

**CRITIQUING THE ERITREA-ETHIOPIA CLAIMS COMMISSION'S  
INTERPRETATION OF THE RULES ON LEGITIMATE MILITARY OBJECTIVES:  
AERIAL BOMBARDMENT OF THE HIRGIGO ELECTRIC POWER STATION**

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In memoriam  
*Michael T. Affa*

*... the definition of Article 52(2) of Geneva Protocol I is not controversial in itself. What is controversial, however, is its interpretation and application.*

Expert Meeting on Targeting Military Objectives, 2005.

**Abstract**

*On 19 December 2005, the Eritrea-Ethiopia Claims Commission (the Commission), in a six-page decision, concluded, by majority vote, that ‘...in the circumstances prevailing on May 28, 2000, the Hircigo power station was a military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I and that Ethiopia’s aerial bombardment of it was not unlawful.’ The award is the only one in the Commission’s fifteen Awards where a decision was made by majority of votes; the rest were decided unanimously. The substance of the majority’s award and the process it followed to arrive at the conclusion, however, raises some important questions regarding the construal of the relevant provisions of Geneva Protocol I and the weighing and balancing of evidence that an international tribunal such as the Commission must employ. This publication will try to highlight some flaws in the award and discuss how the totality of the handling of the dispute by the majority of the Commission and suggest ways how the majority should have interpreted the relevant international humanitarian law instruments.*

**Key words: Geneva Protocol I, Eritrea-Ethiopia Claims Commission, civilian objects, economic targets, Hircigo power station**

**1. Background**

The Award on the aerial bombardment of the Hircigo Power Station (HPS)<sup>1</sup> was one of the many claims<sup>2</sup> decided by the Eritrea-Ethiopia Claims Commission (the Commission), one of three

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<sup>1</sup> The HPS bombardment Award was part of the Commission’s Partial Awards in a package called *Eritrea’s Western Front, Aerial Bombardment and Related Claim*. This is a 57 page long Award in which the Hircigo Power Plant decision occupies a mere six pages at paras. 106-121 of the Award. See Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims (hereinafter ‘Western Front Partial Award’), pp. 1, 3, 5, 9-13, 14, 21, 25 & 26, available at: <http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf>. Accessed 27 October 2015.

organs constituted by the Comprehensive Peace Agreement (the Algiers Agreement) of 12 December 2000 signed between Eritrea and Ethiopia<sup>3</sup> to end the 1998-2000 border conflict between them.<sup>4</sup> These organs were the Boundary Commission, the Claims Commission and an independent body which will investigate the origins of the dispute.

Based in The Hague, the Boundary Commission<sup>5</sup> was constituted by Article 4 of the Algiers Agreement with the mandate to ‘delimit and demarcate the colonial treaty border based on pertinent colonial treaties and applicable international law...’ Based on treaties signed in 1900, 1902 and 1908 and applicable international law, the Boundary Commission delivered its Delimitation Decision on 13 April 2002 delimiting the Central, Western and Eastern sectors of the common border between Eritrea and Ethiopia.<sup>6</sup>

The Commission, also based in The Hague, was comprised of five arbitrators, one of them president of the Commission (the President).<sup>7</sup> Pursuant to Article 5(1) of the Algiers Agreement, the Commission was given the mandate to:

decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

In December 2005 the Commission decided on liability and in August 2009 it awarded respective damages.

Not yet established, the third organ will, according to Article 3(1) of the Algiers Agreement, carry out investigation ‘on the incidents of 6 May 1998 and on any other incident prior to that

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<sup>2</sup> The Commission delivered thirteen Partial and two Final Awards. Detailed information on the progress of the Commission’s works and links to its decisions and awards are available at: [www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151). Accessed 27 October 2015.

<sup>3</sup> UN Doc. S/2000/1183, 13 Dec. 2000.

<sup>4</sup> For a brief summary of the outbreak of the border dispute and the subsequent international efforts to settle the dispute, see Gray 2006, pp. 700-704.

<sup>5</sup> The four Commissioners, with each party appointing two Commissioners, were Sir Arthur Watts, Professor W. Michael Reisman, Judge Stephen M. Schwebel and Prince Bola Adesumbo Ajibola. Professor Sir Elihu Lauterpacht, selected by the four arbitrators, presided as president of the Border Commission.

<sup>6</sup> For further information on the post-delimitation decision developments, see Gray 2006, pp. 707-710.

<sup>7</sup> Eritrea appointed Lucy Reed and John Crook as arbitrators and Ethiopia appointed George Aldrich and James Paul as arbitrators. The four arbitrators in turn selected Hans Van Houtte as president of the Claims Commission.

date which could have contributed to a misunderstanding between the parties regarding their common border, including the incidents of July and August 1997’.

## **2. The Facts**

In this claim, the Commission was requested to decide whether an electricity generating plant – the HPS – was a legitimate military objective under the relevant provisions of Geneva Protocol I Additional to the 1949 Geneva Conventions (Geneva Protocol I). As summarized by the Commission, the claim sprang out of the following facts:

On May 28, 2000, two Ethiopian jet aircraft dropped seven bombs that hit and seriously damaged the HIRGIGO Power Station, which is located about ten kilometers from the port city of Massawa. At that time, construction was complete, and the power station was in the testing and commissioning phase. While not yet fully operational, the power station had successfully supplied some power briefly to Asmara and Mendefera. Eritrea asserted that the bombing of the plant was unlawful because the plant was not a legitimate military objective, and it requested that the Commission hold Ethiopia liable to compensate Eritrea for the damage caused to Eritrea by that violation of international humanitarian law.<sup>8</sup>

## **3. The Heart of the Analyses**

Since we will make extensive reference to the respective analyses of both sides of the Commission, we believe that the relevant parts of the opinions of each side should be appended to the main text. At the heart of the opinions was Article 52, paragraph 2, of Geneva Protocol I (Article 52(2)) which reads:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Both sides of the Commission separately interpreted Article 52(2) and the respective interpretations were reflected in the following two positions.

### **3.1 On Dissecting the Elements of Article 52(2)**

The majority did not first dissect Article 52(2) into its components in order to clearly identify the elements that must be proved by each party. Moreover, the majority did not decide which party had the burden of proof on each of the elements of Article 52(2). The majority, however, generally stated that ‘As a first step, [the Commission] must decide whether the power plant was

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<sup>8</sup> Western Front Partial Award, para 111.

an object that by its nature, location, purpose or use made an effective contribution to military action at the time it was attacked...’<sup>9</sup> and upon a quick affirmative finding, ‘The remaining question [would be] whether the Hirgigo power plant’s ‘total or partial destruction ... in the circumstances ruling’ in late May 2000 ‘offer[ed] a definite military advantage’.<sup>10</sup>

On the contrary the President, who wrote a separate opinion, viewed Article 52(2) as a restrictive definition and designed a two-step dissection<sup>11</sup> of the different components of the paragraph which must be proved by a party which relies on them:

This restrictive definition requires, cumulatively, (1) that the objective makes an effective contribution to military action; and (2) that its destruction, capture or neutralization provides a definite military advantage. As regards the first condition, the objective’s contribution to the military action must be ‘effective’ in the actual situation, not *in abstracto*... As regards the second condition... [a] demonstration of the ‘definite military advantage’ of the attack is required.<sup>12</sup>

### **3.2 On the Merits**

Each side of the Commission separately approached the merits by dwelling on three key issues (although the third issue was not separately discussed by both sides):

- whether the HPS by its nature, location, purpose or use made an effective military contribution at the time it was attacked;
- whether Ethiopia was offered a definite military advantage by attacking the HPS; and
- on proportionality, i.e., the concept generally that the military advantage must outweigh the damage to civilians and civilian objects.

## **4. Critiquing the Majority’s Analysis**

This section will critique the majority’s opinion on its handling of factual and evidentiary considerations as well as on its interpretation of the requirements of Article 52(2).

### **4.1 Factual and Evidentiary Considerations**

Following is a discussion on key facts that were either neglected or improperly utilized by the majority in reaching at its decision.

#### **4.1.1 Precautions in Attack**

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<sup>9</sup> Ibid, para 117.

<sup>10</sup> Ibid, para 121.

<sup>11</sup> This two-tier dissection is the widely accepted method of applying Article 52(2) to cases brought before such tribunals. Yves Sandoz et al. 1987, p. 635, para 2018; Henderson 2009, pp. 52-53; Expert Meeting Report 2005, pp. 2, 28.

<sup>12</sup> Western Front Partial Award section on the Separate Opinion of the President of the Commission (Separate Opinion), paras 2-4.

Ethiopia stated that its airplanes were initially sent to bomb the Port of Massawa but that the pilots were given permission to bomb anti-aircraft missiles stationed near the HPS after the airplanes sensed a signal either of the launching of an anti-aircraft missile or of a detection by missile control radar. In its analysis the majority did not consider Ethiopia's admission that the HPS was not the objective of its attack at all.<sup>13</sup> In fact for Ethiopia the bombing of the HPS was the subject of an *ex-post facto* defense. In the words of the President, 'International law does not permit bombing first and justification later.'<sup>14</sup>

Once an armed conflict is underway, the parties are bound by the rules for precautions in attack under Article 57(2) of Geneva Protocol I especially the rules of target selection and proportionality which are briefly described in the following paragraphs.<sup>15</sup> In view of Ethiopia's statements that the HPS was not in its plan of attack, the majority should have considered these rules in its analysis.

Target selection (distinction) rules require that in deciding to attack the enemy military commanders must clearly identify their targets and be certain that the targets are military objectives.<sup>16</sup> Such caution is intended to ensure that the destructive effects of combat power are applied only against people, places and things whose destruction or neutralization offers a definite military advantage.<sup>17</sup>

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<sup>13</sup> Western Front Partial Award, para 114.

<sup>14</sup> Separate Opinion, para. 10.

<sup>15</sup> Other salient elements in the laws governing the resort to force (*jus in bello*) include the need to secure military necessity for attack and the principle of humanity. Articles 50-59 of Geneva Protocol I; Boothby 2009, pp. 48-49; George N. Walne 1987, available at: <http://www.cna.org/documents/5500045700.pdf>, pp. 4-8. Accessed 28 October 2015; Corn, 'The Targeting Framework of the Law of Armed Conflict', available at: <http://www.jurist.law.pitt.edu/forumy/2006/07/targeting-framework-of-law-of-armed.php>. Accessed 28 October 2015.

<sup>16</sup> Article 57(2)(a)(i) of Geneva Protocol I; Hampson and Dinstein 1992, pp. 46-48; San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994 1994, para 38-46; 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia', available at: <http://www.un.org/icty/pressreal/nato061300.htm>. Accessed 28 October 2015. Under the Geneva Protocol Article 57(2) is linked to Article 52(1) in that the latter requires that:

'Civilian objects, meaning all objects that are not military objectives, shall not be made the object of attack [and that this] prohibition only applies to attacks directed at items which are not military objectives. This prohibition only applies to attacks *directed at* items which are not military objectives. It does not address the issue of collateral damage arising from an attack on a military objective.' Boothby 2009, p. 45.

See also Parks 2007, p. 85. For an explanation of how judges in international tribunals have through the years elaborated the principle of distinction, especially as it is related to the principle of military necessity, see Darcy 2014 pp. 141-145.

<sup>17</sup> See Article 57(2)(a)(i) of Geneva Protocol I which refers to Article 52(2). An ICRC commentary on Article 52(2) links the definition of military objectives to the target selection care enumerated in Article 57. ICRC Commentary, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977', para 1952, available at:

Proportionality, mentioned in the HPS claim by the dissenting President only, is another precaution rule. Article 57(2)(a)(iii) of Geneva Protocol I provides that those who plan or decide upon an attack shall ‘refrain from deciding to launch any 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’.

In the subsequent sections we will discuss whether, as the majority decided, bombing the HPS offered Ethiopia a definite military advantage. However, at this stage we would like to highlight that Article 57(2)(a)(iii) mandates those who plan an attack to consider proportionality in advance of an attack not in retrospect.

Seen in light of the precaution rules Ethiopia’s admission that the HPS was not its initial target – and not even its incidental target (i.e., the anti-aircraft launchers) – weakens, *ab initio*, the majority’s subsequent analysis on whether the HPS was a military objective. Nevertheless, the majority, without first examining whether Ethiopia’s commanders had properly selected the HPS as a target and weighed the advantages of its bombing, moved to discuss whether the HPS was a legitimate military objective.<sup>18</sup> In other words, the majority should, as is the logical order of discussing the bombing of objects in times of war, first have exhausted the discussion on the requirements of Article 57(2) before proceeding to discuss Article 52(2). The President was more exhaustive in considering both paragraphs.

#### ***4.1.2 Evidentiary Issues***

The way the majority reached at its conclusion in light of the evidence available on some of the facts may also be criticized. Paragraphs (1) and (2) of Article 14 of the Commission’s Rules of Procedure respectively read:

1. Each party shall have the burden of proving the facts it relies on to support its claim or defense.
2. The Commission shall determine the admissibility, relevance, materiality and weight of the evidence offered.

##### (a) Degree of Proof

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<http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!Open> Document. Accessed 29 October 2015.

<sup>18</sup> Western Front Partial Award, para 111.

Since the Rules of Procedure did not articulate the degree or quantum of proof required to be submitted by the respective parties, the Commission allowed the parties to debate on the issue and finally opted for *clear and convincing* degree of proof<sup>19</sup> which the Commission consistently applied in other claims and defenses presented to it.<sup>20</sup> The Commission stated: ‘the Commission requires clear and convincing evidence in support of its findings.’<sup>21</sup> The application of the ‘clear and convincing evidence’ standard must be reviewed by looking at how the Commission examined whether: (1) the HPS made an effective contribution to military action; and (2) bombing the HPS offered Ethiopia a definite military advantage.

On the first issue Ethiopia presented no evidence. However, the majority asserted that ‘a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use.’<sup>22</sup> This was despite Ethiopia’s earlier statement that it did not plan to attack HPS. On the contrary, Eritrea submitted evidence that its defense forces used only four percent of the power supplied by non-military electric sources and that the HPS was not operational at the time it was attacked.<sup>23</sup> To support its conclusion on this issue, the majority referred to the British Defense Ministry’s Manual of the Law of Armed Conflict to interpret the term ‘purpose’ in Article 52(2) to mean ‘the future intended use of an object’.<sup>24</sup> The majority did not identify what the future intended purpose of the HPS was and how effectively it would contribute to military action.

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<sup>19</sup> Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea’s Claim 17 (Eritrea POW Partial Award), available at: <http://www.pca-cpa.org/upload/files/ER17.pdf>. at para. 44-46. Accessed 30 October 2015; Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Ethiopia’s Claim 4 (Ethiopia POW Partial Award), available at: <http://www.pca-cpa.org/upload/files/ET04.pdf>, para 35-37. Accessed 30 October 2015.

<sup>20</sup> See, for instance, Eritrea POW Partial Award, *ibid*, paras 49, 62, 69, 82, 90, 103, 106-107, 113, 136, 141; Ethiopia POW Partial Award, *ibid*, paras 43, 65, 72, 76, 90, 93-94, 99, 111, 137, 141, 146, 150; Western Front Partial Award, paras 6, 18, 26, 29, 31, 47, 57, 72, 79, 83, 88, 123, 132; Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, available at: <http://www.pca-cpa.org/upload/files/ER%20Partial%20Award%20Dec%2004.pdf>, paras 35, 118, Award (Section XIII), sub-at para. C. Accessed 30 October 2015; Eritrea-Ethiopia Claims Commission, Partial Award, Civilians Claims, Ethiopia’s Claim 5, available at: <http://www.pca-cpa.org/upload/files/ET%20Partial%20Award%20Dec%2004.pdf>, para 35, Award (Section VIII), sub-at para. C. Accessed 30 October 2015.

<sup>21</sup> Western Front Partial Award, para 108.

<sup>22</sup> *Ibid*, para 120.

<sup>23</sup> Western Front Partial Award, para 111.

<sup>24</sup> Western Front Partial Award, para 120.

On the second issue, Ethiopia did not make any statement on, or submit any evidence to prove, the military advantage it was offered by bombing the HPS. The majority, however, considered Eritrea's signing the Cease-Fire Agreement as a military advantage to Ethiopia.<sup>25</sup>

(b) Burden of proof

According to the Commission's Rules of Procedure Ethiopia had the burden of proving that the HPS was a military objective and Eritrea had the burden of proving that the HPS was not a military objective. The President noted that 'An object is entitled to the full protection afforded to civilian objects if these two conditions [of Article 52(2)] have not been fulfilled. Indeed, under the principle of customary law as laid down in Article 52, paragraph 3<sup>26</sup>... *The burden of proof lies upon the party that must justify the military action* (emphasis added).'<sup>27</sup>

Under IHL, there is a presumption in favor of immunity of objects whose objective may be doubted.<sup>28</sup> Eritrea had proved to the Commission that its defense forces consumed only four percent of its non-military electric sources and the Commission noted that the only time the HPS was tested it supplied power to the cities of Asmara and Mendefera. Added to the fact that Ethiopia could not present evidence to show the contribution made by the HPS to Eritrea's military action (except for the abstract and future, yet unverified, contribution of the HPS to military action identified only by the majority), there is enough indication in the dispute that there was doubt as to the effective military contribution made by the HPS to Eritrea at the time the power plant was attacked. Ethiopia should have been required to prove the HPS's contribution to Eritrea's war effort. Since Ethiopia did not meet its burden of showing that the HPS was making an effective contribution to Eritrea's military action, the Commission should have decided that HPS was not a military objective.

## **4.2 Critique Based on the Elements of Article 52(2)**

We now proceed to critique the majority's interpretation of the requirements of Article 52(2). For purpose of convenience we will separately discuss the three elements of Article 52(2).

### ***4.2.1 The Object Must by its Nature, Location, Purpose or Use Make Contribution to Military Action at the Time it Was Attacked***

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<sup>25</sup> Ibid, para 121.

<sup>26</sup> Which reads: '[i]n case of doubt whether an object which is normally dedicated to civilian purposes ... is being used to make an effective contribution to military action, it shall be presumed not to be so used.'

<sup>27</sup> Separate Opinion, para 5-6.

<sup>28</sup> DeSaussure, 'Military Objectives', available at: <http://www.crimesofwar.org/a-z-guide/military-objectives/>. Accessed 3 November 2015.



The majority devoted four paragraphs to analyze this element. However, since the majority did not separately discuss the four items (nature, location, purpose and use), it is difficult to discern the majority's understanding on the nature, location, purpose or use of HPS. In the following sub-sections, we will briefly discuss each item and try to show how separate discussion on each item could have led to a different conclusion. In Article 52(2), the four items are linked by the proposition 'or' which means that an affirmative finding on only one of the factors is enough to move to the next element. Our critique will attempt to show that the majority was not correct in its finding on all of the items it discussed.

(a) Nature

Under Article 52(2) 'nature' has been understood to mean that all objects which directly,<sup>29</sup> intrinsically<sup>30</sup> or inherently<sup>31</sup> serve the armed forces such as weapons, fortifications, depots, buildings occupied by armed forces, staff headquarters, communication centers etc. are military objectives by nature and can therefore be attacked. Under international law, there is no definite list of objects that should always be considered military objects.<sup>32</sup> Major General Anthony Rogers, a former Director of British Army Legal Services, for instance, listed equipment that he considered to be military objectives by their very nature.<sup>33</sup>

The majority did not thoroughly discuss the specific nature of the HPS. It only made a passing remark that electric power stations are generally deemed military objectives because of their

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<sup>29</sup> Sandoz et al. 1987, para 2020.

<sup>30</sup> Dinstein 2002, pp. 146-147. Here Dinstein proposes that power plants (electric, hydroelectric, etc.) *servicing the military* be considered a military objective because of its nature.

<sup>31</sup> Henderson 2009, p. 55.

<sup>32</sup> In 1956, the International Committee of the Red Cross (ICRC) prepared Draft Rules for the Limitation of Dangers incurred by the Civilian Population (the Rules) Article 7 of which provided:

Only objectives belonging to the categories of objective which, *in view of their essential characteristics, are generally acknowledged to be of military importance*, may be considered as military objectives...

With the help of military experts the ICRC prepared an illustrative model termed List of Categories of Military Objectives to supplement the definition in Article 7 of the Rules viz:...

(1) ...

(8) Industries of fundamental importance for the conduct of the war:

(a) ....

(f) *Installations providing energy mainly for national defense*, e.g. coal, other fuels, or atomic energy, and *plants producing gas or electricity mainly for military consumption* (emphasis added). Sandoz et al. 1987, para 632-633; Hampson and Dinstein 1992, p. 50.

Solis adds: 'The military nature of some targets is clear: defense – or weapons-related industrial plants, major highways, military laboratories, navigable rivers, shipping, ports, *power plants that serve the military*, rail lines, equipment marshalling yards, and command centers such as the Pentagon (emphasis added).' Solis 2010, p. 524.

<sup>33</sup> Here Rogers focuses on the criterion of such equipment being effectively employed for military offensive/defensive or support purposes. Rogers 1996, p. 37. See also Corn, 'The Targeting Framework of the Law of Armed Conflict', available at: <http://www.jurist.law.pitt.edu/forumy/2006/07/targeting-framework-of-law-of-armed.php>. Accessed 28 October 2015.

sufficient support to a State at war. The majority also stated that power stations that have no effect on a State's ability to wage war, such as those limited to supplying power for humanitarian purposes (e.g. medical facilities) should not be considered military objectives.<sup>34</sup> The following three observations may be made on these statements of the majority.

Firstly, the majority did not provide sufficient support for its statement that electric power stations are generally deemed military objectives during armed conflict; it also failed to sufficiently analyze the status of the HPS in light of this statement. The majority cited an ICRC commentary on customary IHL to refer to a 'recent collection of State practice indicating that many economic installations and, indeed, the economic potential of an enemy State constitute military objectives'.<sup>35</sup> The commentary shows that some States qualified the economic installations they considered to be military objectives:

- Australia's Defense Force Manual considers 'power stations [and] industry *which support military operations*' and 'economic targets *that indirectly but effectively support operations* (emphasis added)' as military objectives;
- Germany's Military Manual provides that 'military objectives include, in particular, economic objectives *which make an effective contribution to military action* (transport facilities, industrial plants, etc.) (emphasis added)';
- Italy's IHL Manual reads that 'depots, workshops [and] installations . . . *which can be used for the needs of the armed forces* (emphasis added)' are military objectives;
- Spain's Law of Armed Conflict Manual provides that 'economic-industrial objectives *which make an effective and real contribution to military action* (emphasis added)' are military objectives;
- Swiss Basic Military Manual considers 'plants, factories and establishments *directly linked to the activity of the armed forces* (emphasis added)' as military objectives.<sup>36</sup>

It was mentioned earlier<sup>37</sup> that in its list of military objectives the ICRC included 'installations providing energy *mainly for national defense*, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity *mainly for military consumption* (emphasis added)'. The facts before the Commission indicated that the HPS was not essentially an installation of military importance

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<sup>34</sup> Western Front Partial Award, para 117.

<sup>35</sup> Henckaerts and Doswald-Beck 2005, pp. 216-222, referred to in Western Front Partial Award, f.n. 30.

<sup>36</sup> Ibid.

<sup>37</sup> Sandoz et al. 1987, para 2020; Henckaerts and Doswald-Beck 2005, pp. 216-217.

or was mainly used for military consumption. As in many countries,<sup>38</sup> the Eritrean military consumed very low amount (four percent) of Eritrea's non-military power sources to be considered a military target. A case for comparison is the bombing of Iraq's electric grid during Desert Storm. The bombing has not received much criticism mainly because the grid was 'an integrated national electricity grid, which was used by both the armed forces and civilians... [and the] [p]ower supplies provided significant military support'.<sup>39</sup> By referring to the Iraqi bombing, Dinstein suggests that '[u]ndeniably, an integrated power grid makes an effective contribution to modern military action',<sup>40</sup> but only if such grid makes enough supply to the war activities of the military. The majority did not establish whether the HPS provide enough support to the war activities of the Eritrean military. Therefore, it could have been concluded that at the moment of its attack the HPS did not by its nature qualify as a military objective.

Secondly, the majority neglected Eritrea's proved statement that 96% of the electric power demand of its defense forces was supplied by military power sources. The HPS was to be a major input to the country's national electric demand (i.e., not limited to supplying the Port of Massawa and the naval base). Assuming that the 4%-96% military-civilian consumption equally applied to the HPS once it became operational, the majority should have discussed whether a 4% utilization of the HPS by the Eritrean military would render the power plant a military objective in light of the degree of its contribution to Eritrea's military action. On the contrary, the President perceived the facts on ground to hold that 'The Hirgigo power station, which was intended to become a principal supplier of electricity in Eritrea, unquestionably had a civilian purpose.'<sup>41</sup>

#### (b) Location

Throughout 1998-2000 the battle was fought along the common borders between Eritrea and Ethiopia (southern, south-western and south-eastern parts of Eritrea). The HPS is located ten kilometers from the Port of Massawa which port is located at the north-eastern part of Eritrea by the Red Sea coast.

Neither the majority nor the President discussed the location factor. It is not clear whether both sides decided that the 'location' factor was irrelevant and instead concentrated on the other

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<sup>38</sup> As noted in Griffith 1994, pp. 10-11.

<sup>39</sup> Hampson and Dinstein 1992, p. 50.

<sup>40</sup> Dinstein 2002, pp. 155-156. By their very nature, power generating plants have been found difficult to categorize either as objects (such as a tank or an armored vehicle) which are presumed to be military objects or as objects (such as place of worship or a school) which are normally are presumed to be immune from attack. Kalshoven Zegveld 2011 p. 105.

<sup>41</sup> Separate Opinion, para 7.

three items, i.e., nature, use and purpose. In fact, the Working Group that worked on this factor ‘introduced the location criterion without giving reasons’.<sup>42</sup> The opinions on location as a factor differ. The ICRC commentary on Article 52(2) and other scholars<sup>43</sup> hold that the target should be within or in the vicinity of the combat area while others<sup>44</sup> do not accept this interpretation. In any case, the important point in discussing location, like the other three factors, is to examine the effective contribution of the target to military action. In this case we find it difficult to see how the HPS, not operational at the moment it was bombed, was contributing to Eritrea’s military action by virtue of its being located near Massawa.

(c) Purpose

It was the item ‘purpose’ which both sides discussed in relative depth. The majority justified its conclusion based on the idea that the HPS, upon its completion, would replace the old power facility in Massawa which had provided electricity to the port and the naval base in Massawa.<sup>45</sup> The majority heavily relied on a statement by an official of the Eritrean Electric Authority (EEA) that ‘Hirgigo was going to be a major asset for us. The plant we were using to supply power to Massawa was in Grar. It was big, but it was old and on its last legs.’<sup>46</sup> The majority correctly stated that purpose means ‘future intended use’ of an object.<sup>47</sup> Therefore, the majority concluded that preemptive attack of the HPS which, upon its completion, would supply the two military targets in Massawa was justifiable. The following two points may be raised to challenge the majority’s conclusion.

Firstly, the majority narrowly construed the statement of the EEA official to conclude that the HPS was intended to replace the power supply in Massawa where two military objectives (the port and the naval base) were located.<sup>48</sup> It was known to the majority, and the official had also

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<sup>42</sup> Sandoz et al. 1987, para 2021. Another reason the members of the Commission did not focus on location could be the fact that ‘location’ has been mainly linked to an area of land whose capture is vital for the occupying forces. Solis 2010, p. 525; Dinstein 2002, p. 150.

<sup>43</sup> Sandoz et al. 1987, para 2026; Dinstein, *ibid*.

<sup>44</sup> For instance, Henderson 2009, pp. 56-57.

<sup>45</sup> See the following statement of the majority regarding the HPS: ‘In general, [it was] a large power plant being constructed to provide power for *an area including a major port and naval facility* (emphasis added)...’ Western Front Partial Award, para 121.

<sup>46</sup> Western Front Partial Award, para 118.

<sup>47</sup> Sandoz et al. 1987, para 2022; The President and Fellows of Harvard College 2009, p. 13; Henderson 2009, pp. 59, 61; Dinstein 2002, p. 148. Expert Meeting Report 2005, p. 11.

<sup>48</sup> Western Front Partial Award, para 120.

stated,<sup>49</sup> that HPS, as properly noted by the President in his Separate Opinion,<sup>50</sup> was going to be a major replacement to the electric supply of the whole nation and not only to the old plant in Massawa which powered the two military objectives there.

Secondly, it must be highlighted that purpose means more than ‘the mere potential [or possibility] for use by a belligerent’<sup>51</sup> and that ‘intended use’ means ‘the use for which the object was designed (i.e., its nature) but it might also be a *declared* future use (emphasis added)’ which must be reasonably believed by the attacking party.<sup>52</sup> Ethiopia cannot be said to have reasonably known, based on Eritrea’s declaration on the future use of the HPS (which did not happen), that the HPS was to have a military use. Since Ethiopia did not have any plan to attack the HPS, it cannot be concluded that it attacked HPS with the reasonable knowledge that the plant would have a future military use.

#### (d) Use

The jurisprudence on this item states that use of the targeted object refers to ‘the present function of the object’<sup>53</sup>. Objects which are *prima facie* immune from attack, such as schools or hospitals, may be attacked if and at the moment when they are used for military purposes.<sup>54</sup> In other words, ‘*use* refers to the current employment of an object. Accordingly, if a civilian object is being utilized by the military then at that moment it is potentially a military objective.’<sup>55</sup> Analysis of this factor favors the finding that HPS was not a military target because at the time it was attacked it was not operational.<sup>56</sup>

### ***4.2.2 The Contribution to Military Action Must be Effective***

#### (a) Degree of the Effectiveness of the Contribution

Article 52(2) provides that the object selected for attack must effectively contribute to military action because of its nature, location, purpose or use. The majority was not clear as to how it

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<sup>49</sup> The majority referred to the official’s statement that ‘he thought the reason Ethiopia bombed the power station was *its economic importance to Eritrea* (emphasis added).’ Western Front Partial Award, para 119.

<sup>50</sup> Note the President’s words: ‘The Hirgigo power station, which was intended to become a *principal supplier of electricity in Eritrea*, unquestionably had a civilian purpose (emphasis added).’ Separate Opinion, para 7.

<sup>51</sup> Henderson 2009, p. 60.

<sup>52</sup> Henderson, *ibid.* See also Dinstein 2002, p. 148; Sassòli et al. 2011, p. 161.

<sup>53</sup> Sandoz et al. 1987, para 2022; Dinstein, *ibid.*; Rado, ‘Legitimate Military Targets’, available at: <http://www.crimesofwar.org/thebook/legit-military-target.html>. Accessed 3 November 2015.

<sup>54</sup> Crawford and Pert 2015, p. 169.

<sup>55</sup> Henderson 2009, p. 58.

<sup>56</sup> Western Front Partial Award, para 111.

construed the term ‘effective’ in its decision although there are some references in the decision to infer from.

The majority hinted that it would construe the term ‘effective’ as ‘of sufficient importance’: ‘The Commission agrees with Ethiopia that electric power stations are generally recognized to be *of sufficient importance* to a State’s capacity to meet its wartime needs ... so as usually to qualify as military objectives during armed conflicts (emphasis added).’<sup>57</sup> The subsequent statements of the majority, however, make use of the term ‘effective’ together with the phrase ‘contribution to military action’ without qualifying it.<sup>58</sup>

On the contrary, the President highlighted the importance of the term ‘effective’ and disagreed with the majority’s understanding of ‘effective contribution’. For the President: ‘...the objective’s contribution to the military action must be ‘effective’ in the actual situation, not *in abstracto*. Otherwise, every object potentially of use to enemy troops could become a military objective. Similarly, more is required than a mere contribution to the ‘war-fighting capability’ of the enemy.’<sup>59</sup>

(b) A More Expansive Interpretation of ‘Military Action’ by the Majority?

A close reading of the majority’s interpretation of ‘effective contribution’ seems to reflect the more expansive interpretation of the phrase developed under the United States’ *Commanders Handbook on the Law of Naval Operations* especially as it is related to economic warfare. Bohm states that through this Handbook:

The United States has agreed to the definition of Article 52(2) with one sweeping difference. The United States application of Article 52(2) *replaces the use of “military action” with “war fighting or war sustaining capability.”*<sup>60</sup> As a result of this not so subtle difference, military commanders, per [the Handbook], are provided more latitude in analyzing whether or not an object may be a lawful target (emphasis added). The Handbook states “[e]conomic objects of the enemy that indirectly or effectively support and sustain the enemy’s war-fighting capability may also be attacked.” A report on U.S. practices revealed that the common practice of the United

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<sup>57</sup> Western Front Partial Award, para 117.

<sup>58</sup> See use of the term ‘effective’ in Western Front Partial Award, para 120.

<sup>59</sup> Separate Opinion, para 3.

<sup>60</sup> Section 8.1.1 of the Handbook reads:

Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s *war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force. (emphasis added)

States is to give a broad reading to the definition of article 52(2). The United States' reading would include war-sustaining economic facilities as military objectives.<sup>61</sup>

The term 'war-sustaining capability' which is believed to have its root on the American Civil War<sup>62</sup> has been understood to reflect 'the idea that an object may have an indirect, direct, or discrete connection to war-sustaining efforts'.<sup>63</sup> This term allowed the drafters of the Handbook to recommend a list of military objectives longer than those proposed in the ICRC Commentaries on and other publications on IHL.<sup>64</sup> The Handbook, for instance, holds that 'economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.'<sup>65</sup> Such targets include enemy lines of communication, rail yards, bridges, industrial installations producing war-fighting products and *power generation plants*.<sup>66</sup> The easiness with which the majority found the HPS to have effectively contributed to Eritrea's military action (paragraphs 119 and 120 of the Award) reflects the expansive 'war-sustaining capability' analysis whereas the President's finding that the HPS did not effectively contribute to Eritrea's military action (paragraphs 3-8 of the Separate Opinion) reflects the traditional 'military action' analysis.<sup>67</sup>

The 'war-sustaining capability' interpretation has been criticized for being broad<sup>68</sup> or for going too far<sup>69</sup> not only because 'Article 52(2) requires a more direct connection in order [for the object [to be a legitimate target'<sup>70</sup> but also because 'one must still fulfill the requirement of a

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<sup>61</sup> Bohm 2015, pp. 76-77. See also Expert Meeting Report 2005, p. 3.

<sup>62</sup> Solis 2010, pp. 522-523; Bohm 2015, p. 77. During the Civil War, Union troops frequently attacked Confederate cotton fields because such fields were believed to provide economic support to the Confederacy. In fact, Green states that:

After the American Civil War the British-American Claims Commission held that it was lawful for federal forces to seize and destroy cotton, since its sale provided funds for almost all Confederate arms and ammunition. Green 2000, p. 191, f.n. 58.

<sup>63</sup> Bohm, *ibid.*, p. 80.

<sup>64</sup> Schmitt et al. 2010, pp. 186-187. Oeter criticizes this approach of defining military objectives as follows:

An issue of particular concern is the tendency of the U.S. military, in the context of the doctrine of 'effects based-operations', to extend the ambit of 'military objectives' to so-called 'war-sustaining' objects (primarily economic and political-administrative in nature). Target of military operations here is not the military effort of the enemy any more, but the political command and control system and its resource basis. The requirement of a close nexus between the target and on-going military operations is given up in this approach. Oeter 2007, p. 56.

<sup>65</sup> Green 2000, p. 191; Expert Meeting Report 2005, p. 3.

<sup>66</sup> Expert Meeting Report, *ibid.*

<sup>67</sup> The President stated that for a finding of effective contribution to military action 'more is required than a mere contribution to the "war-fighting capability" of the enemy'. Separate Opinion, para 3.

<sup>68</sup> Crawford and Pert 2015, p. 172; Dinstein 2002, p. 145.

<sup>69</sup> Dinstein, *ibid.*

<sup>70</sup> Bohm 2015, p. 80.

definite military advantage to justify targeting, and that the causal link may be too tenuous to make out'.<sup>71</sup> Other critics have also stated that 'objects of economic significance may be said to have a "war-sustaining capability" whereas their effective contribution to military action may be more difficult to establish.'<sup>72</sup> Although we are of the opinion that conduct of warfare can include economic targets that support war efforts, we believe that such targets must have a direct connection with the war efforts. The more direct the connection, the easier it is to find that economic objects may be legally attacked. For this reason we do not agree with the majority's finding that HPS effectively contributed to Eritrea's military action under Article 52(2).

#### ***4.2.3 In View of the Circumstances Prevailing at the Time of the Attack, the Total or Partial Destruction, Capture or Neutralization Must Offer the Attacking Party a Definite Military Advantage***

Ethiopia had the additional burden of proving that the unintended attack on HPS had offered it a definite military advantage. The majority's decision on this issue shows no record of a statement or evidence presented by Ethiopia in this regard. In fact, it was the majority which picked up a fact that it considered an advantage which 'there can be few military advantages more evident' than it – an effective pressure on Eritrea to end an armed conflict and come to the negotiating table.<sup>73</sup> There are two criticisms, one factual and the other legal, that may be made against the majority's finding on this issue.

From the point of view of facts, the majority was not clear on whether the HPS attack actually contributed to Eritrea's agreeing to the Cease-Fire Agreement. The majority stated:

... the fact that the power station was of economic importance to Eritrea is evidence that *damage to it*, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, *offered* a definite advantage (emphasis added)...<sup>74</sup>

*The evidence does not – and need not – establish* whether the damage to the power station was a factor in Eritrea's decision to accept the Cease-Fire Agreement of June 18, 2000...<sup>75</sup>

The infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict...<sup>76</sup>

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<sup>71</sup> Crawford and Pert 2015, p. 172; Bohm 2015, p. 84; Separate Opinion, para 4.

<sup>72</sup> Expert Meeting Report 2005, p. 24.

<sup>73</sup> Western Front Partial Award, para 121.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.



On the one hand, the majority stated that if an attack to objects of national economic significance contributes to the end of armed conflict, then the objects qualify as military subjects. On the other hand, the majority stated that there is no need to prove whether the attack on the HPS contributed to Eritrea's agreeing to end the armed conflict. This analysis appears to deviate from the principle in Article 52(3) of Geneva Protocol I which puts the burden on the attacking party (Ethiopia) to justify its attack. The majority avoided the issue of burden of proof on Ethiopia by stating that it would require no evidence to show the impact of the HPS attack on Eritrea's decision to sign the Cease-Fire Agreement. For a panel which had consistently required the presentation of clear and convincing evidence for all claims and defenses to require the presentation of no evidence for a crucial defense such as this one is criticizable.

From the point of view of law, the majority may have erred in identifying the signing of a cease-fire agreement as a very evident military advantage. The 1868 St. Petersburg Declaration, one of the most important documents in the law of war, states in its preamble that 'the *only* legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy (emphasis added)'.<sup>77</sup> Sandoz and others elaborated this principle and argued that 'A military advantage can *only* consist in ground gained and in annihilating or weakening the enemy armed forces (emphasis added)'.<sup>78</sup> and Henderson added: 'For there to be a military advantage, the action must logically relate, either directly or indirectly, to weakening the military forces of the enemy.'<sup>79</sup> In other words, definite military advantage under Article 52(2) must be understood to mean:

"a concrete and perceptible military advantage rather than a hypothetical and speculative one."

The advantage gained must be military and not, say, purely political (hence, "forcing a change in the negotiating attitudes" of the adverse party cannot be deemed a proper military advantage).<sup>80</sup>

Article 52(2) requires one party to obtain a military advantage. It is hard to perceive the conclusion of a cease-fire agreement as a military advantage to one party only. Cease-fire agreement is generally a political advantage to the parties that sign it. It is difficult to perceive why the majority believed that a cease-fire agreement is one of the most evident military

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<sup>76</sup> Ibid. With such a doubt, the majority should have had no option but to apply Article 52(3) to decide that HPS was a civilian object.

<sup>77</sup> Henderson 2009, p. 65; Solis 2010, p. 50.

<sup>78</sup> Sandoz et al. 1987, para 2218.

<sup>79</sup> Henderson 2009, p. 65.

<sup>80</sup> Dinstein 2002, pp. 143-144.

advantages to one or more of warring parties. Dinstein, for instance, believes that forcing the negotiating attitude of a warring party (for instance, compelling it to sign a cease-fire agreement) has been wrongly viewed as a legitimate military advantage.<sup>81</sup>

Even if we were to agree with the majority that signing a cease-fire agreement is a military advantage,<sup>82</sup> the majority did not dwell in depth on whether Ethiopia was offered a ‘definite’ military advantage. The term ‘definite’ carries with it the concept of specificity and precision.<sup>83</sup> The majority appeared not to be sure of the definiteness of the military advantage that it thought Ethiopia gained by attacking the HPS: ‘In general, a large power plant being constructed to provide power for an area including a major port and naval facility certainly would *seem to be* an object the destruction of which would offer a distinct military advantage (emphasis added).’<sup>84</sup>

On the dissenting side, however, the President emphasized the importance of the term ‘definite’ in these words:

...a reference to the hypothetical or speculative effect of the destruction of the military objective on the conduct of the war is, in my view, not sufficient. A demonstration of the ‘*definite* military advantage’ of the attack is required. The infliction of economic loss or the undermining of morale through the destruction of a civilian object, or the probability that the destruction may bring the decision-makers to the negotiation table, do not make that object a military objective.<sup>85</sup>

More specific to the aerial bombing of power plants, experts have long agreed that the main purpose of aerial bombing of national power plants, and operational ones at that, is to stop war production, i.e., to halt the contribution of such plants in producing war goods and not primarily to press the other party to succumb to peace or to spread terror among the civilian population.<sup>86</sup>

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<sup>81</sup> Dinstein, *ibid.*, p. 144, f.n. 34.

<sup>82</sup> Please note that the majority did not identify cease-fire agreements as a ‘definite’ military advantage.

<sup>83</sup> See ICRC Commentary, ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977’, para 1952, available at: <http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!Open> Document. Accessed 29 October 2015.

<sup>84</sup> Western Front Partial Award, para 121.

<sup>85</sup> Separate Opinion, para 4. The ICRC understands the element of definiteness as follows: ‘Finally, destruction, capture, or neutralization must offer a *definite military advantage* in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information to take this requirement into account...’ Sandoz et al. 1987, p. 636, para 2024.

<sup>86</sup> Henderson 2009, pp. 139-141; Griffith 1994, pp. 19, 28.

Moreover, attacking national power plants has been proved effective in larger and more powerful countries and not in smaller and less powerful countries.<sup>87</sup>

Jachec-Neale's observation on the majority's finding of a definite military advantage to Ethiopia summarizes our critique of the majority on this issue. After stating that the HPS was a military objective, Jachec-Neale criticized the affirmative finding of a definite military advantage based on an anticipated political gain out of cessation of the war:

Given the Commission's finding that the power generated by the plant was *likely* to be used in the future military operations of the port and the naval base therein, it was clear that the destruction of the [HPS] would offer a definite military advantage to Ethiopia by depriving Eritrea of that power. On this account, the Commission's finding that the destruction of the [HPS] thus offered the Ethiopians military gain is uncontroversial [because she has given deference to the Commission's finding of the potential future military use of HPS]. The Commission's remarks that followed this assessment are far more disconcerting.

The Commission also appeared to suggest that action designed to bring closer an end to the war, and prevent further loss of life on both sides, gives rise to definite military advantage. They appeared to link it to the goal of influencing the political will of the adversary. They further implied that the expectation of bringing the war to an end constitutes military advantage, *even if this is caused by a significant economic impact alone*.

The Commission's remarks suggest that definite military advantage may be anticipated from the application of pressure to end the conflict and prevent further loss of life. It is possible that some strategic military benefits, such as the early cessation of hostilities, will be closely linked to political goals. It may be that some benefits towards strategic military goals may be considered in the context of military advantage, though caution here is advisable. The expectation of only political advantage does not meet the test. Therefore, expecting to influence the will of an adversary would not suffice. The expectation that an attack against one object will end the entire conflict is too uncertain and remote for it to meet the requirement of *definite* [see sub-section 4 below] military advantage, even if the existence of *military* advantage was argued. The danger of the Commission's approach is that it could potentially justify the Second World War attacks on

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<sup>87</sup> Griffith discusses the aerial bombings of national power plants of Germany (World War II), North Korea (Korean War), Vietnam, Iraq (Desert Storm) to arrive at such conclusion. Griffith 1994, pp. 10-11 in general and pp. 2, 51-52 in particular. A more comprehensive and historical analysis of the objectives and strategies of air campaigns against national electric plants is available at: Kuehl 1995, pp. 237-267.

Nagasaki and Hiroshima, and give rise to a far broader interpretation of the definition than that anticipated at its adoption (emphasis added).<sup>88</sup>

## 5. Conclusion

The decision of the majority has serious flaws both in its treatment of the facts submitted or proved by the parties as well as in the perspective from which its analysis was constructed. The fact that the majority bypassed Ethiopia's admission that the HPS was neither its initial nor its subsequent target and that the HPS – not yet operational at the moment it was attacked – did not contribute to the power needs of the Eritrean military puts the majority's treatment of the facts in doubt. Based on the proven facts, the majority could and should have found it difficult to conclude that the HPS *actually made* an effective contribution to Eritrea's military action. The majority's finding of an abstract, future contribution cannot be used for deciding whether the HPS actually made an effective contribution at the time it was attacked.

All the more, the majority almost created its own line of story to find that the attack gave Ethiopia a military advantage. The key findings in the majority's analysis were mainly based on definitions of single countries' army manuals and on practices of other countries which do not show similar trends. Finally, the majority did not appropriately dissect the key provision – Article 52, paragraph 2, of Geneva Protocol I – and analyze its elements as any such tribunal would do. The President of the Commission in his Separate Opinion, showed lucidity and logic in addressing all the above defects of the majority's decision to rightly conclude that attacking the HPS was contrary to the laws of target selection, proportionality and the principles of Article 52(2).

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<sup>88</sup> Jachec-Neale 2014, pp. 118-119. Recent attacks on power plants that may be impacted by such interpretation should the cases be brought before similar tribunals include: the bombing of power plants during the Russia-Georgia war of 2012; Israel's bombing of Gaza's only power plant in July 2014; and the bombing of a power plant in Aleppo by US warplanes in October 2015.

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## **Appendix – Opinions of both sides of the Commission**

### The Majority's Opinion

112. With respect to the applicable law, Eritrea pointed to Article 52, paragraph 2, of Geneva Protocol I, which defines the objects that are legitimate military objectives as follows:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

113. This provision ... is widely accepted as an expression of customary international law, and Ethiopia did not contend otherwise... The Commission is of the view that the term “military advantage” can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack. Thus, with respect to the present claim, whether the attack on the power station offered a definite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack. The Commission finds that [Article 52(2)] is a statement of customary international humanitarian law and, as such, was applicable to the conflict between the two Parties.

114. Before considering the question whether the power station at Hirgigo was a military objective as so defined, the Commission must first address a factual dispute... Ethiopia simply denied that it had targeted a non-military objective. However, in its Memorial and consistently thereafter, including by testimony at the hearing by a senior Ethiopian Air Force officer, Ethiopia maintained that, although the power plant qualified as a legitimate military objective, its objective on May 28 was not the power plant, but rather anti-aircraft missile launchers located at Hirgigo. Ethiopia alleged that the two aircraft in question had been assigned, as their primary objective, the port of Massawa. It further alleged that, as the aircraft approached that area, they detected either the launching of an anti-aircraft missile or their own detection by missile control radar (the evidence was inconsistent on that point) from an anti-aircraft installation within the perimeter of the plant at Hirgigo. Ethiopia further alleged that the pilots immediately sought and obtained instructions to switch targets and attack the anti-aircraft defenses at the power plant. Consequently, Ethiopia asserted that it did not make the power plant its objective.

116. ... Considering all the evidence, the Commission concludes that Ethiopia has failed to prove its first defense, that the anti-aircraft weapons were the objective of the attack, rather than the power plant. Consequently, the Commission turns to the allegation of Eritrea that the power plant was not a legitimate military objective.

117. As a first step, the Commission must decide whether the power plant was an object that by its nature, location, purpose or use made an effective contribution to military action at the time it was attacked. The Commission agrees with Ethiopia that electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts. The Commission also recognizes that not all such power stations would qualify as military objectives, for example, power stations that are known, or

should be known, to be segregated from a general power grid and are limited to supplying power for humanitarian purposes, such as medical facilities, or other uses that could have no effect on the State's ability to wage war. Eritrea asserted that, in May 2000, the Hirgigo plant was not yet producing power for use in Eritrea and that Eritrea's military forces had their own electric generating equipment and are not dependent on general power grids in Eritrea. Eritrea also submitted evidence supporting its assertion that its Defense Ministry used no more than four percent of Eritrea's non-military power supply and that Eritrean manufacturing companies did not produce significant military equipment.

118. The Hirgigo plant had been under construction for a considerable time, and the evidence indicated that much of the related transformer and transmission facilities that would be necessary for it to transmit its power around the country were in place. Also, the Commission notes the witness statement by the head of the Northern Red Sea Region of the Eritrea Electric Authority in which he stated: "Hirgigo was going to be a major asset for us. The plant we were using to supply power to Massawa was in Grar. It was big, but it was old and on its last legs."

119. In fairness to that witness, it should be acknowledged that he also stated that he thought the reason Ethiopia bombed the power station was its economic importance to Eritrea. Nevertheless, the Commission, by a majority, finds in his reference to the power supply for Massawa being old and on its last legs a suggestive example of the potential value to a country at war of a large, new and nearly completed power station so close as to be visible from Massawa. While the fact that Eritrea placed anti-aircraft guns in the vicinity of the power station does not, by itself, make the power station a military objective, it indicated that Eritrean military authorities themselves viewed the station as having military significance.

120. The Commission, by a majority, has no doubt that the port and naval base at Massawa were military objectives. It follows that the generating facilities providing the electric power needed to operate them were objects that made an effective contribution to military action. The question then is whether the intended replacement for that power generation capacity also made an effective contribution to military action. Ethiopia asserted that a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use. Certainly, as the British Defense Ministry's Manual of the Law of Armed Conflict makes clear, the word "purpose" in Article 52's definition of military objectives "means the future intended use of an object." The Commission agrees.

121. The remaining question is whether the Hirgigo power plant's "total or partial destruction . . . in the circumstances ruling" in late May 2000 "offer[ed] a definite military advantage." In general, a large power plant being constructed to provide power for an area including a major port and naval facility certainly would seem to be an object the destruction of which would offer a distinct military advantage. Moreover, the fact that the power station was of economic importance to Eritrea is evidence that damage to it, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, offered a definite advantage. "The purpose of any military action must always be to influence the political will of the adversary." The evidence does not – and need not – establish whether the damage to the power



station was a factor in Eritrea's decision to accept the Cease-Fire Agreement of June 18, 2000. The infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict that, each day, added to the number of both civilian and military casualties on both sides of the war. For these reasons, the Commission, by a majority, finds that, in the circumstances prevailing on May 28, 2000, the Hirgigo power station was a military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I and that Ethiopia's aerial bombardment of it was not unlawful. Consequently, this Claim is dismissed on the merits.

#### The President's Separate Opinion

1. Customary international humanitarian law, as formulated in [Article 52(2)], limits military objectives "to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."
2. This restrictive definition requires, cumulatively, (1) that the objective makes an effective contribution to military action; and (2) that its destruction, capture or neutralization provides a definite military advantage.
3. As regards the first condition, the objective's contribution to the military action must be "effective" in the actual situation, not *in abstracto*. Otherwise, every object potentially of use to enemy troops could become a military objective. Similarly, more is required than a mere contribution to the "war-fighting capability" of the enemy.
4. As regards the second condition, a reference to the hypothetical or speculative effect of the destruction of the military objective on the conduct of the war is, in my view, not sufficient. A demonstration of the "definite military advantage" of the attack is required. The infliction of economic loss or the undermining of morale through the destruction of a civilian object, or the probability that the destruction may bring the decision-makers to the negotiation table, do not make that object a military objective.
5. An object is entitled to the full protection afforded to civilian objects if these two conditions have not been fulfilled. Indeed, under the principle of customary law as laid down in Article 52, paragraph 3, "[i]n case of doubt whether an object which is normally dedicated to civilian purposes ... is being used to make an effective contribution to military action, it shall be presumed not to be so used."
6. The burden of proof lies upon the party that must justify the military action.
7. The Hirgigo power station, which was intended to become a principal supplier of electricity in Eritrea, unquestionably had a civilian purpose. It could have been a military objective if it was established that it made or could make an effective contribution to military action, or was or could be of fundamental importance for the conduct of war. A determination that the Hirgigo power station was a military objective must sufficiently specify the basis for this assumption.
8. Ethiopia has declared – and Eritrea has not denied – that stockpiles of military hardware and weapons were stored at the Massawa port. Consequently, the Massawa port was undoubtedly a military objective. Ethiopia did not, however, in my opinion, sufficiently specify the extent to which Hirgigo power station, by its nature

or purpose, made or would make an effective contribution to the military action or that its destruction offered a definite military advantage. Ethiopia's general statement that "cutting off the power to Massawa would have presented Ethiopia with a clear military advantage of interrupting power to the military offices in Massawa" is insufficient. Moreover, the presence of anti-aircraft missiles in the vicinity of the Hirgigo station does not indicate in itself that the station had military significance, especially as missiles were already located in the area long before the construction of the station had started.

9. Furthermore, military action must be proportional, i.e. the military advantage must outweigh the damage to civilians and civilian objects. This basic requirement of proportionality is expressed in Article 57 of Geneva Protocol I, which has already been applied by the Commission as customary international law:

With respect to attacks, the following precautions shall be taken:

- (a) those who plan or decide upon an attack shall:
  - (i) ...
  - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, ... damage to civilian objects;
  - (iii) refrain from deciding to launch any attack which may be expected to cause ... damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

10. Ethiopia stated to the Commission that it did not plan the bombing of the Hirgigo station on May 28, 2000. It follows, therefore, that Ethiopia did not investigate beforehand whether the concrete and direct military advantage of this bombing outweighed the damage to civil society, as Article 57 requires. International law does not permit bombing first and justification later.

11. In assessing proportionality, it is relevant to consider that Ethiopia was aware at the time of the attack that the power station was not yet fully operational. Furthermore, the fact that neither the port of Massawa itself nor the Grar power station (which effectively supplied power to the Massawa port) were ever bombed is also relevant. Indeed, if different means are available to block harbour activities, the method that is most effective and that causes the least damage to civilians must be chosen. Finally, the expected benefits of the Hirgigo power station to civilians and the expense and time required to repair the damage caused by the attack should also be taken into account. Considering these elements, I find the potential military advantage caused by the bombing to be disproportionate to the damage to civilian objects and the civilian population.