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

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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]

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

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 2022[4] 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]

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[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 Violations of International Human Rights Law and Serious Violations of International*

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 international humanitarian law (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.

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.
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> 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 provision[18] 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

[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.

Conventions list 'wilful killing' of protected persons as a grave breach.[21] The prohibition 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]

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

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

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 Rights[32] (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;

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

(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 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 experts[39] have frequency 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.

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[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 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.
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> 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]

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[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).

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 international human rights law and IHL, and they identify mechanisms, modalities, procedures and methods for the implementation of those existing legal obligations.[47]

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

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[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.

[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.

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.

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 Committee[58] and Committee Against Torture[59] 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 treatment[61] 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

[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.
[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.

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 dignity[68] and their privacy and safety, both physical and psychological, must be safeguarded.[69] For this purpose, the Updated Set of Principles 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, international human rights law will invariably also remain applicable during armed conflict[71] including its standards pertaining to reparations.

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[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].

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

[70] Principle 32, Updated Set of Principles (n 44). 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.

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 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.

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[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.
[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.'

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, 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]

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[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/.ibmmodres/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. Supreme Court of the Netherlands, 17 July 2019.

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

- *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]

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.

[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.

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]

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.

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[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 Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford, Oxford University Press, 2007); M Bazyler 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.

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

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 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]

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[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.
[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.

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.

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]

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

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 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

[100] *Basic Principles and Guidelines* (n 9), para. 13.
[101] UN Human Rights Committee, 'General Comment 31' (n 14), para. 15.

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.

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.

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[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).

[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'].