

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the situation of human rights in Afghanistan; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Working Group on discrimination against women and girls

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(Please use this reference in your reply)

6 June 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on the situation of human rights in Afghanistan; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 49/10, 54/1, 53/4, 52/7, 54/8 and 50/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning protracted delays in providing information about accountability and reparation, and in paying compensation, to the families of three Afghan men allegedly killed unlawfully on 11 September 2012 by members of the Australian Defence Force (ADF) in Afghanistan. We focus on the killings of Mr. **Nazar Gul**, Mr. **Yaro Mama Faqir** and Mr. **Ali Jan**, but emphasize that issues raised are relevant to allegations of at least 37 other alleged unlawful killings by the ADF in Afghanistan. Their killings also engage the rights of their relatives as victims, including Ms. **Bibi Dhorko**, wife of Mr. Jan and daughter of Mr. Faqir) and the three children of Mr. Jan and Ms. Dhorko; Ms. **Bala Nasta** (wife of Mr. Gul). It is noted that Mr. Gul has 17 children and two other wives.

According to the information received:

The ADF was deployed in Afghanistan between 11 October 2001 and 18 June 2021, initially in response to the attacks on the United States of America of 11 September 2001 and later as part of the NATO-led International Security Assistance Force authorized by the United Nations Security Council. Around 30,000 ADF personnel were deployed over this period. The ADF undertook counter-insurgency operations up to 2014, centred on Uruzgan province. Ground combat operations were primarily undertaken by the ADF's Special Operations Task Group, which included units of the Australian Special Air Service Regiment (SASR) and Commando regiments.

Cases of Nazar Gul and Yaro Mama Faqir

On 11 September 2012, in Darwan, Uruzgan province, SASR soldiers were searching a compound, prompted by intelligence that an Afghan Army Sergeant who had killed three Australian soldiers on 29 August 2012 was being 'sheltered' in the compound. The Afghan Army Sergeant was not found

at the compound. During the search, soldiers found two weapons and detained more than 50 Afghan nationals, including Haji Nazar Gul and Yaro Mama Faqir.

Other detainees were present in the room when soldiers questioned Nazar Gul and Yaro Mama Faqir about where they had come from and why they were in Darwan. After the questioning, the soldiers took the two men to a room where almonds were stored. Witnesses reported hearing noises like silenced pistols firing. No one saw what happened, but later that day the two men were found dead. Photographs later shown to an Afghan witness showed the men dead with guns positioned beside them. In their post-mission debrief, SASR soldiers claimed the two men were armed, but the Afghan villagers say they were not.

Nazar Gul had three wives and 17 children. Since his death, life has been very difficult for Nazar Gul's widows and the orphaned children. The family does not have money to buy clothes and sometimes needs to go begging in order to find something to eat. One of the widows, Bala Nasta, asks for help to care for the orphaned children as their economic situation is now so bad following Nazar Gul's death. She is willing to speak with the Australian Government for the purposes of any investigation, court case or compensation, but has not been contacted by the Australian authorities.

Case of Ali Jan

The killing of Ali Jan, Afghan national, on 11 September 2012 occurred later during the same operation by SASR soldiers searching Darwan for the aforementioned Afghan Army Sergeant. According to a 2023 judgment of the Federal Court of Australia,¹ applying a civil standard of proof, two SASR soldiers, a Corporal and his subordinate 'Person 11', were responsible for the war crime of murder of Ali Jan contrary to section 268.70 of the Australian federal Criminal Code 1995. The Federal Court found that SASR soldiers detained, handcuffed and questioned Ali Jan and two other men after locating them in and around a compound they were searching.

Ali Jan, who remained handcuffed, was taken to a place near the compound, adjacent to a small cliff or steep slope to a dry creek bed. He was held by the shoulder by Person 11 while facing the Corporal, who took some steps back, moved forward and kicked Ali Jan off the small cliff/step slope into the dry creek bed below. Ali Jan seriously injured his face and teeth as a result of the fall. At the Corporal's direction or order, Person 11 and another SASR member, Person 4, carried the injured and handcuffed Ali Jan to a cornfield on the opposite side of the dry creek bed and placed him on the ground.

The Corporal and Person 11 conferred briefly and agreed that Ali Jan would be shot. Person 11 shot Ali Jan, who, at that point, was standing and handcuffed. Subsequently, Ali Jan's handcuffs were removed, and an ICOM-brand radio was placed on Ali Jan's body by either the Corporal or Person 11 prior to photographs being taken. The Corporal falsely reported that Ali Jan was a 'spotter' for the Taliban insurgents who had been targeted when in the cornfield.

¹ *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555 at [1367] to [1370] (the case was brought by former SASR Corporal Roberts-Smith against several media outlets and journalists).

The Federal Court found that the Corporal was party to an agreement with Person 11 to murder Ali Jan, or aided, abetted, counselled or procured Person 11 in the murder of Ali Jan. The Corporal is currently appealing the Federal Court findings.

Ali Jan's family, including his widow Bibi Dhorko and three orphaned children, have not been contacted by the Australian Government and have not been paid any compensation. Since Ali Jan's death, life has been very difficult for the family, as Ali Jan had been working to provide for the family. The children go barefoot and most of the time the family does not have food to eat. Bibi Dhorko says that since her husband's death, she always worries about the children and their future, because there is nothing to eat or wear. She does not sleep well at night and is always thinking about why Ali Jan was killed. She is seeking justice and that those responsible for Ali Jan's death should be punished.

The Afghanistan Inquiry Report and Australia's response

These two cases above are part of a wider pattern of alleged unlawful killings and cruel treatment by ADF members during their deployment in Afghanistan. In 2016, the Inspector General of the ADF appointed a judge of the New South Wales Supreme Court and a senior Army Reserve Infantry Officer to inquire (in a non-judicial capacity) into allegations of serious misconduct by Australian special forces in Afghanistan. The resulting Afghanistan Inquiry Report of November 2020 found credible information of 23 incidents of unlawful killings of non-combatants or persons *hors de combat* in Afghanistan, amounting to war crimes of murder, and two further incidents of cruel treatment, involving a total of 39 individuals killed, and a further two cruelly treated, and 25 current or former ADF personnel who were perpetrators.² According to the Report, '[n]one these are incidents of disputable decisions made under pressure in the heat of battle' but were incidents where 'it was or should have been plain that the person killed was a non-combatant or hors-de-combat' (p. 29).

The Afghanistan Inquiry Report further found credible information that some members of the Special Operations Task Group engaged in the practice of 'throwdowns', that is, the subsequent placing of small weapons or other military equipment next to the bodies of supposed 'enemies killed in action' in order to portray that the person was killed legitimately (p. 29). The Inquiry Report found that "[t]his practice probably originated for the less egregious though still dishonest purpose of avoiding scrutiny where a person who was legitimately engaged turned out not to be armed. But it evolved to be used for the purpose of concealing deliberate unlawful killings' (p. 29).

Furthermore, the Afghanistan Inquiry Report stated that 'if Afghans have been unlawfully killed by Australian soldiers ostensibly acting in the name and on behalf of Australia, then Australia should compensate their families' and that

² Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (2020) <<https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>> pages 28–29. We are unable to confirm how the findings in the Report relate to two cases set out above, due to the extensive redactions made to the publicly released version.

this should not ‘be contingent on establishing criminal liability’, due to the delay in bringing criminal prosecutions and the hurdle of establishing criminal intent (p. 173). As such, it recommended that ‘in cases where it has found that there is credible information that an identified or identifiable Afghan national has been unlawfully killed, Australia should now compensate the family of that person’ (p. 173). The Report noted that paying compensation is the ‘morally right thing to do’ (p. 173) and would be ‘an important step in rehabilitating Australia’s international reputation’ (p. 41).

The Australian Government accepted all 143 recommendations of the Afghanistan Inquiry Report, including on compensation of victims. As of May 2024, the Government claims to have implemented 124 of the 143 recommendations.³ While Australia’s Department of Defence set the end of 2021 as the deadline to develop a whole-of-government response to the Afghanistan Inquiry’s 15 recommendations relating to compensation,⁴ at the present time, no compensation has been paid to any victim⁵ and the Government has not explained if and when it will be implemented.

The Afghanistan Inquiry Implementation Oversight Panel’s Final Report of November 2023 (made public in May 2024) indicates that various factors have impeded progress on compensation, including: the deterioration of the political and security situation in Afghanistan, particularly since the Taliban take over; the lack of a diplomatic or charitable organisation in Afghanistan to facilitate compensation; the difficulty in identifying and locating family members and the danger of travel in Afghanistan; the difficulty in effecting payment given the state of Afghanistan’s banking sector; the need to work within sanctions and policies that limit dealings with the Taliban; and the risk that a recipient could be put in danger and become a criminal target (pp. 86-89).

The Oversight Panel advised the Deputy Prime Minister to set up a designated fund to cover potential compensation payments that may be made in future when circumstances in Afghanistan permitted, but the Deputy Prime Minister wished to take stronger action. The Panel later supported a proposal by the legal division of the Department of Defence in July 2023 to introduce a scheme by regulation (under sections 63(1)(f) and 124(1)(r) of the Defence Act) to receive and assess compensation claims, and ‘progress’ to that end is reportedly underway.

It is now three and a half years since the Afghanistan Inquiry Report recommended compensation – and almost 12 years since the murders of Nazar Gul and Ali Jan.

Without prejudging these allegations, we welcome Australia’s recognition of the gravity of the many allegations of unlawful killings by ADF personnel in Afghanistan, evident in the thorough and meticulous investigation by the Inspector General of the ADF’s Afghanistan Inquiry; the in-principle acceptance of all 143 recommendations of the Inquiry, including to pay compensation to the victims;

³ <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response>.

⁴ Defence, *Afghanistan Inquiry Reform Program* (30 July 2021)

<https://www.defence.gov.au/sites/default/files/2021-10/Afghanistan_Inquiry_Reform_Plan_0.pdf> page 10.

⁵ Defence Response, *Afghanistan Inquiry Reform Program Update* (21 December 2023)

<<https://www.defence.gov.au/sites/default/files/2023-08/AfghanistanInquiryProgramUpdate.pdf>>.

the work undertaken thus far by the Defence Reform Program to address the Inquiry's findings and recommendations; the establishment of the Afghanistan Inquiry Implementation Oversight Panel to provide independent oversight and assurance of the Department of Defence's response to the Inquiry;⁶ and – crucially – the establishment of the Office of the Special Investigator⁷ to investigate the alleged war crimes with a view to prosecuting offenders.

We are nonetheless seriously concerned at the prolonged delay in compensating the victims' families for events that occurred almost 12 years ago and request further information about the basis of compensation and the grounds on which it will be assessed; the quantum of compensation; the procedures for compensating; and your intentions regarding other forms of reparation.

Basis of compensation and Australia's international obligation to compensate

We note that the Afghanistan Inquiry Report justified its recommendation for compensation in terms of morality, Australia's international reputation, and Australia's past practice in Afghanistan of making *ex gratia* payments under a 'Tactical Payment Scheme'. We wish to emphasize that Australia is *required* to make reparation, including the payment of compensation, under international law, including international humanitarian law and international human rights law.

Under international humanitarian law, a state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused, including in non-international armed conflicts (International Committee of the Red Cross, Customary International Humanitarian Law rule 150: Reparation) such as that Australia was a party to in Afghanistan at the time of the killings. The killing of any person in custody in non-international armed conflict, whether a civilian or person who took part in hostilities but is *hors de combat* after their capture, is a violation of the prohibition on violence to life under common article 3 of the four Geneva Conventions of 1949 (ratified by Australia on 14 October 1958) and the prohibition on murder under customary international humanitarian law (ICRC Customary International Humanitarian Law rule 89). It also constitutes the war crime of murder under customary international humanitarian law (ICRC Customary International Humanitarian Law rule 156) and article 8(2)(c)(i) of the Rome Statute of the International Criminal Court (ratified by Australia on 1 July 2002). The killings of Nazar Gul, and Yaro Mama Faqir and Ali Jan thus give rise to a duty to make reparation.

Under international human rights law, a state responsible for the arbitrary deprivation of life is required to provide effective remedies, including reparation (ICCPR, article 2(3); general comment No. 13, para. 16). Afghan nationals killed in the custody of Australian military forces in foreign territory were within the power or effective control of Australia or were otherwise affected by its military activities in a direct and reasonably foreseeable manner and were thus within its jurisdiction under human rights law (ICCPR, article 2(1); general comment No. 36, paras. 22 and 63). Further, the right to life under article 6 of the ICCPR is 'the supreme right from which no derogation is permitted, even in situations of armed conflict' (general comment

⁶ Defence Response, *Afghanistan Inquiry Reform Plan* <<https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response>>, Afghanistan Inquiry Implementation Oversight Panel, Final Report to the Deputy Prime Minister and Minister for Defence, November 2023 (public May 2024).

⁷ Office of the Special Investigator <<https://www.osi.gov.au/>>.

No. 36, para. 2); the right continues to apply in armed conflict and practices inconsistent with international humanitarian law – which include the killing of detainees – violate the human right to life (general comment No. 36, para. 64). Violations of the right to life in armed conflict must be investigated in accordance with the international standards.

Where violations of the right to life are established, including in armed conflict, full reparation must be provided, which may entail restitution where possible, compensation, 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) (general comment No. 13, para. 16; general comment No. 36, para. 28). Remedies and reparation are required regardless of the nationality of the victim (see general comment No. 31, para. 16. Reparation must be ‘adequate, effective and prompt’ (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 2005 (‘Basic Principles 2005’), principle 11).

In terms of identifying the class of victims to whom compensation is owed, we emphasize that the arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights to freedom from cruel, inhuman or degrading treatment or punishment under article 7 of the ICCPR (general comment No. 36, para. 56). In this sense the relatives may be entitled to compensation on behalf of the deceased victim as well as for damage in their own right. Further, the failure to provide relatives with information on the circumstances of the death of the individual could also violate article 7 (general comment No. 36, para. 56). The arbitrary killing of a parent may also have negative effects on the rights of dependent minor children and the family under articles 17, 23 and/or 24 of the ICCPR and the Convention on the Rights of the Child, including because the loss of the family breadwinner may deprive family members of their means of livelihood and thus consequently undermine the right to an adequate standard of living (article 11 of the International Covenant on Economic, Social and Cultural Rights). Relatives should be defined as including any partnership and children recognised under the domestic law of the victim’s state, including de facto unions, registered partnerships and marriages (CEDAW general recommendation 29, para. 24), which in the context of Afghanistan includes polygamous marriages.

In relation to Ali Jan, we also note that, prior to being killed, he was kicked forcefully off a cliff and suffered serious and painful injuries, in contravention of his human right to freedom from torture or cruel, inhuman or degrading treatment or punishment (ICCPR, article 7 and Convention against Torture) and in violation of the prohibition on violence to life and person, in particular cruel treatment and torture (four Geneva Conventions 1949, common article 3(1)(a)), as well as the consequent obligation to care for the wounded (four Geneva Conventions 1949, common article 3(2)). Australia also has an obligation to make reparation and pay compensation in relation to this incident and these injuries. Torture is also a war crime in non-international armed conflict (ICRC Customary International Humanitarian Law rule 156; Rome Statute of the International Criminal Court, article 8(2)(c)(i)) and Australia should prosecute the persons allegedly responsible.

The grounds and quantum of compensation under international law

In the case of deceased persons, restitution is not possible and full and effective compensation proportional to the gravity of the violation and the circumstances of each case must be paid (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 2005 ('Basic Principles 2005'), principles 18 and 20).

Compensation must be provided for any economically assessable damage, including: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services (Basic Principles 2005, principle 18; see also International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, article 37). Material damage could also include funeral and burial costs. 'Moral damage' should include compensation for the pain and suffering experienced by the affected families and wider communities.

Reparation should also advance gender equality and inclusion and the needs and agency of women and girl beneficiaries (A/78/181, para. 7) and take into account gendered vulnerabilities including in relation to widows, polygamous marriages, poverty and inequality, risks to children's rights, and the restrictive environment in Afghanistan (see annex).

Since the Afghan Inquiry Report appears to recommend compensation as a charitable *ex gratia* or policy gesture by Australia, rather than as flowing from the above-mentioned legal obligations, it is unclear to the victims and the public on what bases Australia intends to pay compensation, including as regards the heads of compensation and the quantum of awards. We emphasize that compensation must be properly awarded, and assessed and quantified, according to the legal standards above.

The procedures of compensation

We note further that it is unclear what procedures and modalities Australia intends to use to assess, structure (such as in lump sums or installments) and practically make the payments to the families. Under international law, remedies must be accessible and states must adequately inform the victims about their rights and remedies (Basic Principles 2005, principle 24; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, principles 4-5). Specifically, victims must be informed of their role and the scope, timing and progress of the compensation processes, be able to present and have their views considered, and be properly assisted throughout the process (Declaration of Basic Principles 1985, principle 6(a)-(c)). They must also be treated with compassion and dignity (Declaration of Basic Principles 1985, principle 4).

In this regard, we are concerned that, to our knowledge, the victims' families have not been informed by Australia concerning its intentions to compensate them and on what bases; the formulation of a compensation plan; the process of compensation, including the procedures and modalities for their effective and

meaningful consultation and participation; any proposed actions to actually compensate them; and the applicable timeframes. We remind your Excellency's Government that early and regular consultation with the victims' families is essential not only to respect their dignity and recognize their agency and suffering, but also to ensure that compensation is most effectively assessed, designed, and distributed in the light of their personal and community circumstances and the local and cultural context.⁸ A victim-centered approach also requires specific forms of reparation that respond to the most urgent needs caused by violence and economic loss (A/78/181 (para. 5)).

We recognize the potential challenges that Australia may have in communicating with victims in Afghanistan, in the absence of formal diplomatic relations with the de facto authorities since they took power in August 2021. We also acknowledge the need to ensure the safety of the victims and protect them from intimidation or retaliation (Declaration of Basic Principles 1985, principle 6(d)), as well as risks of theft, bribery or corruption. We also note that there may be security concerns in relation to the potential travel and presence of Australian government personnel in Afghanistan.

We nonetheless believe that it would be feasible for the Australian authorities to engage with the victims, at a minimum, through neutral, independent international humanitarian intermediaries who are able to reliably and safely operate in Afghanistan. We note that a variety of journalists have been able to contact and interview family members in recent years, including meeting them in person in Afghanistan. We would also not anticipate objections from the de facto authorities to the payment of compensation, given their interest in ensuring violations by foreign forces are remedied. We further highlight that neither counter-terrorism laws nor related sanctions regimes would appear to presently inhibit the payment of funds to the victims' families. In any case, we note that there are alternative payment methods available to the formal banking system. The payment of compensation by instalments could also minimize the risk of criminal theft.

We would be pleased to assist your Excellency's Government to devise constructive solutions to any particular impediments you have identified which may be delaying payment, including by neutrally facilitating engagement with international humanitarian actors working in Afghanistan or any necessary mediation with the Taliban authorities.

International obligation to promptly compensate

We emphasize that redress for serious violations of international law must be prompt and avoid undue delay (Basic Principles 2005, principle 11(b); Declaration of Basic Principles 1985, principle 6(e)). We reiterate that it is now almost 12 years since the murders of Nazar Gul, and Yaro Mama Faqir and Ali Jan, and three and a half years since the Afghanistan Inquiry Report recommended compensation and your Excellency's Government accepted that recommendation.

We recognize that the Taliban take over of Afghanistan in August 2021 has complicated the operational environment for the payment of compensation. Even

⁸ Noting that 'Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims': Declaration of Basic Principles 1985, Principle 7.

accounting for that development, the delay in paying compensation would appear to be manifestly unjustified, in view of the relatively small number of victims and its manifest affordability to Australia; the feasibility of facilitating compensation even in the current environment in Afghanistan; the urgency of remedying violations which have had such profound impacts on immiserating families and leaving children destitute for substantial portions (12 years) of their formative childhoods, in which they have been denied access to education and other basic services and life opportunities; the situation of acute and distressing vulnerability in which the families have been left without fathers in a rural subsistence economy, an economic crisis deepening poverty in Afghanistan and highly gendered society under Taliban rule; and the need to repair relations with the victims' wider communities in Afghanistan, who still legitimately perceive a climate of impunity for grave violations of international law by western forces.

Other measures of reparation under international law

We note that the duty to provide reparation under international law is not limited to compensation but also measures of satisfaction, including rehabilitation, apology, guarantees of non-repetition and establishing the truth. We acknowledge that Australia has taken and is taking some genuine measures to these ends, including through the Afghanistan Inquiry Report itself and the commitment to implement it, the Office of Special Investigator, the bringing of criminal prosecutions, effecting cultural change within the ADF, and a public apology 'to the people of Afghanistan' by the Chief of the ADF, General Campbell, on 19 November 2020.⁹

We stress, however, that the Australian Government does not appear to have communicated with the victims' families about any relevant measures of satisfaction. They have not received any direct apology – such as by a letter or direct communication in accessible languages – or recognition of the truth from Australia; any update on the progress of criminal investigations or opportunities for them to participate in those proceedings as victims; or any information about the far-reaching reforms and cultural changes in the training, command and leadership within the ADF units involved aimed at prevent repetition of violations in the future. We note that the circumstances of the killings by ADF personnel remain redacted in the Afghanistan Inquiry Report, preventing the publication of, and the right to, the truth for the individual victims. We emphasize that states have an obligation under international law not only to establish the truth and provide full disclosure of the facts concerning the deprivation of life but also to engage victims' relatives in that process and to provide them with information on the causes leading to violations (general comment No. 36; Basic Principles 2005, principles 22 and 24; Minnesota Protocol on the Investigation of Potentially Unlawful Death, para. 11).

We are further not aware that your Excellency's Government has taken any steps to publicly memorialize or commemorate the deceased victims of Australian war crimes (Basic Principles 2005, principle 22). To the contrary, we note that the official Australian War Memorial continues to publicly commemorate as a war 'hero' one of the murderers of Ali Jan, the Corporal Roberts-Smith, who the Federal Court of Australia also found complicit in three other war crimes of murder in Afghanistan. The display very briefly acknowledges the findings of the Federal Court, but not the life-changing plight and suffering of the victims. Relevantly, we emphasize that the

⁹ <https://www.defence.gov.au/news-events/releases/2020-11-19/press-conference-igadf-afghanistan-inquiry>.

principle of satisfaction should involve the inclusion of an accurate account of violations in educational material at all levels (Basic Principles 2005, principle 22(h)).

We note further that, in addition to monetary compensation, international law may require the provision of medical and psychological care and legal and social services to the victims' families (Basic Principles 2005, principle 21), to the extent that this can be feasibly arranged through, for example, neutral humanitarian organizations operating in Afghanistan.

We would be pleased to have an opportunity to meet with your Excellency's Government to discuss what action is currently being taken in relation to the above-mentioned concerns, including the steps taken to engage with victims' families, particularly in relation to truth-telling and reparation, including compensation and apology. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism offers technical assistance to assist your Excellency's Government to devise a compensation plan that meets the above-mentioned international legal standards.

In connection with the above-alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide the details of any steps taken to contact and consult with the victims' families and other families similarly affected to inform and work with them on the accountability and reparation measures being undertaken in relation to the ADF's unlawful killings and torture in Afghanistan.
3. Please provide the details of any steps taken to devise and implement a compensation plan, including the scheme envisaged to be established by regulation under the Defence Act, and including what consultations have been conducted with the victims' families and what efforts have been made to ensure that it is gender-sensitive. If a compensation plan has been drafted, please provide a copy of it.
4. Please indicate the specific bases or heads of damage according to which compensation will be paid.
5. Please indicate the intended amounts of compensation for each victim and how those amounts have been quantified.
6. Please provide details of how your Excellency's Government proposes to make the compensation payments and the arrangements to ensure the security and integrity of the payments.

7. Please provide details of what other types of reparation are being contemplated in relation to victims and families, for example, acknowledgement of the truth of individual cases, direct apologies to individuals, educational scholarships or other support to the victim's children, and public memorials to the victims, and any efforts to ensure that these reparations are gender-sensitive.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please be informed that a copy of this letter has also been sent to the Permanent Mission of the Islamic Republic of Afghanistan in Geneva and to Mr. Muttaqi Khan.

Please accept, Excellency, the assurances of our highest consideration.

Ben Saul
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Richard Bennett
Special Rapporteur on the situation of human rights in Afghanistan

Morris Tidball-Binz
Special Rapporteur on extrajudicial, summary or arbitrary executions

Alice Jill Edwards
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Bernard Duhaime
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Dorothy Estrada-Tanck
Chair-Rapporteur of the Working Group on discrimination against women and girls

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we draw your attention to the following rules and standards of international human rights law and international humanitarian law.

Australia ratified the International Covenant on Civil and Political Rights ('ICCPR') on 13 August 1980. Article 6(1) of the ICCPR provides that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The right to life is non-derogable (article 4 of the ICCPR) as the 'supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation' (general comment No. 36, para. 2). States parties must respect the right to life and "this entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life" (general comment No. 36, para. 8).

The right to life applies outside a state party's territory wherever it exercises jurisdiction, including where the state has custody of a person or is otherwise affected by its military activities in a direct and reasonably foreseeable manner (ICCPR, article 2(1); general comment No. 36, paras. 22 and 63).

The right to life 'continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable' and "both spheres of law are complementary, not exclusive... practices inconsistent with international humanitarian law ... would also violate article 6 of the Covenant (general comment No. 36, para. 64). A killing in violation of international humanitarian law constitutes an arbitrary deprivation of life under international human rights law (International Court of Justice, Nuclear Weapons Advisory Opinion 1996, para. 25).

The killing of any person in custody in non-international armed conflict is a violation of the prohibition on violence to life under common article 3 of the four Geneva Conventions of 1949 (ratified by Australia on 14 October 1958) and the prohibition on murder under customary international humanitarian law (ICRC Customary International Humanitarian Law rule 89); and constitutes the war crime of murder under customary international humanitarian law (ICRC Customary International Humanitarian Law rule 156) and article 8(2)(c)(i) of the Rome Statute of the International Criminal Court (ratified by Australia on 1 July 2002). These rules cover the killing of civilians, or anyone captured after taking part in hostilities (*hors de combat*).

Torture or cruel, inhuman or degrading treatment or punishment is prohibited by article 7 of the ICCPR; the Convention against Torture; and violence to the person, cruel treatment and torture are prohibited by international humanitarian law (four Geneva Conventions 1949, common article 3(1)(a)) and constitute a war crime in non-international armed conflict (ICRC Customary International Humanitarian Law rule 156; article 8(2)(c)(i) of the Rome Statute of the International Criminal Court). States parties have an obligation to collect and care for the wounded and sick (four Geneva Conventions 1949, common article 3(2)).

A state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused, including in non-international armed conflicts (International Committee of the Red Cross, Customary International Humanitarian Law rule 150: Reparation; see also 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 2005, principles 18 and 20).

Article 2(3) of the ICCPR obliges States parties to undertake to ensure any person whose rights of freedoms are violated shall have an effective remedy, notwithstanding that the violations has been committed by persons acting in an official capacity. This requires States parties to make reparation to individuals whose Covenant rights have been violated, otherwise the obligation to provide an effective remedy will not have been discharged (general comment No. 31, para. 16). Reparation generally entails appropriate compensation and 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 (*infra*) (general comment No. 31, para. 16; see also general comment No. 36, para. 28, on the right to life specifically; International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, articles 31, 34, 36 and 37). Reparation is required not only under treaty law but also under customary international law (A/78/181, para. 2).

Compensation must be provided for any economically assessable damage, including: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; and (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services (Basic Principles 2005, principle 18; see also International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, article 37; CEDAW Committee's general recommendation 35, para. 33).

Reparation must address the gender dimension of the harm suffered and ensure women's participation in the design of reparation programmes (CEDAW general recommendation 30, paras. 79 and 81(e)). It is noted that 'widows... and female-headed households are especially vulnerable to increased economic hardship owing to their disadvantaged situation, and often lack employment and means and opportunities for economic survival' (general recommendation 30, para. 51). Women in polygamous marriages are particularly economically vulnerable, as polygamy can have serious emotional and financial consequences (general recommendation 29, para. 27). In this context states must address the specific risks and particular needs of women subjected to multiple and intersecting forms of discrimination (general recommendation 30, para. 52) and take necessary measures to ensure the economic rights of women in polygamous marriages (general recommendation 29, para. 28).

The restrictive and uncertain environment in Afghanistan, and an economic crisis increasing poverty, have placed 'enormous pressure on women and their families' and driven harmful, discriminatory and/or violent practices, such as forced and child marriage, sale of children and body organs, child labour (including begging), trafficking and unsafe migration (A/HRC/53/2, para. 72). There is an urgent need to ensure that marginalized groups, such as women headed households and

widows, receive adequate attention when addressing the humanitarian and human rights crises facing Afghanistan (*infra*, para. 100(f)). The gendered dimensions of poverty, which is deeply imbricated in other forms of inequality and discrimination, must be addressed in reparation A/HRC/53/39, para. 56).