1. Customary international humanitarian law, as formulated in Article 52, paragraph 2, of Geneva Protocol I, 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.\(^1\) Similarly, more is required than a mere contribution to the “war-fighting capability” of the enemy.\(^2\)

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.\(^3\) 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.\(^4\)

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

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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.⁵

7. The Hirigigo 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.⁶ A determination that the Hirigigo power station was a military objective must sufficiently specify the basis for this assumption.⁷

8. Ethiopia has declared – and Eritrea has not denied – that stockpiles of military hardware and weapons were stored at the Massawa port.⁸ Consequently, the Massawa port was undoubtedly a military objective. Ethiopia did not, however, in my opinion, sufficiently specify the extent to which Hirigigo 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”⁹ is insufficient. Moreover, the presence of anti-aircraft missiles in the vicinity of the Hirigigo 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.¹⁰

9. Furthermore, military action must be proportional, i.e. the military advantage must outweigh the damage to civilians and civilian objects.¹¹ 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:

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⁵ See, e.g., ICRC Commentary, supra note 3, at para. 2034; David, supra note 4, at p. 274; Flick, supra note 4, at p. 164.
⁶ See, e.g., ICTY Report, supra note 4, paras. 35 & 39; Flick, supra note 4, at pp. 158 & 161.
⁷ Bothe, supra note 4, at p. 535.
⁸ Ethiopia’s Counter Memorial to Eritrea’s Claim 25, filed by Ethiopia on January 17, 2005, at p. 24.
⁹ Id. at p. 24.
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(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.\textsuperscript{12}

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.\textsuperscript{13} 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.

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\underline{Hans van Houtte}

\textsuperscript{12} David, supra note 4, at p. 274.

\textsuperscript{13} Leslie Green, The Contemporary Law of Armed Conflict p. 193 (Manchester University Press, 2d ed. 2006).