Solastalgia as an embodied experience and the principle of proportionality in international humanitarian law

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This article explores how embodied research in the arts and social sciences can inform the interpretation and application of international humanitarian law (IHL). The cornerstone of this article is the use and significance of the concept "solastalgia" in embodied research in relation to the principle of proportionality. The concept is being developed for use in the formulation of public policy in the environmental sphere (GA Albrecht, GM Sartore, L Connor, N Higginbotham, S Freeman, B Kelly, H Stain, A Toona & G Pollard "Solastalgia: The Distress Caused by Environmental Change" (2007) 15 Australasian Psychiatry S95, S96):

> [S]olastalgia refers to the pain or distress caused by the loss of, or inability to derive, solace connected to the negatively perceived state of one's home environment. Solastalgia exists when there is the lived experience of the physical desolation of home.

In this article we conclude that the concept of solastalgia can be useful for the interpretation of the principle of proportionality in general and also for its application during the planning of military operations, for the benefit of civilians. The article draws on scholarship on emotions and international law to respond to potential criticisms of the use of empathy in the present context. This article also shows the limits of the said embodied experience within IHL, identifies potential criticisms of the inclusion of solastalgia within the principle of proportionality and responds to them.

EMBODIED EXPERIENCE, EMBODIED RESEARCH AND SOLASTALGIA

In the broadest sense, all research involves embodiment, requiring our bodies in every aspect from design to gathering, analysing and presenting findings (see T Thanem & D Knights *Embodied Research Methods* (SAGE Publications, online, 2019) 142). However, on the basis that "human understanding is embodied, language is complex and communication is multimodal", embodied research methods specifically gather complex and nuanced understandings of our lived experiences (see J Leigh & N Brown *Embodied Inquiry: Research Methods* (Bloomsbury, London, 2021) at 42). Embodied research methods require attention to embodied experiences: attention to sensory input, to proprioception and kinesthetic awareness, and to the thoughts and emotions of our lived experiences. Attention to embodied experiences, alongside researching IHL, provides insight into civilian experiences during armed conflict. While not the focus of discussion in this article, the method of engaging movement, theatre and visual artists with IHL texts, concepts and testimonies of civilians affected by armed conflict, strengthened the authors' appreciation of the significance and range of embodied experiences. There is little doubt that embodied experiences are (literally) at the heart of what civilians go through in armed conflict. Embodied research with artists revealed insights into one of these embodied experiences – solastalgia. Solastalgia is thus the focus of this article.

SOLASTALGIA IN INTERNATIONAL HUMANITARIAN LAW

It is not surprising that there is a concern in IHL for the long-term effects of armed conflict, and these effects are associated with solastalgia. Article 54 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) prohibits attacking or destroying:

… objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas … crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population.

Medical facilities and personnel require a particular protection by IHL for the long-lasting critical embodied experiences that injured combatants and civilians may face if medical care is not received on time. For instance, art 18 of the Fourth Geneva Convention provides that "[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and

protected ….". And art 20 of the said Convention requires respect and protection for persons solely engaged in operating and administering civilian hospitals.

While all civilian lives are equal under IHL the extent of incidental harm to civilian objects depends on context and can vary accordingly (see Laurent Gisel *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law* Université Laval and International Committee of the Red Cross (2016) at 62 (*International Experts' Report)*, available at <www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality>). The difference depends sometimes on the importance of the civilian object or the use of the civilian object for the lives of the civilians. Places of worship and cultural objects also have a higher degree of protection. Article 53 of Protocol I states.

> Protection of cultural objects and of places of worship.
> [I]t is prohibited:
> a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> b) to use such objects in support of the military effort;
> c) to make such objects the object of reprisals.

One of the most significant harmful embodied experiences is forced displacement of civilians as a result of armed attack. Forced displacement is already forbidden by art 49 of the IV Geneva Convention and art 17 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Although solastalgia is, in the literature, about remaining in place rather than being displaced, we also include forced displacement as part of solastalgia for the purpose of this article due to the significant extent of the harmful embodied experience this displacement causes.

Finally, given the original connection between solastalgia and environmental harm, it is important to recall art 55 of Protocol I, which provides in relevant part that "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage …".

As can be seen, all these provisions, which are not the only ones by any measure, are aimed at preserving the embodied experiences of civilians, despite the existence of armed conflict. But there are other ways in which solastalgia can be mitigated or avoided in armed conflict, as will be seen below.

SOLASTALGIA IN THE PRINCIPLE OF PROPORTIONALITY IN ARMED CONFLICT

The principle of proportionality is a customary rule of IHL. Article 51.4 of Protocol I prohibits indiscriminate attacks and art 51.5(b) defines as one of them:

> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

To comply with this precept, New Zealand's regulation, for instance, requires from commanders (New Zealand Defence Force Te Ope Kaatua Aotearoa *Manual of Armed Forces Law. Law of Armed Conflict* vol 4, section 4.4.3, available at (LOAC Manual) <www.nzdf.mil.nz/assets/Uploads/DocumentLibrary/DM-69-2ed-vol4.pdf>):

> … to balance military necessity against humanity. In planning an attack, the overall benefit of the military action proposed must be balanced against the potential effects on civilians, civilian objects, cultural property and the environment. Even where the object of the attack is legitimate, an attack is unlawful if the destruction it is likely to cause to protected persons and objects is too great in proportion to the overall military benefit anticipated.

According to the International Committee of the Red Cross, the concept "military advantage" "can only consist in ground gained and in annihilating or weakening the enemy armed forces". (International Committee of the Red Cross 1987 Commentary on Additional Protocol I, at [2218]).

The connection between solastalgia and the principle of proportionality is direct. The purpose of the principle is to mitigate the impact on civilians before military operations are executed.

As will be seen below, the proportionality assessment includes both the expected immediate impact on civilians after the operation and the expected impact on their embodied experiences that will follow and persist afterwards, which are associated with solastalgia.

Finally, solastalgia is just a part of the harm that civilians may experience in armed conflict. Loss of civilian life or damage or destruction of civilian property are other forms of harm. While they can create solastalgia, the harms are conceptually different.

FORESEEABILITY WITHIN THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The application of the principle also requires an assessment of the expected harm to civilian objects or lives, and the concept of foreseeability becomes pertinent for this purpose. Basically, the concern is for the foreseen civilian harm that an attack may cause. Foreseeability is a familiar concept in the law of armed conflict. The ICRC Expert Group uses the concept in the context of the principle of proportionality. Gillard refers to reasonable foreseeability, "which depends on the circumstances in which the attack is planned, decided or launched" (EC Gillard, *Proportionality in the Conduct of Hostilities. The Incidental Harm Side of the Assessment*, Chatham House. The Royal Institute of International Affairs. December 2018 at 16, available at <www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf>).

There could be a tendency to treat solastalgia as difficult to identify or measure and, for this reason, unforeseeable. However, embodied research shows that this can be a real harm and the fact that its measurement is difficult, which it certainly is in some events, does not mean that the harm is less felt by the affected civilian population. In addition, the expected solastalgia is not always difficult to identify. The solastalgia expected to be created by the destruction of a religious or cultural site of significance can be easily foreseeable for the purpose of proportionality assessments.

Considering solastalgia does not necessarily mean stopping an armed attack. It may mean a change in the choice of weapons or in the design of the operation in order to minimise or supress

the expected solastalgia impact, and other forms of civilian harm so the attack is proportionate in light of the anticipated military advantage.

The next issue is how solastalgia could be incorporated within the proportionality assessment. Military commanders would make the assessment on the basis of information on the expected incidental harm regarding the following factors:

1. Number of expected deaths or injuries to civilians.
2. Extent of expected damage to civilian property.
3. Extent of expected damage to public and civilian infrastructure.
4. Foreseeable expressions of medium- or long-term effects, including those associated with solastalgia, as a result of the military operation.

POTENTIAL CRITICISM TO INTRODUCING SOLASTALGIA WITHIN THE PRINCIPLE OF PROPORTIONALITY

An important criticism of the incorporation of solastalgia can be inferred from the following argument (G Nolte "Thin or Thick? The Principle of Proportionality and International Humanitarian Law" (2010) 4 Law & Ethics of Human Rights 245 at 248):

> [I]f too many considerations enter the proportionality analysis it tends to lose one of the important elements of the law, calculability, and thus it ultimately calls into question the goal of equal application of the law.

There is no question that including solastalgia as part of the proportionality assessment makes it more complex. Indeed, it requires commanders to have knowledge not only of the physical environment and density of the population, but also about its social customs and culture. The aggregate of this information will allow commanders to truly identify the foreseeable civilian harm and determine the choice of weapons and design of the operation that will meet the principle of proportionality. But this is not a process out of the ordinary in some current laws of war regulations, as will be seen below: a well-planned attack with vast amounts of data will give a good sense of the overall degree of solastalgia that the attack is expected to create.

In sum, the principle of proportionality does not narrow its protection just because its application is a complex exercise. If calculability were to central to the application of the principle of proportionality the scope of the latter would be too narrow. It is not certainly the case and even less now with the so-called "humanisation" of international law. Such humanisation is in perfect line with the recognition of the embodied experiences of civilians in armed conflict.

SOLASTALGIA AND THE PRINCIPLE OF PROPORTIONALITY IN MILITARY MANUALS

Elements associated with solastalgia can be found in some States' military manuals, which also show that States are already collecting information on issues related to the concept regardless of the uncertainty associated with their magnitude and likelihood. In other words, States are recognising that such uncertainty is not a factor severely affecting the possibility of a reasonable application of the principle in the planning of military operations.

New Zealand

The LOAC Manual recognises the principle of proportionality and states that commanders need to consider the following factors when planning attacks against valid military targets. Several factors are associated with solastalgia (above, at [8.5.15]):

> **a.** The value of the military objective.
> **b**. Whether any LOAC protection applies to it, eg the likelihood of releasing dangerous forces if destroyed, its cultural or religious significance, its use by the civilian population, or the presence of medical facilities.
> **c.** The nature and capabilities of weapons available to the force, in particular their range, accuracy and radius of effect, as well as the available methods of attack.
> **d.** …
> **e.** The number of civilians in the vicinity and how close they are to the objective.
> **f.** The number and nature of civilian objects in the vicinity, whether they are inhabited, and how close they are to the objective …

In 2021, the NZDF released the 'Defence Force Order 35 Response to Civilian Harm' (The Defence Order 35, 21 January 2021, is issued and promulgated by the Chief of Defence Force

under s 27 of the Defence Act 1990). It improves mechanisms to report civil harm in the battlefield, creates a categorisation of civilian harms and sets up processes to respond and repair such harms. Order 35 does not deal with proportionality per se, since it mainly relates to what occurs *after* military operations. However, Order 35 creates powerful incentives for military commanders during the planning of operations to mitigate civilian harm, and elements of solastalgia are included among those that should be reported and that could be compensated.

Order 35 mandates preparations for responses to civilian harm that include elements of solastalgia. Section 3.01, under the heading "Preparing for response to civilian harm", provides:

> 3.01.c. Steps that can assist in an appropriate response to civilian harm include— (1) pre-deployment training on civilian harm, tailored to the environmental and cultural context of the upcoming deployment; …
> (8) an understanding of the need to develop responses tailored to the demographic make-up of the affected population, e.g., women, children, older persons;

Knowing the environmental and cultural context of the civilian population in the zone of military operations will allow New Zealand commanders to foresee the solastalgia that can be created by particular designs of military operations.

The Order defines Critical Civilian Harm in s 3.02(3), which must always be investigated when it occurs, and dimensions of solastalgia are clearly incorporated.

> (3)(b) Critical civilian harm includes
> (i) any death or serious physical injury of a person with civilian status;
> (ii) significant damage to civilian property, including places and objects of cultural significance;
> (iii) any damage to essential civilian infrastructure or services, or the infrastructure used to access an essential civilian service;
> (iv) any significant degradation of quality of life imposed on a community, including that caused through residual effects;

The definition of critical harm is broad and explicitly includes the immediate effects on civilian lives and objects, and also those that persist after the armed attack.

Section 3.04(a) makes the report of all civilian harm mandatory for all NZ Defence Force personnel involved in the given armed attack, and such reports are used to develop harm mitigation measures and best practices among other objectives. The obligation requires reporting critical and also non-critical civilian harms.

The Order also provides for the possibility of amends for harm caused to the civilian population in s 3.10b. The amends cover, in addition to monetary payments, contributions to community infrastructure, medical and psychological social services, and commemorations to victims, or public and private apologies.

As can be seen, Order 35 is expansive in its treatment of civilian harm and the reporting obligations military commanders possess gives the Order "teeth". There is a clear goal of mitigating civilian harm, particularly critical harm. Elements of solastalgia are openly recognisable as part of civilian harm, critical and non-critical, for the purpose of reports in the aftermath of attacks. Consequently, one can expect that these elements are also considered during the planning of the operations in order to mitigate them. Mental harm, damages to the environment, collective harm, and other forms of harm that may have a significant degradation impact on the quality, pattern and fabric of life should be considered.

SOLASTALGIA IN DECISIONS BY INTERNATIONAL AND NATIONAL COURTS AND TRIBUNALS

Different expressions of solastagia have already been recognised by international and national courts and tribunals too. Although some of these decisions do not concern specifically the principle of proportionality, they shed light on dimensions that can be meaningful during the application of the principle.

Solastalgia and the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in *The Prosecutor v Prilic et al* dealt with the destruction of a historic bridge used by one of the parties to the

conflict to transport ammunition, weapons and military materiel (see International Tribunal for the Former Yugoslavia Trial Chamber III *The Prosecutor v Prilic et al* Judgment of 29 May 2013, vol 2, at [1286])). The bridge was also the main way for the civilian population of the adjacent town to access foods and health services. The Old Bridge, as it was called, was also a significant object for the Muslim population of Mostar.

Although the ICTY recognized that there was a military advantage to be attained by the Army of Bosnia and Herzegovina (ABiH) with the destruction of the bridge, the adverse impact on the lives of the civilian population was excessive (at [1292]–[1293]) The ICTY also added to the material impact on the lives of the population, the psychological effect caused by the destruction.

The ICTY finally concluded (at [1584] – [1585]):

> The Chamber also holds that the destruction of the Old Bridge, in view of its immense cultural, historical and symbolic value for the Muslims in particular, was extensive.

Solastalgia and crimes against cultural/religious sites or objects

The International Criminal Court (ICC) in *Prosecutor v Ahmad AL Faqi Al Mahdi* dealt with an intentional attack and subsequent destruction of several mausoleums of saints and mosques in Timbukto, Mali, that had the status of UNESCO World Heritage sites. The attack was regarded as falling under art 8(2)(e)(iv) of the Rome Statute. The provision includes as a crime: "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals…". The mausoleums were places of prayer and pilgrimage by civilians and an armed group taking part in a non-international armed conflict prohibited the practice. The civilian population protested against the destruction and the ICC noted that a witness had expressed that that the purpose of the attack had been to "break the soul of the people of Timbuktu" (International Criminal Court, Trial Chamber VIII. *Situation in the Republic of Mali. In the case of the Prosecutor v Ahmad Al Faqi Al Mahdi.* Judgment and Sentence, 27 September 2016 at [80]).

When assessing the gravity of the crime for the purpose of sentencing, the ICC stated that (at [79]):

> … the fact that the targeted buildings were not only religious buildings but also had a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed.

The solastalgia created by the destruction was regarded by the ICC as an element that increased the gravity of the crime. The ICC unpacked some of the layers of the crime and its impact on civilians: the destruction of the religious site, was the first element, but the ICC gave relevance to the loss of the symbolic and emotional value for the inhabitants caused by the commission of the crime.

The Eritrea-Ethiopia Claims Commission's recognition of solastalgia as harm to be compensated for violations of international law

The solastalgia created by violations of the IHL norms on belligerent occupation has been considered as a damage to be compensated by the State responsible for the violation. The Eritrea-Ethiopia Claims Commission (EECC) was created to determine the compensation each State owed to the other as a consequence of a war in 1998-2000.

In a different context from the that of the ICC in *Prosecutor v Ahmad Al Faqi Al Mahdi*, the EECC deal with the solastalgia created by the damage of ancient cultural property caused by Ethiopia. The EECC held (Eritrea Ethiopia Claims Commission, *Final Award. Eritrea's Damages Claims between The State of Eritrea and the Federal Democratic Republic of Ethiopia* 17 August 2009 (*Eritrea Award*) at [217] – [218]):

> … the Commission found Ethiopia liable '[f]or permitting, while occupying the area, deliberate damage by explosion to the Stela of Matara, an ancient monument in the Senafe Sub-Zoba.'
>
> The Stela is a stone obelisk, perhaps 2,500 years old, carved with the symbol of the sun over the crescent moon and an inscription in Ge'ez. The Stela, apparently the only such artifact in Eritrea, is located in the archaeological site of Matara (or Metera), near

> Senafe. It was located close to a road, and was not heavily fenced or otherwise protected. The Commission found that the obelisk was seriously damaged by explosive charges placed at its base during Ethiopia's May 2000 offensive.

The EECC recognised the solastalgia created for the Eritrean population by the damage to the artefact, even if it could be repaired to resemble its original state. The EECC ordered Ethiopia to compensate Eritrea for the solastalgia (at [222] – [223]).

> … the Commission believes that serious damage to a significant object of cultural patrimony warrants some award of compensation going beyond the mere costs of attempting to restore the object to its earlier appearance. ...
>
> Accordingly, the Commission awards Eritrea the amounts expended to attempt to restore the Stela, plus an additional amount to reflect, in part, the unique cultural significance of the Stela, for a total award of US$50,000.

As can be seen, the EECC recognised the cost of repairing the obelisk but also included an additional amount to compensate for the solastalgia created by the loss of the uniqueness of the artefact.

Compensation for the solastalgia caused by the destruction of medical facilities

Eritrea claimed compensation for damages not only related to the damage and destruction of hospitals, but also for the impact on the civilian population that was virtually deprived of access to medical care (at [208]). The EECC, aware of the specific provisions protecting hospital and health personnel already mentioned, agreed and expressed (at [210]):

> The Commission believes that, in these factual circumstances, injuries to Eritrea's nationals resulting from loss of access to medical care on account of unlawful destruction or damage to medical facilities should be considered in assessing compensation. In reaching this conclusion, the Commission has given weight to the extent to which international humanitarian law accords special protection to medical facilities and medical personnel, and to patients needing medical care. These

> protections were presumably familiar to Ethiopia's military commanders, who, Ethiopia maintained, were all trained in the principles of humanitarian law. They should have led commanders to recognise the likely consequences for civilians of widespread damage to medical facilities and loss of medical supplies.

The EECC stated that the said provisions were aimed at protecting civilians not just States' property or interests. The evidence provided by Eritrea was limited: the EECC did not have evidence regarding the number of patients who had used the damaged medical facilities or the length of time during which they did not have access to health services. Nonetheless, the EECC granted US$1.500.000 to Eritrea (at [216])):

> … in respect of injuries to civilians due to loss of access to health care on account of damage to or destruction of Eritrean hospitals and other medical facilities and loss of medical supplies.

As can be seen, the loss of access to health care caused by armed conflict, an alteration of the affected civilians' fabric of life, resulted in solastalgia. The EECC was then recognising this specific expression of civilian harm, which was foreseeable as the EECC indicated.

Compensation for mental harm and moral damages as a form of solastalgia in armed conflict

The EECC indicated that compensation for mental harm, or more generally non-material injury, can be awarded for individuals or small groups and not for significant segments of a country's populations affected by international armed conflicts (See EECC, *Final Award. Ethiopia's Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea*, 17 August 2009 (*Ethiopia Award*) at [61]). However it is also worth noting that the EECC also expressed that compensations for moral damages make distinctions based on relationship with and dependency from the victim (at [62]).

The strongest recognition of mental harm in armed conflict comes from the ICC, which has not hesitated to recognise mental harm as a form of civilian damage resulting from the commission of crimes under the jurisdiction of the Court and that must be compensated by the perpetrator. The fact that the mental harm cannot be established individually has not been an obstacle for

the recognition of its existence and for the award of compensation. (See International Criminal Court, Trial Chamber II, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga.* Order for Reparations pursuant to Article 75 of the Statute 24 March 2017 at [129] and [236]).

Relevance of International Courts' and Tribunals' decisions recognising Solastalgia for the application of the Principle of Proportionality

There are multiple lessons to draw from the previous judicial decisions that can be relevant to the interpretation and application of the Principle of Proportionality.

First, it is also important to recognise as part of proportionality assessments that the potential destruction of specific objects, such as religious sites, that are protected by IHL may have different degrees of expected solastalgia.

Both the ICTY and the ICC considered the higher significance that the destruction of the bridge and the mausoleums had for the affected civilian population. The same can be said for sites of cultural significance, as the EECC recognised in its *Eritrea Award.* Such conclusions should equally be relevant for the purpose of the application of the principle of proportionality: not all religious or cultural sites or places are equal of equal value for the potential civilian population for the purpose of the principle.

The recognition of embodied experiences would also be relevant to the direct inclusion of expected displacement as a form of civilian harm. When dealing with this issue, Gillard says (above at 20):

> Assigning weight to different types of incidental harm also allows consideration to be given to some of the adverse effects of attacks on civilians that do not fall within the scope of incidental harm. For example, displacement of civilians does not constitute incidental harm *per se*. However, the fact that displacement is likely to occur as a result of an attack expected to destroy civilian homes affects the weight to be given to that

destruction. Their destruction should be assigned greater weight than that of business premises, for example.

The significant extent of solastalgia created by displacement would prevent its exclusion as a form of civilian harm. Gillard's suggestion is laudable but it raises the question whether the weight given to the expected destruction of buildings will be commensurate with the magnitude of the expected harm inflicted on the displaced civilians. Displacement first causes physical harm for vulnerable civilians, who can develop illnesses or succumb to them in the process of displacement. Likewise, displacement causes extraordinary and long-lasting mental harm for the displaced population. In addition, displacement dislodges the fabric of life of the affected population, and the quality of its everyday life. These expressions of expected embodied experiences must find their separate way as a form of civilian harm within proportionality assessments with their appropriate weight. A forced displacement as a result of an armed attack that can be foreseen on the basis of the available information is a type of incidental civilian harm, bodily and mental, and should be included directly and not through indirect means, within proportionality assessments.

The effect of recognising the expected solastalgia in all the above-mentioned events would not be minor for the civilian population: the potential mitigation of such adverse embodied experiences by requiring commanders to use different weapons or means of warfare, or to suspend the operation, if the planned attack is regarded as not in compliance with the principle of proportionality.

CONCLUSION

This article explores the use and significance of the concept "solastalgia" in embodied research in the arts and social sciences within the principle of proportionality in IHL. The term refers to the pain or grief prompted by the loss of, or incapacity to obtain, solace in relation to the negatively perceived state of one's home environment.

We conclude that the concept of solastalgia can be useful for the interpretation of proportionality in general and also for its application during the planning of military operations, for the benefit of civilians. This article also shows that dimensions related to solastalgia are

already included in Military Manuals, such as the New Zealand Defense Order 35, and have bee been recognised by several international courts and tribunals.

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