to have been taken by the Ukrainian military are highly questionable, when viewed alongside its use of wide-impact weapons as recorded by the OSCE, in the context of the large numbers of civilian casualties and deaths throughout the conflict. In his oral evidence, Professor Bowring told us that an article in the *Kyiv Post* on 23 May 2020 reported that there had been 3,079 civilian deaths since the outbreak of the conflict. The OHCHR reported in its August to November 2019 report that some 50,000 homes had been destroyed: see [5] and [34].

246. Put in the crudest terms, unless the Ukrainian military and government are to acquiesce in the internationally condemned invasion of their territory by armed militia sponsored by Russia, there will necessarily need to be a degree of targeting of the armed groups in built up areas. There will necessarily be targeting errors in a conflict of this character; the issue for our analysis as set out above is to determine,

knowing *what* happened, *why* it happened, and whether there were breaches of IHL such that they amounted to acts contrary to the basic rules of human conduct.

247. Against that background, we turn to the specific incidents set out in the background materials and drawn to our attention by the appellants.

248. We are not privy to the tactical justifications relied upon by the Ukrainian military. And we remind ourselves that the objective of IHL is to minimise the loss of life to civilians, rather than prohibiting the loss of civilian life altogether, as regrettable and tragic as such losses are. We make this observation not to shroud the Ukrainian military in a cloak of impunity, nor to justify the extensive civilian casualties of which we were reminded by Professor Bowring, but simply to highlight the difficulties inherent in the task that lies ahead of us.

249. We note the concerns of organisations such as the OHCHR and OSCE concerning breaches of the principles of distinction, precaution and proportionality by the Ukrainian military arising from the presence of heavy artillery on both sides of the conflict. See, for example, the concerns raised in the August to November 2017 OHCHR report surrounding the use of wide area impact munitions and multiple rocket launch systems. We also note that during the same period the HRMMU documented civilian casualties and damage to civilian property that was attributable to heavy weapons. While recalling the geographical realities of conflict along the contact line, we accept that the use of heavy artillery, in populated residential areas, does give rise to some cause for concern. But we do not consider that the mere presence and use of heavy artillery necessarily merits the conclusion that the Ukrainian military engage in acts contrary to the basic rules of human conduct on the necessary widespread and systemic basis. It has not been suggested by the appellants that such weaponry could never feature as part of the full spectrum of military capabilities that Ukraine would be entitled to rely on in the conflict.

250. We also accept that the sheer magnitude of the civilian death toll, which stood at 3,079 on 23 May 2020 according to Professor Bowring, tends to suggest that there has been disregard for life on all sides of the conflict. But we do not consider that all the examples given by the background materials merit the conclusion that the Ukrainian military breached the principles of distinction, proportionality and precaution.

251. For example, some of the OHCHR reports assume that certain events must have lacked military objective or justification, but in our view, for many of the incidents it is difficult to draw such conclusions, and the reasoning given by the OHCHR lacks substance. In its May to August 2018 report, the OHCHR documented injuries caused by a shell landing next to a civilian bus. At [23], the report recorded that over 1,000 civilians reside in the village and suggests that "there were no military objectives" located near the site of the incident, and there were no members of armed groups "in combat function" observed in the area. This led the OHCHR to suggest that it was a "serious violation" of IHL for a party in a conflict to target civilians and civilian infrastructure, or to carry out an indiscriminate attack, highlighting the obligations upon parties to conflict to take all feasible precautions to avoid harm to the civilian population. It is not clear to us how the OHCHR could have concluded that there were "*no* military objectives" in the village in question; the report proffered

no explanation. Its suggestion that there were no "members of armed groups in combat function observed in the area at the time" is ambiguous. It could mean that the OHCHR was confident that there were no armed militia in the area at all. Alternatively, it could mean that there were such members present, but simply that, at the time, they were not "in combat function" at the time. If so, that they were not in combat function at the time does not necessarily mean that they fell within any of the established categories of attracting the protection of being *hors de combat*. This, of course, is not to negate the account of the incident taking place, but we do consider that some of the OHCHR's commentary to the incident merits further consideration, and does not necessarily lead to the conclusion that it involved Ukraine breaching its obligations under IHL on that occasion.

252. We accept that there appears to have been a pattern of workers close to civilian water installations, and the installations themselves, being targeted. The August to November 2017 OHCHR report records at [24] ten incidents affecting water facilities in conflict affected areas. The First Lift Pumping Station of the South Donbas water pipeline was shelled on three occasions. The Donetsk Filtration Station ("the DFS") was shelled repeatedly between 3 and 5 November 2017, causing damage to a backup chlorine pipeline. However, there does not appear to have been a "direct hit" of the sort necessary to destroy the facility; so much is clear from the fact that the DFS continued to be a target for future military action, and due to the fact that OHCHR report records that neither the main pipeline or the chlorine pipeline received a direct hit. The fact that the DFS itself remained intact tends to suggest that a degree of restraint was exercised by the targeting forces.

253. On 17 April 2018, a bus carrying 30 civilian workers from the DFS appears to have been the target of deliberate small arms fire originating from the direction of government-controlled territory: see [22]. Footnote 29 on page 6 of that report gives reasons for the OHCHR's view that the bus was deliberately targeted: it was travelling away from the DFS in armed group-controlled territory; the bus was clearly marked with the Voda Donbasa insignia and was easily recognisable; the parties to the conflict in the area are well aware of the movement of the bus on the road, which carried civilian workers twice daily; and the parties to the conflict had previously negotiated "windows of silence" to enable the safe transport of civilian staff.

254. The January 2019 attack on three civilian workers in a Voda Donbasa bus (which must have been clearly marked as such, given the OHCHR's earlier observations) suggests a continuation in this tactic, assuming responsibility for the attack lay with the Ukrainian forces (the detail of which is not specified in the relevant OHCHR report). See the summary at [146], above.

255. The above reports do tend to suggest a wilful disregard of the principles of precaution and distinction. Workers at critical civilian infrastructure and their vehicles do appear to have been targeted on multiple occasions, despite reportedly clear vehicle signage, and no apparent military justification. However, the reports do not record that there were large numbers of civilian casualties caused by this aspect of the conduct of the Ukrainian military. It does not appear that the indiscipline recorded in the reports entailed wilful killing or other acts contrary to the basic rules

of human conduct on a sufficiently widespread or systematic basis so as to reach the threshold described in Krotov.

256. The evidence concerning "targeting" of schools is mixed. Again, recalling that the context for the conflict is the unlawful occupation of Ukrainian towns and cities by armed groups, the reality of Ukraine's military response will necessarily involve the targeting of military objectives that are proximate to civilians and protected civilian buildings. At [172], above, we recorded the OHCHR's summary of shelling which affected schools and a kindergarten in Novoluhanske, a town in government-controlled territory. Although the appellants directed us to this incident, it appears to have taken place at the hands of the armed groups, attempting to target Ukrainian forces, rather than the other way round. By contrast, [28] and [29] of the May to August 2019 OHCHR report recorded alleged heavy machine gun fire hitting School No. 30 in Horlivka, in armed group-controlled territory. One of the classroom windows was damaged on the first occasion in July 2019; unspecified damage took place during a later incident in August 2019. Two further schools in the armed group-controlled Donetsk region were also damaged in July that year. The shelling took place at night when no one was present. In our view, the evidence demonstrates that the schools which may have been hit by government fire were only peripherally damaged, and the attacks took place at night when the schools were empty. If anything, that demonstrates an attempt by the Ukrainian military to respect the principles of precaution, distinction and proportionality. To the extent schools that enjoy special protection under IHL, it appears the damage they sustained was minimal compared to that which could be inflicted pursuant to the firepower available to Ukraine.

257. We recall that the November 2019 to February 2020 OHCHR report documents that Ukraine has joined the "Safe Schools Declaration". We have not been presented with any evidence of further incidents at the hands of the Ukrainian forces involving schools since the signing of that declaration.

258. Finally on this issue, we note the pre-investigation preliminary activities of the Office of the Prosecutor of the International Criminal Court. We approach the report with a degree of caution commensurate to the early, preliminary stage of the Prosecutor's activities. The Prosecutor has simply outlined pre-investigative concerns, which are presently insufficient to enable the determination necessary under Article 15(3) of the Rome Statute to take place. Even if there were sufficient evidence for such a determination in favour of referring the matter to the Pre-Trial Chamber, the process would be with a view to a formal investigation being opened in due course. Put another way, the Prosecutor's observations are preliminary, as the title of the report suggests. But they do attract some weight. It is of some significance that the Office of the Prosecutor is considering whether to apply to commence a formal investigation which would focus on the very conduct which we have been asked to assess, to the lower standard applicable to protection proceedings.

259. Drawing this analysis together, recalling the Krotov summary of what amounts to acts contrary to the basic rules of human conduct, and the need for there to be a policy and system of such conduct in order to merit a finding of such conduct, we do

not consider that it has been demonstrated to the lower standard that the Ukrainian military engages in such conduct during its conflict operations. There is no evidence of the widespread, systemic and deliberate targeting of civilians or civilian installations. Undoubtedly there have been incidents of local indiscipline and poor targeting decisions resulting in a disproportionate amount of collateral civilian deaths and casualties. There have been isolated examples of civilians being targeted, such as the targeting of the bus carrying 30 civilian workers of the DFS on 17 April 2018, but such conduct is not widespread and systemic. We consider the geographical realities of the conflict and the close proximity of the contact line to residential areas to be the main cause of such casualties, rather than the widespread actions of a brutal military coupled with official indifference. Where there are examples of what appears to be the deliberate targeting of civilians and civilian installations (for example, the backup chlorine pipes of the DFS as documented in the August to November 2017OHCHR report), there does appear to have been a degree of restraint.

260. Finally, the evidence of Professor Bowring was that, by March 2020, adherence to the ceasefire had been very positive. Even if there had previously been the commission by the military of acts contrary to the basic rules of human conduct on a sufficiently widespread or systematic basis, the evidence now demonstrates that such conduct has been curtailed by the ceasefire.

261. For these reasons, we do not consider that the Ukrainian military currently engages in acts contrary to the basic rules of human conduct in the conduct of military targeting and use of arms in the east of Ukraine.

262. Anti-personnel mines: The past use of mines and similar indiscriminate munitions, if laid by Ukraine, is deeply concerning. As noted in BE (Iran), the position in 2008 was that there was an emerging international norm prohibiting the use of such munitions. While we have not heard any argument suggesting that the then-emerging norm is now settled, that is, of course, irrelevant as Ukraine is a State party to the Ottawa Convention. The continued indiscriminate use of anti-personnel and other mines in heavily populated or accessed civilian areas would be conduct capable of amounting to an act contrary to the basic rules of human conduct. Their past use, if they were laid by Ukraine, certainly appears to have been in breach of the undertakings Ukraine gave pursuant to Article 5 of the Ottawa Convention.

263. There are no materials that record that Ukraine was responsible for laying all the mines in question, still less is there anything that demonstrates there to be a continued practice of laying landmines on its part. We do not consider that it is self-evident that all mines located in government-controlled territory were laid by the Ukrainian military, although we accept it is likely that Ukraine has deployed some of the mines and IEDs in question. The conflict in Ukraine involves pockets of Ukrainian territory being "taken" by Russia-backed militia, in breach of international law. No materials have been drawn to our attention which demonstrate that those same militia could not be responsible for laying mines in government-controlled territory, especially close to the contact line. While we note, for example, [22] of the November 2017 to February 2018 OHCHR report, which suggests that "the parties" to the conflict continued in their placement of IEDs and anti-personnel mines, the

report does not detail the basis upon which those actions may properly be said to be attributable to the government. Footnote 15 on that page relies on reporting from the HRMMU which records a tractor driver being injured by a mine exploding in an area which had previously been de-mined, and a trip-wire explosive device injuring a woman near her neighbour's house. These brief factual summaries do not provide a basis upon which to attribute responsibility to the Ukrainian military; there is no suggestion that the armed militia groups have engaged in any mine clearing activities, and it is highly illogical to think that the Ukrainian military would re-mine an area the government had previously de-mined. When considered alongside Ukraine's efforts to comply with its international obligations concerning anti-personnel mines, this suggests that the armed groups were responsible for the placement of the mines and, significantly, does not merit a finding that it was reasonably likely that it was Ukraine.

264. It is more significant that mine-related casualties are falling, and that Ukraine has taken positive steps to comply with its international obligations concerning anti-personnel mines. For example, the August to November 2019 OHCHR report at [30], which notes that while residual mine-related casualties continued to occur, there had been a 51.3 per cent reduction in the number of deaths when compared to the previous year. The same paragraph implies that mine clearance activity was underway at that time: see the reference to such action being described as "still necessary". In the November 2019 to February 2020 report, the OHCHR recorded a 50 per cent decrease in year on year mine-related casualties: see [24].

265. Similarly, where mines have been deployed near the contact line, there have been attempts to ensure that signage highlights the risks to civilians of straying into the areas concerned: see [22] of the November 2017 to February 2018 report. While there were concerns on the part of OHCHR that the signage could have been more accurate, and locals did not consider the signs to be reliable, it is nevertheless significant that there was an attempt to deploy signs. There must have been improvements, either in signage, civilian awareness, or sweeping of mines, from the dates covered by this report, given the year on year decreases noted by the OHCHR, as outlined in the preceding paragraphs.

266. We also note that the OHCHR considered the fact that Ukraine sought to comply with its obligations under Article 5 of the Ottawa Convention to be a positive development: see [26] of the August to November 2018 report. Article 5 obliges a party to the Convention to destroy or ensure the destruction of all anti-personnel mines in areas under its jurisdiction (which, for present purposes, we take to mean *exercisable* jurisdiction, and thus would not cover territory held by Russia-backed rebels). While the nature of Ukraine's compliance on that occasion was to seek an extension for the time in which it was to comply with its Article 5 obligations, it demonstrates that Ukraine is seeking to ensure compliance with the Ottawa Convention, even though the mine-clearing activities it is undertaking will consume more time than the initial permitted ten years. The same OHCHR report also records as a "positive development" the adoption at the first reading of a draft law, "On mine action in Ukraine" No. 9080-1 of 19 September 2018, which is described as

creating the legal framework for enhanced mine action activities in Ukraine. We share the sentiment of the OHCHR in regarding this as a positive development.

267. The OHCHR report for August to November 2017 recorded concerns at [22] that the parties to the conflict *continued* to practice the placement of IEDs and anti-personnel mines in populated areas and near objects of civilian infrastructure. Subsequent, contemporary, reports do not record that the practice continues. Instead, the focus appears to be on the impact of such munitions, previously laid. Paragraph [24] of the November 2019 to February 2020 OHCHR report records that, at 10 casualties during that reporting period, there had been a 50 per cent decrease during that period.

268. From the materials available to us, therefore, we do not conclude that it is reasonably likely that the Ukrainian military engage in acts contrary to the basic rules of human conduct through the laying of anti-personnel mines. The evidence demonstrates a clear downwards trajectory in the number of civilian casualties caused by such munitions, and steps taken by Ukraine which – significantly – were welcomed by the OHCHR, to comply with its international obligations under the Ottawa Convention, and pass domestic legislation providing an enhanced legal framework for the clearing of mines already laid. These are not the actions of a military and government that engage in acts contrary to the basic rules of human conduct on that basis.

269. <u>Use of civilian property without permission, restitution or reparation, looting:</u> Another common feature which often accompanies reports of civilian homes being destroyed or used by the military, often without consultation, permission or compensation, is the practice of looting with impunity by the Ukrainian forces (see, for example, [118] of the OHCHR November 2017 to February 2018 report). Most OHCHR reports document instances of this nature, culminating in the most recent report available to us, the quarterly report to 15 February 2020 which states at [42] that the OHCHR "*continued* to document the extended military use of property without lease agreements or compensation" (emphasis added), with residents receiving utility bills for energy used during military use of property. The Government is said to have failed to implement judgments awarded against it in cases brought by the families of those killed in the conflict seeking restitution (see the OHCHR May to August 2019 report, at [32]).

270. We do not accept that the Ukrainian government's allegedly lacklustre approach to making post-conflict reparations, or the practice of looting, amounts to an act contrary to the basic rules of human conduct (see [32], above). The rights at play in such failures are of a different order to those basic human rights reflected and protected by the concept of basic rules of human conduct. It is an abhorrent practice, which fuels an atmosphere of lawlessness for the military and helplessness for civilians, but, at its core, looting is not an act which breaches the basic rules of human conduct.

271. Similarly, there are other examples of conduct of the Ukrainian government that are worthy of criticism, but which do not amount to acts contrary to the basic rules of human conduct. For example, the fact that the Commission on Persons Missing due to Special Circumstances, established in April 2019, is yet to commence its work (see

the August to November 2019 OHCHR report at [55]), is not an act contrary to the basic rules of human conduct, as suggested by the appellants at [14(g)] of their skeleton argument. Indeed, the same OHCHR report records that the Cabinet of Ministers approved a regulation on the management of the register of missing persons. Such delays do not have the characteristic of an act contrary to the basic rules of human conduct.

272. The appellants have submitted that the Ukrainian military are engaged in the forced movement of civilians, which is prohibited in international law. In common with the referencing for the remainder of the background materials, they have simply cited a page number, with no wider context (such as the title of the document) or the paragraph of the document in question. This made identifying the references considerably harder than it should have been, especially in light of the fact that many of the page references in the index to the appellant's bundle referred to different OHCHR reports, with the result that consulting the index to identify the title of the document the appellants sought to rely upon would not necessarily identify the correct document. For example, the index to the bundle states that pages 432 to 463 feature the November 2017 to February 2018 report, whereas those pages, in fact, feature the August to November 2017 report. Looking at page 235 of the bundle, the sole reference given as authority for the proposition that the Ukrainian military engages in the forced movement of civilians, one finds the OHCHR report for August to November 2019. Page 235 commences with the continuation of [50], which concerns the abduction of a single male in Government controlled territory. We have covered unlawful abduction above, and do not consider that individual abductions can be categorised as "forced movement of *civilians*". The other examples given on page 235 relate to torture, abduction and forced movement conducted by the rebel militia in Russia-backed territories, rather than wider movement of groups of civilians. We do not, therefore, consider the evidence to demonstrate that there are forced movements of civilians by the Ukrainian military.

273. Recalling our analysis of Krotov and its approach to what amounts to an act contrary to the basic rules of human conduct, we do not consider that isolated examples of utility services being affected by the conflict to amount to an act contrary to the basic rules of human conduct. For example, [41] of the OHCHR report for August 2019 to November 2019 highlights how the Government-controlled village of Novooleksandrivka, which has 18 residents, has been without electricity since the beginning of the conflict. Although the appellants rely on this example as a specific act contrary to the basic rules of human conduct, we do not consider that a failure to restore electricity to a small village is capable of reaching that threshold. Our conclusion is reinforced when one examines the accompanying commentary in the OHCHR report, which suggests that the issues faced by the village are not being addressed "in part due to the Government's failure to assign responsibility to the village to any local authority". Properly understood, this is an allegation of civil society mismanagement, which not only does not reach the "acts contrary to the basic rules of human conduct threshold" but appears to be related to the failure of the government, rather than the military, to adopt the necessary steps to post-conflict recovery.

PART F: COUNTRY GUIDANCE – CONCLUSIONS ON THE CONDUCT OF THE UKRAINIAN MILITARY

274. Drawing the above analysis together, we make the following findings, to the reasonable likelihood standard:

a. Elements of the Ukrainian military engage in the unlawful capture and detention of civilians with no legal or military justification. The detention of some detainees will be justified by military necessity or otherwise permissible under IHL, but a large number of detentions feature no such justification and are motivated by the need for "currency" for prisoner exchanges with the armed groups.

b. There is systemic mistreatment of those detained by the Ukrainian military in the conflict in the ATO, which is in the east of the country. This involves torture and other conduct that is cruel, inhumane and degrading treatment contrary to Article 3 of the ECHR. Even where such detainees are eventually transferred into the judicial detention process, there is likely to be official indifference to the mistreatment they have received.

c. There is an attitude and atmosphere of impunity for those involved in mistreating detainees. No one has been brought to justice. Pro-Kyiv militia have been rewarded for their work by formal incorporation into the military. Lawyers are afraid of taking on cases due to the risk of retribution.

d. The systemic and widespread detention practices of the Ukrainian military and law enforcement officials involving torture and Article 3 mistreatment amount to acts contrary to the basic rules of human conduct.

e. The Ukrainian military has had to engage with armed groups that have embedded themselves in towns, residential areas and civilian installations along the contact line. Legitimate military targets are often in close proximity to areas, buildings or people protected by international humanitarian law ("IHL"). The Ukrainian military's adherence to the principles of distinction, precaution and proportionality when engaging with such targets has been poor, despite that being a task which calls for surgical precision, especially in the context of a conflict in which legitimate military targets have been embedded within civilian areas, properties and installations. The widespread civilian loss of life and the extensive destruction of residential property which has occurred in the conflict will, in part, be attributable to poorly targeted and disproportionate attacks carried out by the Ukrainian military, but the evidence does not suggest that it is reasonably likely that there was targeting of civilians on a deliberate, systemic and widespread basis.

f. Water installations have been a particular and repeated target by Ukrainian armed forces, despite civilian maintenance and transport vehicles being

clearly marked and there being an established practice of negotiating "windows of silence" on some occasions, and despite the protected status such installations enjoy under IHL. The background materials suggest a continued focus on water and similar civilian installations, but the evidence does not demonstrate that those targeting decisions were part of a policy and system. Often such installations serve both sides of the contact line, militating against the conclusion that government forces sought to deprive armed group territory of basic services through the prosecution of the strikes and attacks.

g. Most civilian casualties have been from indirect fire rather than specific targeting.

h. Civilian casualties continue to fall.

i. Damage to schools appears to have been collateral or accidental rather than intentional.

j. It is not clear whether Ukraine was responsible for laying any of the anti-personnel mines documented in the background materials. Mines are no longer deployed by either side, and Ukraine is committed to complying with its international legal obligations under the Ottawa Convention to clear mines that are in areas under its jurisdiction.

k. While regrettable, we do not consider the use of civilian property without payment or reparation, or looting, to amount to acts contrary to the basic rules of human conduct.

l. Ukraine has begun steps to establish a register of missing persons. It is not an act (or omission) contrary to the basic rules of human conduct not to have established that register with greater success or resolve.

m. There is no evidence that the Ukrainian military is engaged in the forced movement of civilians.

PART G: CONSCRIPTS AND MOBILISED RESERVISTS, ENFORCEMENT OF DRAFT EVASION

275. The quality of Professor Bowring's evidence concerning draft evasion was mixed. He was reluctant or unable to answer several of Mr Malik's entirely reasonable questions, all of which were within the scope of the issues in relation to which he attended to give oral evidence as an expert witness. Other parts of his evidence were speculative or unsupported by sufficient reasons. However, we consider that, overall, much of Professor Bowring's evidence carries weight commensurate with his reputation and experience, and we ascribe significance to it as outlined below.

276. We accept Professor Bowring's evidence that it is "highly unlikely" that persons with the profile of these appellants would be sent to the ATO. We note that at [6] of his report, Professor Bowring states that each of the appellants are mobilised reservists; no doubt those were his instructions. However, for the reasons given at

paragraph 308, below, we explain why the findings of the First-tier Tribunal in relation to PK do not admit of the conclusion that he was found to be a reservist. That does not matter for the purposes of this part of our analysis, given that more is generally expected of mobilised reservists than conscripts. For example, under Article 336 of the penal code, mobilised reservists who evade military service may be sentenced to up to 5 years' imprisonment, whereas conscripts will be subject to a maximum of three years' imprisonment for evasion of military service. As such, Prof Bowring's evidence in relation to the minimal likelihood of these appellants being required to serve in the ATO applies with all the more force to conscripts. We accept Professor Bowring's evidence that the focus of the Ukrainian military is now to send professional recruits to the ATO, rather than reluctant forced conscripts or mobilised reservists. That was a theme which ran consistently throughout Professor Bowring's written and oral evidence, and the sources he relied upon.

277. We find that there is no evidence to disturb the conclusions of VB that the vast majority of draft evaders are not prosecuted in Ukraine. Professor Bowring's reports were quite clear that he had been unable to find any details of any prosecutions for draft evasion that had taken place.

278. We do not consider the five articles that were put to Professor Bowring by Mr Metzer part way through his evidence to call for a different conclusion. There was only a single report of a person actually prosecuted for draft evasion (*A man will stand trial for evading military service*, 12 July 2019). The remaining reports which purported to outline an increase in enforcement activity, taken at their highest, do not demonstrate that there is a basis to depart from the conclusions of the tribunal in VB. Even those articles that record the commencement of some form of enforcement activity provide no basis to conclude, to the lower standard, that criminal prosecutions will follow. For example, the report dated 29 November 2018 ("*Seven residents of Lviv region face criminal liability for evading conscription*") records that seven criminal cases had been registered, and 400 administrative cases, but there was no indication that criminal proceedings had followed in even those seven cases. Professor Bowring, of course, said that he had been able to find no examples of criminal prosecutions actually taking place.

279. In relation to the 22 December 2019 article, *How many Ukrainians were punished for evading the army in 2019*, the source is given as the "Opendatabot" platform. No other details are given as to the provenance or reliability of this platform. The article itself is internally inconsistent. It suggests that "most" of the 280 convictions related to those who evaded the mobilisation call, and gives that specific figure as being 45. That contrasts with the preceding sentence, in which it stated that 12 people had evaded mobilisation, and 129 had received convictions for "evasion from military registration or special fees". The figures do not add up. In any event, we recall that Professor Bowring's own research had revealed no such data. We prefer the evidence of the established expert in the field to a poorly referenced online article, in relation to which we were given no details of the publication in which it featured, nor the general reliability of the underlying source.

280. We also note that the suggestion of future law reform to increase the penalties for draft evasion is still at the draft proposal stage (*Zelensky proposes to fine Ukrainians for*

evading mobilization, 29 May). The increase in penalties recorded in the article relates only to financial penalties, rather than criminal convictions. The proposals feature within a package of other reforms. They include lowering the conscription age to include men aged 18 to 19 and making provision for the preservation of pre-military employment roles for those forcibly recruited into the military, presumably to cater for those who fear losing their jobs during a period of military service. The article also indicates an intention for those reserve officers aged under 43 to be subject to future mobilisations. To the extent this article demonstrates a likely increased zeal for the forcible recruitment of conscripts and the mobilisation of reservists in the future, it is correspondingly silent on the prospect of enhanced criminal penalties, in particular, custodial disposals.

281. We do not find that there is any evidence to suggest that Ukraine now has a sophisticated computerised system that operates at the border to detect suspected draft evaders upon their arrival. As Professor Bowring noted in his first report, he has no evidence concerning this issue. To the extent he thought that it is likely there would be such a system, we consider his evidence to be speculative. Again, there was nothing in any of the remaining background materials or media reports which supports Professor Bowring's estimate of the likely border infrastructure. In fairness to Professor Bowring, he clearly stated in his report that he was making an informed guess; but it was, nevertheless, speculation. We do not consider the findings in VB concerning the prospect of criminals convicted in absentia being identified at the border to be inconsistent with this conclusion. There is a clear distinction between an individual who has failed to report for military service who has not been prosecuted, still less convicted, on the one hand, and a person who has been convicted and sentenced *in absentia* on the other, which was the context in VB.

282. Similarly, there is no evidence that the new ID card system is likely to result in any increase in the detection of draft or mobilisation evaders in general life. It is speculative to suggest that ID cards have been linked in this way to the vast numbers of draft evaders clearly circulating in Ukraine. We recall that Professor Bowring had been unable to find any reports of draft evaders being prosecuted following the evidence he gave in VB; it is precisely within that timeframe that the ID cards have begun to be rolled out across Ukraine. There is no suggestion in any of Professor Bowring's evidence, or the other background materials (putting to one side the unclear and, at times, internally inconsistent news reports to which Professor Bowring was referred by Mr Metzer at the end of his evidence, which are not reliable for the reasons set out above) that the new ID card system has in any way been responsible for an increase in prosecutions.

283. Professor Bowring was also clear that it would be very unlikely that, even if prosecuted, either appellant would serve a sentence of custodial imprisonment. We consider that it is not reasonably likely that a draft or mobilisation evader would be placed into pre-trial detention at the border. Professor Bowring's evidence is ambivalent on this. On the one hand, he states that, where a person such as these appellants has previously fled the country, that may be an aggravating factor leading to their pre-trial detention. On the other hand, Professor Bowring notes that the "relatively lenient punishments could mean release on bail, perhaps with electronic

tagging". We have found above that the evidence does not demonstrate that it is reasonably likely that a person would be flagged up as a draft or mobilisation evader at the border. We also recall that there is no support in any of the background materials for persons returning to Ukraine as draft or mobilisation evaders being identified as such at the border, still less their being detained on that basis. Bearing in mind that the future legislative and enforcement focus of the government of Ukraine in relation to draft evasion appears to be to increase the fines imposed for draft evasion, we consider that it is highly unlikely that a draft evader would be detained pending trial at the border, given that the enforcement focus is on fines, rather than custody.

284. Conscripts are entitled to establish a conscientious objection to military service on religious grounds, pursuant to Article 35 of the Ukrainian constitution. We accept Professor Bowring's evidence that conscientious objector status is not available to mobilised reservists.

285. Article 14 of the 1992 law makes provision for a medical examination of a conscript or reservist to result in a number of different outcomes. There is a graduating scale of seriousness of the medical conditions, or other reasons preventing service, with corresponding consequences according to the circumstances of the individual concerned. The examination may result in a decision that the individual is fit for service in the military. Alternatively, it may result in a temporary deferment of military service, pending medical treatment, or a finding that the individual is unfit for military service in peacetime, but in wartime, may be placed on restricted duties. At the other end of the spectrum, there is the possibility of a decision that the individual is unfit for military service and shall be excluded from registration. The article also makes provision for what appears to be a special subset of registration applicable to servicemen "previously convicted to imprisonment, restraint of liberty, arrest, correctional labour for committing a crime of small or medium gravity, including with release from serving a sentence". Finally, there is the possibility of what appears to be permanent exclusion from military registration on the grounds that the individual concerned had previously been sentenced to imprisonment for a serious or particularly serious crime.

286. It is possible to defer military service as a conscript on grounds of ill health, under Article 14 of the 1992 law, or on one of the bases set out in Article 17 of the 1992 law. Whether those exceptions would be available as a fact-specific question.

Part H: Country guidance: conscripts and mobilised reservists

287. In light of the above analysis, we give the following country guidance:

a. The Ukrainian military relies upon professional soldiers in its conflict with Russia-backed armed groups in the east of the country, in the Anti-Terrorist Operation zone ("the ATO"). Forced conscripts or mobilised reservists are not sent to serve in the Anti-Terrorist Operation zone ("the ATO") and play no part in the conflict there. It is not reasonably likely that conscripts or mobilised reservists would provide indirect support to the Ukrainian military effort in the ATO, for example through working in an arsenal.

b. It remains the case that, at the current time, it is not reasonably likely that a draft evader avoiding conscription or mobilisation in Ukraine would face criminal or administrative proceedings for that act. The guidance given by VB and Another (draft evaders and prison conditions) Ukraine CG [2017] UKUT 00079 (IAC) remains in force.

c. Although the Ukrainian criminal code provides at Articles 335 and 336 respectively for sentences of imprisonment for conscripts and reservists who have unlawfully avoided military service, absent some special factor, it is highly unlikely that a person convicted of such an offence will be sentenced to a period of imprisonment.

d. It is not reasonably likely that conscripts and mobilised reservists who have avoided military service would be identified as such at the border. Where a person has been convicted and sentenced *in absentia*, the guidance given in VB concerning their likely treatment at the border remains applicable.

e. It is possible to defer military service as a conscript on grounds of ill health, under Article 14 of the 1992 law, or on one of the bases set out in Article 17 of the 1992 law. Whether those exceptions would be available as a fact-specific question.

f. There is no evidence that it is reasonably likely that the ID card system introduced in 2016 will lead to an increased risk in a draft evader or mobilised reservist being prosecuted.

g. It is highly unlikely that a draft evader would be detained pending trial at the border, given that the enforcement focus is on fines, rather than custody.

PART H: THE INDIVIDUAL APPEALS

PK

288. PK was born on 31 January 1981. He and his wife claimed asylum on 5 March 2017, having entered the United Kingdom clandestinely in 2013. The claim was based, in part, on the risk said to face the appellant that his military service would entail acts contrary to the basic rules of human conduct. His claim was refused by the Secretary of State on 5 September 2017, and he appealed to the First-tier Tribunal. In a decision promulgated on 25 October 2017, Judge Frankish dismissed the appeal. PK appealed to the Upper Tribunal which, in a decision and reasons promulgated on 2 May 2018, found the First-tier Tribunal to have made an error of law, and remade the decision itself, dismissing the appeal. PK appealed to the Court of Appeal; the appeal was allowed: see (PK (Ukraine) v Secretary of State for the Home Department [2019] EWCA Civ 1756). The court's order set aside decision of the Upper Tribunal in its entirety, including the finding that the decision of Judge Frankish involved the making of an error of law. It follows that our task in relation to the decision of Judge Frankish is first to determine whether it involved the making of an error of law, before addressing the issue of whether, and if so how, the decision should be remade, in light of the country guidance we have given above.

289. Judge Frankish found that military conscription papers had been sent to the appellant's parents' address in Ukraine on 5 October 2016 and 24 February 2017. The judge found that, even though the appellant was at those times older than 27, which had previously been the upper age limit for conscription, the conflict between Russia and Ukraine had led to the draft age being extended to an upper limit of 47. Although the appellant's brothers had not received conscription notices, that was because one had a leg injury and the other was wheelchair-bound. The judge accepted that PK had previously received call-up papers, but had successfully applied to defer conscription, on the basis of an illness at the time. The judge also found that the appellant's ill-health persisted, accepting his evidence that he had been diagnosed with cerebral arachnoiditis, and that he had difficulty remembering things.

290. The judge dealt with the implications of those findings only briefly. Addressing a submission made by Ms Norman, who also appeared before us, that the appellant would be required to engage in acts "contrary to the basic rules of human conduct" as a member of the Ukrainian armed forces, the judge listed some of the background materials he had been invited to consider, although did not engage with their contents in detail. He held that the IHL issue was determined against the appellant by VB.

291. The judge found that PK would likely be dealt with by way of a fine for his draft evasion. There were no aggravating features which militated in favour of a finding that a harsher penalty was reasonably likely. The appeal was dismissed.

292. It is clear from the approach of the Court of Appeal at [27] that the First-tier Tribunal had failed properly to consider the extensive background materials that were before it. The finding at [29] that PK would not be required to engage in acts contrary to the basic rules of human conduct was reached without sufficient reasons, and without having regard to the contents of the background materials that the tribunal had been invited to consider. We find that judge failed to give sufficient reasons and failed to have regard to relevant considerations.

293. The judge also failed to give reasons why he did not consider that PK would be detained upon his arrival, which was a significant omission in light of the findings in VB that those detained in Ukraine would face treatment contrary to Article 3 of the ECHR. Although it was clear that the judge considered that the appellant would not be detained upon arrival (as to which, see the judge's discussion at [30] that one of the appellants in VB would have been subject to lengthy detention pending trial, which was not a factor that applied to PK), he gave no reasons for that finding.

294. To determine whether the above errors were material, we will address the three country guidance questions identified for our resolution.

1. Whether military service by PK in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?

295. We find that it is not reasonably likely that military service by PK would entail the commission of or participation in acts contrary to the basic rules of human conduct.

While the conflict detention activities of the Ukrainian military in the ATO do, as a matter of policy and system, entail acts contrary to the basic rules of human conduct, it is not reasonably likely that PK would be sent to the ATO or otherwise involved in such activities. The army relies on professional soldiers in the conflict in the east of the country. The background materials and the evidence of Professor Bowring do not demonstrate that it is reasonably likely that PK's role would involve the commission of acts contrary to the basic rules of human conduct, or that it is reasonably likely that any tasks that PK would perform would provide indispensable support to the preparation or execution of acts contrary to the basic rules of human conduct.

296. Moreover, we do not consider the prospect of PK being required to perform *any* military service to be reasonably likely. We have set out below our reasons for rejecting the submission that Judge Frankish found PK to be a reservist; PK's understanding of that term related to his prior receipt of call-up papers, in relation to which he obtained a deferment on medical grounds: see [308]. PK has never served in the military previously, still less is he liable to be called up as a mobilised reservist. He is not a reservist. However, even if he were, he is now aged 39. Professor Bowring accepted under cross examination that, in view of PK's age, it is unlikely that he would be called up. PK also experiences a number of medical conditions.

297. In light of our answer to question 1 concerning PK, question 2 does not need to be addressed.

3. If the answer to issue (2) is "no", whether…

(a) PK, on return to Ukraine, would be subjected to prosecution for draft evasion?

298. In an unchallenged finding of fact, Judge Frankish found that PK would be prosecuted and fined upon his return. The prosecution is most likely to be for the administrative offence of failing to appear in the military recruitment office, without good reason, under Article 210 of the Code of Administrative Office. In view of PK's age and health conditions, we do not consider that it is reasonably likely that he will be prosecuted for breach of Article 335 of the penal code. He is too old for military service, whether as a conscript or a reservist, and he has a number of health conditions, as outlined by Judge Frankish. In a further unchallenged finding of fact reached by the First-tier Tribunal, Judge Frankish noted, at [29], that "I have accepted that [PK] is not a well man. There is a strong likelihood that he will not pass a fitness test, still more that he could not play a role in direct conflict…" There was no medical report, so we are unable to supplement the summary health findings reached by the First-tier Tribunal.

(b) If PK will be prosecuted, whether he would receive any punishment following that prosecution, such as, fine, probation, suspended sentence or a custodial sentence?

299. For the reasons set out in the preceding paragraph, the most likely punishment that PK would face would be an administrative fine for failing to report that the military recruitment office. The vast, vast, majority of draft evaders are not punished at all for their conduct. The evidence suggests that a sentence of imprisonment is very unlikely. It is not reasonably likely that PK will be imprisoned.

(c) Whether the prospect of that prosecution or punishment means that PK is a refugee?

300. PK would receive a modest fine for failing to report for military service. Even had he been required to perform military service, it would not have entailed the commission of, or the provision of indispensable support to, the military's commission of acts contrary to the basic rules of human conduct. There can, therefore, be no Convention nexus on that basis.

301. It was submitted on behalf of PK that, as he is a member of the pro-Russian party of the regions, he is ideologically committed to defend and uphold the rights of ethnic Russians and speakers of the Russian language in Ukraine. Accordingly, PK claims to have a conscientious objection to fighting against his own people. We do not consider that such conscientious objections entitle PK to refugee status. It is well established that there is no general right under international law to conscientious objection, nor that the convention is capable of being engaged on that basis in isolation: see Sepet. No part of the evidence demonstrates that PK would be subject to more severe punishment on account of his pro-Russian views, nor that he would be targeted for enforcement of his evasion of the draft on a discriminatory basis on account of those views. Indeed, his case is that he has previously been able to obtain a legitimate deferment of his military service on account of his health conditions. His ability to have done so is entirely inconsistent with the suggestion that he will be targeted in a disproportionate or discriminatory manner for holding those views.

302. It follows, therefore, that the prospect of PK's punishment lacks the necessary Convention nexus in order for him to be recognised as a refugee.

303. Drawing the above analysis together, therefore, we find that PK is not entitled to be recognised as a refugee.

304. In contrast to the appellants in VB, PK has not been convicted *in absentia*. There is no evidential basis to suspect that his status as a draft evader makes it reasonably likely that he will be detained at the border upon his return, with the effect that his appeal cannot succeed on Article 3 grounds.

305. PK did not seek to rely on Article 8 ECHR.

306. It follows that the decision of Judge Frankish, while involving the making of an error of law, did not involve an error of law such that it must be set aside.

307. We dismiss the appeal of PK.

Postscript: PK

308. There had been a suggestion in cross examination in the First-tier Tribunal, that PK was already a military reservist, which PK appeared to accept: see [25] of Judge Frankish's decision. However, he had no documentation or even basic knowledge of what being a reservist entailed. The judge found that PK had misunderstood the concept of being a military reservist, and that he had attributed his receipt of call-up papers previously to being a reservist: "It emerged that his concept of military service was that he had been called up before", wrote the judge in the same paragraph. His

poor memory explained the answers he gave, and the prior history of being called up added to the plausibility of his claim, found the judge. These findings, which accept the core narrative of PK's case, have not been challenged. It follows that PK is a conscript and not a reservist.

OS

309. OS was born in October 1975. He entered the United Kingdom on a visit visa on 7 November 2014 with his wife and sons, born in June 2012 and March 2014. OS claims to have trained as a pilot cadet in Ukraine between 1993 and 1997, after which he signed a five-year contract, serving as a reserve Lieutenant until 1999. He claims to have left the military after 2 years because planes were destroyed, the military was disarmed, and there was little for him to do. In order to break his contract early, he had to acquiesce in being dismissed for inaptitude. He claims that, shortly after arriving in the United Kingdom, he was told by his father that he had received a notification from the army that he was being sought for active service. His father's address was visited 10 times, he claimed. By April 2015, his father was told that, if OS did not report for duty, a prosecution file would be opened in relation to him. This threat was made five times and accompanied by the threat of five years' imprisonment.

310. OS claimed asylum on 23 March 2015. The claim was eventually refused by the respondent on 14 February 2018. In a decision promulgated on 9 May 2018, First-tier Tribunal Judge Allen dismissed OS's appeal against the refusal.

311. The decision of First-tier Tribunal Judge Allen was found to have involved the making of errors of law by a deputy judge of the Upper Tribunal. The deputy judge found that the First-tier Tribunal had erred by requiring the appellant to have demonstrated that he would either necessarily or be likely to be involved in human rights abuses or war crimes, given the then leading House of Lords authority suggested that the threshold was whether an individual "would or might" be involved in such activities. The judge had failed to engage with the extensive background materials documenting IHL breaches by the Ukrainian military and had not made any findings concerning the Article 3 risk of detention in Ukraine. There were no challenges by the respondent to the judge's findings of fact that supported the appellant's case, and the deputy judge noted at [20] of her decision that the judge's credibility findings remained intact.

312. We turn now to remaking the decision in the case of OS. Again, we do so through the lens of the country guidance questions identified for our consideration.

1. Whether military service by OS in Ukraine would or might involve acts which are contrary to the basic rules of human conduct?

313. The analysis we set out in relation to PK at paragraph 295, above, applies with equal measure to OS. In summary, as a mobilised reservist, OS would not be sent to the ATO. He would not be required to engage in the conflict detention activities of the Ukrainian military. Any military role he would be required to perform would

not entail acts contrary to the basic rules of human conduct, nor would he provide the required "indispensable support" to the commission of such acts.

314. In his oral evidence, Professor Bowring said that, at 44 years old, it was unlikely that OS would now be required to perform service as a mobilised reservist in any event. We agree.

315. In light of our answer to question 1 concerning OS, question 2 does not need to be addressed.

3. If the answer to issue (2) is "no", whether…

(a) OS, on return to Ukraine, would be subjected to prosecution for draft evasion?

316. The preserved findings of fact in relation to OS are as follows. The First-tier Tribunal judge accepted the appellant's account of being told by his father he was wanted for military service [50]. The judge ascribed significance to the fact that he had not heard anything since 2015, and there was no indication that he had been tried in absentia [51]. The appellant's account of poorly equipped military personnel was consistent with the background materials considered by the judge [52]. His military record said he had been dismissed for inaptitude, and the threats of prosecution had not been carried out. The appellant had not been convicted in absentia [61].

317. We find that it is not reasonably likely that OS would be identified at the border as a mobilised reservist who had failed to report for duty, in light of the country guidance we give above. We were not invited to consider additional evidence post-dating the judge's findings that, since 2015, there had been no interest in the appellant; there is no evidence of any continued interest on the part of the authorities in him. He has not been prosecuted or convicted. We accept, however, the appellant has a profile which may result in a revival of the interest of the military authorities, in the event that they become aware of his return, given his past profile and military service, and the sustained interest of the authorities in 2014 – 15, as accepted by the judge. As OS explained at question 52 of his substantive asylum interview, his father explained that he, OS, had left the country to the military authorities.

(b) If OS will be prosecuted, whether he would receive any punishment following that prosecution, such as, fine, probation, suspended sentence or a custodial sentence?

318. We accept that if the authorities become aware of OS's return to the country, they may resume their enforcement activities. We accept the evidence of Professor Bowring at [44.b] of his first report that the most likely punishment OS would face would be a fine. At [44.f], Professor Bowring opines that a sentence of imprisonment is "possible but very unlikely".

(c) Whether the prospect of that prosecution or punishment means that OS is a refugee?

319. Our findings in relation to PK at 300, above, apply equally to OS in this respect. The fine that OS would be liable for would not be for a refusal to perform military service that would or might involve the commission of acts contrary to the basic rules of human conduct. There is no evidence that any subsequent prosecution would be

targeted on a discriminatory basis. We note OS's concerns that he would be singled out for prosecution as a result of his past work in Russia, following his dismissal from the Ukrainian military (see [14] of his witness statement prepared for the proceedings before the First-tier Tribunal), but find no support for that fear in any of the background materials. Certainly OS's own expert, Professor Bowring, was silent on this prospect of enforcement activity targeting those with Russian connections. If OS is prosecuted, it will be because, as a military reservist, he failed to answer the mobilisation call. The imposition of a fine for military desertion is not a disproportionate punishment in those circumstances. OS does not meet the definition of "refugee" and his appeal is dismissed on asylum grounds.

320. It is not reasonably likely that OS will be subject to any form of detention in connection with the proceedings he fears will be brought against him. His appeal therefore also fails on Article 3 grounds.

321. OS did not seek to rely on Article 8 ECHR.

322. We dismiss the appeal of OS on asylum and human rights grounds.

Anonymity

323. We maintain the anonymity orders already in force.

Notice of Decision

Both appeals are dismissed on asylum and human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, each appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith* Date 19 November 2020

Upper Tribunal Judge Stephen Smith

APPENDIX

DOCUMENTARY EVIDENCE BEFORE THE UPPER TRIBUNAL

Item	Document	Date
1.	Ukrainian Statute – Law on Military Discipline, paragraph 68	24/03/1999
2.	Ukrainian Statute – Article 26: Discharge from Military Service	13/05/1999
3.	War Resisters International – Country Report and updates: Ukraine	15/05/2005
4.	Ministry of Defence of Ukraine Order – No. 402: On approval of the Regulations on military medical examination in the Armed Forces of Ukraine	14/08/2008
5.	Kyiv Post - Yanukovich signs law of biometric passports	29/11/2012
6.	Parliamentary Commissioner of Ukraine for Human Rights – Articles 1 - 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including in connection with the previous recommendations of the Committee	2014
7.	Kharkiv Human Rights Protection Group - Sixth Periodic Report of Ukraine on Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2014
8.	BBC News - Ukraine ex-leader Viktor Yanukovich vows fightback	28/02/2014
9.	Ukrainian Statute – Article 17: Deferment of conscription for military service	04/09/2014
10.	Reuters - Bravado, resentment and fear as Ukraine calls men to war	03/02/2015
11.	The Guardian – Ukraine: draft dodgers face jail as Kiev struggles to find new fighters	10/02/2015
12.	Foreign Policy – The Draft Dodgers of Ukraine	18/02/2015
13.	News Punch – Young people flee Ukraine to evade conscription	06/05/2015
14.	Amnesty International – Breaking Bodies: Torture and summary killings in Eastern Ukraine	22/05/2015
15.	Refworld – Ukraine: military service, including information on military service notices, who issues them, their contents,	01/06/2015

	and physical characteristics [2014 – May 2015]	
16.	Human Rights in Ukraine – Outrage as young men grabbed off the street in Kharkiv for military service	29/06/2015
17.	Kyiv Post – Ukrainians find it easy to evade military service	27/08/2015
18.	Ukr.media – Are there penalties for evaders in Ukraine?	11/10/2015
19.	Korrespondent – 15 thousand cases opened for draft evaders	06/04/2016
20.	Interfax-Ukraine – Poroshenko sees no need for new wave of mobilisation on Ukraine army	22/04/2016
21.	Korrespondent – Spring call has started in Ukraine	05/05/2016
22.	Amnesty International – No justice for eastern Ukrainian's victims of torture	27/05/2016
23.	Korrespondent – Poroshenko told how he stopped the mobilization	25/06/2016
24.	Amnesty International & Human Rights Watch – "You Don't Exist": Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine	21/07/2016
25.	Human Rights Watch – Ukraine: Torture, Disappearances in East	21/07/2016
26.	Interfax-Ukraine – No plans for seventh round of mobilisation	11/10/2016
27.	USSD Country Reports on Human Rights Practices: Ukraine 2017	2017
28.	USSD – International Religious Freedom Report for 2017: Ukraine	2017
29.	Amnesty International Report 2017/2018 – Excerpt: Ukraine	2017/2018
30.	BFA: Republic of Austria - Fact Finding Mission Report: Ukraine 2017	02/05/2017
31.	NBC News – Ukraine's LGBTQ soldiers hope their service will change hearts and minds	28/11/2017
32.	OHCHR – Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018 (Parts 1-4; Conclusion and Recommendations)	12/12/2017
33.	112 International – Autumn military draft 2017: over 12,000 conscripts enlisted	12/12/2017

34.	Human Rights in Ukraine – 10 thousand Crimeans forced to serve in Russian occupying army	12/01/2018
35.	War Resisters International – The return of conscription?	19/01/2018
36.	Interfax-Ukraine – Over 30,000 Ukrainians sign military contracts in 2017	06/02/2018
37.	Human Rights in Ukraine – Russia doubles war crimes against Crimeans forced to serve in occupier's army	12/03/2018
38.	OHCHR – Report on the human rights situation in Ukraine May 2018 to August 2018 (Parts 1-4; Conclusion and Recommendations)	19/04/2018
39.	OHCHR – Report on the human rights situation in Ukraine 16 February 2018 to 15 May 2018 (Parts 1-4; Conclusion and Recommendations)	20/06/2018
40.	OHCHR – Report on the human rights situation in Ukraine 16 May 2018 to 15 August 2018 (Parts 1-4; Conclusion and Recommendations)	19/09/2018
41.	Opinion UA – In Ukraine, the autumn conscription for regular service has started | Interfax-Ukraine	01/10/2018
42.	Carnegie Europe – Judy Dempsey's strategic Europe: Crimea Annexation 2.0	29/11/2018
43.	Radio Free Europe & Radio Liberty – Ukraine Under Martial Law: In Kharkiv, Shrugs and Confusion amid Mobilisation	29/11/2018
44.	Seven residents of Lviv region face criminal liability for evading conscription	29/11/2018
45.	UAWire – Ukraine calls up reservists	02/12/2018
46.	OHCHR – Report on the human rights situation in Ukraine 16 August 2018 to 15 November 2018 (Parts 1-4; Conclusion and Recommendations)	17/12/2018
47.	USSD Country Reports on Human Rights Practices: Ukraine 2019	2019
48.	Amnesty International – Ukraine: Five years after the Maydan protests, justice still not attained for victims	19/02/2019
49.	OHCHR – Report on the human rights situation in Ukraine 16 November 2018 to 15 February 2019	12/03/2019
50.	OHCHR – Report on the human rights situation in Ukraine 16 February 2019 to 15 May 2019	13/06/2019
51.	Ukrainian National News – Since the beginning of the year, more than 300 evasion proceedings have been registered	04/07/2019
52.	Human Rights Watch – EU should Encourage Ukraine Government to do more for Human Rights by Yulia Gorbunova	05/07/2019

53.	Ukrainian National News – A man will stand trial for evading military service	12/07/2019
54.	UNCHR – Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2570/2015	20/08/2019
55.	Global Security – Military Personnel	28/08/2019
56.	OHCHR – Report on the human rights situation in Ukraine 16 May 2019 to 15 August 2019	17/09/2019
57.	Unian – Calling up for military service kicks off in Ukraine	01/10/2019
58.	Home Office – Response to an Information Request. Ukraine: Military Service	15/11/2019
59.	International Criminal Court: Report on Preliminary Examination Activities 2019 - Ukraine (Extract)	05/12/2019
60.	OHCHR – Report on the human rights situation in Ukraine 16 August 2019 to 15 November 2019	12/12/2019
61.	M Group Development – How many Ukrainians were punished for evading the army in 2019	22/12/2019
62.	112 International – Autumn Military Draft 2019: over 15 000 conscripts enlisted	29/12/2019
63.	Human Rights Watch: World Report – Ukraine: Events of 2019	2020
64.	Unian – Zelensky signs decree to call up for military service from age of 18	16/01/2020
65.	Unian – Over 4.3 mln ID cards issued to Ukrainians in four years: Interior Ministry	27/01/2020
66.	Ukrainian Legal Portal - Statement and Registration 2020: new rules for registration of residence	16/02/2020
67.	BBC News – Ukraine Conflict: Deadly flare-up on eastern front line	18/02/2020
68.	Home Office - Ukraine: Country Policy and Information Note	March 2020
69.	112 Ukraine – Reserve officers will be called up for military service: what does that mean for Ukraine?	04/03/2020
70.	OHCHR – Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020	12/03/2020
71.	Unian - Donbass War update: 10 enemy attacks on Ukrainian positions, one soldier wounded on March 21	21/03/2020
72.	Glavcom – Zelensky proposes to fine Ukrainians for evading mobilization	29/05/2020
73.	Parliamentary Assembly – Recent Developments in Ukraine: threats to the functioning of democratic institutions	undated

74.	Liberty Human Rights – Identity Cards	undated
75.	UKRINFORM – Ukrainian President signs decree on conscription from age of 18	undated
76.	Committee Against Torture – Concluding observation on the sixth periodic report of Ukraine	undated