

## Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26

The authors would like to thank Ms Anne-Laurence Brugère, teaching assistant at the University of Geneva, for having prepared a summary of this case and its discussion.

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

**[Source:** Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, Between the State of Eritrea and the Federal democratic Republic of Ethiopia. The Hague, December 19, 2005. The Permanent Court of Arbitration, the Hague. Footnotes omitted.]

## PARTIAL AWARD

### Western Front, Aerial Bombardment and Related Claims

#### Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26

### I. INTRODUCTION

#### A. Summary of the Positions of the Parties

1. [...] Eritrea asks the Commission to find Ethiopia liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by Eritrean nationals and persons of Eritrean national origin and agents, as a result of alleged infractions of international law occurring during the 1998-2000 international armed conflict between the Parties. The Claimant requests monetary compensation. [...]

2. The Respondent asserts that it fully complied with international law in its conduct of military operations.

#### B. Background and Territorial Scope of the Claims

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award issued today in

Ethiopia's Claim 1 for the Western Front ("Ethiopia's Western Front Claims"), addresses allegations of illegal conduct related to military operations on the Western Front of that conflict, as well as allegations of illegal conduct in the course of Ethiopia's aerial bombardment at various places in Eritrea, including but not limited to the Western Front [...]. [...]

## **V. UNLAWFUL AERIAL BOMBARDMENT (ERITREA'S CLAIM 26)**

[...]

### **C. The Merits**

[...]

98. *Harsile Water Reservoir*: Ethiopia acknowledges that it made several air strikes on the water reservoir located at the village of Harsile, which is located in a harsh desert region about 17 kilometers from the large port city of Assab. Bombs were dropped on three days in February 1999 and once in June 2000, but the reservoir either was not damaged or any damage was quickly repaired. Ethiopia's senior Air Force officer who testified at the hearing indicated that the reservoir was targeted because Ethiopia believed that the loss of that supply of drinking water would have restricted Eritrea's military capacity on the Eastern Front, and he identified a few Eritrean military units that Ethiopia believed obtained their water from the reservoir. However, in response to a question, he acknowledged that it was possible that water from the reservoir was used by civilians.

99. Eritrea submitted witness statements indicating, first, that the reservoir served only civilians and was the sole source of drinking water for the town of Assab and, second, that the Eritrean armed forces in that area had their own wells and underground storage tanks. Eritrea claimed that these attacks on the reservoir were illegal under Article 54 of Geneva Protocol I, which prohibits attacks on objects indispensable to the survival of the civilian population.

100. Based on the evidence in the record, the Commission has no doubt that the Government of Ethiopia knew that the reservoir was a vital source of water for the city of Assab. Thus, it seems clear that Ethiopia's purpose in targeting the reservoir was to deprive Eritrea of the sustenance value of its water, and that Ethiopia did not do so on an erroneous assumption that the reservoir provided water only to the Eritrean armed forces.

101. As the area around Assab is extremely harsh, hot and dry, the Commission considers it very fortunate that the water in the reservoir was not lost or made unavailable by those air strikes. Neither, apparently, was a nearby refugee camp damaged by the strikes, but the absence of significant damage would not justify a failure by the Commission to decide the legality of those attacks.

102. The Parties do not disagree that an attack on the reservoir would be prohibited by Article 54 of Geneva

Protocol I, were that provision to apply between them. [...]

103. In its defense, Ethiopia asserted that destruction of the Harsile water reservoir would have limited significantly Eritrea's ability to conduct military operations on the Eastern Front and, consequently, that the reservoir was a legitimate military objective under the applicable customary international humanitarian law. Ethiopia further maintained that Article 54 of Geneva Protocol I was a new development in 1977 that had not become a part of customary international humanitarian law by the 1998-2000 war.

104. The Commission recognizes the difficulty it faces in deciding this question, as there have been less than three decades for State practice relating to Article 54 to develop since its adoption in 1977. Article 54 represented a significant advance in the prior law when it was included in the Protocol in 1977, so it cannot be presumed that it had become part of customary international humanitarian law more than 20 years later. However, the Commission also notes the compelling humanitarian nature of that limited prohibition, as well as States' increased emphasis on avoiding unnecessary injury and suffering by civilians resulting from armed conflict. The Commission also considers highly significant the fact that none of the 160 States that have become Parties to the Protocol has made any reservation or statement of interpretation rejecting or limiting the binding nature of that prohibition. Only two of those statements relate to the scope of the prohibition. One, by the United Kingdom, merely emphasizes what paragraph 2 of Article 54 says, i.e., that it prohibits only attacks that have the specific purpose of denying sustenance to the civilian population or the adverse Party. The other, by France, preserves a right to attack objects used solely for the sustenance of members of the armed forces. All other statements referring to Article 54 also refer to other articles, and relate solely to the thorny issue of the right of reprisal. The United States has not yet ratified Geneva Protocol I, but the Commission notes with interest that the United States Annotated Supplement (1997) to its Naval Handbook (1995) makes the significant comment that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a "customary rule" accepted by the United States and codified by Article 54, paragraph 2, of Protocol I.

105. While the Protocol had not attained universal acceptance by the time these attacks occurred in 1999 and 2000, it had been very widely accepted. The Commission believes that, in those circumstances, a treaty provision of a compelling humanitarian nature that has not been questioned by any statements of reservation or interpretation and is not inconsistent with general State practice in the two decades since the conclusion of the treaty may reasonably be considered to have come to reflect customary international humanitarian law. Recalling the purpose of Article 54, the Commission concludes that the provisions of Article 54 that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become part of customary international humanitarian law by 1999 and, consequently, was applicable to Ethiopia's attacks on the Harsile reservoir in February 1999 and June 2000. Therefore, those aerial bombardments, which fortunately failed to damage the reservoir, were in violation of applicable international

humanitarian law. As no damage has been shown, that finding, by itself, shall be satisfaction to Eritrea for that violation. [...]

## **VI. AERIAL BOMBARDMENT OF HIRGIGO POWER STATION (ERITREA'S CLAIM 25)**

[...]

### **C. The Merits**

111. 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.

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 was not applicable as part of a treaty binding on both Parties to the conflict, but it is widely accepted as an expression of customary international law, and Ethiopia did not contend otherwise. The Commission notes that none of the 160 Parties to that Protocol has attached to its signature or instrument of ratification a reservation or statement of interpretation that would indicate disagreement with that definition. 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, paragraph 2, of Geneva Protocol I is a statement of customary international humanitarian law and, as such, was applicable to the conflict between the two Parties. [...]

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 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.

[...]

## **Ethiopia's Claim 2**

**[Source:** Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Ethiopia's Claim 2, Between the Federal democratic Republic of Ethiopia and the State of Eritrea. The Hague, April 28, 2004. The Permanent Court of Arbitration, the Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)].

## **PARTIAL AWARD**

### **Central Front Ethiopia's Claim 2 Between the Federal democratic Republic of Ethiopia and the State of Eritrea**

[...]

#### **J. Aerial Bombardment of Mekele**

1. On June 5, 1998, Ethiopia and Eritrea exchanged air strikes, Ethiopia attacking the Asmara airport and Eritrea attacking the Mekele airport. Each accuses the other of striking first, but that is a question the Commission need not address, because both airports housed military aircraft and were unquestionably legitimate military objectives under international humanitarian law. Ethiopia's claim in the present case is based not upon deaths, wounds and damage at the Mekele airport, but upon the fact that Eritrean aircraft also dropped cluster bombs that killed and wounded civilians and damaged property in the vicinity of the Ayder School and the surrounding neighborhood in Mekele town. Ethiopia states that those bombs killed fifty-three civilians, including twelve school children, and wounded 185 civilians,

including forty-two school children.

2. Ethiopia alleges that Eritrea intentionally targeted this civilian neighborhood in violation of international law. Eritrea vigorously denies this allegation. While Eritrea acknowledges that one of its aircraft did drop cluster bombs in the vicinity of the Ayder School, it contends that this was an accident incidental to legitimate military operations, not a deliberate attack, and consequently not a basis for liability.

[...]

1. After carefully considering all the evidence, the Commission concludes that the fourth sortie dropped at least one cluster bomb on the Ayder neighborhood and that there is no evidence that it dropped any bomb on or near Mekele airport. [...]
2. Consequently, the Commission holds that Eritrea's four sorties resulted in two strikes hitting Mekele airport and two strikes hitting the Ayder neighborhood in Mekele. Nevertheless, the Commission is not prepared to draw the conclusion urged by Ethiopia, as it is not convinced that Eritrea deliberately targeted a civilian neighborhood. Eritrea had obvious and compelling reasons to concentrate its limited air assets on Ethiopia's air fighting capability – its combat aircraft and the Mekele airport, which was within twenty to twenty-five minutes' flight time from Asmara. Moreover, it is not credible that Eritrea would see advantage in setting the precedent of targeting civilians, given Ethiopia's apparent air superiority.
3. The Commission acknowledges the long odds against two consecutive sorties taking precisely the same targeting error, particularly in view of Eritrea's representation that the two aircraft's computers were programmed for two different targets. However, the Commission must also take into account the evidence that Eritrea had little experience with these weapons and that the individual programmers and pilots were utterly inexperienced, and it recognizes the possibility that, in the confusion and excitement of June 5, both computers could have been loaded with the same inaccurate targeting data. It also recognizes that the pilots could reprogram or could drop their bombs without reliance on the computer. For example, it is conceivable that the pilot of the third sortie simply released too early through either computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported. It is also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie.
4. The Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force's choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea's argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all "feasible" precautions, not precautions that are practically impossible. However, the Commission has serious concerns about the manner in which these operations were carried out. The failure of two out of three bomb runs to come close to their intended targets clearly indicates a lack of essential care in conducting them, compounded by Eritrea's failure to take appropriate actions afterwards to prevent future recurrence.

[...]

1. From the evidence available to it, the Commission cannot determine why the bombs dropped by the third and fourth sorties hit the Ayder neighborhood. All of the information critical to that issue was in the hands of Eritrea or could have been obtained by it, and Eritrea did not make it available. In those circumstances, the Commission is entitled to draw adverse inferences reinforcing the conclusions already indicated that not all feasible precautions were taken by Eritrea in its conduct of the air strikes on Mekele on June 5, 1998.
2. For these reasons, the Commission finds that Eritrea is liable for the deaths, wounds and physical damage to civilians and civilian objects caused in Mekele by the third and fourth sorties on June 5, 1998.

## K. Aksum

1. Ethiopia claims that Eritrea also bombed the Aksum civilian airport late on June 5, 1998, the same day that Mekele was bombed. Eritrea denies any such bombing. The Commission believes that there is credible evidence that a bomb was dropped and some damage caused at the Aksum airport on that date. It is possible that it was dropped by Eritrea's sortie number four, which may have dropped only one of its two bombs on Mekele. In any event, the Commission finds no liability for this Aksum bombing, as an airfield is a legitimate target, even when there are no military personnel there at the time. The landing strip and other facilities could be used later for military purposes.

[...]

## Discussion

1. Is Art. 52(2) of Protocol I customary law?
2.
  - a. Can it be rightly stated that the Hirgigo Power Station was a legitimate military objective, as the Commission did? According to IHL, could any electric power station be considered as a military objective? In what sense do electric power stations make an "effective contribution to military action"?
  - b. Is the fact that an electric power station generally meets the wartime needs of communication, transport and industry (*para. 117*) sufficient for it to be considered as making an effective contribution to military action? Is the fact that in our case the port and naval base of Massawa would have been supplied with power sufficient?
  - c. Does the fact that anti-aircraft guns are sited in the vicinity of a power plant make it a military objective? Is it an indication that it contributes to military action?
3. Do you agree with the Commission's understanding of the word "purpose" in Art. 52(2) of Protocol I? Can the Commission argue that the power plant, as a *future* "effective contribution to military action", can be defined as a military objective?
4.
  - a. Would the partial or total destruction of the Hirgigo Power Station have offered a "definite military advantage" to Ethiopia, according to the Commission? According to IHL?
  - b. To your mind, is the Commission right in arguing that the "effective pressure to end an armed conflict" constitutes an evident military advantage? Do you agree with the Commission's understanding of the term "definite military advantage", according to which the military advantage has to be determined "in the context of the military operations between the Parties *taken as a*

*whole, not simply in the context of a specific attack*" (emphasis added)? Is "the armed conflict as a whole" (para. 113) and "military operations as a whole" the same standard?

5. If the power plant was a military objective, was the attack on it necessarily lawful? Should not the Commission have evaluated the proportionality between the military advantage of cutting the power supply to the port and naval base of Massawa and the effects upon the civilian population? (P I, Art. 51(5)(b))
6.
  - a. Is Art. 54 of Protocol I customary law? On what elements does the Commission base its finding that it is?
  - b. If Art. 54 of Protocol I had not been found to be customary law, would the Harsile Water Reservoir have been a legitimate military objective?
  - c. Do you think Art. 54(2) could have been applied to the Hirgigo Power Station's case?
7.
  - a. Was the Ayder neighbourhood in Mekele a military objective? If not, was the attack on it not a prohibited attack on civilians and civilian objects? Why was it not? Was the proportionality principle violated? Were the necessary precautionary measures not taken?
  - b. Does the Commission explain which precautionary measures should have been taken? On what elements does the Commission base its finding that not all feasible precautionary measures were taken? What elements influence the feasibility?
  - c. May one assume that a belligerent who had an obligation to take feasible precautionary measures to avoid a result that actually occurred did not take those measures if he does not explain how his forces proceeded?
8. Under which conditions can a civilian airport be regarded as a legitimate military objective? Given that there were no military personnel at the Aksum civilian airport, could one argue that since its "landing strip and other facilities could be used later for military purposes", the airport can be considered a legitimate target?

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