



3 August 2021

The Hon Scott Morrison MP
Prime Minister of Australia

Senator the Hon Michaelia Cash
Attorney-General of Australia

The Hon Peter Dutton MP
Minister for Defence

Dear Prime Minister, Attorney-General and Minister Dutton,

Re: Adequate, effective and prompt reparation to Afghan victims of Australian war crimes

We write in relation to the Afghanistan Inquiry Report led by Assistant Inspector-General of the Australian Defence Force the Hon Justice Brereton (hereafter the “Brereton Report”) and in particular the report’s recommendations concerning compensation. The Afghanistan Inquiry Reform Plan published recently by the Department of Defence indicates that an implementation timeline for the recommendations on compensation will be established and that more information will be available by the end of 2021.¹ We take this opportunity to bring to your attention important preliminary considerations on the issue of compensation.

As you are aware, the Brereton Report recommended that Australia compensate the families of Afghan nationals unlawfully killed and that this is done now, without waiting for the establishment of criminal liability.² The Brereton Report noted that the payment of compensation “will contribute to the maintenance of goodwill between the nations, and do something to restore Australia’s standing, both with the villagers concerned, and at the national level”. The report noted further that “it is simply the morally right thing to do”.³ There are also legal obligations on states to make reparation for violations of international humanitarian law. International human rights law stipulates that reparation should be provided to victims of gross violations of international human rights law or serious violations of international humanitarian law and that such reparation be adequate, effective and prompt.⁴ With these requirements in mind we offer recommendations for a way forward that adopts best practice and a victim-centred approach.

1. The Australian government should as an interim step promptly pay compensation in those cases earmarked for compensation in the Brereton Report

¹ Department of Defence, *Afghanistan Inquiry Reform Plan, Delivering the Defence Response to the IGADF Afghanistan Inquiry* (30 July 2021) 13.

² Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (November 2020) 173.

³ IGADF Afghanistan Inquiry Report (n 2) 173.

⁴ 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, GA Res 60/147, UN Doc A/RES/60/147 (21 March 2006).

In paying compensation, the Australian government should take measures to ensure that the compensation is received promptly and in full by the victims and their relatives. Payments should be made directly to victims and their relatives where possible. For the avoidance of doubt, it should be communicated clearly to the recipients that these compensation payments will not prevent victims and their relatives from speaking about their experiences or giving evidence in any future legal proceedings.

2. The Australian government should ensure that compensation is not limited to cases of unlawful killings

The Brereton Report recommended that Australia pay compensation in a number of cases where there is credible information that an identified or identifiable Afghan national has been unlawfully killed.⁵ The report also recommends the payment of compensation in one case of cruel treatment/assault⁶ but appears to be silent on the issue of compensation in relation to another incident of cruel treatment.⁷ Plans for compensation must extend to all relevant violations of international humanitarian law, including cases of cruel treatment, and should not be limited to unlawful killings.

3. The Australian government should ensure that compensation is not limited to cases identified in the Brereton Report

The Brereton Report acknowledged that reports of war crimes in Afghanistan “will continue to emerge following the release of the Inquiry’s findings, and potentially for many years.” Following the publication of the report, many further cases have indeed been documented.⁸ The Government’s plan for compensation must incorporate a plan for processing and assessing cases beyond those for which Brereton Report has recommended compensation, including cases documented locally during the conflict as well as those emerging more recently and those that are yet to come to light.

4. The Australian government should include survivors in the design and implementation of further reparation and provide a space for human rights and civil society organizations input into the process

Compensation is just one element of full and effective reparation for violations of international human rights law and international humanitarian law. Other elements include restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁹ Initial contact with survivors in Uruzgan indicates that there is a strong interest – beyond compensation – in truth and justice. In this regard we welcome the apology by Australian Defence Force Chief Angus Campbell to the people of Afghanistan on behalf of the Australian Defence Force as well as the establishment of the Office of the Special Investigator to examine matters of criminal liability arising from the findings of the Brereton Report. We call on the Australian government to build on this positive start by consulting with survivors and their communities about other forms of reparation that could be provided. This could potentially include, for example, assistance with the provision of psychosocial supports for survivors as well as contributions towards education funds and collaboration on the establishment of memorials. While the deteriorating security situation in Uruzgan and the closing of Australia’s embassy in Afghanistan currently pose logistical challenges to such consultations, we emphasise the importance of committing resources to local consultation on the issue of further reparation when circumstances allow. The undersigned organisations can offer assistance in this regard.

⁵ IGADF Afghanistan Inquiry Report (n 2) 173.

⁶ Ibid 72.

⁷ Ibid 96.

⁸ See, eg, Andrew Quilty, ‘The worst form of defence: New revelations of Australian war crimes in Afghanistan’, *The Monthly*, April 2021.

⁹ 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, n 4, Principle 18.

5. Plans for compensation and further reparation should consider the gendered impact of war crimes

The Australian government's plans for compensation and further reparation should consider the gendered impact of the war crimes on victims and their families.¹⁰ The Australian National Action Plan on Women, Peace and Security for 2021-2031 emphasizes the importance of women's meaningful participation in post-conflict processes, from which they are often excluded.¹¹ The experiences of Afghan women must be taken into account and women's equal participation and full involvement must be guiding pillars in the design and implementation of further reparation.

Conclusion

Australia currently has an opportunity to demonstrate that it will implement the Brereton Report's recommendations on compensation in good faith and in line with best international practice. We look forward to the prompt publication of the implementation timeline and to further engagement with the Government on these issues.

Yours sincerely,

Hadi Marifat
Afghanistan Human Rights and Democracy
Organisation

Horia Mosadiq
Conflict Analysis Network

Fiona Nelson
Australian Centre for International Justice

Manizha Isaar
Transitional Justice Coordination Group

¹⁰ See Lucy Geddes, 'Compensation Is Not Enough, Afghan Victims Are Entitled Other Forms of Reparation', *Opinio Juris*, (Blog post, 2 December 2020) < <http://opiniojuris.org/2020/12/22/compensation-is-not-enough-afghani-victims-are-entitled-other-forms-of-reparation/>>.

¹¹ *Australian National Action Plan on Women, Peace and Security 2021-2031*, foreword by Marise Payne, Minister for Foreign Affairs, Minister for Women.