

Switzerland, Swiss Federal Criminal Court Finds Liberian Commander Guilty of War Crimes

This case deals with the Swiss Federal Criminal Court judgment of Alieu Kosiah, a Liberian who was tried for several crimes, including the use of a child soldier and ordering the killings of civilians, committed during the First Liberian Civil War (1989-1996). Alieu Kosiah held the position of a commander within the United Liberation Movement of Liberia for Democracy (ULIMO) a rebel group, which was involved in an armed conflict against the National Patriotic Front of Liberia (NPFL). This judgment was the first time a Liberian national was found guilty of war crimes in relation to the Liberian Civil Wars.

Acknowledgments

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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.

DECISION OF THE SWISS FEDERAL CRIMINAL COURT OF 18 JUNE 2021

[Source: Decision of the Swiss Federal Criminal Court dated 18 June 2021, available at: <https://75890720.flowpaper.com/20210618SK2019171/#page=1> (footnotes omitted), unofficial translation]

[...]

In fact

[...]

A. The proceedings

[...]

B. Personal situation of the defendant

[...]

[1] [...] Alieu Kosiah has indicated that he returned to Liberia in 1992 or 1993 and took part in the war, in the United Liberation Movement of Liberia for Democracy (ULIMO) faction, until 1995. [...]

[...]

C. Brief history of the first civil war in Liberia

Overview

[2] The first civil war in Liberia began in late 1989, in a context of great instability linked to the repressive and authoritarian policies of the government of Samuel Doe [...]. The war is widely considered to have begun on 24 December 1989, when around one hundred insurgents, from the ranks of the National Patriotic Front of Liberia (NPFL), under the command of Charles Taylor, [...] entered Liberia from Côte d'Ivoire and took the Butuo border post in Nimba County. [...]. The NPFL's incursion marked the start of a series of clashes between the NPFL and the armed forces of Liberia (AFL). The AFL were made up primarily of ethnic Krahn soldiers, who were hostile to the NPFL. They arrived in Nimba County to push back the NPFL and targeted Gio and Mano communities, who were suspected of supporting the insurgents. The NPFL went against Krahn and Mandingo communities, which they considered to be government sympathisers. They comprised two separate forces [...]. Following the clashes in Nimba County, the fighting between the NPFL and AFL spread towards the coast of Liberia and Monrovia. In mid-1990, the NPFL controlled over 80% of the territory of Liberia. The arrival of the NPFL in Liberia triggered a reaction from other countries in the region, which, through the Economic Community of West African States (ECOWAS), set up an intervention force, the ECOWAS Monitoring Group (ECOMOG). This group was dominated by Nigeria, which provided the majority of the troops. Other troops came from Ghana, Guinea, Sierra Leone and the Gambia. ECOMOG arrived in Monrovia on 24 August 1990 and managed to halt the NPFL's advances, pushing them far out of the city [...].

[3] Samuel Doe's regime came to an end on 9 September 1990 when he was assassinated by insurgents from the Independent National Patriotic Front of Liberia (INPFL), a dissident group that had separated from the NPFL in late July 1990, [...].

[4] On 28 November 1990, a ceasefire agreement was signed in Bamako, which provided for the establishment of an interim government [...].

[5] In early 1991, a movement was organized in Conakry, in Guinea, made up primarily of Mandingo refugees, whose aim was to return to Liberia to fight the NPFL. This movement was known as the Movement for the Redemption of Muslims (MRM) [...]. In May 1991, it merged with another movement made up of former ethnic Krahn soldiers from the AFL who had been deployed to Sierra Leone to fight Charles Taylor. This movement was the Liberian United Defense Force (LDUF). The merged group was known as the United Liberation Movement of Liberia for Democracy (ULIMO) [...]. Formed from within the Liberian diaspora in Sierra Leone and Guinea, ULIMO had the support of those two countries, particularly for the supply of weapons [...]. ULIMO was made up of two battalions [...].

[6] ULIMO entered Liberia in September 1991, with the support of ECOMOG. From February 1992, there were violent clashes between the NPFL and ULIMO. [...]

[7] In October 1992, threatened by the advance of ULIMO in Liberia, the NPFL launched operation "Octopus" with the aim of removing ECOMOG from Monrovia and taking over the capital. However, ECOMOG, with the support of the AFL and ULIMO, pushed Charles Taylor's troops back [...].

[...]

[8] On 25 July 1993, the three parties to the conflict, that is, the NPFL, ULIMO and the interim government sponsored by ECOMOG, signed the Cotonou Agreement, which provided for a ceasefire, the establishment of a new transitional authority, and disarmament and demobilization. This peace process failed, however, after only a few months, mainly because new armed groups emerged that did not consider themselves to be bound by the Cotonou Agreement [...].

[9] In October 1993, the Liberian Peace Council (LPC), composed primarily of ethnic Krahn former soldiers, was created. This group focused its fight against the NPFL in the south-east of Liberia. At the same time, Charles Taylor organized the formation of a new faction, the Lofa Defense Force (LDF), [...] to fight against ULIMO in Lofa County [...].

[10] In March 1994, following the Cotonou Agreement and disagreements about the election of ULIMO representatives to the transitional government authority, ULIMO was split in two: a Mandingo wing (ULIMO-K) [...] and a Krahn wing (ULIMO-J) [...].

[...]

[11] On 19 August 1995, the Abuja Peace Agreement was signed, which included a ceasefire, the establishment of a new transitional government and elections within one year. In December 1995, ULIMO-J violated the ceasefire when it attacked ECOMOG positions in Tubmanburg. On 6 April 1995, the situation worsened again, with a failed attempt to arrest the leader of ULIMO-J, [...] by the NPFL and ULIMO-K. There

were clashes in Monrovia involving all Krahn factions (ULIMO-J, AFL, LPC), the NPFL and ULIMO-K [...].

[12] In August 1996, the factions signed a second Abuja Peace Agreement, which reinstated the ceasefire, ordered the troops to disarm and provided for elections on 30 May 1997, which were eventually postponed until 19 July 1997. Charles Taylor was then elected president with 75% of the vote and became the head of state, bringing an end to seven years of civil war [...].

[...]

The Court considers in law:

1. Authority

[...]

2. Interlocutory and incidental matters

[...]

3. Requests for evidence

[...]

4. Applicable law

[...]

4.4.1 Spatial and temporal scope of application

[13] Under Article 1 common to the Geneva Conventions (GC), the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances.

[14] The four Geneva Conventions of 12 August 1949 have been ratified by both Switzerland and Liberia. They entered into force in Switzerland on 21 October 1951 and in Liberia on 29 September 1954.

[15] Under Article 1.1 of Additional Protocol II (AP II), the Protocol applies to all armed conflicts not covered by Additional Protocol I (international armed conflicts) that take place in the territory of a High Contracting Party [...].

[16] Both Switzerland and Liberia have ratified AP II, which entered into force in Switzerland on 17 August

1982 and in Liberia on 30 December 1988.

[17] As the events that the defendant has been accused of committing happened between 1993 and 1996, Article 3 common to the GC and Article 4 of AP II are applicable *ratione loci et temporis* in the present case.

4.4.2 Material scope of application

[18] Article 3 common to the GC covers armed conflicts "not of an international character", whereas Article 2 covers fighting between States. International armed conflict is referred to when one or several States use armed force against another State [...]. Armed conflicts not of an international character are those in which at least one of the parties involved is not governmental. Depending on the circumstances, the hostilities may occur between one (or several) armed group(s) and State forces, or only between armed groups (ICTY, Tadic Case, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70).

[19] An "armed conflict" exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there [...]. For there to be an "armed conflict", the situation must reach a level that distinguishes it from other forms of less serious violence to which international humanitarian law does not apply, such as internal disturbances or tensions, riots or acts of banditry [...]. The required threshold for violence in the case of a non-international armed conflict is higher than for an international armed conflict [...]. Practice, particularly that of the International Criminal Tribunal for the former Yugoslavia (ICTY), demonstrates that this threshold is reached whenever the situation can be qualified as "protracted armed violence" (ICTY, Tadic Case, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70). The condition of the existence of armed conflict must be assessed in the light of two fundamental criteria: the intensity of the violence and the organization of the parties to the conflict [...].

[20] Concerning the criterion of the intensity of the violence, it is necessary to consider the seriousness of the attacks, the multiplication of armed clashes, the spread of the fighting over a given territory and period, the strengthening and mobilization of governmental forces, the collective nature of the fighting, the fact that the State has been forced to resort to using its army (with the police forces no longer able to handle the situation alone), the territorial control exercised by the opposition forces, the length of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used (in particular, the use of heavy weaponry and other military equipment such as tanks or other heavy vehicles), blockades or sieges of town and intense looting of them, the extent of the destruction and the number of victims of bombings or fighting

(deaths, injuries, displacements, etc.), the number of soldiers or units deployed, the existence of front lines between the parties and the movement of those front lines, road closures, the existence of ceasefire orders or agreements, and the extent of the efforts of representatives of international organizations to obtain and ensure compliance with ceasefire agreements. These are factors to be assessed on a case-by-case basis in order to determine whether the intensity threshold has been reached; they are not conditions that must all be met cumulatively [...].

[21] Concerning the criterion of organization, the perpetrators of armed violence must be organized to a minimal extent. Governmental forces are presumed to meet this requirement without it being necessary to conduct an assessment in each case [...]. For non-governmental armed groups, the indications that are taken into consideration include the existence of an organization chart explaining the command structure, the power to launch operations involving coordination between different units, the capacity to recruit and train new combatants and the existence of internal regulations [...]. [...]

[22] AP II is an instrument that completes and develops common Article 3; it is an extension of it and is based on the same economy [...]. The threshold for application of AP II is determined by the criteria set out in Article 1 thereof. Under Article 1.1 of AP II, which develops and completes Article 3 common to the GC without modifying its present conditions of application, AP II applies to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations [...].

[23] AP II is therefore applicable to non-international armed conflicts. The definition in AP II is narrower than that in Article 3 common to the GC in two ways. First, it introduces the condition of control over territory, specifying that non-governmental parties must exercise such control "as to enable them to carry out sustained and concerted military operations". Second, the application of AP II is expressly limited to armed conflicts between State armed forces and dissident armed forces or other organized armed groups. Unlike common Article 3, AP II does not apply to armed conflicts involving only non-State armed groups. As with common Article 3, there can only be a non-international armed conflict within the meaning of AP II if the situation reaches a certain level of violence that distinguishes it from internal disturbances and tensions. The scope of application of this instrument is, however, more restricted than that of Article 3 common to the GC. It requires non-governmental forces to have a particularly high level of organization, as they must be placed "under responsible command" and exercise such territorial control "as to enable them to carry out sustained and concerted military operations".

[24] While Article 3 common to the GC also supposes that armed groups demonstrate a certain level of organization, it does not require these groups to be able to control part of the territory. It could therefore be

the case that a conflict falls within the scope of common Article 3 but does not meet the conditions required under AP II. However, all armed conflicts covered by AP II are also covered by common Article 3 [...]. The extent of the territorial control required could be subject to different assessments depending on the case. If a broad interpretation is adopted, the notion of non-international armed conflict within the meaning of AP II is similar to that provided in Article 3 common to the GC. In this case, even temporary and geographically limited control is sufficient. However, if a strict interpretation of Article 1.1 of AP II is used, the situations covered by AP II are limited to cases where the non-governmental party exercises similar control to that of a State or where the nature of the fighting is similar to that of an international armed conflict [...]. The ICRC seems to adopt an intermediary position on this point, stating that territorial control can sometimes "be relative, for example, when urban centres remain in government hands while rural areas escape their authority". It nevertheless considers that the nature of the obligations set forth in AP II assumes that "there must be some degree of stability in the control of even a modest area of land" [...].

[25] In the case in point, the acts of which Alieu Kosiah is accused were carried out in the context of the first civil war that took place in Liberia between 1989 and 1996. Concerning the non-international nature of the conflict, it was a war that remained within Liberia's borders and that consisted firstly of fighting between governmental forces (AFL) and a dissident group, the NPFL, and eventually involved other armed groups in the country, including ULIMO [...]. The non-international nature of the conflict is not contested by the parties.

[26] The armed nature of the conflict is not contested either. In that regard, the following points should be noted.

[27] With regard to the criteria of the intensity of the violence, the war lasted from December 1989 until August 1996, which is seven years. There were numerous clashes, particularly around Monrovia [...] and in Lofa County [...]. The different forces involved fought against each other and successively controlled areas of the country's territory. The conflict was marked by events such as the assassination of President Samuel Doe in September 1990 [...] and operation "Octopus" [...] led by the NPFL in October 1992. The various armed factions fought for control of different territorial areas of Liberia. In mid-1990, the NPFL controlled 80% of the national territory. For a long time, ECOMOG and the AFL controlled Monrovia and the surrounding areas [...]. ULIMO took over the west of the country, particularly Lofa County [...]. The governmental forces (AFL) were deployed when NPFL entered Liberia and the AFL became one of the main forces involved [...]. In August 1990, the AFL began to receive the support of ECOMOG, an intergovernmental intervention force established by countries from the West Africa region. In terms of weapons, both ULIMO and the NPFL used heavy artillery after Zorzor was taken by ULIMO [...]. During the seven years of the civil war, several ceasefire agreements were signed and then violated by renewed hostilities, until the last agreement, the second Abuja Peace Agreement, which was signed in August 1996 and brought an end to Liberia's first civil war [...]. There are no official figures concerning the number of victims of the conflict. All sources mention, however, that there were several hundreds of thousands of victims [...]. In addition to the large number of victims, there was large-scale looting and destruction of towns, villages and infrastructure by the various

factions involved in the first civil war in Liberia. The NPFL destroyed most of the homes in the town of Voinjama in early 1993 and ULIMO was accused of destroying villages in Lofa County as well as traditional sanctuaries and electric power generators and plants [...]. Numerous civilians were also forced to flee the combat zones. According to the Liberian Truth and Reconciliation Commission (TRC), more than 160,000 civilians fled Liberia for Guinea and Côte d'Ivoire between January and May 1990 [...]. In its 16 December 1992 edition, Monrovia's *Daily News* reported that over 700,000 people had fled Liberia since the start of the war and 750,000 had been internally displaced [...].

[28] Concerning the criteria of organization, it should be noted that ULIMO, of which the defendant was a member, also had a command structure. [...]. When ULIMO split in 1994, ULIMO-K and ULIMO-J each had their own leader [...]. Even if the ULIMO chain of command varied throughout the seven years of the civil war and combatants awarded themselves military grades, ULIMO, and then ULIMO-K and ULIMO-J, were nevertheless organized based on a military structure and had common interests and objectives, which enabled them to take control of numerous areas, particularly Lofa County. ULIMO was therefore capable of carrying out operations in an organized manner that enabled them to take control of that county [...]. In terms of numbers, before the division, ULIMO had 6,000 men [...]. ULIMO recruited new members from within the civilian population, including children [...]. In terms of weapons, they were able to obtain supplies from Sierra Leone and Guinea [...]. In addition, soldiers received training in Sierra Leone [...].

[29] In the light of the foregoing, an armed conflict did occur during Liberia's first civil war, given both the intensity of the violence and the organization of the factions, particularly the ULIMO group, of which the defendant was a member.

[30] The existence of a non-international armed conflict having been recognized, Article 3 common to the GC and Article 4 of AP II are materially applicable to the acts of which Alieu Kosiah is accused in the indictment of 22 March 2019, provided that those acts were committed within the context of the armed conflict, which will be examined individually.

4.4.3 Personal scope of application

[31] Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause are protected under Article 3 common to the GC [...].

[32] All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted [...], as well as children, are protected under Article 4 of AP II [...].

[33] Furthermore, killing a combatant who has not been captured or is not 'hors de combat', or a civilian who is taking an active part in the hostilities is, in theory, lawful under international humanitarian law and therefore not criminally punishable [...].

[34] The acts of which Alieu Kosiah is accused in the indictment were committed against civilians not taking part in the hostilities, against captured combatants and against a child, meaning that Article 3 common to the GC and Article 4 of AP II are applicable, *rationae personae*, to the presumed victims of the crimes in question.

[...]

5. Statute of limitations

[...]

6. Matters concerning the witness statements

[...]

7. Charges against Alieu Kosiah

7.1. Recruitment and use of a child soldier

7.1.1 Charge

[35] [...] Alieu Kosiah is accused, in the context of the domestic armed conflict that occurred in Liberia between 1989 and 1996 and as a member of the ULIMO armed faction, of recruiting the child Olivier [...] and allowing him to take part in the hostilities in the Lofa region from January 1993 until [...], the date of Olivier's 15th birthday.

7.1.2 Evidence

[...]

[36] [...] Olivier has stated that ULIMO arrived in the area of Todee [...] in 1992 [...]. The NPFL had been forced to retreat and Olivier was one of the civilians who was captured by the Zebra battalion of the ULIMO group [...]. This is how he ended up joining ULIMO, even though he must have been 12 years old [...]. That was when he met Alieu Kosiah, who was one of the ULIMO commanders [...]. The defendant then took him on as a child soldier [...]. According to Olivier, when ULIMO wanted to kill the group of captured civilians, the defendant prevented them from being executed [...]. He has stated that he joined ULIMO voluntarily because of the benefits that it brought, which were that he would not have to see his sister raped before his eyes, would not have to watch his brother being killed and would not have to carry heavy loads. It was also safer for his own life to be able to carry a weapon. He also wanted to be able to defend his country. Indeed, the

NPFL had caused much destruction in the country. The aim was to overthrow Charles Taylor and bring an end to the fighting with the NPFL, which had destroyed many things in the country and had raped and killed people [...]. Olivier became one of Alieu Kosiah's small soldiers [...]. The latter was his personal commander and Olivier was assigned to him directly. Whichever front line Alieu Kosiah went to, Olivier went with him [...]. Olivier was not assigned to Alieu Kosiah against his will. He decided to join him five or six months after being recruited [...]. He says that Alieu Kosiah was someone who liked children very much and who looked after them [...]. For Olivier, Alieu Kosiah looked after him like a father [...]. He has stated that when he met him, the defendant did "good things in his presence". After being recruited, Olivier had to do around three months of training, during which he was taught how to handle weapons, how to take cover and how to hide. [...]. After his training, Olivier was given his first weapon, an AK-47. He was subsequently given other weapons [...].

[37] Concerning his role by the defendant's side, Olivier has stated that he served as his bodyguard. [...]. His work, for which he was not remunerated, consisted of ensuring that Alieu Kosiah was safe [...]. [...]. When he went to the front line with Alieu Kosiah, he was given instructions by the latter [...]. [...]

[...]

[38] Alieu Kosiah has said that he did not recruit Olivier. It is his understanding that recruiting someone entails going and finding them and bringing them to a training camp [...]. He never saw ULIMO soldiers recruiting small soldiers and has indicated that he did not know how small soldiers other than Olivier ended up with the group. He had never heard that the young people had been forced to join the ULIMO faction. He has stated that some of them joined the group by themselves in order to survive and to be able to eat. Alieu Kosiah puts the number of small soldiers that he saw with the ULIMO in Voinjama at five. He has also stated that he did not know the reason why the ULIMO wanted to have young people within its group [...]. Alieu Kosiah does not know when and where Olivier may have been given training. According to Alieu Kosiah, many people said that they had received training when they had not. In general, ULIMO soldiers were not given any training. It was impossible to do in three months, given the unstable situation caused by the war. Sometimes, the soldiers were given a week of training to learn how to handle a weapon [...].

[...]

7.1.3 Law and assessment of evidence

[39] Under Article 4.3 (c) of AP II, children shall be provided with the care and aid they require, and in particular children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

[40] Children are particularly vulnerable. They require preferential treatment relative to the rest of the civilian

population; that is why they are afforded special legal protection [...]. Intentionally, a precise definition of the term "child" has not been given by the legislator. In the same way, the moment when a human being ceases to be a child and becomes an adult is not universally defined. Depending on the culture, it can vary between the age of around 15 and 18. With regard to the recruitment and use of children within an army, AP II sets the lower limit at 15 years of age [...]. Prohibiting the use of children in military operations is fundamental to their protection. [...] The principle of non-recruitment also prohibits the acceptance of voluntary enrolment [...]. Not only can the child not be recruited or enrolled, they are not "allowed to take part in hostilities". Voluntary inclusion and forced inclusion are two variants of the crime of recruitment provided for in AP II, the second being an aggravated form of the crime [...].

[41] The aim of prohibiting the recruitment and use of child soldiers is the protection of the physical and psychological integrity of children against the risks of armed conflict, the protection of all persons against the actions perpetrated by child soldiers in armed conflicts and, as with all offences relating to war crimes, peace [...]. [...]

[...]

[42] [...] AP II stipulates that children who have not attained the age of 15 years shall not be allowed to "take part in hostilities". This is a broad formulation that can be extensively interpreted [...]. This rule was created with the aim of allowing for a broad interpretation of what taking part in hostilities means, with acts such as collecting information, transmitting orders, transporting munitions and other supplies and sabotage also covered by this notion [...]. Article 8 of the Rome Statute covers the act of using children under the age of 15 years "to participate actively in hostilities". The International Criminal Court has ruled that the conduct covered by the expression "participate actively in hostilities" can be broadly interpreted. The notion of active participation within the meaning of Article 8 of the Rome Statute therefore overlaps with that contained in Article 4 of AP II, with the fundamental criteria being that the child must, at the very least, constitute a potential target in the course of the hostilities. It is therefore crucial to determine whether the support that the child provides to the combatants exposes the child to real danger, making the child a potential target [...].

[43] In this case, which involves recruitment, it has been established that Alieu Kosiah was present when Olivier was captured, as the statements of the two participants are consistent on this point. It has also been established that Olivier was under the age of 15 when he was arrested by ULIMO. In fact, based on the statements of the defendant and the witness, they met between the end of 1992 and March 1993. Olivier was born on [...] and was therefore 12 years old at the time. Moreover, the fact that Olivier voluntarily joined the ULIMO armed faction to avoid mistreatment by the NPFL rebels does not exonerate the defendant, as recruitment includes both forcing a child to join the ranks of an army and accepting that the child chooses to join a military entity. [...]

[44] The Court notes, however, that the indictment of 22 March 2019 does not describe how Alieu Kosiah may have been involved in the recruitment of Olivier. [...]

[...]

[45] In conclusion, Alieu Kosiah is acquitted of the crime of recruiting a child soldier and found guilty of using a child soldier [...].

[...]

7.2 Ordering the murder of seven civilians in Zorzor

[...]

[46] [...] Alieu Kosiah is accused, in the context of the domestic armed conflict that took place in Liberia from 1989 to 1996 and as a member of the ULIMO armed faction, of ordering the murders of seven civilians in Zorzor, including N., in March 1993.

[...]

[47] [...] The complainant saw and heard Alieu Kosiah giving the orders to kill these seven people [...].

[...]

[48] Alieu Kosiah accused them of being NPFL rebels. The individuals contested this but Alieu Kosiah maintained that they were part of the rebels and ordered his boys to kill them [...]. To give the order to execute, Alieu Kosiah allegedly said "kill these people because they're NPFL fighters" [...]. According to the complainant, Alieu Kosiah was the leader of the group because everyone called him "Chief Kosiah". [...]

[...]

7.2.3 Law and assessment of the evidence

[49] Under Article 3.1.1 (a) common to the GC, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture are and shall remain prohibited at any time and in any place whatsoever with respect to persons not taking part in the hostilities.

[50] Under Article 4.2 (a) of AP II, violence to the life, health and physical or mental well-being of all persons who do not take a direct part or who have ceased to take part in hostilities, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment are and shall remain prohibited at any time and in any place whatsoever.

[...]

[51] Civilians can be defined as persons that are not part of the State or non-State armed forces (ICC, Katanga Case, Judgement of 7 March 2014, para. 784 ss.).

[52] Objectively, given Paul's consistent statements, it must be upheld that Alieu Kosiah gave the order to the ULIMO soldiers present in Zorzor to execute the seven people, including the brother of the complainant, and that they executed that order by killing them with blows from bats and mallets. The civilian characteristic of the people killed must be upheld. There is no element in the description given by Paul that suggests that they were soldiers. They were selected at random with the deliberate aim of causing terror and enabling ULIMO to impose their authority in the village that ULIMO had just captured. The alleged membership of the victims to the NPFL was just a pretext for killing them. This pretext for committing murder was mentioned on several occasions during the proceedings [...]. Concerning Alieu Kosiah's quality as a superior, there is no need to specifically establish the defendant's hierarchical position at the time of the events. This exercise would be impossible, as it was emphasized in the preliminary proceedings and the debates that ULIMO was a rebel, non-State faction, that the ranks were not clearly defined and that soldiers awarded themselves unofficial ranks and functions. To determine the defendant's responsibility, it is sufficient to be able to establish that his hierarchical position was higher than that of the soldiers to whom he gave the order to kill. Paul has clearly stated that the soldiers called the defendant "Chief Kosiah" and that the orders he gave were executed. These elements are objectively sufficient to determine Alieu Kosiah's responsibility [...].

[...]

[53] Alieu Kosiah must therefore be found guilty of ordering the killing of seven civilians [...].

[...]

Discussion

Abbreviations: AFL: Armed Forces of Liberia ECOMOG: Economic Community of West African States Monitoring NPFL: National Patriotic Front of Liberation ULIMO: United Liberation Movement of Liberia for Democracy

I. Classification of the situation and applicable law

1. (*Paras [2]-[12], [18]-[21], [26]-[30]*)

1. How would you classify the situation in Liberia from 1989 to 1996 involving the NPFL, the AFL, the ULIMO, and the ECOMOG? What criteria must be met for there to be an armed conflict? What is the classification made by the Court? On what grounds?
2. Did the classification change after the first ceasefire agreement of November 28, 1990? After the

second of July 25, 1993? After the third of August 19, 1995? After the fourth of August 1996?

3. (*Paras [2], [5] and [28]*) Does the fact that members of ULIMO were formed and supported by Sierra Leone and Guinea make both States parties to the conflict? If not, what additional elements may make the classification change?
4. What element(s) need to be fulfilled to define a non-State party as an “organized armed group”? Are only “organized armed groups” bound by the law of NIAC? Or is the existence of at least one organized armed group (fighting the government or of two such groups fighting each other) a condition for the existence of an armed conflict? (GC I-IV, Common Art. 3)
5. Is it sufficient that one non-State armed group fulfils the threshold of application of Common Article 3 to the Geneva Conventions or Protocol II to automatically consider that all armed groups are parties to the conflict? Or should one assesses the existence of an armed conflict in respect to each individual armed group? If a NIAC exists, are only those belonging to an organized armed group belonging to a party bound by IHL?

2. (*Paras [13]-[30]*) Which IHL texts apply between the parties to the conflict in Liberia from 1989 to 1996? Under what conditions is Additional Protocol II applicable? Does it apply to the case at hand? What about customary IHL?

II. Recruitment and use of child soldiers

3. (*Para. [40]*) Are children afforded specific protection in NIACs? If yes, until which age? Can the definition of “child” vary under IHL? (P II, Arts 4(3) and 6(4); CIHL, Rules 135-137)

4. (*Paras [35]-[45]*)

1. Do you agree with Alieu Kosiah’s understanding that “recruiting someone is the act of picking them up and bringing them to the training camp”? If not, what is the definition of recruitment? (P II, Art. 4(3)(c); CIHL, Rule 136)
2. Is the forced recruitment of civilians prohibited by the IHL of NIACs? If the recruited persons are above 18 years of age? If they are between 15 and 18? If they are below 15? What if the children voluntarily enlist? In the government’s forces? In a non-state armed group? What are the differences between the formulations of the provisions relating to child soldiers addressed to governments and armed groups? (GC I-IV, Common Art. 3; P II, Art. 4(3)(c); CIHL, Rules 136 and 137; 1989 Convention on the Rights of the Child, Art. 38(2) and (3); ICC Statute, Art. 8(2)(e)(vii); See Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, Arts 1-4)
3. Are non-State armed groups, like the ULIMO, obliged under IHL to ensure that their soldiers are above the prescribed age by conducting age screening procedures?
4. (*Paras [36] and [40]*) How can the distinction between voluntary and forced recruitment be drawn? To what extent can a child give its consent to being a soldier?

5. (*Paras [35]-[45]*)

1. What criteria should be considered to determine whether a child is actively involved in hostilities? Does the different formulation in the two Additional Protocols also entail a different meaning (P I, Art. 77(2); P

II, Art. 4(3)(c))? Should the notion of direct participation in this context be interpreted in the same way as in the context of conduct of hostilities? Does the different formulation in the P II and ICC Statute also entail a different meaning? (P II, Art. 4(3)(c); ICC Statute, Art. 8(2)(e)(vii); See ICRC, Interpretive guidance on the notion of direct participation in hostilities)

2. May child soldiers be classified as combatants in an IAC? In NIAC? (P I, Art. 77(3); P II, Art. 4(3)(d))
3. Does a child lose his or her special protection if he or she takes direct part in hostilities? Does IHL allow the targeting of child soldiers who are actively participating in hostilities? Who have a continuous combat function? Does the principle of necessity require the attacking forces to try to capture a child soldier before killing him or her? (P II, Art. 4(3)(d); CIHL, Rules 7 and 137; see ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)
4. According to you, is there a contradiction between affording children special protection and at the same time allowing the targeting of children taking direct part in hostilities?
5. Is the use of a child soldier a war crime? (GC IV, Art. 147; P I, Arts 11(4), 77(2) and 85; P II, Art. 4(3); CIHL, Rule 137 and 156; ICC Statute, Art. 8(2)(b)(i) and (e)(vii))

III. Ordering the killing of civilians

6. (*Para. [51]*) Who is considered a civilian under IHL? Is a civilian defined as a person who does not belong to the armed forces of a State or a non-State armed group, as stated by the Swiss Federal Criminal Court? (GC I-IV, Common Art. 3; GC IV, Art. 4; P I, Art. 50; P II, Art. 13; CIHL, Rule 5)

7. (*Paras [31]-[34]*)

1. How are civilians protected against attacks in a NIAC? Who is a lawful target in a NIAC? Are members of a non-State armed group considered lawful targets? Can non-combatants never be targeted? (GC I-IV, Common Art. 3; P II, Art. 13; CIHL, Rules 1 and 6)
2. Do the rules on the conduct of hostilities apply the same way in an IAC and in a NIAC? (CIHL, Rules 1-6, 14, 15-21)
3. If the civilians were part of the NPFL, would they have been a lawful target? (CIHL, Rule 6)

8. (*Paras [48] and [52]*)

1. Were the persons killed in the power of those who killed them? If so, does it matter whether they were civilians? (GC I-IV, Common Art. 3)
2. Is ordering the killing of civilians a war crime? What are the duties of commander in an IAC? In a NIAC? (GC IV, Art. 147; P I, Arts 11(4), 85, 86(2) and 87(3), CIHL, Rules 4, 152, 153 and 156)
3. In order to find a commander responsible for the crimes committed by his or her subordinates, what elements must be fulfilled in an IAC? In a NIAC? Under IHL, was Alieu Kosiah a military commander *de jure*? Is the element that he was called “Chief Kosiah” enough to establish his responsibility?
4. Is Alieu Kosiah criminally responsible for the killing of the civilians even if he was not the commander?

IV. Universal Jurisdiction

9. Why does Switzerland have jurisdiction to prosecute Alieu Kosiah? (CIHL, Rules 157 and 158)

