

AUSTRALIAN ■■■■■
■■■■■ **CENTRE**
FOR INTERNATIONAL
JUSTICE ■■■■■

Inquiry into Department of Defence Annual Report 2021-22

Submission to the Parliamentary Joint Standing
Committee on Foreign Affairs, Defence and Trade:
Defence Subcommittee

28 March 2023

About the Australian Centre for International Justice

The Australian Centre for International Justice is an independent and not-for-profit legal centre working to develop Australia’s domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code as part of its mission to seek justice, redress and accountability for the survivors of these crimes.

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1 Introduction

1. The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade – Defence Subcommittee’s Inquiry into the Department of Defence Annual Report 2021–22 (the **Inquiry**). Our submission focuses on the following term of reference:

(d) Other issues as communicated to Defence, namely the Defence response to the Inspector-General of the Australian Defence Force Afghanistan Inquiry, as addressed in the Department of Defence Annual Report 2021–22 (**Annual Report**) on page 95.

Primary focus of submission

2. This submission focuses on the Defence response to the findings and recommendations of the Inspector-General of the Australian Defence Force Afghanistan Inquiry’s report (**IGADF Report**), concerning allegations of war crimes by Australian Special Forces in Afghanistan between 2005 and 2016. Defence’s response to these allegations is addressed on page 95 of its Annual Report.
3. This submission addresses shortcomings in the Defence response to the IGADF report, focusing on redress and institutional reform.
4. A major shortcoming is the lack of transparency about the progress and outcome of Defence responses. In many instances, Defence provides general information about both the issue of compensation and institutional reform without going into further detail. This is reflected in the Annual Report, which out of a total of 318 pages only dedicates one page to Defence’s response to the IGADF Inquiry.

Recommendations

This submission makes the following recommendations:

Recommendation 1

Defence should publish details of a redress plan for Afghan victims and their families.

Recommendation 2

Survivors, victims' families and affected communities should be informed about their rights and available remedies.

Recommendation 3

Defence should provide explicit and detailed information on planned and completed reforms within the ADF and how the reforms will address the IGADF Report's recommendations.

2 Compensation and other reparation measures

Recommendation 1

Defence should publish details of a redress plan for Afghan victims and their families.

Recommendation 2

Survivors, victims’ families and affected communities should be informed about their rights and available remedies.

5. The IGADF Report recommends prompt compensation for the families of Afghan victims, where there is credible information that an identified or identifiable Afghan national has been unlawfully killed.¹ It also recommends compensation for two victims of assault.² These recommendations have not yet been addressed, despite the emphasis in the IGADF Report that compensation is to be implemented “now” without waiting for the establishment of criminal liability.³
6. In the Afghanistan Inquiry Reform Plan (**Reform Plan**), published on 30 July 2021, Defence indicated that a compensation plan would be released by the end of 2021.⁴ This deadline was not met. In April 2022, a spokesperson from the Department stated that Defence is consulting with a range of Government agencies on the compensation recommendations.⁵ While expressing that “[f]urther information will be available following advice/consultation and consideration by the [G]overnment”,⁶ to date no such information has been released.

¹ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (November 2020) 41 [76], 166-167, 173 [36] (**IGADF Report**).

² Ibid 72, 86.

³ Ibid 41 [76], 167, 172 [27].

⁴ Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Version 1.0, 30 July 2021) (**Defence Reform Plan**) 13.

⁵ Daniel Hurst, ‘Australian Government Misses Compensation Deadline for Victims of Alleged War Crimes’, *The Guardian* (online, 24 April 2022), https://www.theguardian.com/australia-news/2022/apr/24/australian-government-misses-compensation-deadline-for-victims-of-alleged-war-crimes?utm_term=.6264af24c8464f49169882624d21aef9&utm_campaign=GuardianTodayAUS&utm_source=esp&utm_medium=Email&CMP=GTAU_email.

⁶ Ibid.

7. The Annual Report does not provide any specific information in relation to compensation for Afghan victims and instead directs readers to a link to the Department of Defence's website which provides basic information on Defence's response to the IGADF Report.⁷
8. The Department's Afghanistan Inquiry Reform Program Update (**Reform Update**) from 5 January this year lists compensation-related recommendations as "open",⁸ i.e. still in progress. In recent correspondence with ACIJ, the Department of Defence reiterated that "there remains a number of challenges in relation to the payment of compensation" and the Department is "continuing its close engagement with other relevant Commonwealth agencies to find a way forward on this issue",⁹ without providing any further details.
9. Australia has an obligation to provide adequate, effective, and prompt reparation to Afghan victims and their families.¹⁰ In this regard, the Government's reparation plan must address several key considerations.
10. First, while the recommendations of the IGADF Report are limited to compensation for a few specific incidents, following the publication of the report, many additional cases of ill-treatment and unlawful killings have been documented.¹¹ Australia's redress response must apply to similar, credible incidents that were not included in the IGADF report.¹²

⁷ Department of Defence, *Annual Report 2021-22*, 95; Department of Defence, 'Defence Response', (Website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response>.

⁸ Department of Defence, 'Afghanistan Inquiry Reform Program Update', 5 January 2023, <https://www.defence.gov.au/sites/default/files/2023-01/AfghanistanInquiryReformProgramUpdate.pdf>, (**Defence Reform Update**).

⁹ Response letter from Department of Defence to the Australian Centre for International Justice, 17 February 2023.

¹⁰ See Carla Ferstman, 'Implementing the Brereton Report Recommendations: Reparations for Afghan Victims of Australian Special Forces Abuses' (Expert Opinion Prepared for the Australian Centre for International Justice, 28 November 2022) in Australian Centre for International Justice, *Afghanistan Inquiry: Assessing the Australian Government's Response* (Report, 29 November 2022), Annex E. The report is attached to this submission at Annex A.

¹¹ Andrew Quilty, 'The Worst Form of Defence', *The Monthly* (Online, April 2021) <https://www.themonthly.com.au/issue/2021/april/1617195600/andrew-quilty/worst-form-defence#mtr>; Mark Willacy, Alex McDonald and Josh Robertson, 'Former Australian Commander under Investigation over 2012 Afghanistan Rotation', *ABC* (Online, 21 September 2022 <https://www.abc.net.au/news/2022-09-21/australian-commando-under-investigation-over-2012-rotation/101442434>).

¹² Ferstman (n 10) 3.

11. Secondly, compensation constitutes one form of reparation which encompasses a wide range of measures including restitution, rehabilitation, satisfaction and guarantees of non-repetition.¹³ While the IGADF Report is silent on measures beyond compensation, to be effective and adequate, Australia’s reparation plan must adopt a broader approach, taking into account international best practice and the needs and priorities of victims.
12. Thirdly, international human rights standards emphasise that victims should play a meaningful role in the design and implementation of reparation programmes.¹⁴ To be meaningful for survivors and families of victims, Australia’s redress programme must be responsive to their needs.¹⁵ An expert opinion by Professor Carla Ferstman, attached to this submission, notes that victim engagement will be vital throughout the reparation process including during and following its implementation.¹⁶ Therefore, the intra-Government discussions must consider the possibilities for victim engagement and participation.
13. Finally, a related issue is the information and outreach gap that the Department of Defence and other government agencies must address. International standards underscore the importance of informing victims about their rights to remedy.¹⁷ While Defence has repeatedly stated that discussions are underway on compensation, there is no publicly available information about the progress of the protracted intra-departmental consultations or when to expect the publication of a compensation plan. Moreover, there is also no indication that Defence and/or other Government agencies have notified affected

¹³ Ibid 7.

¹⁴ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN ESCOR, 61st sess, Agenda Item 17, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005) (*Updated Set of Principles*) Principle 32.

¹⁵ Joint letter from Australian Centre for International Justice and partner organizations to Scott Morrison and others, ‘Re: Adequate, Effective and Prompt Reparation to Afghan Victims of Australian War Crimes’, 3 August 2021 <https://acij.org.au/wp-content/uploads/2021/08/Joint-Letter-Reparations-Afghan-Victims-3-August-2021.pdf>.

¹⁶ Ferstman (n 10) 12, 20.

¹⁷ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, A/RES/60/147 (16 December 2005), 11(b) (*Basic Principles on Reparation*) 24; See also, *Updated Set of Principles*, Principle 33 states: “Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile”.

communities about the rights and remedies available to them, nor about the delays in receiving compensation. While the Government has made efforts to inform members of the Australian Defence Force (ADF) who may be affected by war crimes investigations about the services and welfare support that are available to them,¹⁸ to date, no such information has been made available to victims or witnesses from Afghanistan. To address this gap, the Department of Defence and other responsible Commonwealth agencies must explore the possibilities for undertaking outreach with affected communities in and from Afghanistan.

14. It is understood that the implementation of reparation is complicated by the lack of Australian diplomatic presence in Afghanistan and the Taliban's return to power. However, these challenges should not be used as an excuse for inaction. While operating inside Afghanistan is complex, it is not impossible. United Nations agencies are currently delivering humanitarian aid across Afghanistan, including in Uruzgan.¹⁹ Australian humanitarian groups such as Action Aid Australia, Mahboba's Promise, Act for Peace, CARE Australia and Caritas Australia are either present in Afghanistan or have physical access through their Afghan partner organisations.²⁰ Australia is already delivering its aid program in Afghanistan through UN agencies.²¹ The Australian Interim Mission on Afghanistan (IMA) in Doha, Qatar potentially could assist with facilitating internal and external consultations for the delivery of redress measures inside Afghanistan.²²
15. However, if it is indeed impossible to deliver redress inside Afghanistan under the current circumstances, the Australian Government must explore other options, such as placing

¹⁸ 'Welfare Support FAQ', *Department of Defence* (website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/welfare-support-faq>.

¹⁹ UNICEF, *Afghanistan Humanitarian Situation Report* (Report 4, 1-31 March 2022) 3; World Health Organisation, *Afghanistan: Emergency Situation Report*, (Report No. 15, 15-31 March 2022) 3-4; WFP, 'Cash-Based Transfers in Afghanistan January 2022', *Relief Web* (Website, 23 January 2022) <https://reliefweb.int/report/afghanistan/cash-based-transfers-afghanistan-january-2022>.

²⁰ ACFID, 'Aid Sector Welcomes Australia's Additional Funding for Afghanistan', *Relief Web* (Website, 1 April 2022) <https://reliefweb.int/report/afghanistan/aid-sector-welcomes-australia-s-additional-funding-afghanistan>.

²¹ *Ibid.*

²² 'Afghanistan', DFAT (website) <https://www.dfat.gov.au/geo/afghanistan>.

funds in a trust for future disbursement and organising interim measures for reparation in urgent cases.²³

²³ See Ferstman (n 10) 10.

3 Institutional reform

Recommendation 3

Defence should provide explicit and detailed information on planned and completed reforms within the ADF and how the reforms will address the IGADF Report’s recommendations.

16. The IGADF Report provides 25 recommendations to address systemic organisational and cultural failings within the ADF that may have contributed to the misconduct described therein. Most of the recommendations relate to improving education and training on the Laws of Armed Conflict, changing policies and practices to ensure compliance with those laws (e.g., improving operational reporting mechanisms), and understanding the causes of war crimes in the context of ADF operations in Afghanistan.
17. Defence has addressed some, but not all, of the reform-related recommendations. According to the Defence Reform Update from 5 January 2023, six of the 25 recommendations are closed, and the other 19 remain open.²⁴ The Reform Update does not explicitly identify the closed/open recommendations and Defence’s corresponding response. The Annual Report also fails to provide clarifications in this regard.
18. One of the key shortcomings in Defence’s response to institutional reform is the lack of clarity and detail. In many cases, it is not possible to determine from publicly available information whether actions underway as part of the Defence reform programme will actually implement the relevant recommendation. For example, while the IGADF Report recommends mandating the use of helmet or body cameras by Special Forces during operations,²⁵ Defence states that it is “developing a joint approach to the wearing and use of cameras on operations” and that the army is using “digital technology to enhance the record of action for Special Forces patrol operations”.²⁶ It is unclear whether as part of this new approach, the use of helmets or body cameras will be mandated. Similarly, Defence states that work is in progress to review and update its doctrine, policy, and training for the use

²⁴ Defence Reform Update (n 8).

²⁵ Ibid 114, 364, 466.

²⁶ Defence Reform Plan (n 4) 26.

of ADF military working dogs,²⁷ but fails to explicitly state whether it will implement the recommendation to introduce a clear doctrine about the permissible use of working dogs and to improve relevant trainings emphasising limitations on their use.²⁸

19. Furthermore, scepticism has been expressed about the extent to which the proposed reforms will address cultural and organisational failings at the ADF as identified in the IGADF Report. The Afghanistan Inquiry Oversight Panel, which provides “oversight and assurance of Defence’s broader response to the Inquiry relating to cultural, organisational and leadership change”,²⁹ has criticised the lack of attention to Defence’s corporate responsibility as an organisation. It describes Defence’s response as a “bottom-up” exercise “focused primarily at the operational and not Defence’s most senior governance level.”³⁰
20. To ensure transparency and allow public oversight over its reform program, Defence should improve its approach to public information by providing detailed updates in its annual reports and the Department’s website. Moreover, Defence should respond to concerns and claims that the Reform Plan fails to address cultural and organisational shortcomings and command responsibility.
21. Implementing effective reform measures could help prevent the recurrence of gross violations of international human rights law and serious violations of international humanitarian law (IHL) in future conflicts. Victims of such violations have a right to guarantees of non-repetition which constitute an essential component of reparation.³¹ In

²⁷ Ibid 21; Defence Reform Update (n 8).

²⁸ IGADF Report (n 1) 108.

²⁹ Department of Defence, *Joint Statement – Statement on IGADF Inquiry* (Website) <https://www.minister.defence.gov.au/statements/2020-11-12/joint-statement-statement-igadf-inquiry>.

³⁰ Department of Defence, FOI 491/21/22, 2 September 2022, Document 4, p. 3; Ben Packham, ‘Defence Ducks Probe Into War Crimes Accountability’, *The Australian* (Online, 13 September 2022) https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fdefence%2Fdefence-ducks-probe-into-war-crimes-accountability%2Fnews-story%2F27dbacc563a7e6dcecf936088f8c4213&memtype=anonymous&mode=premium&v21=dynamic-high-test-score&V21spcbehaviour=append.

³¹ *Basic Principles on Reparation* (n 17) 23.

addition, Australia is under obligations to ensure respect for international humanitarian law.³²

³² Common Article 1 of the four *Geneva Conventions* state: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”, see *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (*Geneva Convention I*); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (*Geneva Convention III*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (*Geneva Convention IV*); ICRC, *Convention (III) Relative to the treatment of Prisoners of War: Commentary of 2020 on Article 1 – Respect for the Convention* (Website) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538>.

4 Conclusion

22. Defence should take further action to ensure that its response effectively addresses the legacy of harm inflicted by Australian forces in Afghanistan and complies with Australia's international law obligations.
23. Defence should publish a comprehensive redress plan that takes into account the needs of victims and victims' families. It should further implement effective reform measures to address cultural and organisational failures at the ADF and establish mechanisms to prevent the recurrence of human rights abuses in future operations. To ensure transparency, Defence should make clear and detailed information available to the public on a regular basis about its response to reparation and institutional reform.
24. For more information on the gaps in the Australian Government's response to the IGADF Report, see ACIJ's 2022 report attached at Annex A.

Annex A: ACIJ report assessing Australia's response to IGADF Report

AUSTRALIAN
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FOR INTERNATIONAL
JUSTICE

Afghanistan Inquiry: Assessing the Australian Government's Response

29 November 2022



About the Australian Centre for International Justice

The Australian Centre for International Justice (ACIJ) is an independent and not-for-profit legal centre working to develop Australia's domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code. ACIJ aims to combat impunity and works with survivors of international crimes to seek justice, redress and accountability.

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Cover artwork

Elyas Alavi, from BLOODING series (detail), 2022, pencil, artist's own blood, found images on found newspapers and printed Brereton report on wooden shelf.

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Acronyms

ADF	Australian Defence Force
AFP	Australian Federal Police
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMA	Australian Interim Mission on Afghanistan
OSI	Office of the Special Investigator
MUC	Meritorious Unit Citation
SASR	Special Air Service Regiment
SOCOMD	Special Operations Command
SOTG	Special Operations Task Group

Executive Summary

Overview

Two years ago, in November 2020, a redacted version of the Afghanistan Inquiry Report was released by the Chief of the Australian Defence Force. The Report contains the findings and recommendations of the four-year Afghanistan Inquiry, led by Justice Paul Brereton, into allegations of war crimes by Australian Special Forces in Afghanistan between 2005 and 2016.

The Afghanistan Inquiry (commonly known as the Brereton Report) made 191 findings and 143 recommendations. It found credible evidence of numerous war crimes by the Australian Special Forces in Afghanistan including two incidents of cruel treatment and the unlawful killing of 39 non-combatants or persons who were *hors de combat*, in most cases prisoners.

This report assesses the extent to which Australia has addressed and implemented the recommendations of the Afghanistan Inquiry under four themes – redress, investigations and accountability, institutional reform, and administrative action – with a particular focus on the first two issues. The review finds that while some progress has been made, there are several shortcomings that need to be resolved to deliver a meaningful and effective response to the Inquiry’s findings and further reports of possible war crimes that continue to emerge.

Across all four thematic areas, the lack of information and engagement with victim communities is a key gap. To ensure that Australia’s response to the Afghanistan Inquiry is meaningful for victim communities in Afghanistan, Australian authorities must develop mechanisms for informing, engaging, and consulting with those communities in the ongoing processes.

This report also identifies further issues in each thematic area that require resolving.

The Afghanistan Inquiry Report recommended that survivors and the families of victims be compensated without delay. Two years on, the Australian Government has failed to produce a plan to address this. An expert opinion by Professor Carla Ferstman, attached as an annex to this report, sets out Australia’s international legal obligations to provide reparations and outlines operational steps to aid with the prompt determination and delivery of reparations.

Significant progress has been made in the ongoing criminal investigations into potential war crimes, with the establishment of the Office of the Special Investigator and the possibility of prosecutors receiving the first brief of evidence in 2023. This report also looks at investigations by the Australian Federal Police, which after several years have not led to any prosecutions.

Many of the Inquiry’s recommendations on reform and administrative action are yet to be implemented. Public updates about Defence’s responses are in many instances vague, failing to explicitly state whether particular recommendations have been or will be implemented.

Australia still has a long road ahead when it comes to reckoning with the legacy of harm caused by members of its military in Afghanistan. Adequately implementing the recommendations of the Afghanistan Inquiry is a crucial first step in this process.

ACIJ's recommendations

This report makes the following recommendations:

- The Government should consult with victims, their families, and communities on compensation and other effective forms of redress depending on their needs and priorities. Based on the results of the consultation, the government should develop a comprehensive reparation programme.
- The Government should adopt interim measures for reparation in urgent cases.
- The Government should inform victims and affected communities about their rights and available remedies.
- The Office of the Special Investigator, Australian Federal Police, and Commonwealth Director of Public Prosecutions should adopt public information and outreach measures to effectively engage and communicate with affected communities in and from Afghanistan.
- AFP should make information publicly available about the progress of its Afghanistan-related investigations.
- Investigations should examine systemic issues and the extent to which legal liability for war crimes extends up the chain of command.
- The Department of Defence should provide explicit information on planned and completed reforms within the Australian Defence Force and how the reforms will address the Afghanistan Inquiry's recommendations.

Redress

Afghanistan Inquiry recommendations

The Afghanistan Inquiry Report recommends prompt compensation for the families of Afghan victims, where there is credible information that an identified or identifiable Afghan national has been unlawfully killed.¹ It also recommends compensation in relation to two victims of assault.² The Report emphasises that Australia should compensate the families of the victims “now” without waiting for the establishment of criminal liability.³ The Report emphasises that compensating victims represents is “an important step in rehabilitating Australia’s international reputation” and “simply the right thing to do”.⁴

Government response

At the time of the release of the Afghanistan Inquiry Report, General Angus Campbell, Chief of the Australian Defence Force (ADF) stated that he “very much support[s] Justice Brereton’s recommendation”.⁵ However, subsequently, former Prime Minister Scott Morrison stated that the Government was not currently considering compensation for Afghan victims,⁶ prompting concerns from human rights advocates.⁷

On 30 July 2021, the Department of Defence published its “Afghanistan Inquiry Reform Plan” (hereinafter “Defence Reform Plan”) aimed at delivering Defence’s response to the findings and recommendations of the Inquiry. In relation to compensation, the Department indicated that the then-Government’s plan for compensation would be released by the end of 2021.⁸ However, the Morrison Government missed this deadline.

Subsequent comments from the Department of Defence suggest that there are ongoing discussions within Government agencies on compensation. A month before the federal election, in April 2022, a spokesperson from the Department stated that Defence is consulting with a range of government agencies on the compensation recommendations,⁹ noting that the “issue of compensation is complex and comes with a number of legal, practical and logistical issues”, presumably arising from the Taliban takeover of Afghanistan. While expressing that “[f]urther information will be available following advice/consultation and consideration by the [G]overnment”, to date no such information has been released.

¹ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (November 2020) 41 [76], 166-167, 173 [36] (‘Afghanistan Inquiry Report’).

² *Ibid* 72, 86.

³ *Ibid* 41 [76], 167, 172 [27].

⁴ *Ibid* 41 [76].

⁵ Daniel Hurst, ‘Australian Government Misses Compensation Deadline for Victims of Alleged War Crimes’, *The Guardian* (online, 24 April 2022), https://www.theguardian.com/australia-news/2022/apr/24/australian-government-misses-compensation-deadline-for-victims-of-alleged-war-crimes?utm_term=.6264af24c8464f49169882624d21aef9&utm_campaign=GuardianTodayAUS&utm_source=es&utm_medium=Email&CMP=GTAU_email.

⁶ Christopher Knaus, ‘Scott Morrison Warned Australia is Obligated to Compensate War Crimes Victims’, *The Guardian* (Online, 9 December 2020), <https://www.theguardian.com/australia-news/2020/dec/09/scott-morrison-warned-australia-is-obliged-to-compensate-war-crimes-victims>.

⁷ ‘Letter to Prime Minister Morrison on Accountability for Alleged War Crimes by Australian Special Forces in Afghanistan’, *Human Rights Watch* (Website, 8 December 2020) <https://www.hrw.org/news/2020/12/08/letter-prime-minister-morrison-accountability-alleged-war-crimes-australian-special>.

⁸ Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Version 1.0, 30 July 2021) 3 (‘Defence Reform Plan’) 13.

⁹ Hurst (n 5).

Since taking office in May 2022, the Labor Government has not yet given any indication of its plans for redress. The Afghanistan Inquiry Reform Program Update (hereinafter “Defence Reform Update”) from August 2022 lists compensation-related recommendations as “open”,¹⁰ i.e. still in progress. In subsequent correspondence with ACIJ, the Department of Defence reiterated that compensation remains a challenging issue in light of the ongoing geopolitical situation in Afghanistan, without providing further details. It confirmed that “the Government has not reached a decision on the way forward in relation to its options.”¹¹

Analysis

The recommendations on compensation have not yet been addressed. While Justice Brereton emphasised compensating victims ‘now’, almost two years after the release of his Report, compensation has not occurred and no details of plans for compensation and redress have been released.

An expert opinion by Professor Carla Ferstman, attached as an annex to this report, details Australia’s legal obligations to provide reparation.

Professor Ferstman notes that several forms of reparation will often need to be applied in combination in order to achieve adequate, fair and effective results. Reparation can include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. While the Afghanistan Inquiry Report is silent on reparation measures beyond compensation, Australia’s response must adopt a broader approach, taking into account best international practice and the needs and preferences of victims. Human rights standards emphasise that victims should play a meaningful role in the design and implementation of reparations. To be meaningful for survivors and families of victims, Australia’s redress response must be responsive to their needs and priorities.¹² Professor Ferstman notes that victim engagement will continue to be vital throughout the reparation process including during and following its implementation.¹³

The Afghanistan Inquiry recommends compensation for two instances of assault¹⁴ and fifteen specific cases of unlawful killing and makes a general recommendation to compensate the family of an identified or identifiable person who has been killed.¹⁵ Following the publication of the Afghanistan Inquiry Report, many additional cases of ill-treatment and unlawful killings

¹⁰ Department of Defence, ‘Afghanistan Inquiry Reform Program Update’, 1 August 2022, https://www.defence.gov.au/sites/default/files/2022-11/Afghanistan_Inquiry_Reform_Program_Update_0.pdf, (‘Defence Reform Update’).

¹¹ Response letter from Department of Defence to the Australian Centre for International Justice, 2 September 2022.

¹² Joint letter from Australian Centre for International Justice and partner organizations to Scott Morrison and others, ‘Re: Adequate, Effective and Prompt Reparation to Afghan Victims of Australian War Crimes’, 3 August 2021, August 2021) <https://acij.org.au/wp-content/uploads/2021/08/Joint-Letter-Reparations-Afghan-Victims-3-August-2021.pdf>.

¹³ Carla Ferstman, ‘Implementing the Brereton Report Recommendations: Reparations for Afghan Victims of Australian Special Forces Abuses’ (Expert Opinion Prepared for the Australian Centre for International Justice, 28 November 2022), Annex E of this document, 12, 20.

¹⁴ Afghanistan Inquiry Report (n 1) 72, 86, 73, 77–80, 82, 84, 87, 95, 104–105.

¹⁵ Ibid 41 [76], 173 [36].

have been documented.¹⁶ Australia's reparation programme must also apply to similar, credible incidents which were not included in the Afghanistan Inquiry Report.¹⁷

The obligation to provide reparations encompasses the obligation to provide adequate, effective and prompt reparation. In her expert opinion, Professor Ferstman outlines the importance of promptness in redress, in particular where victims are in a vulnerable and precarious situation.¹⁸ The Afghanistan Inquiry Report also emphasised that compensation should be paid promptly, without waiting for the outcome of criminal processes.

In her opinion, Professor Ferstman sets out some operational steps that could be taken to assist with the prompt delivery of reparations, including setting up an administrative process to allow groups of victims to present claims and facilitating interim reparations in urgent cases such as situations of pressing medical need.¹⁹

There is a critical information and outreach gap which need to be addressed. International standards underscore the importance of informing victims about their rights to remedy. The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* assert:

States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law (IHRL) and serious violations of the international humanitarian law (IHL) of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.²⁰

While the Department of Defence has indicated that discussions are underway on compensation, there is no publicly available information about the progress of the protracted intra-departmental consultations on compensation or when to expect the publication of details of a plan. There is also no indication that the Government has notified victims about their rights and remedies available to them, nor about the delays in receiving compensation. While the Government has made efforts to inform members of the ADF who may be affected by war crimes inquiries and investigations about the services and welfare support that are available to them,²¹ to date, no such information has been made available to victims or witnesses from Afghanistan.

¹⁶ Andrew Quilty, 'The Worst Form of Defence', *The Monthly* (Online, April 2021)

<https://www.themonthly.com.au/issue/2021/april/1617195600/andrew-quilty/worst-form-defence#mtr>; Mark Willacy, Alex McDonald and Josh Robertson, 'Former Australian Commander under Investigation over 2012 Afghanistan Rotation', *ABC* (Online, 21 September 2022 <https://www.abc.net.au/news/2022-09-21/australian-commando-under-investigation-over-2012-rotation/101442434>).

¹⁷ Fertsman (n 13) 3.

¹⁸ *Ibid* II.2, 17-19.

¹⁹ *Ibid* II.2, 19-20.

²⁰ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, A/RES/60/147 (16 December 2005), 11(b) ('Basic Principles on Reparation') 24; See also, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN ESCOR, 61st sess, Agenda Item 17, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005) Principle 33 states: "Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile" ('Updated Set of Principles').

²¹ 'Welfare Support FAQ', *Department of Defence* (website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/welfare-support-faq>.

Logistical challenges

The dissemination of reparations is complicated by the lack of Australian diplomatic presence in Afghanistan and the Taliban's return to power. However, these challenges should not be relied upon as an excuse for inaction.

While operating inside Afghanistan is complex, it is not impossible. United Nations agencies are currently operating across Afghanistan. United Nations International Children's Emergency Fund and World Health Organisation are delivering services, aid programs, and cash transfers in various provinces including Uruzgan.²² Australian humanitarian groups such as Action Aid Australia, Mahboba's Promise, Act for Peace, CARE Australia and Caritas Australia are either present in Afghanistan or have physical access through their Afghan partner organisations.²³ Australia is already delivering its aid program in Afghanistan through UN agencies.²⁴

The Australian Interim Mission on Afghanistan (IMA) in Doha, Qatar could assist with consultations and the delivery of redress inside Afghanistan. IMA was established after the Taliban's return to power to manage Australia's interests in Afghanistan and establish working relationships with international partners under the new political environment.²⁵

However, if it is indeed impossible to deliver redress inside Afghanistan under the current circumstances, the Australian Government must explore other options, such as placing funds in a trust for future disbursement.

The path forward

The Australian Government should:

- Consult with victims, their families, and communities on compensation and other effective forms of redress depending on their needs and priorities. Based on the results of the consultation, the government should develop a comprehensive reparation programme.
- Adopt interim measures for reparation in urgent cases.
- Inform victims and affected communities about their rights and available remedies.

²² UNICEF, *Afghanistan Humanitarian Situation Report* (Report 4, 1-31 March 2022) 3; World Health Organisation, *Afghanistan: Emergency Situation Report*, (Report No. 15, 15-31 March 2022) 3-4; WFP, 'Cash-Based Transfers in Afghanistan January 2022', *Relief Web* (Website, 23 January 2022) <https://reliefweb.int/report/afghanistan/cash-based-transfers-afghanistan-january-2022>.

²³ ACFID, 'Aid Sector Welcomes Australia's Additional Funding for Afghanistan', *Relief Web* (Website, 1 April 2022) <https://reliefweb.int/report/afghanistan/aid-sector-welcomes-australia-s-additional-funding-afghanistan>.

²⁴ Ibid.

²⁵ 'Afghanistan', DFAT (website) <https://www.dfat.gov.au/geo/afghanistan>.

Criminal Investigations and Prosecutions

Afghanistan Inquiry recommendations

The Afghanistan Inquiry recommends referring 36 matters for criminal investigation. These matters relate to 23 incidents involving 19 individual perpetrators.²⁶

The Report further recommends that any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police (AFP) and Commonwealth Director of Public Prosecutions (CDPP) with a view to prosecution in civilian courts, in trial by jury, rather than as a Service offence in a Service Tribunal.²⁷

Response

The Office of the Special Investigator (OSI) and AFP are investigating war crimes. The OSI is an independent body established in 2020 to investigate (along with AFP) the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict, by Australian forces in Afghanistan between 2005 and 2016.²⁸

OSI began its operations on 4 January 2021²⁹ and its work is set to run until at least 2026.³⁰ Recent updates indicate that all 36 incidents referred to by the Afghanistan Inquiry Report are under investigation,³¹ along with a number of additional incidents.³²

In July 2022, Mark Weinberg, the Special Investigator at OSI, stated that the OSI is focusing primarily on war crimes of particular gravity including murder, mutilation, cruel treatment, torture, outrages upon personal dignity, attacks on protected objects, and pillaging.³³ He further noted that for now, OSI is mostly examining the execution of civilians and persons who were detained or otherwise *hors de combat*.³⁴

OSI investigations are focused on gathering evidence outside Afghanistan.³⁵ OSI has noted that the security and political situation following the Taliban takeover makes it difficult for Australian investigators to travel to Afghanistan to obtain evidence and interview witnesses.³⁶ In a November 2022 update, OSI Director-General Chris Moraitis confirmed that investigators

²⁶ Afghanistan Inquiry Report (n 1) 40 [68].

²⁷ Ibid 40 [74].

²⁸ Office of the Special Investigator, 'Our Purpose', <https://www.osi.gov.au/about/our-purpose>; Office of the Special Investigator, '2021-22 Annual Report' (2022) ('OSI 2021-22 Annual Report').

²⁹ OSI 2021-22 Annual Report (n 28) 15.

³⁰ Office of the Special Investigator, *2022-23 Corporate Plan* (2022) 24-26.

³¹ Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 8 November 2022,

https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/26263/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2022_11_08.pdf;fileType=application%2Fpdf#search=%22committees/estimate/26263/0000%22, 40 ('November 2022 Senate Estimates').

³² Ibid 42.

³³ Mark Weinberg, 'The Investigation and Prosecution of Alleged War Crimes: Lessons from the Past' (Speech, Hellenic Australian Lawyers Association, 21 July 2022) 13 [70].

³⁴ Ibid.

³⁵ Commonwealth, *Parliamentary Debates*, Senate Legal and Constitutional Affairs Legislation Committee, 14 February 2022,

https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/25615/&sid=0000 ('February 2022 Senate Estimates').

³⁶ Ibid; Weinberg (n 33) [72].

are still precluded from gathering evidence inside the country.³⁷ OSI has travelled to other countries as part of its investigations and engaged with international organisations³⁸ and non-government bodies.³⁹

As of November 2022, no matters have yet been referred by OSI to the CDPD for an assessment and possible prosecution.⁴⁰ OSI indicated that it may pass the first complete brief of evidence to the CDPD in the first half of 2023.⁴¹

Investigations into possible war crimes in Afghanistan are also underway by AFP.⁴² AFP investigations pre-date the recommendations of the Afghanistan Inquiry Report but are included in this review for the sake of completeness.

Documents released through an FOI request indicate that between 2012 to 2018, AFP assessed and finalised three allegations of war crimes, concluding that no offence/s were disclosed.⁴³ Other cases continue to be investigated by AFP. In 2019, AFP investigators travelled to Afghanistan in connection with war crimes investigations.⁴⁴ At the time AFP declined to provide any insight into the alleged incidents and perpetrators being investigated, however, it noted that it had received a referral to investigate such allegations in June 2018.⁴⁵ In October 2021, in a submission to a senate inquiry into Australia's engagement in Afghanistan, AFP confirmed that other than assisting OSI investigations, AFP "retains responsibility for investigating any allegations of war crimes that do not fall within the remit of the OSI."⁴⁶ AFP also noted that the political change and security situation in Afghanistan may limit its ability to obtain evidence and access witnesses in Afghanistan.⁴⁷ It further stated that it is not engaging with Taliban de-facto authorities⁴⁸ and that any future AFP engagement in Afghanistan will depend on an assessment of the security situation.⁴⁹

In November 2021, AFP's deputy commissioner of investigations confirmed that AFP's Afghanistan-related investigations "are still ongoing".⁵⁰ While he expressed that AFP is no longer seeking more witnesses and the AFP investigation is near completion,⁵¹ more recent information indicates that the AFP's Afghanistan-related investigations continue for the moment.⁵² These investigations relate to "a very small number" or a "couple" of incidents.⁵³

³⁷ November 2022 Senate Estimates (n 31) 41.

³⁸ Ibid 41, 43.

³⁹ Ibid 41.

⁴⁰ Ibid 43; See also Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Australia's Engagement in Afghanistan* (Final Report, April 2022) 106 [6.14].

⁴¹ November 2022 Senate Estimates (n 31) 41.

⁴² Ibid 43.

⁴³ Australian Federal Police, CRM2019/284, 6 May 2019, on file with ACIJ.

⁴⁴ 'AFP Investigates Afghan War Crime Claims', 9 News (Online, 20 September 2019)

<https://www.9news.com.au/national/afp-investigate-alleged-afghan-war-crimes/9fb500b2-1198-4d64-85ef-45692d36451f>; Tom Stayner, 'AFP Travels to Afghanistan for Alleged 'War Crimes' Investigation', SBS News (Online, 20 September 2019) <https://www.sbs.com.au/news/article/afp-travels-to-afghanistan-for-alleged-war-crimes-investigation/2ggvd63n9>.

⁴⁵ Stayner (n 44).

⁴⁶ Australian Federal Police, Submission Number 34 to the Senate Standing Committee on Foreign Affairs and Defence Trade, *Inquiry into Australia's Engagement in Afghanistan* (October 2021) [38].

⁴⁷ Ibid [39].

⁴⁸ Ibid [3].

⁴⁹ Ibid [39].

⁵⁰ Courtney Gould, 'Federal Police Face Difficulties in War Crime Probe due to Taliban Takeover', News (Online, 15 November 2021) <https://www.news.com.au/world/middle-east/federal-police-face-difficulties-in-war-crime-probe-due-to-taliban-takeover/news-story/6373c21bddc18e0598ad207e5a275959>.

⁵¹ Ibid.

⁵² November 2022 Senate Estimates (n 31) 43.

⁵³ Ibid.

These incidents remain solely under the remit of AFP and are not being investigated jointly with the OSI.⁵⁴

Media reports indicate that in April 2020, AFP sent two briefs of evidence to the CDPP against Corporal Ben Roberts Smith, alleging that he was involved in the execution of Afghan prisoners.⁵⁵ While Ben-Roberts-Smith has claimed that he has received assurances from the police that no brief of evidence has been submitted for prosecution, both AFP and CDPP refused to comment and clarify the situation.⁵⁶

So far, AFP has made two arrests in connection to Australian forces' engagement in Afghanistan, however neither of these concerned war crimes offences. In 2017, David McBride was arrested for blowing the whistle on alleged war crimes by Australian forces in Afghanistan.⁵⁷ His trial is anticipated to begin next year. In April 2022, AFP arrested a former soldier who was a witness in defamation proceedings brought by Ben Roberts-Smith against newspapers who reported on his involvement in possible war crimes in Afghanistan. The witness was arrested for obstructing, hindering, or intimidating an investigator and causing harm to an investigator.⁵⁸

Analysis

The recommendations concerning investigation currently appear to be met. The establishment of the OSI is a positive step towards investigating allegations of war crimes by Australian forces in Afghanistan and the first brief of evidence appears to be forthcoming.

Several years on, there is very little to show for AFP's investigations beyond media reports that two briefs of evidence have been passed to the CDPP.

Beyond the recommendations of the Afghanistan Inquiry Report, there are other actions that should be taken to bring Australia's response in line with international best practices.

Transparency and outreach

There is work to be done on informing the public and affected communities about the progress of investigations and any eventual prosecutions.

OSI and AFP need to adopt outreach strategies to effectively communicate their work to affected communities in Uruzgan. The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* require criminal processes to be responsive to the

⁵⁴ Ibid.

⁵⁵ Nick McKenzie, Chris Masters and Joel Tozer, 'Buried Evidence and Threats: How Ben Roberts-Smith Tried to Cover up his Alleged Crimes', *The Age* (Online, 11 April 2021) <https://www.theage.com.au/national/buried-evidence-and-threats-how-ben-roberts-smith-tried-to-cover-up-his-alleged-crimes-20210408-p57h1r.html>.

⁵⁶ Paul Maley, 'Military Hero Ben Roberts-Smith Denies AFP War Crimes Move', *The Australian* (Online, 7 May 2020) <https://www.theaustralian.com.au/nation/defence/military-hero-ben-robertssmith-denies-afp-war-crimes-move/news-story/eeda198cbee71e1674d2dcd29dd714b3>.

⁵⁷ Nick Xenophon, 'If Moral Courage Matters, This Whistleblower Needs Defending', *The Age* (28 November 2020) <https://www.theage.com.au/national/if-moral-courage-matters-this-whistleblower-needs-defending-20201116-p56ey4.html>.

⁵⁸ ACIJ, 'Statement: First Arrest Concerning Allegations of War Crimes by Special Forces in Afghanistan for Obstruction and Harm to Investigator', (Online, 27 April 2022) <https://acij.org.au/statement-first-arrest-concerning-allegations-of-war-crimes-by-special-forces-in-afghanistan-for-obstruction-and-harm-to-investigator/>; Ben Doherty, 'Ben Roberts-Smith Defamation Trial: Police Feared Witness Would Destroy Phone Evidence', *The Guardian*, (Online, 29 April 2022) <https://www.theguardian.com/australia-news/2022/apr/29/ben-roberts-smith-defamation-trial-police-feared-witness-would-destroy-phone-evidence>.

needs of victims, which among other things involve “[i]nforming victims of their role and the scope, timing and progress of the proceedings, [...] especially where serious crimes are involved.”⁵⁹

Australia’s response to war crimes by Australian Special Forces in Afghanistan will have little to no impact on affected communities in and from Afghanistan if those communities are not informed about the ongoing proceedings and engaged.⁶⁰ Transparency and outreach are therefore essential to ensure that the ongoing processes are meaningful for victims and observers from Afghanistan.

Adopting transparency measures also improves public trust in the proceedings and enables scrutiny of the decision-making process and outcome by victims, civil society, and academic commentators. Access to information is critical to evaluating the ongoing investigative processes and the extent to which they comply with international human rights standards and with Australia’s obligations under the *Rome Statute* of the International Criminal Court to carry out genuine investigations.⁶¹

OSI’s website collates various updates on the progress of its work.⁶² The website is now available in various languages via an automated AI-generated translation. This is helpful but not a replacement for a more comprehensive outreach strategy addressing victims, their families and affected communities.

OSI notes that the sensitive and singular focus of its work “necessarily places limits on the amount of information the OSI is able to release publicly while investigations are ongoing.”⁶³ While it is of course crucial to avoid jeopardising ongoing investigations and future trials, there is a need to balance this caution with the interests of transparency and outreach and the right of victims and affected communities to information.

Compared to OSI, there is much less transparency and no attempts at outreach on the part of the AFP. The AFP’s media team regularly publishes press releases on arrests, charges and sentencing in select cases,⁶⁴ but no such updates have been made on Afghanistan-related investigations. In its 2021–2022 Annual Report, AFP does not make any references to its Afghanistan-related investigations.

In other jurisdictions, police units investigating international crimes (war crimes, torture, crimes against humanity, etc) have made efforts to make information available to victims and communities affected by such crimes.⁶⁵ AFP, which has the power to investigate international crimes with and without a link to Australia, should do the same. A first step could be to make information available and accessible about its Afghanistan-related investigations.

⁵⁹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGA Res 40/34, A/RES/40/34 (29 November 1985), 6(a) (*‘Victims’ Declaration*).

⁶⁰ Fiona Nelson and Kobra Moradi, ‘The Role of Transparency in Australia’s Response to War Crimes in Afghanistan’, *Opinio Juris* (Online, 4 November 2022) <http://opiniojuris.org/2022/11/04/the-role-of-transparency-in-australias-response-to-war-crimes-in-afghanistan/>.

⁶¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 17 (*‘Rome Statute’*).

⁶² Office of the Special Investigator, ‘News and Resources’ (Website) <https://www.osi.gov.au/news-and-resources>.

⁶³ OSI 2021–22 Annual Report (n 28) 3.

⁶⁴ Australian Federal Police, ‘News and Media’ (Website) <https://www.afp.gov.au/news-media>.

⁶⁵ ‘War Crimes – Swedish Police Efforts’, *Polisen* (Website) <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>.

OSI, AFP and CDDP should coordinate their approach on outreach to victims and affected communities.

Scope of investigations

The Afghanistan Inquiry Report found that some commanders bore “*moral* command responsibility for what happened under their command and control.”⁶⁶ The report’s finding on command responsibility has received widespread criticism.⁶⁷

Command responsibility is a legal doctrine which provides for the individual criminal responsibility of superiors in situations where they knew or should have known⁶⁸ about international crimes and failed to prevent or punish those crimes. The doctrine was borne of the understanding that those higher up in the hierarchy may bear greater responsibility for international crimes, in part because they are better placed to ensure that such crimes are prevented, both through training and through punishment to prevent recurrence. If Australia is to satisfy the complementarity requirements of the *Rome Statute*,⁶⁹ it will need to ensure that its investigations address systemic failures and the criminal liability of those bearing the greatest responsibility for the crimes. The “deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible” is one of the factors that the International Criminal Court’s Office of the Prosecutor may consider in assessing national prosecutions for the purpose of determining whether it has jurisdiction over potential cases.⁷⁰

The scope of OSI’s investigative mandate is broad and includes matters that have not been referred to by the Afghanistan Inquiry. The ongoing investigations must therefore examine systemic failures and the criminal liability of those bearing the greatest responsibility for the crimes, including those further up the chain of command. Systemic failures would appear to include the widespread use of “throwdowns”,⁷¹ the broader practice of cover-ups and the inadequacy of initial investigations. It is not currently known to what extent the ongoing investigations are examining these issues.

The path forward

The following steps should be taken to address the identified gaps:

- OSI, AFP, and CDDP should adopt public information and outreach measures to effectively engage and communicate with affected communities in and from Afghanistan.

⁶⁶ Afghanistan Inquiry Report (n 1) 32 [32], 103, 472, 502 (emphasis added).

⁶⁷ See, eg, Douglas Guilfoyle, Joanna Kyriakakis, Melanie O’Brien, ‘Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report’ (2022) 99 *Stockton Center for International Law* 222; Stuart MacCarthy, ‘They Didn’t Know, Really? Pursue Top Brass over Alleged War Crimes in Afghanistan, Says Veteran’, *Michael West* (Online, 5 October 2020) <https://michaelwest.com.au/they-didnt-know-really-pursue-top-brass-over-alleged-war-crimes-in-afghanistan-says-veteran/>.

⁶⁸ Article 28 of the *Rome Statute* on command responsibility requires that the military commander “knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”. By comparison, s 286.115 of the *Criminal Code Act 1995* (Cth) imposes a different standard by replacing the terms “should have known” with “reckless as to”. Under that section a military commander is culpable if they “either knew or, owing to the circumstances at the time, was *reckless as to* whether the forces were committing or about to commit such offences” (emphasis added). For further analysis on this difference, see O’Brien and Guilfoyle (n 85) 258-265.

⁶⁹ *Rome Statute* arts 17, 53.

⁷⁰ Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (Policy Paper, November 2013) [48].

⁷¹ Afghanistan Inquiry Report (n 1) 29 [18], 297 [45], 470-471.

- AFP should make information publicly available about the progress of its Afghanistan-related investigations
- Investigations should examine systemic issues and the extent to which legal liability for war crimes extends up the chain of command.

Institutional Reform

Afghanistan Inquiry recommendations

The Afghanistan Inquiry Report provides circa 25 recommendations⁷² to address systemic organisational and cultural failings within the ADF that may have contributed to the conduct described in the Report. Most of the recommendations relate to improving education and training on the Laws of Armed Conflict, changing policies and practices to ensure compliance with those laws (e.g., improving operational reporting mechanisms), and understanding the causes of war crimes in the context of ADF operations in Afghanistan.

Defence response

The Defence Reform Plan sets preventing recurrence as one of its two key objectives.⁷³ The Plan’s “transformational reform” work package is directed towards implementing reforms required “to address what went wrong and prevent any future issues occurring.”⁷⁴ In the Defence Reform Update from 1 August 2022, four of 25 recommendations are listed as closed, and the other 21 remain open.⁷⁵

Analysis

Defence has addressed some, but not all, of the reform-related recommendations.⁷⁶ For example, in accordance with the Afghanistan Inquiry’s recommendation, Defence is reviewing its policy on appropriate dwell times between operational deployments.⁷⁷ The Defence Reform Update also suggests that Defence has developed training for ADF members on the requirement to comply with the Laws of Armed Conflict, the direct responsibility of commanders to ensure compliance, and the consequences of non-compliance.⁷⁸ Moreover, work is in progress to review the Laws of Armed Conflict Manual and to improve command accountability at the ADF by developing command accountability doctrine and training.⁷⁹

There are shortcomings in the Defence Department’s response that require resolving. A key issue is the lack of detail and clarity on reform measures. In many cases, it is not possible to determine from publicly available information whether actions underway as part of the Defence reform programme will actually implement the relevant recommendation. For example, while the Afghanistan Inquiry recommends mandating the use of helmet or body cameras by Special Forces during operations,⁸⁰ Defence claims that it is “developing a joint approach to the wearing and use of cameras on operations” and that the army is using “digital technology to enhance the record of action for Special Forces patrol operations”.⁸¹ It is unclear whether as part of this new approach the use of helmet or body cameras will be mandated. Moreover, Defence states that work is in progress to review and update its doctrine, policy, and training for the use of ADF military working dogs,⁸² but fails to explicitly

⁷² See Annex C of this document.

⁷³ Defence Reform Plan (n 8) vii, 3, 9.

⁷⁴ Defence Reform Update (n 10)

⁷⁵ Ibid.

⁷⁶ See Annex C of this document.

⁷⁷ Defence Reform Plan (n 8) 24; Defence Reform Update (n 10).

⁷⁸ Defence Reform Update (n 10).

⁷⁹ Ibid.

⁸⁰ Ibid 114, 364, 466.

⁸¹ Defence Reform Plan (n 8) 26.

⁸² Ibid 21; Defence Reform Update (n 10).

state whether it will implement the recommendation to introduce a clear doctrine about the permissible use of working dogs and to improve relevant trainings emphasising limitations on their use.⁸³ There are several additional gaps set out in Annex C.

Furthermore, scepticism has been expressed about the extent to which the proposed reforms will address the cultural and organisational failings at the ADF. The Afghanistan Inquiry Oversight Panel, which provides “oversight and assurance of Defence’s broader response to the Inquiry relating to cultural, organisational and leadership change”,⁸⁴ has criticised the lack of attention to Defence’s corporate responsibility as an organisation. According to the Panel, “the reforms are contained in a reasonably narrow compass focused mainly on the middle and lower ranks”.⁸⁵ It describes Defence’s response as a “bottom-up” exercise “focused primarily at the operational and not Defence’s most senior governance level.”⁸⁶

The Panel recommends a “top-down” inquiry to assess the following:⁸⁷

- the shortcomings in ADF’s governance arrangements that caused or allowed the organisational failure to take place;
- whether any senior officers who held office at the relevant time bear any personal responsibility for those shortcomings; and
- the steps Defence should take to ensure that its future governance arrangements will prevent such failure from occurring again.

Implementing the Afghanistan Inquiry’s recommendations on institutional reform could help prevent recurrence of gross violations of IHRL and serious violations of IHL in future conflicts. Victims of gross violations of IHRL and serious violations of IHL have a right to guarantees of non-repetition which constitute an essential component of reparation.⁸⁸ States are required to provide adequate training and education on the Laws of Armed Conflict to members of their military and security forces.⁸⁹ Moreover, as a party to the *Geneva Conventions*, Australia is obligated to ensure respect for IHL as set out in those Conventions.⁹⁰

⁸³ Afghanistan Inquiry Report (n 1) 108.

⁸⁴ Department of Defence, *Joint Statement – Statement on IGADF Inquiry* (Website)

<https://www.minister.defence.gov.au/statements/2020-11-12/joint-statement-statement-igadf-inquiry>.

⁸⁵ Department of Defence, FOI 491/21/22, 2 September 2022, Document 4, p. 3 (‘Defence FOI 491/21/22’); Ben Packham, ‘Defence Ducks Probe Into War Crimes Accountability’, *The Australian* (Online, 13 September 2022)

https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fdefence%2Fdefence-ducks-probe-into-war-crimes-accountability%2Fnews-story%2F27dbacc563a7e6dcecf936088f8c4213&memtype=anonymous&mode=premium&v21=dynamic-high-test-score&V21spcbehaviour=append.

⁸⁶ Defence FOI 491/21/22 (n 85), Document 4, p. 3.

⁸⁷ *Ibid*, Document 4, p. 3-4.

⁸⁸ *Basic Principles on Reparation* (n 20) 23.

⁸⁹ *Ibid* 22(h), 23(e)-(f).

⁹⁰ Common Article 1 of the four *Geneva Conventions* state: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”, see *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘*Geneva Convention I*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (‘*Geneva Convention II*’); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (‘*Geneva Convention III*’); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Geneva Convention IV*’); ICRC, *Convention (III) Relative to the treatment of Prisoners of War: Commentary of 2020 on Article 1 – Respect for the Convention* (Website) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538>.

The path forward

The Department of Defence should:

- Provide explicit information on planned and completed reforms within the ADF and how the reforms will address the Afghanistan Inquiry's recommendations.

Administrative Action

Afghanistan Inquiry recommendations

The Afghanistan Inquiry Report makes several recommendations regarding the consideration of administrative action against serving ADF members and the review of honours and awards. Specifically, it recommends that the ADF:

- consider taking administrative action for some serving members where there is credible information of misconduct which does not meet the threshold for referral for criminal investigation but is such that, if established, should have some consequence for the member.⁹¹ Such action may include termination, transfer out of the Special Forces, reprimand, or a warning;⁹²
- review the distinguished service awards of commanders at troop, squadron, and task group levels in respect of Special Operations Task Group (SOTG, Task Force 66) rotations and the decorations of those in command positions in the Special Air Service Regiment (SASR) from 2008 to 2012;⁹³ and
- revoke the Meritorious Unit Citation (MUC) of SOTG (Task Force 66),⁹⁴ which was awarded to the unit for their collective effort and “sustained outstanding service” in military operations.⁹⁵

Defence response

Initially, in its Reform Plan, Defence stated that it would address all inquiry recommendations relating to administrative action in accordance with existing workforce management processes, setting “mid-2021” as the deadline for achieving this objective.⁹⁶ While it is unclear whether Defence met this deadline for the recommendation concerning serving members, it is clear that this deadline was not met for the following two recommendations regarding honours and awards including the MUC.

In relation to administrative action against serving ADF members, the Defence website states that 17 individuals were issued a notice to show cause for termination of service.⁹⁷ However, the outcome of this process remains unclear. Media reports suggest that many of the soldiers issued termination notices were later dismissed, some were allowed to continue serving, and others were medically discharged.⁹⁸ However, the Defence website does not clarify whether

⁹¹ Afghanistan Inquiry Report (n 1) 166, 172 [25-26].

⁹² Ibid 172 [25].

⁹³ Ibid 41 [77] – [78].

⁹⁴ Ibid 41 [77].

⁹⁵ Department of Defence, ‘Meritorious Unit Citation’, (Website) <https://www.defence.gov.au/adf-members-families/honours-awards/honours-decorations/australian-gallantry-distinguished-service-awards/meritorious-unit-citation>; Department of the Prime Minister and Cabinet, ‘Meritorious Unit Citation’, (Website) <https://www.pmc.gov.au/government/its-honour/meritorious-unit-citation>.

⁹⁶ Defence Reform Plan (n 8) 18.

⁹⁷ Department of Defence, ‘Workforce and Administrative Action FAQ’, (Website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/workforce-and-administrative-action-faq>.

⁹⁸ Andrew Greene, ‘ADF Documents Show Senior Officers yet to Face Consequences for Alleged Afghanistan War Crimes’, ABC (Online, 12 April 2022) <https://www.abc.net.au/news/2022-04-12/afghanistan-war-crimes-documents-brereton-officers/100985048>.

any individuals actually received termination of service as a result of the notice to show cause process. For further information see Annex D.

While initially Defence stated that it would address the recommendations in this regard based on existing processes,⁹⁹ in July 2021, consideration of administrative action was suspended at the direction of then-Minister for Defence, Peter Dutton.¹⁰⁰ According to media reports, following the Afghanistan Inquiry Report, Brigadier Ian Langford, a senior officer who commanded Australian special forces in Afghanistan when around 16 alleged war crimes were committed, sought to hand back his Distinguished Service Cross but was unable to do so because there was no formal process available to deal with the request.¹⁰¹ While Defence had decided to review Langford's performance for a possible administrative censure, the process was never finalised.¹⁰² This year, he was voluntarily discharged.¹⁰³

The process of reviewing the honours awarded to individual commanders has recently recommenced at the direction of the current Minister for Defence.¹⁰⁴ On its website, Defence confirms that the Chief of Defence "has recommenced his consideration of administrative action for command accountability related to the Afghanistan Inquiry" and is addressing the recommendations relating to individual honours and awards in accordance with existing processes.¹⁰⁵

Regarding the MUC, Justice Brereton stated its revocation would represent an effective demonstration of the collective responsibility and accountability of SOTG (Task Force 66) as a whole.¹⁰⁶ When announcing his response to the Afghanistan Inquiry in November 2020, General Angus Campbell also acknowledged that units "live and fight as a team" and accepted the recommendation to revoke the citation.¹⁰⁷ He later advised Peter Dutton that his preferred option was revocation.¹⁰⁸ However, contrary to this advice and Justice Brereton's recommendation, on 19 April 2021, Dutton decided to retain the MUC.¹⁰⁹ This position was also endorsed by the then Labor defence spokesperson, Brendan O'Connor.¹¹⁰

⁹⁹ Defence Reform Plan (n 8) 19.

¹⁰⁰ Department of Defence, FOI 349/21/22, FOI 351/21/22, FOI 353/21/22, 8 April 2022, 2 ('Defence FOI 349, 351, 353'); Daniel Hurst, 'Confronted About his Inaction on the Brereton Reforms, Peter Dutton Attempts to Shoot the Messenger', *The Guardian* (Online, 5 May 2022) <https://www.theguardian.com/australia-news/2022/may/05/when-confronted-by-his-inaction-on-the-brereton-reforms-peter-dutton-attempts-to-shoot-the-messenger>.

¹⁰¹ Anthony Galloway, '“A Massive Loss”: Senior Officer who led Special Forces in Afghanistan Felt his Position was Untenable', *The Age* (Online, 2 October 2022) <https://www.theage.com.au/politics/federal/a-massive-loss-senior-officer-who-led-special-forces-in-afghanistan-felt-his-position-was-untenable-20220929-p5blxq.html#:~:text=Brigadier%20Ian%20Langford%2C%20who%20commanded,the%20Defence%20Force%20Angus%20Campbell>.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Commonwealth, *Parliamentary Debates*, Foreign Affairs, Defence and Trade Legislation Committee, 9 November 2022, 72-73 ('Defence Committee Senate Estimates November 2022'); Mathew Doran, 'Australian Defence Force Chief gives Afghanistan Veterans 28 Days to Explain Why They Should Keep War Honours', *ABC* (Online, 26 November 2022) <https://www.abc.net.au/news/2022-11-26/afghanistan-war-veterans-justify-keeping-medals/101702610>.

¹⁰⁵ Department of Defence, 'Defence Response FAQ', (Website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/defence-response-faq>.

¹⁰⁶ Afghanistan Inquiry Report (n 1) 41 [77].

¹⁰⁷ Hurst (n 104).

¹⁰⁸ Anthony Galloway, 'Defence Warned Keeping Afghanistan Honours Posed "Unacceptable Risk to Moral Authority" of the ADF' *The Age* (Online, 9 June 2021) <https://www.theage.com.au/politics/federal/defence-warned-keeping-afghanistan-honours-posed-unacceptable-risk-to-moral-authority-of-the-adf-20210608-p57z4w.html>.

¹⁰⁹ Ibid; Defence FOI 491/21/22 (n 89), Document 2, p. 2; Department of Defence (n 109).

¹¹⁰ Galloway (n 112).

Analysis

The recommendation on the revocation of the MUC has been overridden. The decision not to revoke SOTG’s MUC, in defiance of the Afghanistan Inquiry’s recommendation, sends the wrong message about how seriously Australia is taking the findings of the Afghanistan Inquiry Report. A Department of Defence briefing signed by General Angus Campbell on 31 March 2021 to the Minister for Defence gave preference to cancelling the MUC,¹¹¹ warning that retaining the MUC “does not send a decisive message about the accountability Australia is taking for the actions identified in the Inquiry report” and would cause “significant further harm to the families of those affected by the alleged actions of Australian soldiers and Australia’s relationship with Afghanistan.”¹¹²

The ADF has not been wholly transparent in relation to its response to the recommendations by the Afghanistan Inquiry Report on administrative action and the review of honours and awards. While there is some detail about the notice to show cause process initiated against 17 individuals on Defence’s website, there is no clear statement about whether any individuals were subject to a termination of service by virtue of their conduct in Afghanistan or, where retained, whether a lesser form of administrative action was taken.

Administrative action in relation to the review of honours and awards for individual commanders was delayed due to an intervention in 2021 by Peter Dutton. The new government’s decision to reverse this decision and recommence the process is a welcome step.

The path forward

The Department of Defence should:

1. Clarify the details about the administrative action that has been taken against serving ADF members.

¹¹¹ Department of Defence, FOI 465/20/21, Meritorious Unit Citation, 4 June 2021, 5 [23]-[26].

¹¹² Ibid [34]-[36(a)].

Conclusion

Australian authorities are taking some important steps towards accountability for breaches of international humanitarian law by members of its forces in Afghanistan. The establishment of the Office of the Special Investigator and potential future prosecutions will contribute to meeting Australia's obligations to investigate and prosecute such crimes.

The Government's inaction on the recommendations concerning compensation, however, means Australia has to date failed to provide effective and prompt reparation to victims.

Across all aspects of the response to the Inquiry's findings, the lack of adequate public information and outreach with survivors and victims is a key issue of concern. To ensure that Australia's response to the Afghanistan Inquiry is meaningful for victim communities in and from Afghanistan, Australian authorities must develop mechanisms for informing, engaging, and consulting with those communities in the ongoing processes.

Taking effective action on reparations and planning for outreach to affected communities are crucial next steps in the ongoing process of reckoning with the legacy of Australia's engagement in Afghanistan.

Annex A: Redress

Afghanistan Inquiry Recommendation	Implemented?	Analysis of Response	The Path Forward
Where there is credible information that an identified or identifiable Afghan national has been unlawfully killed, Australia should now compensate the family of that person, without waiting for the establishment of criminal liability. ¹¹³	No	<p>Despite the recommendation to compensate Afghan victims swiftly, the Australian Government has not done so, nor has it released any information about a plan for compensation.</p> <p>Australia has obligations under international law (see Annex E) to provide adequate, effective and prompt reparation.</p>	<p>The Australian Government should:</p> <ul style="list-style-type: none"> • Consult with victims, their families, and communities on compensation and other effective forms of redress depending on their needs and priorities. • Develop a comprehensive reparations package aimed at addressing all aspects of the harm suffered including physical harm, psychological or mental harm, and material loss. • Adopt interim measures for reparation in urgent cases. • Inform victims and affected communities about their rights and available remedies.

¹¹³ Afghanistan Inquiry Report (n 1) 41 [76].

Annex B: Investigations and prosecutions

Afghanistan Inquiry Recommendation	Implemented?	Analysis of Response	The Path Forward
Refer 36 matters relating to 23 incidents involving a total of 19 individuals to AFP for criminal investigations. ¹¹⁴ These matters concern unlawful killings and cruel treatment.	Yes	<p>AFP and OSI are investigating war crimes by Australian forces in Afghanistan. This is a positive step and may result in prosecutions. However, the investigations face several challenges that need to be addressed.</p> <p>There is a lack of outreach to affected communities in Afghanistan. The proceedings in Australia will have little meaning for victims and survivors if they are not informed about the ongoing processes in Australia and engaged. Moreover, there is a lack of information in particular about the status of AFP investigations. It is also unclear whether AFP and OSI investigations encompass command responsibility.</p>	<ul style="list-style-type: none"> • OSI, AFP, and CDPP should adopt public information and outreach measures to effectively engage and communicate with affected communities in and from Afghanistan. • AFP should make information publicly available about the progress of its Afghanistan-related investigations. • Investigations should examine systemic issues and the extent to which legal liability for war crimes extends up the chain of command.
Any criminal investigation and prosecution of a war crime should be undertaken by AFP and CDPP with a view to prosecution in the	Yes	Investigations are being undertaken by AFP and the OSI, who will provide briefs of evidence to the CDPP.	N/A

¹¹⁴ Ibid 29 [21], 40 [68].

<p>civilian courts, in a trial by jury.¹¹⁵</p> <p>Establish an Afghanistan Inquiry Legacy Cell to receive and conduct initial scoping of outstanding matters and future reports of misconduct in Afghanistan, in order to provide a forum for those who wish to make disclosures to be heard, and to triage disclosures for criminal or disciplinary investigation, other processes, or no further action.¹¹⁶</p>	<p>No</p>	<p>Defence has stated that it will work with the Inspector-General of the ADF in accordance with normal legislative processes to address this recommendation,¹¹⁷ without providing further detail and clarity.</p>	<ul style="list-style-type: none"> • Clarify whether and when the Afghanistan Inquiry Legacy Cell will be established.
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¹¹⁵ Ibid 40 [74].
¹¹⁶ Afghanistan Inquiry Report (n 1) 109-110.
¹¹⁷ Defence Reform Plan (n 8) 18.

Annex C: Institutional reform

Afghanistan Inquiry Recommendation	Implemented?	Analysis of Response	The Path Forward
Review the relevant ADF policies and procedures to ensure new weapons and ammunition cannot be used operationally before receiving chain of command and technical approval and being subject to Article 36 legal review. ¹¹⁸	In progress	Defence claims that work is in progress to review and update “policies and procedures to ensure new weapons and ammunition cannot be used operationally prior to receiving chain-of-command and technical approval.” ¹¹⁹ It is unknown when the review and update will be finalised.	<ul style="list-style-type: none"> Provide updates when the policies and procedures are reviewed and revised, including details about what explicit revisions have been made to guarantee weapons and ammunition will not be used without approval.
Promulgate clear doctrine on the permissible use of military working dogs, in particular in the context of tactical questioning. ¹²⁰ The training of military working dogs and military working dog handlers should emphasise the limitations on their use. ¹²¹	In progress	Defence states that work is in progress to review and update its doctrine, policy and training for the use of military working dogs, ¹²² without clarifying what changes will be made and how the update would address Inquiry recommendation.	<ul style="list-style-type: none"> Provide clear and detailed information about what the proposed updates involve and how they will limit the use of military working dogs.
The wearing and use of an appropriate helmet camera or body camera by Special Forces operators on	Unknown	Defence claims that it is “developing a joint approach to the wearing and use of cameras on operations” and that the “army is using digital technology to enhance the record of	<ul style="list-style-type: none"> Clarify whether the recommendation that the use of a helmet or body camera be mandated will be implemented.

¹¹⁸ Afghanistan Inquiry Report (n 1) 108.

¹¹⁹ Defence Reform Plan (n 8) 21; Defence Reform Update (n 10).

¹²⁰ Afghanistan Inquiry Report (n 1) 108.

¹²¹ Ibid.

¹²² Defence Reform Plan (n 8) 21; Defence Reform Update (n 10).

<p>operations should be mandated.¹²³</p>		<p>action for Special Forces patrol operations.”¹²⁴ Defence is however unclear whether this joint approach includes mandating the use of camera during operations.</p>	<ul style="list-style-type: none"> • Provide an update when the joint approach is developed and clear information about what the approach entails.
<p>In future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.¹²⁵</p>	<p>Unknown</p>	<p>Defence states, “Australia’s approaches to command of deployed forces and use of Special Forces are being reviewed and updated.”¹²⁶ Whether this review and update will align with this recommendation is yet to be determined.</p>	<ul style="list-style-type: none"> • Provide detailed information when the review and update are complete, explicitly identifying how the revised approach addresses the recommendations.
<p>The drawdown of the Special Forces should be a prime consideration and that the Special Forces should not be treated as the default “force of first choice” for expeditionary deployments, except for irregular and unconventional operations.¹²⁷</p>	<p>Unknown</p>		
<p>Undertake a professional review of appropriate dwell times between operational deployments.¹²⁸</p>	<p>Yes</p>	<p>The Defence Reform Plan states that “a review is being conducted in relation to the policy on respite and waivers.”¹²⁹ In a recent update, Defence indicates that it has</p>	<p>N/A</p>

¹²³ Afghanistan Inquiry Report (n 1) 114, 364, 466.

¹²⁴ Defence Reform Plan (n 8) 26.

¹²⁵ Afghanistan Inquiry Report (n 1) 110, 335 [31].

¹²⁶ Defence Reform Plan (n 8) 21.

¹²⁷ Afghanistan Inquiry Report (n 1) 110, 327, 337 [39], 357.

¹²⁸ Ibid 110, 327, 337 [39], 357.

¹²⁹ Defence Reform Plan (n 8) 24.

<p>Provides several recommendations on education and training:</p> <ul style="list-style-type: none"> • Every member of SOCOMD should receive education on the causes of war crimes, to be delivered by SOCOMD soldiers and reviewed by appropriate external reviewers.¹³¹ • Members of SOCOMD should be recorded talking candidly, and on the record, about the ethical drift that took place, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should 	<p>Partially</p>	<p>introduced an interim respite policy in the Military Personnel Manual to address the concerns raised in the Inquiry.¹³⁰</p> <p>The Defence Reform Plan can be improved by providing further detail and addressing each individual recommendation on training and education individually. The Plan often makes broad statements about, for example, “reforming end-to-end training for all Defence personnel on ethics, leadership, command, culture, character and Law of Armed Conflict”,¹³⁸ without explicitly identifying how this will implement the recommendations.</p> <p>Nonetheless, some progress has been made. For example, Defence claims to have developed training for ADF members on the requirement to comply with the Law of Armed Conflict and the consequences of non-compliance.¹³⁹ Work is also in progress to review the Laws of Armed Conflict Manual, and to develop command accountability doctrine and training to define and improve command accountability within the ADF.¹⁴⁰ There are however several gaps that the ADF must address.</p> <p>Defence does not clarify whether its training incorporates the recommendations to provide</p>	<ul style="list-style-type: none"> • Future updates should address each recommendation individually, giving precise information on the reforms completed, in progress, or planned and how the reforms address each individual recommendation concerning education and training.
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¹³⁰ Defence Reform Update (n 10).

¹³¹ Afghanistan Inquiry Report (n 4) 110, 327, 338 [44], 357.

¹³⁸ Defence Reform Plan (n 8) 24.

¹³⁹ Defence Reform Update (n 10).

¹⁴⁰ Ibid.

<p>have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.¹³²</p> <ul style="list-style-type: none"> • Training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member’s personal responsibility and legal duty to refuse to do so.¹³³ • Training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high-pressure setting with the requirement to make decisions in the context of incidents.¹³⁴ 	<p>education on the causes of war crimes, to organise a candid conversation among members of SOCOMB to discuss the ethical drift, and to ensure that force preparation training on the Laws of Armed Conflict addresses why ammunition not authorised for use cannot be procured or used. Implementing these recommendations is essential to understanding the root causes and promoting non-recurrence.</p> <p>Regarding reporting, Defence states that it is “reviewing and improving legal, investigative and reporting mechanisms for serious operational incidents and allegations.”¹⁴¹ According to its recent update, Defence has introduced training on individual responsibility for reporting breaches of the Law of Armed Conflict as part of force preparation for future deployments and has updated the ADF and Australian Public Service annual performance reporting processes, policies, and templates.¹⁴² What these training and updates look like in practice is unclear.</p> <p>On ethical training, the Defence Reform Plan states that “more will be done to embed critical thinking and ethical decision</p>	
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¹³² Afghanistan Inquiry Report (n 1) 110, 327, 338 [44], 357.

¹³³ *Ibid* 110, 327, 338 [44], 357.

¹³⁴ *Ibid*.

¹⁴¹ Defence Reform Plan (n 8) 21.

¹⁴² Defence Reform Update (n 10).

<ul style="list-style-type: none"> • It should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, for which there is an obligation to notify and report.¹³⁵ • Training should emphasise absolute integrity in operational and other reporting is both an ethical obligation and fundamental for sound command decisions and operational oversight.¹³⁶ • ADF personnel review force preparation training to ensure that the Laws of Armed Conflict training sufficiently and specifically addresses 	<p>making”,¹⁴³ without providing further details. The Reform Update suggests that work has been completed delivering Edition 1 of the Military Ethics Doctrine and Edition 3 of the ADF Leadership Doctrine which emphasises end-to-end ethics training, and that work is in progress to update the Integrity Framework to embed lessons learned from the Afghanistan Inquiry, including the development of tools to assist individuals with ethical leadership and decision-making.¹⁴⁴ While this broadly addresses the suggestions on ethical issues, it does not explicitly respond to the recommendation to incorporate practical ethical decision-making scenarios in training.</p>	
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¹³⁵ Afghanistan Inquiry Report (n 1) 111, 357.

¹³⁶ Ibid 110, 114, 327, 339 [47], 357, 364, 465.

¹⁴³ Defence Reform Plan (n 8) 24.

¹⁴⁴ Defence Reform Update (n 10).

<p>why ammunition not authorised for use by the ADF is not to be procured or used, including from allies.¹³⁷</p> <p>Members should have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.¹⁴⁵</p> <p>Establish an independent tri-service multi-disciplinary specialist operations inquiry cell for the conduct of administrative inquiries into operational incidents.</p>	<p>In progress</p>	<p>Defence’s recent update suggests that work is in progress to establish an “alternative, safe and confidential reporting process for allegations of serious operational incidents.”¹⁴⁶</p>	<ul style="list-style-type: none"> • Provide updates about the new reporting process and how it enables confidential reporting.
<p>Establish an independent tri-service multi-disciplinary specialist operations inquiry cell for the conduct of administrative inquiries into operational incidents.</p>	<p>Unknown</p>	<p>Defence has not explicitly addressed this recommendation.</p>	<ul style="list-style-type: none"> • Clarify whether Defence has or will establish the recommended cell.

¹³⁷ Afghanistan Inquiry Report (n 1) 108.

¹⁴⁵ Ibid 111, 114, 328, 340 [54], 357, 364, 465.

¹⁴⁶ Defence Reform Update (n 10).

Annex D: Administrative action

Afghanistan Inquiry Recommendation	Implemented?	Analysis of Defence Response	The Path Forward
<p>Consideration be given to administrative action for some serving members, where there is credible information of misconduct which does not meet the threshold for referral for criminal investigation but should have some consequence for the member.¹⁴⁷</p>	<p>Unknown</p>	<p>Defence has failed to provide clear information about its response to this recommendation. The recent Defence Reform Update of 1 August 2022 flags 97 recommendations concerning individuals as closed, one as open, and five on hold.¹⁴⁸ without ascertaining whether these recommendations relate to referrals for investigation or administrative action.</p> <p>The FAQ section of the Department of Defence Afghanistan Inquiry page contains some information about ‘Workforce and administrative action’.¹⁴⁹ These FAQs confirm that the Army initiated administrative action against 17 individuals, by issuing them a notice to show cause for termination of service.¹⁵⁰ These notices were issued over a two-week period, and none of the notices were withdrawn.¹⁵¹ The website also notes that outcomes were determined by the decision-maker on a case-by-case basis, that some individuals separated from the ADF on medical grounds, while others continue their</p>	<ul style="list-style-type: none"> Clarify the details about the administrative action that has been taken against serving ADF members, including distinguishing those who the Afghanistan Inquiry Report determined there was credible information about misconduct but who were not referred for investigation, and those who the ADF determined warranted additional workforce management action.

¹⁴⁷ Afghanistan Inquiry Report (n 1) 41 [75].

¹⁴⁸ Defence Reform Update (n 10).

¹⁴⁹ Department of Defence (n 119).

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

		<p>service in the permanent or reserve force.¹⁵² It is also stated that the Chief of the Defence Force is giving no further consideration to administrative action until any relevant criminal processes are complete.</p> <p>There is much that the FAQ section does not make clear. There is no clear statement as to whether any individuals actually received termination of service as a result of the notice to show cause process, or if any of the medical separations were dual mode (occurred on the basis of the medical reasons and the content of the notice to show cause). For those whose service was clearly not terminated due to their remaining in permanent or reserve service, it is unclear whether they had a lesser administrative sanction imposed upon them, such as Reduction in Rank, Censure or Formal Warning, or whether no action was taken.</p> <p>The MUC has not been revoked. On 19 April 2021, the then-Minister for Defence Peter Dutton made the decision that SOTG (Task Force 66) will retain the MUC.¹⁵⁴</p>	
<p>Recommends the revocation of the award of the MUC, as an effective demonstration of the collective responsibility and accountability of SOTG.¹⁵³</p> <p>Review the distinguished service awards of</p>	<p>No</p> <p>In progress</p>	<p>Defence’s response to these recommendations is in progress.</p>	

¹⁵² Ibid.

¹⁵³ Afghanistan Inquiry Report (n 1) 41 [77], 166.

¹⁵⁴ Defence FOI 491/21/22 (n 89), Document 2, p. 2; Department of Defence, ‘Honours and Awards FAQ’, (Website) <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/frequently-asked-questions/honours-and-awards-faq>.

<p>commanders at troop, squadron and task group levels in respect of SOTG.¹⁵⁵</p>		<p>Initially the Defence Reform Plan stated that the ADF will address these recommendations “in accordance with existing processes for the review of honours and awards” by end-2021.¹⁵⁶ However, in July 2021, at the direction of then-Minister for Defence, Chief of the Defence suspended his consideration of administrative action in relation to the military careers of, or honours awarded to, individual commanders.¹⁵⁷ Recently, on 9 November 2022 during the Senate Estimates, Defence noted that it has recommenced reviewing the honours awarded to those who held command positions during the period in Afghanistan, at the direction of the current Defence Minister.¹⁵⁸ The FAQ section of Defence website also confirms “Defence is addressing these recommendations relating to individual honours and awards in accordance with existing processes for the review of honours and awards.¹⁵⁹ It underscores that “[e]nsuring this work does not compromise any relevant criminal processes is a key consideration (and may require deferral of action in some circumstances).”¹⁶⁰</p>	<ul style="list-style-type: none"> • When administrative action process is implemented, provide detailed information about the outcome of the process.
<p>Review the award of decorations to those in command positions in SASR during the period 2008 and 2012 be reviewed.</p>			

¹⁵⁵ Afghanistan Inquiry Report (n 1) 41 [78], 116, 472.

¹⁵⁶ Defence Reform Plan (n 8) 19.

¹⁵⁷ Defence FOI 349, 351, 353 (n 104) Letter from Angus Campbell to General Rick Burr, ‘General Account Ability for Allegations Concerning Special Operations Task Group (SOTG) Activities in Afghanistan’; Defence Committee Senate Estimates November 2022 (108) 72.

¹⁵⁸ Defence Committee Senate Estimates November 2022 (108) 72, 73.

¹⁵⁹ Department of Defence (n 109).

¹⁶⁰ Ibid.

Annex E: Expert Opinion by Professor Carla Ferstman

Implementing the Brereton Report Recommendations: Reparations for Afghan Victims of Australian Special Forces Abuses

Expert Opinion Prepared for the Australian Centre for
International Justice, 28 November 2022

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I. Introduction

The Inspector-General of the Australia Defence Force’s (IGADF) Afghanistan Inquiry Report concerning allegations of war crimes by Australia’s Special Forces in Afghanistan between 2005 and 2016 (Brereton Report) was released in November 2020. The public redacted version of that report disclosed that there is credible information of 23 incidents in which one or more non-combatants or persons hors-de-combat were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in

circumstances which, if so accepted, would be the war crime of cruel treatment. These incidents involved a total of 39 persons unlawfully killed and 2 persons subjected to cruel treatment. Some of these incidents involved a single victim, and some multiple victims.¹

The report made numerous recommendations for follow-up, including investigations and compensation for survivors and families of victims, without the need to await the establishment of criminal liability.² The Department of Defence accepted all the findings and has indicated that it is addressing all recommendations. According to the Afghanistan Inquiry Reform Program, the approach related to compensation was due to be settled by end 2021.³ The Afghanistan Inquiry Reform Program Update from August 2022⁴ lists as Work Package 3: “Address Inquiry recommendations regarding compensation.” Under this heading, the item “Develop a whole-of-Government response to the Inquiry recommendations relating to compensation” is listed as “open”, in other words, still in progress.

II. Questions on which the expert opinion was sought

II.1 What are Australia’s international obligations to provide reparations?

Reparation encompasses the various ways in which wrongdoers must answer for wrongdoing. Domestically, injured individuals can pursue public law or tort actions against persons or entities that wronged them, including officials and the State itself. Crime victims may also pursue civil claims against perpetrators, either alongside criminal trials or as separate tort actions. Some countries have established administrative programmes to indemnify victims as an extension of criminal injuries or social welfare policies,⁵ or to respond to mass victimisation as part of political transitions.⁶

In international law, the obligation to afford reparation arises as a consequence of the breach of a primary obligation causing injury.⁷ The Permanent Court of International Justice (PCIJ) held in *Chorzów Factory* that it is ‘a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.’⁸ The standard of reparation articulated by the PCIJ is ‘full,’ as needing to wipe out all the consequences of the illegal act and reestablish the *status quo ante*.⁹

¹ Brereton Report, public version, pages 28-29, paras. 15, 16.

² *Ibid*, in relation to unlawful killings, see page 41, para. 76. See also, in relation to compensation for cruel treatment, pages 72 and 86.

³ Department of Defence, Afghanistan Inquiry Reform Program, 30 July 2021, pg. 10. “Work Package 3 will develop a whole of government response to address the 15 recommendations made by the Afghanistan Inquiry in relation to compensation. Further information on the approach to be taken will be available by end-2021. As part of developing and agreeing the approach, an implementation timeline will be established”, *ibid*, pg. 13.

⁴ Afghanistan Inquiry Reform Program Update, August 2022.

⁵ Andrew Ashworth, ‘Punishment and Compensation: Victims, Offenders and the State’ (1986) 6 Oxford J Legal Studies 86. See, e.g., for Australian criminal injuries funds, Victims Support and Rehabilitation Act 1996 (NSW).

⁶ See generally, Pablo de Greiff, ‘Repairing the Past: Compensation for Victims of Human Rights Violations’ in Pablo de Greiff (ed), *The Handbook of Reparations* (OUP 2006) 1-20; John Torpey, *Making Whole What Has Been Smashed: On Reparation Politics* (Harvard Univ Press 2006).

⁷ ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on the work of its 53rd session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [ARS], Art 31, reflecting *Chorzów Factory (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21.

⁸ *Chorzów Factory (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 29.

⁹ *Chorzów Factory* (Merits) *ibid*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, [152]. See also, ARS (n 7) Arts 31, 34 and commentaries thereto. See, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross*

Where restitution (reestablishing the *status quo ante*) is not possible or feasible, compensation is appropriate,¹⁰ and compensation may be accompanied by additional forms of reparation depending on the nature of the breach, the harms suffered by the victims, and the context. Reparation applies to any breached international obligation causing injury.¹¹ This includes breaches of human rights and IHL.¹²

The nature of the violation (what happened in fact and in law) frames the reparation obligations. This is because the right to reparation is a secondary rule which arises when the primary obligation is breached; it derives its status from the primary obligation which was breached. Consequently, in the context of the Inquiry report, what is relevant is:

- i) Firstly, the nature of the obligation to afford reparation for murder (which can be characterised under IHL as the war crime of murder and under human rights law as the violation of the right to life);
- ii) Secondly, also relevant is the nature of the obligation to afford reparation for cruel treatment (recognised as a war crime under IHL and as torture or other cruel, inhuman or degrading treatment or punishment under human rights law).

Australia's obligation to afford reparation stems firstly from the law applicable to the Commonwealth of Australia, its Departments, and officials and secondly from the wrongful acts said to have been perpetrated by or which are attributable to the Commonwealth of Australia, the Australian Defence Forces and/or its officials. Consequently, while the Brereton Report recommended compensation for very specific criminal incidents it determined as credible this would simply be a starting point; the quantum and quality of reparations should be determined in relation to the law applicable to the Commonwealth of Australia. Furthermore, the obligation to afford reparation would also apply to any similar, credible incidents which had not yet come to light at the time of the publication of the Brereton Report.

i) Applicable international law

As a dualist country, treaty obligations must be enacted into domestic law before they are legally binding in Australia. Nevertheless, the failure to enact domestic legislation does not impact Australia's international obligations, which are to implement its treaty obligations fully and in good faith.¹³ In this respect, the UN Human Rights Committee, in its General Comment on the nature of the general legal obligation imposed on States Parties to the International Covenant on Civil and Political Rights (which Australia has ratified), has explained:

A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction.

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) [Basic Principles and Guidelines] 18, which describes 'full and effective' reparation.

¹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [Judgment on reparations, 9 February 2022], para. 101.

¹¹ ARS (n 7) Art 31 and commentaries.

¹² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 257, para. 259.

¹³ *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entry into force 27 January 1980), Art. 26.

Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.

Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.¹⁴

i) Treaties and declaratory instruments

International Humanitarian Law

The obligation to afford reparation is reflected in IHL treaties, particularly Article 3 of the *Hague Convention IV*,¹⁵ largely reproduced in Article 91 of *Protocol I*, ratified by Australia,¹⁶ which provides:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.¹⁷

While the four Geneva Conventions do not contain similar wording on compensation, the obligation to compensate has been implied from the common provision¹⁸ that parties cannot absolve themselves of liability they incur in respect of grave breaches.¹⁹

The reference in Article 91 of Protocol I to 'the provisions of the Conventions or of this Protocol' refers to the four Geneva Conventions of 1949 and Protocol I. Common Article 3 of the four Geneva Conventions prohibits 'violence to life and person, in particular murder of all kinds' of civilians and persons *hors de combat*.²⁰ All four Geneva Conventions list 'wilful killing' of protected persons as a grave breach.²¹ The prohibition

¹⁴ UN Human Rights Committee, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the ICCPR (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, paras. 3, 4, 13.

¹⁵ *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910).

¹⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 [Protocol I]. Australia ratified Protocol I on 21 June 1991

¹⁷ Art 91, Protocol I, *ibid*.

¹⁸ First Geneva Convention Art 51; Second Geneva Convention Art 52; Third Geneva Convention Art 131; Fourth Geneva Convention Art. 148.

¹⁹ First Geneva Convention, ICRC Commentary to Art 51; Fourth Geneva Convention. ICRC Commentary to Art 29

²⁰ Geneva Conventions, common Art. 3.

²¹ First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147.

of murder is recognized as a fundamental guarantee by Additional Protocol I,²² as well as Protocol II.²³ Similarly, Common Article 3 of the Geneva Conventions prohibits ‘cruel treatment and torture’ and ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ of civilians and persons *hors de combat*.²⁴ Torture and cruel treatment are also prohibited by specific provisions of the four Geneva Conventions,²⁵ and ‘torture or inhuman treatment’ and ‘wilfully causing great suffering or serious injury to body or health’ constitute grave breaches of the Geneva Conventions.²⁶ The prohibition of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, is recognized as a fundamental guarantee for civilians and persons *hors de combat* by Additional Protocols I and II.²⁷

The obligation to afford compensation applies to all Parties to the conflict when violations have been committed. According to the ICRC official commentary, the obligation to afford compensation

corresponds to an uncontested principle of international law which has been reaffirmed by the Permanent Court of International Justice many times: “It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation [...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself”.²⁸

The Commentary goes on to explain that

The text declares that such compensation is due only “if the case demands”. It is not sufficient for a violation simply to have been committed. For the obligation to make reparation to exist, there must also be a loss or damage which in most cases will be of a material or personal nature. Moreover, compensation will be due only if restitution in kind or the restoration of the situation existing before the violation, are not possible. Such compensation is usually expressed in the form of a sum of money which must correspond either to the value of the object for which restitution is not possible, or to an indemnification which is proportional to the loss suffered....²⁹

Restitution is typically understood in most IHL treaties as the main obligation, failing which compensation or other forms of reparation should be afforded.³⁰

²² Protocol I (n 16), Art. 75(2)(a).

²³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 [Protocol II], Art. 4(2)(a).

²⁴ Geneva Conventions, common Art. 3.

²⁵ First Geneva Convention, Art. 12(2); Second Geneva Convention, Art. 12(2); Third Geneva Convention, Arts. 17(4), 87(3), 89; Fourth Geneva Convention, Art. 32.

²⁶ First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147.

²⁷ Protocol I (n 16), Art. 75(2); Protocol II (n 23), Art. 4(2).

²⁸ ICRC, Protocol I Commentary of 1987, Responsibility, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1066AF25ED669409C12563CD00438071>.

²⁹ *Ibid.*

³⁰ See, e.g., First Geneva Convention Arts 34, 35; Fourth Geneva Convention Art. 55.

Thus, the Brereton's findings in relation to unlawful killings and cruel treatment perpetrated by Australian forces gives rise to an obligation to compensate. The situation of 'if the case demands' is applicable as restitution for unlawful killings and cruel treatment is impossible – it is impossible to undo those violations. Furthermore, the loss or damage caused by those violations are typically understood as both material (loss of income to the family; funeral and burial costs, medical and rehabilitative expenses related to persons tortured or ill-treated) and moral costs (the undeniable pain and suffering experienced by families and communities associated with these events).

The obligation under IHL to afford reparation for violations of IHL is distinct from the practice of certain States (including Australia) to make *ex gratia* non-liability payments for property or other collateral damage, injury or death resulting from military actions by deployed forces.³¹ These are payments a State decides to make to maintain good relations with the local population. In contrast, reparations are legal obligations which are undertaken in response to acknowledged wrongs.

International Human Rights Law

The State obligation to afford reparation for the violation of human rights is set out in human rights treaties and their interpretive bodies, by independent experts and in declarative texts. The human rights treaties with most relevance to the subject matter of the Brereton Report are the International Covenant on Civil and Political Rights³² (ICCPR, which prohibits the arbitrary deprivation of life in Article 6, and prohibits torture and other cruel, inhuman or degrading treatment or punishment in Article 7) and the UN Convention Against Torture (UNCAT, which prohibits torture in Article 4).³³

Article 2(3) ICCPR obliges States parties to undertake:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

The UN Human Rights Committee, the official interpretive body of the ICCPR, has determined that Article 2(3) requires States Parties to make reparation to individuals whose Covenant rights have been violated. It 'considers that the Covenant generally

³¹ E.g., the tactical payments scheme adopted in 2009 under sections 123H and 123J of the Defence Act 190 and s. 33 of the Financial Management and Accountability Act 1997. On the resort to *ex gratia* payments in Afghanistan, see CIVIC, 'Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces', 2010, https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf.

³² *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR], ratified by Australia 13 August 1980.

³³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [UNCAT], ratified by Australia 8 August 1989.

entails appropriate compensation’, but also notes that ‘where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.’³⁴

Article 14(1) UNCAT requires States parties to the Torture Convention to ensure that each victim of an act of torture obtains redress and has ‘an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.’ The UN Committee Against Torture, the official interpretive body of UNCAT has explained that the term ‘redress’ in Article 14(1) is a comprehensive reparative concept which ‘entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.’³⁵ These measures ‘must be adequate, effective and comprehensive.’³⁶ The Committee Against Torture has also explained that the obligations contained in Article 14(1) pertain to both acts of torture and other cruel, inhuman or degrading treatment or punishment.³⁷

The Committee Against Torture has underscored that States Parties must

ensure that victims of any act of torture or ill treatment under its jurisdiction obtain redress. States parties have an obligation to take all necessary and effective measures to ensure that all victims of such acts obtain redress. This obligation includes an obligation for State parties to promptly initiate a process to ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place.³⁸

In addition to treaty bodies, UN independent experts³⁹ have frequently pronounced themselves on the obligation of States to afford reparation for the arbitrary deprivation of life and the violation of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

The then UN Special Rapporteur on Torture, Mr Juan Mendez, in his 2015 report on the extraterritorial application of the prohibition of torture and other ill-treatment, explained that:

Under customary international law a State’s duty to make reparation for an injury is inseparable from its responsibility for commission of an internationally wrongful act (see A/56/10 and Corr.1) and, as such, the right to an effective remedy is applicable extraterritorially.

³⁴ UN Human Rights Committee, ‘General Comment 31’ (n 14), para. 16.

³⁵ Committee Against Torture, ‘General comment 3’, Implementation of article 14 by States parties (13 December 2012) UN Doc CAT/C/GC/3, para. 2.

³⁶ Committee Against Torture, ‘General comment 3’, *ibid*, para. 6.

³⁷ Committee Against Torture, ‘General comment 3’, *ibid*, para. 1.

³⁸ *Ibid*, para. 27.

³⁹ UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (9 August 2012) UN Doc A/HRC/21/46; UNGA, ‘Interim report of the Special Rapporteur on torture’ (11 August 2000) UN Doc A/55/290, paras 24-30; UNGA, ‘Report of the Special Rapporteur on torture’ (3 July 2003) UN Doc A/58/120, paras 29-35; UNGA, ‘Report of the Special Rapporteur on torture’ (15 January 2007) UN Doc A/HRC/4/33, paras. 61-68.

The Special Rapporteur recognizes that some States have provided financial compensation to victims of extraordinary rendition and secret detention as part of undisclosed out-of-court settlements for complicity in torture or other ill-treatment abroad in response to civil suits. The Special Rapporteur welcomes this step in the right direction but insists that strict compliance with international law requires States to provide compensation pursuant to a finding of wrongdoing through available legal mechanisms.⁴⁰

The above comment related to the need to uphold strict compliance with international law related to compensation applies just as easily to overseas military abuses as it does to overseas extraordinary rendition and secret detention.

Declarative texts

The right to reparation is also reflected in a range of declarative texts such as the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* [Basic Principles and Guidelines],⁴¹ the International Law Association's *Declaration of International Law Principles on Reparation for Victims of Armed Conflict*,⁴² and the *Principles on Housing and Property Restitution*,⁴³ among many others.⁴⁴

The 2005 *Basic Principles and Guidelines* were adopted by consensus after a lengthy negotiation process.⁴⁵ Their adoption was described as 'a monumental milestone in the history of human rights as well as international criminal justice', and 'a step towards putting victims on the road to recovery and reparation'.⁴⁶ Though it is a declarative text, the *Basic Principles and Guidelines* derive their status by reflecting existing obligations under IHRL and IHL, and they identify mechanisms, modalities, procedures and methods for the implementation of those existing legal obligations.⁴⁷

⁴⁰ UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc A/70/303 (7 August 2015) paras. 55, 59.

⁴¹ *Basic Principles and Guidelines* (n 9).

⁴² International Law Association (ILA), 'Declaration of International Law Principles on Reparation for Victims of Armed Conflict' Res 2/2010 (74th Conference, The Hague, 15-19 August 2010) Art. 6, 30.

⁴³ UN Commission on Human Rights, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons' (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17, para. 2.1.

⁴⁴ E.g., Universal Declaration of Human Rights, UNGA Res 217(A)(III) (10 December 1948) (adopted by 48 votes to none, eight abstentions) [UDHR] Art 8; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985) (adopted without vote) [Victims' Declaration] 4; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 [Impunity Principles] 31; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res 1989/65 (24 May 1989) UN Doc E/1989/89, 20; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf > 3(a).

⁴⁵ Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the United Nations Principles and Guidelines', in Carla Ferstman and Mariana Goetz (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in the making* (second revised edition, Brill, 2020), 15-37, 25-27; M. Cherif Bassiouni,

'International recognition of victims' rights', (2006) 6(2) *Human Rights Law Review* 203-279, 247 *et seq.*

⁴⁶ Bassiouni, *ibid*, 278.

⁴⁷ Van Boven (n 45), 29.

The *Basic Principles and Guidelines* underscore that States' obligations to respect, ensure respect for and enforce international human rights and IHL norms, which form the basis for the articulation of the right to reparation, derive from an array of standards including customary international law.⁴⁸ The Inter-American Court of Human Rights has considered that the right to reparation, as a right of customary international law included 'restitutio in integrum, payment of compensation, satisfaction, guarantees of non-repetitions among others'.⁴⁹ The International Committee of the Red Cross (ICRC) has expressed the view that the State obligation to afford reparation for IHL violations constitutes a rule of customary international law, applicable in both international and non-international armed conflicts.⁵⁰ The same view was expressed in the final report of the International Commission of Inquiry on Darfur.⁵¹

The *Basic Principles and Guidelines* make clear that access must be fair and non-discriminatory, and procedures must be accessible and suitable to take account of victims' particular needs. In practice, discrimination and marginalisation can inhibit access to justice or associated reparations processes; often, key documents are not translated to local languages; information dissemination does not reach remote areas or reach those who cannot read; structures to ensure safety, privacy and dignity are not in place which can discourage many women and others who experience stigma from coming forward.⁵² The *Basic Principles and Guidelines* underscore that measures should be taken to 'minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.'⁵³

The *Basic Principles and Guidelines* describe reparation for gross human rights and serious IHL violations as needing to be 'full and effective',⁵⁴ to wipe out all the consequences of the illegal act and re-establish the *status quo ante*. Given that re-establishing the *status quo ante* may be impossible to achieve for many human rights and IHL abuses, the *Basic Principles and Guidelines* recognize a variety of forms of reparation – restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, which can be applied usually in some combination to achieve results that are fair, adequate or effective,⁵⁵ and proportionate to the harm.⁵⁶ Invariably, there will be a need for several forms of reparations to adequately address the harms.

⁴⁸ *Basic Principles and Guidelines* (n 9), 1(b).

⁴⁹ *Loayza Tamayo Case (Reparations)*, Series C No. 42 (27 November 1998), para 85. See also, *Aloeboetoe et al v Suriname (Reparations)*, Series A No. 15 (10 September 1993), para. 43.

⁵⁰ ICRC, 'Customary International Law Database' (undated) Rule 150 www.icrc.org/customary-ihl/eng/docs/home.

⁵¹ International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur' (25 January 2005) <https://www.legal-tools.org/doc/1480de/pdf/>, paras. 76, 592, 593. Note however that the compensation commission the Commission of Inquiry recommended was never established.

⁵² C O'Rourke, F Ni Aolain and A Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 *Harvard Human Rights Journal* 97, 137-139.

⁵³ *Basic Principles and Guidelines* (n 9) art 12(b).

⁵⁴ *Basic Principles and Guidelines*, *ibid*, 18.

⁵⁵ *Basic Principles and Guidelines*, *ibid*, 15. See also, UNCAT (n 33) Art. 14.

⁵⁶ *Basic Principles and Guidelines*, *ibid* 15, 18.

These forms of reparation are broadly consistent with the International Law Commission’s Articles on the Responsibility of States (mainly dealing with reparations in State to State claims).⁵⁷ and have been taken on board by the UN Human Rights Committee⁵⁸ and Committee Against Torture⁵⁹ and in international caselaw and are understood to reflect best practice.

Taking into account the facts considered in the Brereton Inquiry, restitution is largely inapplicable given the nature of the harms and the context. Compensation is understood to cover any financially assessable damage both material and moral and loss of profit, as well as the costs for legal or expert assistance, medicine, and psychological and social services.⁶⁰ Rehabilitation includes measures for physical and psychological treatment⁶¹ and scholarships and vocational training.⁶² Certain specialist thematic IHL conventions emphasise the importance of targeted victim assistance and rehabilitation.⁶³ Satisfaction has been frequently ordered in human rights jurisprudence to address injuries which involve breaches of trust, which acknowledgement and commemoration may help to remedy.⁶⁴

As the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recently concluded with respect to efforts to address the legacy of the ‘Troubles’ in Northern Ireland: ‘It is critical, however, to direct attention to instruments that may capture the more “structural” dimension of violations and abuses, so that victims and society receive answers on whether the violations were part of a pattern reflecting a policy under the responsibility of institutions with identifiable chains of command. This issue is critical to establishing the trustworthiness of institutions.’⁶⁵ Guarantees of non-repetition have included strengthening monitoring mechanisms and other procedural safeguards, changing policies or legislation, vetting public officials, and setting up commissions of inquiry.⁶⁶

Jurisprudence and standard-setting texts recognise the need to consider the quality of victims’ access to and experience of justice and reparations processes. Victims must receive adequate information,⁶⁷ they must be treated with humanity and dignity⁶⁸ and

⁵⁷ ARS (n 7).

⁵⁸ UN Human Rights Committee, ‘General Comment 31’ (n 14).

⁵⁹ Committee Against Torture, ‘General comment 3’, (n 35).

⁶⁰ *Basic Principles and Guidelines* (n 9) 20.

⁶¹ *Plan de Sánchez Massacre v Guatemala* (Reparations) Ser C no 116 (19 November 2004) para. 106-8.

⁶² ***Juvenile Reeducation Institute v Paraguay*** (Preliminary Objections, Merits, Reparations and Costs) Ser C no 112 (2 September 2004) para. 340(13).

⁶³ See, *Convention on Cluster Munitions* (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, Art 3.

⁶⁴ *Mack-Chang v Guatemala* (Merits, Reparations and Costs) Ser C no 101 (25 November 2003) paras 8, 9, 11, 12.

⁶⁵ UN General Assembly, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland’ UN Doc. A/HRC/34/62/Add.1 (17 November 2016), para. 111.

⁶⁶ *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, Comm no 292/04 (African Commission on Human and Peoples’ Rights, 43rd Session, 7–22 May 2008) para. 87.

⁶⁷ *Anguelova v Bulgaria* App no 38361/97 (13 June 2002); See also, *Zontul v Greece* App no 12294/07 (17 January 2012) [115]; Recommended Principles and Guidelines on Human Rights and Trafficking, (20 May 2002) UN Doc E/2002/68/Add.1, 9.2; *Basic Principles and Guidelines* (n 9) 11(c); 24.

⁶⁸ HRC, General Comment 31 (n 14) para 15; *Basic Principles and Guidelines* (n 9), 12(c); *Aksoy v Turkey* App no 21987/93 (18 December 1996) [98].

their privacy and safety, both physical and psychological, must be safeguarded.⁶⁹ For this purpose, the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* emphasises that ‘[v]ictims and other sectors of civil society should play a meaningful role in the design and implementation of programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.’⁷⁰

This also aligns with best practice. Experience shows that reparations processes should be highly consultative regardless of whether they are claimant led or more diffuse administrative programmes set up by governments or as part of settlement arrangements. Consultation with victim communities about their suffering, their particular wants and needs is particularly important when determining what reparations should look like, especially when it is impossible to reestablish the *status quo ante*, as will be the usual case with human rights and IHL violations. Victim engagement will continue to be vital throughout the reparation process including during and following its implementation.

ii) Extent to which human rights law applies during military operations operating extraterritorially

As described above, IHL recognises the obligation to afford compensation for IHL breaches. Nevertheless, IHRL will invariably also remain applicable during armed conflict⁷¹ including its standards pertaining to reparations. Notably, in *Al Skeini v United Kingdom*, the European Court of Human Rights held that human rights law applies to the Iraq war and occupation in situations where UK forces were an occupying force or when they had custody over an individual and that the RMP investigations were not sufficiently independent to satisfy the standards in the Convention.⁷²

The obligations to afford reparation apply extraterritorially. Under human rights law, remedies must be available to all persons within the State’s jurisdiction, which has been understood to include non-citizens and instances when a State exercises effective control over an area outside its national territory.⁷³ This would include situations where military troops stationed abroad are alleged to have perpetrated human rights abuses including violations of the right to life and the prohibition against torture. This point is underscored by the UN Human Rights Committee: ‘This principle [to respect and to ensure the Covenant rights] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent

⁶⁹ *Basic Principles and Guidelines* (n 9) 10, 12(b).

⁷⁰ Principle 32; See also, Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (International Meeting on Women’s and Girls’ Right to a Remedy and Reparation (n 44), Principle 1(D).

⁷¹ UN Human Rights Committee, ‘General Comment 36’ Art. 6: Right to Life, UN Doc CCPR/C/GC/36 (3 September 2019) para. 64; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168.

⁷² *Al-Skeini and Others v The United Kingdom* (Grand Chamber), Appl. no. 55721/07, 7 July 2011.

⁷³ *Ilaşcu v Moldova and Russia*, App no 48787/99, 8 July 2004; *Al-Saadoon v United Kingdom*, App no 61498/08, 2 March 2010.

of a State Party assigned to an international peace-keeping or peace-enforcement operation.’⁷⁴

Operational difficulties or challenges associated with a conflict-affected environment or fragile security situation do not serve to reduce or limit a State’s non-derogable human rights obligations though a degree of flexibility can be introduced as required.⁷⁵ This principles applies equally to the obligation to afford reparations for violations of human rights or IHL.⁷⁶ However, such circumstances should be taken into account and reflected in the operational plans put in place to contact potential beneficiaries and to distribute compensation payments and any other forms of reparation.

iii) Relevant practice pertaining to compensation for human rights and humanitarian law abuses perpetrated extraterritorially by armed forces

Several countries have afforded compensation for human rights and IHL violations perpetrated by their troops when operating abroad. In most cases, the decision to afford reparation stemmed from a mixture of pressure from the courts (victim claimants bringing civil actions in the domestic courts of States alleged to have caused the violations) resulting in judgments in their favour or satisfactory offers of settlement prior to or following the conclusion of the proceedings. Some (non-exhaustive) examples judged as relevant to the facts considered in the Brereton report, are set out below:

Canada:

- *Shidane Arone*, a 16-year-old Somali youth was caught trespassing by Canadian soldiers of the Canadian Airborne Regiment on their base in Somalia. He was tortured to death in their custody. The Canadian government compensated Arone’s clan the value of 100 camels, which they had demanded as blood money. Arone’s parents later sued the Canadian government for \$5 million CDN, but the suit was dismissed in 1999.

The Netherlands:

- *Basim Razzo*, an Iraqi man who lost his wife, daughter, brother, and nephew in an airstrike after US intelligence misidentified his home as an Islamic state headquarters. In March 2020,

⁷⁴ UN Human Rights Committee, ‘General Comment 31’ (n 14) para 10.

⁷⁵ See, *Al Skeini v UK* (n 72) para. 164. See also, Commission on Human Rights, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc E/CN.4/2006/53 (8 March 2006), para. 36: ‘Armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. [...] It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. ...’

⁷⁶ HRC, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para. 14: ‘Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.’

Razzo filed a lawsuit against The Netherlands for \$2 million. In September 2020, the government of The Netherlands made a ‘voluntary offer of compensation’ of €1 million, whose F16 jets were responsible for the attack.

- *Hasan Nuhanović* is a Bosnian former UN interpreter for Dutch troops stationed at the Dutchbat compound in Potočari, Srebrenica. His entire immediate family was murdered by members of the Bosnian Serb army when they were handed over by members of the Dutch peacekeepers. The Supreme Court of the Netherlands held that the Dutch State was responsible for their deaths and paved the way for a settlement agreement on compensation.⁷⁷
- *Mothers of Srebrenica* brought a case in The Netherlands concerning the abandonment by Dutch troops of the Dutchbat compound in Srebrenica, which served as a protection zone where thousands of Bosnian Muslims had been sheltering. The abandonment led to the mass killings at the site, which amounted to genocide. After protracted litigation, the Supreme Court of The Netherlands determined that the Dutch troops were 10% responsible for the ensuing killings, paving the way for compensation.⁷⁸

The United Kingdom:

- *Alseran*: The High Court found that four men had been unlawfully detained and subjected to inhuman and/or degrading treatment with respect to assaults, hooding with sandbags, deprivation of sight and hearing, use of ‘harshing’ techniques and use of sleep deprivation. They were each awarded compensation between £10,600 and £33,300.⁷⁹
- *Baha Mousa* was an Iraqi hotel worker who died in British army custody in Basra, Iraq in September 2003. It was determined that his death was caused by lack of food and water, heat, exhaustion, hooding, and that he had 93 recorded injuries on his body at the time of his death. Injuries and hooding. After launching a civil suit against the Ministry of Defence, the family of Baha Mousa and nine other Iraqis were in July 2008 offered £2.83 million in compensation.
- The Ministry of Defence has settled hundreds of Iraq compensation claims concerning cruel and inhuman treatment, arbitrary detention, and assault, resulting in settlements of several million pounds.⁸⁰
- *Serdar Mohammed* was captured by British forces in Helmand province, Afghanistan and was subsequently detained for 110 days before being transferred to the custody of Afghan authorities. In a separate incident, *Abd Ali Hameed Ali Al-Waheed*, an Iraqi citizen, was detained by British forces in Basra, Iraq in 2007; he was held for about six weeks then released. Both sought damages for their allegedly unlawful detention and/or treatment. The UK Supreme Court held that while the detentions were lawful, the UK detainee review process in Afghanistan breached the European Convention on Human Rights.⁸¹

⁷⁷ *The State of Netherlands v. Hasan Nuhanovic*, 12/03324, Supreme Court, 06 September 2013 https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/DD1F57EC48A29629C1257D250050B800/CASE_TEXT/Netherlands%20%28the%29%20-%20The%20Netherlands%20v.%20Hasan%20Nuhanovic%2C%20Supreme%20Court%2C%202013%20%5BEng%5D.pdf

⁷⁸ *The State of The Netherlands v. Respondents & Stichting Mothers of Srebrenica*. No. 17/04567, [https://uitspraken.rechtspraak.nl/inziendocument?id = ECLI:NL:HR:2019:1284](https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1284). Supreme Court of the Netherlands, 17 July 2019.

⁷⁹ *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB).

⁸⁰ <https://www.theguardian.com/uk-news/2021/nov/06/mod-has-settled-417-iraq-war-compensation-claims-this-year> .

⁸¹ [2017] UKSC 1 & [2017] UKSC 2.

The European Court of Human Rights has reviewed several cases involving the response to allegations of human rights violations by militaries operating abroad and resulting in compensation. Seminal cases include:

- *Al Jedda v United Kingdom* (Grand Chamber), Appl no. 27021/08 (7 July 2011). In October 2004, the US forces arrested Mr Al Jedda – a dual UK/Iraqi national, in Iraq and handed him over to the British forces and he was detained by them in Basra without charge until 30 December 2007. Mr Al Jedda claimed he was arbitrarily detained by UK troops in Iraq, to which the Court agreed. Considering the duration of his detention, the Court awarded him the sum of € 25,000 in compensation.
- *Al-Skeini and Others v The United Kingdom* (Grand Chamber), Appl. no. 55721/07 (7 July 2011). This case concerned the deaths of six close relatives of the applicants in Southern Iraq, in 2003 while the United Kingdom was an occupying power: three of the victims were shot dead or shot and fatally wounded by British soldiers; one was shot and fatally wounded during an exchange of fire between a British patrol and unknown gunmen; one was beaten by British soldiers and then forced into a river, where he drowned; and one died at a British military base (Baha Mousa, which had since been resolved). The Court determined that the European Convention on Human Rights applied in respect of the killings and thus the UK was responsible to carry out an effective investigation into their deaths (which it had failed to do). The Grand Chamber ordered the UK to pay each of the first five applicants, within three months, EUR 17,000 (seventeen thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage.
- *Jaloud v The Netherlands* (Grand Chamber), Appl. No. 47708/08 (20 November 2014). An Iraqi civilian died of gunshot wounds in an incident involving Netherlands Royal Army personnel, which had not been appropriately investigated. The Grand Chamber determined that The Netherlands was required to pay the applicant EUR 25,000 in respect of non-pecuniary damage.

International claims procedures have also been established in response to human rights and IHL violations, such as the UN Compensation Commission,⁸² Ethiopia Eritrea Claims Commission,⁸³ and numerous Holocaust-era restitution programmes.

Claims processes have adopted simplified approaches to evidence such as the use of evidentiary presumptions, lowered standards of proof and grouping and statistical sampling of claims when there is a large number of injured individuals who would be entitled to significant reparation that would be overwhelming for a court to adjudicate claim by claim, and/or when the nature of the violations is such that victims would not have the requisite proof to satisfy a court of their injuries using typical standards of proof.⁸⁴

⁸² See, UNCC, 'Arrangements for Ensuring Payments to the Compensation Fund' (2 August 1991) UN Doc S/AC.26/1991/1, para. 14.

⁸³ Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (adopted 12 December 2000, entered into force 12 December 2000) 2138 UNTS 94, 40 ILM 260, art 5.

⁸⁴ See generally, HM Holtzmann and E Kristjánsson (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford, Oxford University Press, 2007); M Bazylar and R Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (New York, New York University Press, 2006); P Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edn (New York, Routledge 2010); Heike Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes' in C Ferstman and M Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Revised and Updated Second Edition, Brill, 2020) 217-239; M Henzelin, V Heiskanen and G Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons From International Mass Claims Processes' (2006) 17 *Criminal Law Forum* 317.

International claims procedures have equally adapted measures to reflect the fact that victims of human rights and IHL violations, particularly when they remain in insecure, fragile environments, will not have access to evidence to a usual standard to prove their claims; often it will be easier for the claims body, through access to census records or other macro-level data to collate parts of the evidence required to substantiate a claim and match against corroborating details provided by claimants.

The International Court of Justice in its recent reparations award in the *DRC v Uganda* case, decided, given the enormous scale of the case, the complexity of the evidence and the understandable difficulties to arrive at a precise quantifiable figure for compensation, determined that compensation could nevertheless be ordered on an equitable basis. It held:

‘While the Court recognizes that there is some uncertainty about the exact extent of the damage caused, this does not preclude it from determining the amount of compensation. The Court may, on an exceptional basis, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations. Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury.’⁸⁵

It should be noted, however, that the scale of the DRC claim bears no resemblance to the facts at issue in the Brereton report, in terms of the numbers of alleged victims running to 180,000 and the challenges with respect to causality (the extent to which it can be shown that the harm was caused by the internationally wrongful acts) in the DRC case. The degree to which compensation should be determined on an equitable basis, as opposed to based on a precise calculation of the harms, will depend on the available evidence.

II.2 Explain the obligation for reparations to be “prompt”. How can this obligation best be implemented?

The right to reparation for victims of human rights violations or violations of IHL is a right to adequate, effective and *prompt* reparation.⁸⁶ The need for redress to be “prompt” is also set out in the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides that ‘[v]ictims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.’⁸⁷

i) The meaning of ‘prompt’

What will be considered ‘prompt’ will depend on the circumstances of a given case. Courts have generally refrained from making generalised statements. The human rights caselaw on ‘prompt’ is mostly concerned with the speed of investigations, both how quickly they are opened and the length of time they remain open (reasonable expedition). On right to life cases, the European Court of Human Rights has determined that commencing inquest

⁸⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [Judgment on reparations, 9 February 2022], para. 106.

⁸⁶ *Basic Principles and Guidelines* (n 9), 11(b).

⁸⁷ Adopted by the United Nations General Assembly on 29 November 1985, by resolution 40/34. Principle 4.

proceedings eight years after a killing by security forces was not sufficiently prompt.⁸⁸ Similarly, keeping criminal proceedings pending for almost fifteen years in respect to a death in custody case was understood as insufficiently prompt.⁸⁹ The Committee Against Torture determined in *Halimi-Nedzibi v. Austria*, that the State's failure to investigate an allegation of torture for 15 months was contrary to the requirement of prompt investigations.⁹⁰

The European Court of Human Rights has recognised that situations of generalised violence, armed conflict or insurgency may impede investigations, and has called for a realistic approach.⁹¹ It has held that 'even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.'⁹²

Given the impact of an insufficiently prompt investigation on the prospects for compensation, the UN Committee Against Torture has found the absence of a prompt investigation to also violate Article 14 of UNCAT concerning compensation.⁹³ Furthermore, the Inter-American Court of Human Rights has indicated that a remedy may be ineffective 'when there is an unjustified delay in the decision.'⁹⁴

ii) What values do 'prompt' reparations serve?

Prompt reparations serve several purposes.

First, for victims in a difficult or vulnerable situation, whether because of age, disability, or infirmity, or because of the precarious circumstances in which they are living, 'prompt' reparations are vital. Reparations are intended to be practical, and effective and prompt reparations can help to support victims practically, when the impact of the violations is felt most acutely and such support is most needed. The Inter-American Court of Human Rights recognised the importance of prompt reparations in the *Lucero Garcia* case. It determined that: 'In addition, he is an elderly person, being 79 years of age, and suffers from a permanent disability. In this context, it should be recalled that the Court has had the occasion to consider the special importance of the promptness of judicial proceedings in relation to persons in a vulnerable situation, such as a person with a disability, given the specific impact that a delay may have for such individuals.'⁹⁵ Giving the enormously challenging security situation in Afghanistan which has resulted in living circumstances of extreme precarity, it would appear clear that the victims relevant to the Brereton Inquiry are living in a situation of vulnerability and would benefit significantly from prompt reparations.

⁸⁸ *Kelly and Others v The United Kingdom*, Appl. no. 30054/96 (4 May 2001) para. 136. See also, *Mccaughey & Others v. The United Kingdom*, Appl. no. 43098/09 (16 July 2013).

⁸⁹ *Nafiye Çetin and Others v Turkey*, Appl. no. 19180/03 (7 April 2009), para. 42.

⁹⁰ CAT Committee, *Halimi-Nedzibi v. Austria*, Comm. No. 8/1991, para. 13.5.

⁹¹ *Georgia v. Russia (II)* (Grand Chamber), Appl. no. 38263/08 (21 January 2021), para. 327.

⁹² *Hanan v. Germany* (Grand Chamber), Appl. no. 4871/16 (16 February 2021), para. 204; *Georgia v. Russia (II)*, *ibid*, para. 326.

⁹³ CAT Committee, *Ben Salem v. Tunisia*, Comm. No. 269/2005, para. 16.8.

⁹⁴ *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 6 October 1987, Series A No. 9, para. 24.

⁹⁵ *García Lucero and others v Chile* (Preliminary Objection, Merits and Reparations) Series C no. 267 (28 August 2013), para. 246.

Second, prompt reparations may contribute to healing societal wounds associated with the crimes committed. Particularly given the extraterritorial context, in which Australian forces are no longer in the country, the tumultuous regime change which followed their and others' departures from Afghanistan, the memories of the local population in the affected areas is on the crimes and on the departure. Payment of reparations may contribute to building a different narrative. The European Court of Human Rights has determined in *Al Skeini v The United Kingdom* that 'a prompt response by the authorities in investigating a use of lethal force, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.'⁹⁶

Third, prompt reparations are important for practical reasons related to the safeguarding of evidence. The European Court of Human Rights has explained that the passage of time 'is liable not only to undermine an investigation, but also to compromise definitively its chances of being completed.'⁹⁷ The Inter-American Commission on Human Rights has similarly held that investigations 'should be conducted promptly in order to protect the interests of the victims and to preserve the evidence.'⁹⁸ The UN Committee Against Torture has also stressed the importance of prompt investigations to the preservation of evidence.⁹⁹

iii) What operational steps can be taken to aid with the 'prompt' determination and delivery of reparations?

The best way to ensure prompt determination and delivery of reparations is to take the time to plan the process well and to consult effectively with victims and the local community. This might seem as if it would contribute to further delays, but to the contrary, it will help avoid mistakes and mis-starts.

An administrative mechanism

A first step that can be taken is to put in place a framework to address the claims administratively. The *Basic Principles and Guidelines* encourage States to set up administrative systems: 'In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.'¹⁰⁰ Similarly, the UN Human Rights Committee in its General Comment 31, clarifies that 'Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.'¹⁰¹

Administrative mechanisms are particularly important given the extraterritorial nature of the claims, the fact that evidence of harm is in Afghanistan, the victims are far from the

⁹⁶ *Al-Skeini and Others v UK* (n 72) 167.

⁹⁷ *Mocanu and Others v. Romania* (Grand Chamber), Appl. nos. 10865/09, 45886/07, and 32431/08 (17 September 2014), para. 337.

⁹⁸ *Alan Felipe da Silva et al v. Brazil*, Case 665-05, Report No. 40/07, IACHR, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007), para. 54.

⁹⁹ CAT Committee, *Blanco Abad v. Spain*, Comm. No. 59/1996, para. 8.2.

¹⁰⁰ *Basic Principles and Guidelines* (n 9), para. 13.

¹⁰¹ UN Human Rights Committee, 'General Comment 31' (n 14), para. 15.

Courts of Australia and travel to Australia would be difficult. Requiring victims to plead their claims for damages in Australian courts would significantly disadvantage them, and the traits which contribute to this disadvantage (their “otherness” or “foreignness”) were ultimately the traits that fuelled the violations in the first place. Thus, subjecting them to Australian civil procedure would serve as a double disadvantage, it would be cumbersome, and the result would not likely serve the interests of justice or the objectives of reparations.

Given that the number of victims identified to date is relatively few (in comparison to many of the mass claims processes which have been established worldwide), there is no definite need to use all available mass claims techniques to approximate the evidence (such as grouping claims; statistical sampling; lowering standards of proof), though some tools may indeed be useful and may assist to speed up the process.

The precarity of victims’ current situations should be considered in devising how claims should be evidenced. It should not be expected that victims will have detailed proof that given their situation would be impossible for them to have. Many claims processes have established secretariats with a registry function to deal with such issues and to collate victims’ evidence with other, statistical or census records, or even hospital records, that may be easier to be collected and reviewed centrally. Certainly, the information already collated by the Brereton Inquiry may serve such a purpose.

The dissemination of reparations should be understood as a significant challenge to be tackled with the same degree of rigour as the adjudication of claims. The security situation, poverty and stigma associated with the status of victims may combine to put beneficiaries at risk of physical violence, theft, bribery and/or corruption associated with unvetted intermediaries. Furthermore, the family and societal dynamics should be considered in how measures of reparations are distributed.

Victim and civil society engagement

Reparations should involve a process of consultation and dialogue with those most affected. The process of developing and implementing a reparations programme should explicitly recognise that reparation is a right of victims, and that victims have the key stake in the process of designing and implementing the programme.¹⁰² Reparations should be meaningful and relevant and should contribute to the amelioration of victims’ lives. Victims’ and civil society will know best what that will look like. Limiting reparations to compensation,¹⁰³ and failing to consult with victims as to their preferences and needs, would not meet Australia’s international human rights’ obligations.

Furthermore, given the security context, it is important that reparations do not put victims at heightened risk. There is a need to consult carefully about the modalities for disseminating reparations.

¹⁰² ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Diane Orentlicher’ (27 February 2004) UN Doc. E/CN.4/2004/88, para. 59.

¹⁰³ For instance, reparations which has provided ‘austere and symbolic’ or ‘derisory’ compensation only, has been deemed inadequate by the UN Committee Against Torture. See, UN Committee Against Torture, Concluding Observations: Peru, UN Doc. CAT/C/PER/CO/4 (25 July 2006), para. 22; Concluding Observations: Chile, UN Doc. CAT/C/CR/32/5 (14 June 2004), para. 6(g)(v).

Interim reparations

Through the Brereton Inquiry and further discrete consultations, it may already be, or become, apparent that there are certain urgent medical or other needs which simply cannot wait.¹⁰⁴ It would be important to proceed with a simplified process to verify the veracity of such needs and to adopt urgent interim measures as needed as soon as practicable. These would not need to impact on a full reparations process.

Adopting a process for urgent, interim reparations would also serve as a sign of good will towards making amends.

Urgent, interim measures are only relevant when there is a capacity to act quickly to a solution, within weeks or at most a few months. It would be inappropriate to devote significant time to an interim reparations process which could only be implemented within twelve months or longer. That kind of lengthy ‘interim’ process may effectively confuse matters and diminish prospects for a more complete programme. An overall reparations package, once the parameters are set, if correctly administered should be capable of implementation within that type of timeframe.

/end.

¹⁰⁴ Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’, June 2014), Operational Principle 7 [‘interim reparations to address immediate needs and avoid irreparable harm should be made available’].