UiO : Faculty of Law
University of Oslo

Understanding Armed Groups' Demand for Child Soldiers: Towards Greater Compliance with International Law

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I want to dedicate my Master's thesis to Henry, who is certainly a child and will hopefully never need to be a soldier. I like to believe that he's the reason why I began this journey.

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Abstract

The scourge of child soldiering has attracted significant international attention in the past three decades, including the production of a vast academic literature. Considerable progress has by now been made, particularly through NGO campaigning and UN policies, leading to the end of recruitment of children into the armed forces of many States. Yet, little has been achieved with respect to that same practice within the ranks of non-State armed groups (NSAGs).

Most relevant scholarship has focused on examining what factors may prompt a child to join in armed struggles. Albeit essential for a better understanding of the topic analysed by this thesis, it largely fails to explain what reasons armed groups may have for recruiting and using children in armed hostilities, or refraining from doing so. Such is therefore the question that this research project attempts to answer, with a focus on the African context. Through a theoretical analysis of NSAG conduct and the key peculiarities of child soldiering, it is posited that the reasons weighing most heavily on a group's decision depend on its intrinsic characteristics and the relationship it has with 'its' State, the local population, and the international community.

A greater comprehension of the motivations behind an NSAG's behaviour is crucial in order to devise the correct incentives for preventing future violations, mostly upon humanitarian dialogue with its members.

Keywords: Non-State armed groups; Child soldiering; Africa; International humanitarian law; International human rights law; Humanitarian negotiation.

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List of acronyms and abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	*African Charter on Human and Peoples' Rights*
ACJHR	African Court of Justice and Human Rights
ACRWC	*African Charter on the Rights and Welfare of the Child*
ACtHPR	African Court on Human and People's Rights
ANSA	Armed non-State actor
APCLS	Alliance pour un Congo libre et souverain
API	*First Protocol Additional to the Geneva Conventions of 12 August 1949*
APII	*Second Protocol Additional to the Geneva Conventions of 12 August 1949*
ATT	*Arms Trade Treaty*
AU	African Union
CAAC	Children and armed conflict/Children affected by armed conflict
CAAFAG	Children associated with armed forces and armed groups
CAR	Central African Republic
CMA	Coordination des mouvements de l'Azawad
CRC	*Convention on the Rights of the Child*
CtRC	Committee on the Rights of the Child
DDR	Disarmament, demobilisation and reintegration
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers
FGM	Female genital mutilation
GCs	*Geneva Conventions (I-IV) of 12 August 1949*
GDPR	General Data Protection Regulation
HRC	Human Rights Council
IAC	International armed conflict
ICC	International Criminal Court
ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*

ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICRC Customary IHL Study	Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds. *ICRC Customary International Humanitarian Law* of 2005
ICTR	International Criminal Court for Rwanda
IHL	International humanitarian law
IHRL	International human rights law
ILL	International labour law
ILO	International Labour Organization
Int.1/2/3/4	First/second/third/fourth interviewee
JNIM	Jama'a Nusrat ul-Islam wa al-Muslimin
LRA	Lord's Resistance Army
Machel Report	Machel, Graça. *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General to the UN General Assembly* of 1996
MNLA	Mouvement national de libération de l'Azawad
MRM	Monitoring and Reporting Mechanism on Grave Violations Against Children in Situations of Armed Conflict
NGO	Non-governmental organisation
NIAC	Non-international armed conflict
NSAG	Non-State armed group
OAU	Organization of African Unity
OPAC	*Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*
POW	Prisoner of war
Res.	Resolution
SCC	Special Criminal Court
SCSL	Special Court for Sierra Leone
(UN)SG	Secretary-General (of the United Nations)
SPLM/A	Sudan People's Liberation Movement/Army
SPLM-N	Sudan People's Liberation Movement–North

(O)SRSG-CAAC	(Office of the) Special Representative of the Secretary-General for Children and Armed Conflict
SSPDF	South Sudan People's Defence Forces
TRC	Truth and reconciliation commission
UDHR	*Universal Declaration of Human Rights*
UN	United Nations
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series

1 Introduction

'Mankind owes to the child the best it has to give'.[1]

In 2021, almost half a billion children were living in a conflict zone.[2] Amongst other risks, such exposition to organised violence puts children in constant danger of being enrolled in the ranks of armed forces and armed groups and/or used in the fighting.[3] Although it is arguably impossible to know exactly how many child soldiers there are in the world today, estimates suggest that the 'children used for military purposes' alone could be as many as 100,000.[4] This is notwithstanding the fact that the United Nations (UN) was only able to verify 6,310 cases in 2022.[5] Such figures arguably suffice to justify the extreme and persistent relevance of the topic.

Child soldiering rose to international prominence in the 1990s, especially as a consequence of the attention drawn by the Liberian and Sierra Leonean Civil Wars, and it is an appalling new development of organised violence.[6] There are many factors commonly cited to explain the increasing participation of children in armed hostilities. The very evolution of contemporary warfare has resulted in a proliferation of non-international armed conflicts (NIACs), with a gradual abandonment of the modern war paradigm envisaging two sovereign States – or coalitions thereof – fighting against one another by means of their respective national armies composed of trained professionals.[7] The increase of NIACs, particularly in the most vulnerable areas of the world, has by definition been accompanied by an increase of non-State armed groups

[1] *Declaration of the Rights of the Child*, 5th recital of the Preamble.

[2] Strømme et al., 8.

[3] Throughout this thesis, the expression 'child soldier' is employed, following the approach of Drumbl, *Reimagining Child Soldiers in International Law and Policy*, 3–6, by reason of its being so firmly entrenched in common parlance. However, it should be interpreted as covering also children not engaged in combat functions, in accordance with the definition provided by the 1997 *Cape Town Principles*.

[4] https://web.archive.org/web/20180126070954/https://www.child-soldiers.org/FAQs/how-many-children-are-used-for-military-purposes-worldwide [accessed 29 August 2023].

[5] *Annual Report of the SG to the UNSC and UNGA on CAAC* of 23 June 2022, the last one available at the time of writing.

[6] Drumbl, *Reimagining Child Soldiers in International Law and Policy*, 1–3.

[7] Sassòli, 'Taking Armed Groups Seriously', 7.

(NSAGs),[8] that always account for at least one side of the belligerent dyads.[9] The internalisation of warfare has in turn meant an ever-shorter distance between combatants and civilians, a clear-cut distinction between whom is on the other hand a crucial component of the law of international armed conflicts (IACs).[10] Finally, the engagement of children in a wide array of roles typical of guerrilla and urban warfare has been facilitated by the technological developments enabling the design of light and rather simple weaponry, that no longer require to be operated by strong and trained adults.[11]

Despite the paramount importance of NSAGs, most efforts devoted so far to the issue of child soldiering have focused on national armies, with the result that today most violations of children's rights during armed conflict are attributed to rebel groups.[12] The 'Children, not Soldiers' campaign, launched under the auspices of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict between 2014 and 2016, is exemplary in this respect, as it was directed exclusively to State armed forces.[13] Thus, while the overall situation is perhaps not as gruesome as when it entered the international agenda – the ground-breaking Machel Report of 1996 estimated the existence of 300,000 child soldiers worldwide[14] –, the problem is also clearly far from being solved, even after three decades of campaigns, policies, and legal developments, especially with regard to NSAGs' ranks.

Despite its being a particularly odious practice, the recruitment and use of children in hostilities has not yet been paralleled by a clear and definitive ban in the field of international law. To be sure, norms exist under international humanitarian law (IHL), international human rights law (IHRL), international labour law (ILL) and international criminal law (ICL). However, each of

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[8] This thesis focuses exclusively on groups capable of meeting the threshold of common art. 3 to GCs or APII, in accordance with the findings of the ICTY in *Boškoski & Tarčulovski*; cf. Kleffner, 'The Applicability of the Law of Armed Conflict and Human Rights Law to Organised Armed Groups', 50–51.

[9] 'ICRC Engagement with Non-State Armed Groups', 1090.

[10] Cf. API, arts 43(2) and 50(1), respectively.

[11] Singer, *Children at War*, 44–49.

[12] Elaboration from Uppsala Conflict Data Program; https://ucdp.uu.se/ [accessed 31 August 2023].

[13] See https://childrenandarmedconflict.un.org/children-not-soldiers/ [accessed 29 August 2023].

[14] Bongard and Heffes, 'Engaging ANSAs on the Prohibition of Recruiting and Using Children in Hostilities', 605.

these branches elaborates the prohibition in slightly different terms, with the outcome of an inconsistent – if not openly contradictory – normative framework that has the twofold worrying consequence in terms of lack of legal coherence and even bigger challenges in the practical compliance with the law.

This thesis addresses a limited number of the issues briefly presented here, in particular focusing on the reasons why NSAGs operating on the African continent comply or not with the international law prohibition on the recruitment and use of children in armed hostilities, and how a due recognition of those reasons could prove beneficial to a greater compliance with the law. The geographical scope is justified – stereotypes apart – since Africa is the continent where the scourge of child soldiering is most spread and evident, arguably a direct consequence of both the peculiar demographic composition of its societies,[15] and the average fragility of its States,[16] in turn intimately intertwined with the frequent outbreak of NIACs and with the difficulties encountered by public authorities to enforce key provisions of domestic and international law. The interest in the motivations of NSAG behaviour is supported by the acknowledgement that other factors explaining the likelihood of child soldiering, including children's own motivations ('push factors') have already been sufficiently explored in the literature, and by the crucial recognition that '[m]any of the factors that shape supply are rather invariant across many of the conflicts; demand is what determines the actual number of children who are ordered to kill'.[17] It has in particular been observed how – the demographic and technological trends being rather constant across armed groups –, it is the specific reasons of each NSAG that account for a higher or lower degree of extent of recruitment and use of children.[18]

1.1 A necessary premise

This thesis acknowledges and itself adopts the so-called 'straight-18' advocacy position, according to which the term 'child' is interpreted – also for the purpose of defining a child soldier

[15] Cf. the analysis below.

[16] Twenty of the thirty most alarming countries in the world are African, including those mostly afflicted by child soldiering, like Somalia, South Sudan, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Mali; cf. https://fragilestatesindex.org/ [accessed 29 August 2023].

[17] Andvig and Gates, 'Recruiting Children for Armed Conflict', 78.

[18] Beber and Blattman, 'The Logic of Child Soldiering and Coercion', 68.

– in accordance with the first part of article 1 of the Convention on the Rights of the Child (CRC), which defines it as 'every human being below the age of eighteen years'.[19] This position is upheld in the relevant regional legal formulation, under the African Charter on the Rights and Welfare of the Child (ACRWC).[20] However, it departs as such from the human rights prohibition entailed under the same CRC, whose provision on the protection of children from the effects of armed hostilities[21] is the only norm in the entire treaty setting a different age threshold, namely fifteen years, as a reflection of the previously existing prohibition envisaged under IHL instruments.[22]

Admittedly, not every humanitarian actor (not to mention military leaders and policy-makers) would agree that this is the best way to safeguard children's rights in armed conflict, and thus many scholars remain sceptical of this approach, preferring alternative paths to recognise a higher legitimacy to adolescents' agency in particular.[23] Nevertheless, there seems to be a growing consensus in the international arena, especially after the adoption in 2000 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), whereby the mentioned straight-18 position is increasingly seen as the most desirable.[24] While not wholly rejecting the idea that a 16- or 17-year-old child is not capable of expressing a genuine consent for decisions affecting their life, the lesser evil is deemed to be a presumption of the irrelevance of children's consent in the matter of their recruitment by NSAGs, precisely given the extreme difficulty in determining whether such consent was truly free and informed.[25]

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[19] CRC, art. 1.

[20] ACRWC, art. 2 reads: 'For the purposes of this Charter, a child means every human being below the age of 18 years'.

[21] CRC, art. 38(2).

[22] API, art. 77(2) for what concerns IACs; APII, art. 4(3)(c) for high-threshold NIACs.

[23] Hanson and Molima, 'Getting Tambo Out of Limbo'.

[24] Sheppard, 'Child Soldiers'.

[25] Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict', 540.

1.2 Outline

Following this introduction, the thesis is presented in six parts. Part 2 reviews the literature available on the topics addressed by this thesis, in particular with respect to non-State armed groups' behaviour under international law, children's rights and child soldiering, and some key aspects of the African context, before identifying the knowledge gap that is addressed by the research question and sub-questions guiding the whole project. Part 3 explains what methodological approach is adopted, and what methods and materials are utilised to seek an answer to the research question. The core of this thesis, a theoretical analysis of the reasons why NSAGs comply or not with the international law prohibition on the recruitment and use of children, is the content of part 4. A discussion of the findings of such analysis is presented under part 5, in the form of a series of incentives that may help prevent child soldiering within armed groups, while part 6 concludes the thesis with a recognition of the relevance of this contribution, an acknowledgement of its inherent limitations, and some recommendations for both researchers and practitioners.

2 Literature review

The phenomenon of child soldiering within the ranks of African armed groups is far from being a complete novelty, and it has thus received a considerable degree of attention in the academic debate of the last two decades especially, with insightful contributions originating from the most diverse disciplines. Without venturing too deep into an investigation of every aspect relevant to a study of child soldiers, it is nevertheless crucial at this point to map those inputs which are most useful in narrowing the overarching topic down to a researchable question. Although a strict compartmentalisation of such contributions is admittedly rather artificial, for they inevitably tend to influence and support each other, such contributions can roughly be divided – for the purpose of this thesis – into three main areas, namely NSAGs under international law, children's rights, and the African context.

2.1 The regulation of NSAGs under IHL and IHRL

An initial challenge is warranted by the nature of the (potential) child recruiters considered by this thesis, precisely given the legal uncertainty with which the status of armed groups is still imbued. In spite of the increasing relevance of NIACs, in fact, international law remains inherently State-centric.[26] The principle of voluntarism, developed by State jurisprudence and conceived for State prerogatives, entails that a subject of international law can only be bound by those obligations to which it has expressly consented, typically via ratification of an international treaty.[27] However, a progressive trend is gradually emerging in the academic debate on the matter, which argues that a limited form of international legal subjectivity – a concept of otherwise clear Westphalian origin[28] – could and should be granted to actors other than States by reason of the crucial role they play in the international arena.[29] Such call is endorsed by the long-standing approach adopted by the International Court of Justice (ICJ), that observed as

[26] Daboné, 'International Law'.

[27] Hiemstra and Nohle, 'The Role of NSAGs in the Development and Interpretation of IHL'.

[28] Heffes, Kotlik, and Ventura, 'The Functions and Interactions of Non-State Actors in the Realm of IHL', 4.

[29] Sassòli, 'Taking Armed Groups Seriously'.

early as 1949 how international legal personality is not a privilege granted to sovereign States alone.[30]

Alternative avenues for the imposition of international law obligations normally invoke: the doctrine of legislative jurisdiction, thus imposing the law through the relevant State; the mechanisms of ICL, hence applying legal norms indirectly to NSAG members;[31] the transposition of State obligations, in the case of armed groups exercising *de facto* governmental functions.[32] All these paths have their pros and cons, and none is arguably strong enough to justify on its own the bindingness of international law on armed groups. However, one last possibility is arguably persuasive enough, precisely because it reflects the abovementioned principle of voluntarism: NSAGs can and often do agree to commit to certain international standards.[33] Even beyond the imposition of legal norms unto armed groups based on their consent, some authors suggest actively involving such actors in the creation of new international norms.[34] This is notwithstanding the obvious reluctance of States, that would understandably oppose such a development for fear that it mean an enhancement of NSAGs' status and legitimacy and/or a decrease in the standards of protection during armed conflict.[35]

Recognising that armed groups can be bound by international law is however not the end of the story. As anticipated in the introduction, the prohibition on child soldiering is found under more than one branch of international law; it is in fact primarily governed by IHL and IHRL. Much has been written on the interplay of these two legal bodies: some authors are rather sceptical of the potential for their amalgamation;[36] other scholars are more confident in the feasibility of an integration through the adoption of a 'common sense' approach grounded in the *lex specialis*

[30] ICJ, *Reparations* case. This tendency has also been confirmed in later decisions: the 1996 *Advisory Opinion on the Legality of Nuclear Weapons* and the 2007 *Bosnia v. Serbia* case.

[31] Kleffner, 'The Applicability of the Law of Armed Conflict and Human Rights Law to Organised Armed Groups'.

[32] Murray, 'Engaging Armed Groups Through the Development of Human Rights Obligations'.

[33] Bellal, 'Improving Respect for IHL Through the Engagement of Armed Non-State Actors'.

[34] Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts'.

[35] Roberts and Sivakumaran, 'Lawmaking by Nonstate Actors'.

[36] McLaughlin, 'The Law of Armed Conflict and International Human Rights Law'.

derogat generali principle;[37] yet other commentators explicitly support a co-application of the two regimes in the extremely delicate need to protect civilians during NIACs.[38] In the end, however, this debate is arguably not too relevant for the present discussion. Not only has the exceptional importance of human rights already been repeatedly stressed also in the event of an armed conflict triggering the applicability of IHL,[39] but this academic position has long been endorsed by the practice of both UN bodies like the Human Rights Council (HRC)[40] and the Security Council (UNSC),[41] and regional human rights systems,[42] including – notably – the one developed under the auspices of the African Union (AU).[43] Lastly, the OPAC is often cited as a *sui generis* instrument of international law, precisely for its being at the crossroads of IHL and IHRL.[44] It is thus probably superfluous to establish whether the prohibition on child soldiering is an IHL norm encroaching on the field of IHRL or vice versa (or even a bit of both).

In summary, the significant level of disagreement on the legal bases for imposing international obligations to NSAGs is ironically matched with an undisputed recognition of the existence of such obligations, which is confirmed by the clear emergence of a norm of customary law about the applicability to this type of actors of at least some parts of both IHL and IHRL (although it is significantly less disputed as regards the former).[45] Nevertheless, investigating the origin and nature of such obligations is anything but a purely doctrinal exercise. On the one hand, engaging NSAGs in the acceptance, if not in the creation, of legal norms, is a safe way to remove any doubts as to whether they can indeed be bound by international law, given the mentioned persistent uncertainty; on the other hand, calls for a clearer delimitation of the IHL, IHRL and ICL contours on the prohibition on child recruitment and use certainly have their merits, even though from a purely pragmatic point of view it might not be too relevant an argument. As is observed later in this thesis, '[t]he failure to argue convincingly why and how the law applies to organized

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[37] Gill, 'Some Thoughts on the Relationship Between IHL and IHRL'.

[38] Matthews, 'The Interaction between International Human Rights Law and International Humanitarian Law'.

[39] Scobbie, 'Human Rights Protection During Armed Conflict'.

[40] Bellal, *Human Rights Obligations of Armed Non-State Actors*.

[41] Hamza, 'Engaging with Non-State Armed Groups through *Ad Hoc* Commitments', 15–25.

[42] Oberleitner, 'The Development of IHL by Human Rights Bodies'.

[43] Waschefort, 'The Subject-Matter Jurisdiction and Interpretive Competence of the ACtHPR in Relation to IHL'.

[44] Henckaerts and Wiesener, 'Human Rights Obligations of Non-State Armed Groups', 200–201.

[45] Mastorodimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law*, 168.

armed groups will hinder effective strategies to engage them in the quest to ensure better compliance with IHL'.[46]

It must be observed that a number of contributions explicitly reject the idea that a low level of compliance with IHL in NIACs may satisfactorily be explained by reference to the brutality and irrationality of 'new wars' (as it has been done particularly with respect to African NSAGs).[47] Thus, such contributions have already explored possible reasons why NSAGs comply or not with IHL provisions.[48] A justification of why this strain of research is deemed highly relevant, but still insufficient for the purposes of this thesis, is provided below, at the beginning of the analysis in part 4.

2.2 Old and new trends in the children's rights discourse

At the turn of the century, a vast literature was produced on the specific topic of child soldiering. Still today, many of those contributions are considered 'classics' in this field.[49] However, since the phenomenon was still in its infancy at the time, those articles and books are usually more descriptive than truly analytical, for they had the goal of examining events that had only been scarcely present until around three decades ago. This is why it is deemed more relevant in this section to review other contributions on children's rights, albeit only tangential to the specific issue dealt with by this thesis, with a view to unpacking some of the points that may be useful for the analysis below.

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[46] Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups', 444.

[47] Beber and Blattman, 'The Logic of Child Soldiering and Coercion', 68.

[48] E.g. Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not'; Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs'; Bongard and Heffes, 'Engaging ANSAs on the Prohibition of Recruiting and Using Children in Hostilities'; Jo, 'Compliance with IHL by Non-State Armed Groups'.

[49] Examples include: Cohn and Goodwin-Gill, *Child Soldiers*; Brett and MacCallin, *Children: The Invisible Soldiers*; de Berry, 'Child Soldiers and the Convention on the Rights of the Child'; Davison, 'Child Soldiers'; and Singer, 'Talk Is Cheap'; later additions are Gates and Reich, *Child Soldiers in the Age of Fractured States*; and Dallaire, *They Fight like Soldiers They Die like Children*.

Still decades after the inception of the contemporary international human rights regime, many scholars are sceptical of the opportunity to envisage specific safeguards for children[50] (not to mention those opposing the recognition of the existence of human rights in general). Even amongst the staunchest advocates for children's rights, however, a heated debate exists between researchers endorsing the so-called protectionist (or nurturance) approach to children's rights, and supporters of an emancipatory (or participatory or liberationist) approach. The former emphasises that the very *raison d'être* of a special regime for children rests on the assumption that they are human beings characterised by a particular (albeit temporary) state of vulnerability and dependency on others (parents or legal guardians, or adults in general).[51] Proponents of a nurturance approach would advocate the need to protect those who cannot protect themselves and provide for those who cannot provide for themselves.[52] On the other hand, a liberationist approach, often justified by reference to a key provision of the CRC requiring that also children's voices be heard,[53] calls for a greater recognition of especially older children's agency; it stresses the importance of always taking into account children's views, interests and opinions, as opposed to considering them as merely passive members of society at the mercy of adult abusers and similar dangers.[54]

Transposed to the specific question of child soldiering, this tension adds an obvious nuance to the debate. Even though not directly the object of the analysis conducted here – which is exclusively concerned with the armed groups' motivations, not those of children –, the role played in particular by adolescents in the process of their potential enrolment in NSAGs' ranks and use in armed hostilities cannot be ignored.[55] In addition to a (real or perceived) lack of socio-economic alternatives and future prospects, including work opportunities, which is normally much

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[50] Lundy, 'A Lexicon for Research on International Children's Rights in Troubled Times'.

[51] Bantekas and Oette, *International Human Rights Law and Practice*, 544–45.

[52] With the caveat that a clear compartmentalisation in the scholarship is necessarily artificial and approximate, Singh, 'When a Child Is Not a Child'; Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict'; and Kotlik, 'Compliance with Humanitarian Rules on the Protection of Children by Non-State Armed Groups' could arguably be ascribed to this school of thought.

[53] CRC, art. 12(1) and (2).

[54] By way of example, Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights'; Ferguson, 'Not Merely Rights for Children but Children's Rights'; and Hanson and Molima, 'Getting Tambo Out of Limbo' would agree with this paradigm.

[55] This is notwithstanding the premise made under 1.1 above.

truer for children than it is for adults, the former frequently suffer many different forms of deprivation, and they are deeply affected by loss of support form the traditional social networks (family, village, community).[56] Moreover, children too can and often do manifest a genuine desire 'to achieve political goals, topple dictators, acquire training, effect economic gains, serve [their] community, and make the best of a bad situation'.[57] These and similar reasons are highly pertinent to a child's experiences, in so far as they relate to the wish to shape one's identity, to increase one's self-esteem and to find an activity that gives meaning to one's life. The ways in which these motivations play out in a potential child soldier's life may well have an impact in the likelihood that an NSAG recruits them (perhaps accepting their 'voluntary' enlistment).

Finally, a *leitmotif* of the most recent research on the matter revolves around the recognition of child soldiers' twofold roles of victims and perpetrators. The persistent dilemma – should child victims be punished for the atrocities they committed? and if so, how?[58] – has undeniable implications when child soldiering enters a court of law, a matter on which a definitive solution is yet to be found.[59]

2.3 African children and African laws

A final layer of complexity is added to the issue of child soldiering in the ranks of NSAGs when this phenomenon is examined in the specific context of the African region. This is evidently an extremely broad topic. However, for the purpose of this thesis, it is sufficient to draw attention to two main points.

Firstly, the abovementioned tension between different perspectives on children's rights originates primarily in 'Western' academic circles. Its validity is not questioned here, but such debate need be integrated by the awareness that in other areas of the world the question as to how children's rights should be interpreted may be even more complex. Some authors have stressed

[56] *Machel Report*, paras 37–40.

[57] Drumbl, 'The Effects of the *Lubanga* Case on Understanding and Preventing Child Soldiering', 97.

[58] Such are the main questions investigated by Ramos, 'Dominic Ongwen on Trial'.

[59] Graf, 'The International Criminal Court and Child Soldiers'.

the non-universal character of an absolute (as opposed to relative, and relational) conception of a child.[60] Others have criticised an individualistic interpretation of their rights.[61] The point here is not to debate the legal definition of an African child: the coincidence between the CRC and the ACRWC definitions have already been observed. Rather, the main objective is bearing in mind that NSAGs (from anywhere, but *a fortiori* if they come from certain non-Western traditions) may simply not recognise that a child (in its international law definition) is a child for the purpose of preventing them from taking part in fighting, and consider them mature enough when they are still a minor.

A second crucial aspect is the problematic relationship between Africa and branches of international law that emerged in the 'West' and were only gradually accepted (some would say: imposed) in other regions of the world. This is especially true of IHL, which was primarily negotiated at a time when almost all of Africa was still subjected to colonial domination and had very little say on the matter.[62] Hence, such body of law may be perceived as more 'alien' than others: 'Third World countries […] have enthusiastically embraced human rights, despite their Western origins, as a means initially of fighting imperialism and racism and then, more recently, as a way of resisting dictatorship'.[63] Relatedly, the ICC does not enjoy a specially good reputation amongst African States.[64] This is notwithstanding that most available research on the topic confirms an impressive correspondence between the traditional customs of war of many African societies and the legal provisions of modern IHL.[65] The key characteristics of this paradoxical co-existence – of IHL-conducive customs of war, and the most brutal fighting during actual conflicts[66] – can and must be addressed, according to many authors, some of whom are confident in an advancement of IHL in Africa.[67] The point here is thus highlighting that certain legal provisions, instruments and even entire legal regimes may be accepted less

[60] Mangena and Ndlovu, 'Shona and Ndebele Proverbs and Children's Rights'.

[61] Moyo, 'Reconceptualising the "Paramountcy Principle"'.

[62] Waschefort, 'Africa and International Humanitarian Law'.

[63] Anghie, 'Rethinking International Law', 79.

[64] Rukooko and Silverman, 'The International Criminal Court and Africa'.

[65] Bello, *African Customary Humanitarian Law*; and the well-known *Spared from the Spear*, an ICRC study on Somali traditional conduct of hostilities.

[66] Mubiala, 'International Humanitarian Law in the African Context'.

[67] Ewumbue-Monono and von Flüe, 'Promotion of International Humanitarian Law through Cooperation between the ICRC and the African Union'.

eagerly if they are perceived as not resonating with local traditions, customs, values. Framing the same issue as a matter of IHRL, more consonant with typical African values like Pan-Africanism, the right to peace, to development and to self-determination, might prove more successful than presenting it a strictly IHL concern.[68] Framing it as a matter already found in local customs might be even better.

In addition to obvious pragmatic challenges,[69] the non-particularly felicitous relationship between Africa and IHL may partially explain – from a more legalistic point of view – the issues still so frequently encountered in the compliance with IHL by actors from the African continent.[70]

2.4 The knowledge gap and research question

In conclusion, a vast literature has already explored a wide array of topics highly relevant for the present discussion, yet not enough has been written on the specific issue of why NSAGs would abide or not by the international standards on child soldiering. This shortcoming is addressed by the research question that guides the remainder of this thesis, and that can be formulated as follows: how might an understanding of NSAGs' reasons for recruiting child soldiers be used to enhance their compliance with the relevant international law prohibition? For an easier operationalisation, this is split into narrower sub-questions: (1) can NSAGs be characterised as rational actors? (2) what are the reasons why NSAGs comply with international standards on child soldiers? (3) why might NSAGs be unwilling or unable to comply with the international law prohibition on child recruitment? and (4) how can knowledge about NSAGs' motivations for and against using child soldiers be used to formulate incentives to comply with international standards? The next section lays out the ways in which this thesis seeks to answer the above questions.

[68] This suggestion is reinforced by the peculiar approach to the relationship between IHL and IHRL held by the African Court on Human and Peoples' Rights (ACtHPR); cf. Hailbronner, 'Laws in Conflict'.

[69] Cf. the brief discussion of State fragility, and the increase of NIACs and NSAGs in the introduction.

[70] Ewumbue-Monono, 'Respect for International Humanitarian Law by Armed Non-State Actors in Africa'; Balarabe, 'Africa and the Domestic Implementation of the Geneva Conventions and Additional Protocols'.

3 Methodology

The question and sub-questions just formulated are inherently qualitative, and analytical in nature (as opposed to, for instance, purely theoretical or descriptive), given their attempt at explaining a complex phenomenon – the recruitment and use of children by NSAGs – by identifying underlying trends and patterns – the reasons for such behaviour.[71] This entails that the methodological approach followed by this thesis need also be qualitative, or, as some scholars would prefer to say, it must reflect a flexible (as opposed to fixed) design.[72] An interpretive paradigm is preferred to other epistemological tendencies, precisely given the aim of this thesis to understand social phenomena: such paradigm is deemed appropriate for it interprets the researched reality as being socially constructed, with the corollary that a comprehension of its functioning cannot but be contextual, rather than universal; further, knowledge about it cannot be achieved by means of a rigorous scientific method (which would on the other hand be required by, e.g., post-positivism).[73] Strictly related is the awareness that the researcher is necessarily influenced by their belonging, or not, to the social reality they attempt to understand – and it is not the case for this thesis.

It follows from the above that any observations on the recruitment and use of children by an armed group would be highly specific to the single group and context-dependent, hence empirical studies on the topic would be strongly needed, in order to provide practical understanding of the reasons behind concrete cases of child soldiering.[74] This project is, however, theoretical.[75] The fitness for purpose of a non-empirical approach is explained by reference to the knowledge gap identified in the previous section: since a general theory on the specific aspect analysed here is arguably still missing, the contribution of this thesis could be thought of as the formulation of a series of assumptions on the behaviour of a generic (African) non-State armed group, in an attempt to at least partially fill that gap. Such assumptions, though generated by induction

[71] Hennink, Hutter, and Bailey, *Qualitative Research Methods*, 70–102.

[72] Robson and McCartan, *Real World Research*, 145–73.

[73] Willis, *Foundations of Qualitative Research*, 95–146.

[74] Cf. the recommendation for future research in section 6.3 below.

[75] Petre and Rugg, *The Unwritten Rules of PhD Research*, 90–91.

through the methods described below, won't be valid for any specific group, as they refer to a purely analytical construct,[76] but they could still serve the purpose of generating hypotheses on the behaviour of concrete NSAGs, that would need to be tested in future empirical research.

3.1 Methods

Within this framework, two methods are employed. The first and main one is an integrative literature review, which has been described as particularly suitable in cases of omissions or deficiencies in the available research on a specific issue, like the one identified by the research question guiding this thesis.[77] Thus, Part 4 presents a critical analysis of existing theory as found in the scholarship produced, on the one hand, on NSAG behaviour under international law, and on child soldiering on the other. The goal is identifying, by means of logical inference, the reasons capable of explaining the former in light of the peculiar characteristics of the latter, in an attempt to bridge the gap between the two sets of academic contributions. Notwithstanding the nature of the analysis, practical examples of African armed groups are offered, when they are deemed useful for illustrating theoretical points.

This thesis acknowledges and endorses the calls made by numerous authors for a greater inter-disciplinarity in the research on international humanitarian and human rights law.[78] Hence, the existing theory is derived from sources belonging to different disciplines, in the firm belief that the degree of adherence of a social group to legal norms cannot be fully explained by exclusive reliance upon legal research. Rather, an exploration of the political motivations behind armed groups' conduct – as well as the tools at the disposal of the humanitarian actors that confront them – requires to equally draw from social science research.[79] Specifically on child soldiering, it has been observed how the integration of literature from as many relevant fields as possible cannot but be deeply beneficial to a thorough and accurate understanding of the phenomenon,

[76] Cf. the meaning of Max Weber's concept of 'ideal type'; Adair-Toteff, 'Weber's Methodological Writings', 94.

[77] Torraco, 'Writing Integrative Literature Reviews', 358.

[78] E.g. Langford, 'Interdisciplinarity and Multimethod Research'.

[79] Jo, 'Compliance with IHL by Non-State Armed Groups', 64–65.

and thus also better inform policy and practice on the matter.[80] The practical examples, on the other hand, are mostly borrowed from reports issued by NGOs and UN bodies.

The second method consists of a series of exploratory interviews serving the specific purpose of preventing the results of the analysis from being too vague or overly theoretical. As one of the most widely used methods in qualitative research, interviewing has been considered especially apt for supplementing the literature reviewed, and giving more substance and nuances to its findings.[81] The interviewees were semi-structured,[82] and have been conducted remotely in the month of August 2023. Around ten people were contacted – experts that, in various capacities, are, or in the past have been, more or less directly engaged with NSAGs and/or child soldiers. Of those, four agreed to participate in the project.

The first interviewee (who is hereinafter referred to as Int.1) has a solid background on IHL and IHRL, and their perspective on the topic at hand comes from both the academic and the NGO worlds, since they are currently a university professor and author but in the past also held a senior position at the former Coalition to Stop the Use of Child Soldiers (later Child Soldiers International); they were moreover directly involved in humanitarian engagement with NSAGs. The second interviewee (hereinafter Int.2), with a non-legal background, has had extensive experience in dialogue with armed groups in the past, incidentally also on child soldiering, but only agreed to speak in a personal capacity, hence none of their present or past affiliations is mentioned here. The third interviewee (Int.3) is a lawyer specialised in IHL and IHRL; they have worked for the ICRC in operational positions, being deployed in different conflict areas, including in the DRC, then as a policy and legal advisor at Geneva Call, before assuming the role of director of an international network of human rights and humanitarian organisations committed to increasing the protection of children in armed conflict situations, which is their main current occupation. The fourth and last interviewee (Int.4) has a predominantly academic point of view since they are a law professor, having researched and written extensively on

[80] Drumbl and Barrett, 'Introduction to the *Research Handbook on Child Soldiers*', 7, mention child psychology and trauma studies, ethnographic participant observation, anthropology, survey data and feminist theory.

[81] Bryman and Bell, *Social Research Methods*, 239–50.

[82] The interview guide can be found in the appendix to this thesis, pp. 84–85.

‘victims who victimised’, including on child soldiers; they additionally have done consulting with the UN on the involvement of children and youth in mass violence.[83]

Apart from granting anonymity to the interviewees, no other ethical concern was observed for this thesis.

[83] The subjects are anonymised, as per requirements in data protection legislation (GDPR). Such procedure has been approved by the Data Protection Services of Sikt – Kunnskapssektorens tjenesteleverandør (the Norwegian Agency for Shared Services in Education and Research).

4 Analysis

As pointed out in the literature review, most contributions relevant to the topic examined here have focused either on the reasons why armed groups respect or not IHL, or on the key factors that explain the possibility of child soldiering. However highly pertinent for the analysis attempted by this thesis, both are nonetheless arguably insufficient.

4.1 The need for an analysis of NSAGs' reasons to respect or not the law

Many arguments have been advanced for why NSAGs comply or not with the law in general. However, some of the reasons usually identified are not applicable to the prohibition on child soldiering, simply because they do not reflect the specific characteristics of this phenomenon. A prime example amongst those reasons is the positive reciprocity argument:[84] it has been observed that a higher respect for legal norms by one party to a conflict is likely to entice the opposing party into equally adopting a more IHL-compliant behaviour,[85] thus increasing the overall protection afforded by the law to persons affected by that conflict.[86] The most widely cited application of the principle of reciprocal respect is the mutual benefit in treating prisoners of war (POWs) and other enemy detainees humanely.[87] However, a similar conclusion could hardly be reached with respect to child soldiering, which is *sui generis* violation of IHL, in so far as it does not affect the enemy, if not only indirectly.[88]

Yet other reasons frequently found in the literature are applicable to the prohibition on child soldiering only incidentally. Examples include: respect for the law increases the likelihood that

[84] For a defence of the importance of this principle in NIACs, see Provost, 'Asymmetrical Reciprocity and Compliance with the Laws of War'.

[85] Sassòli, 'The Implementation of International Humanitarian Law', 58.

[86] Such argument must be understood as a non-legal incentive to compliance with IHL, since (negative) reciprocity is not accepted as a legal justification for a violation under this branch of international law.

[87] Cf. Mack, *Increasing Respect for International Humanitarian Law in Non-International Conflicts*, 30.

[88] Other reasons of this kind, mentioned in Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', are: allegiance to other laws; blaming the other party to the conflict for a violation committed in the guise of the enemy; an armed group's desire for revenge; a group's aim entailing a violation of IHL (such as in the case of ethnic cleansing).

the State will grant amnesties for the mere participation in the conflict once the fighting is over; respect for the law increases the legitimacy of the group and is thus particularly beneficial if the NSAG's intent is to displace the current government;[89] violations of the law follow the logic of 'nothing to lose', especially when the armed group has been labelled as a terrorist organisation, or has anyway already gained a particularly negative image on the international stage; violations of the law are committed simply because there is very little benefit from compliance (e.g. given the lack of combatant status in NIACs, with all the attached rights).[90] While these and similar motivations may well have an impact, at times even decisive, on the choice to rely on child soldiers or not, they are valid only as part of a general attitude of the group towards the law and/or the overall conduct of hostilities, and therefore they are less pertinent to this analysis.

Similarly, by looking at general social, economic, technological, military and political trends, a sizeable strain of the literature has arguably delved too deep into some of the circumstances allowing for an increased involvement of children in contemporary warfare, while at the same time neglecting the potential recruiters' own motivations. If it is crucial to acknowledge why a child (and, for that matter, why any individual) may decide to join in forms of political violence, it is also undeniable that those explanatory factors do not account for variations in the degree of reliance on child soldiering across different groups.[91] Understanding why certain NSAGs refrain from using children despite having the opportunity to do so is of course paramount in order to devise suitable incentives for those groups engaging in the opposite practice.

Consequently, it seems necessary to outline an *ad hoc* list of reasons why armed groups would choose to respect or not the international law prohibition on the recruitment and use of children

[89] Int.1 and Int.4 mentioned the legitimacy concern; Int.2 is of the exact opposite opinion, since armed groups are eventually legitimised and pushed to sign a peace agreement (at least so far as they have enough political and military power to negotiate with the sitting government) even if they have committed the worst atrocities, provided that ending the conflict is in both sides' interest.

[90] All these reasons are cited in Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs'.

[91] This is also the point of departure of Beber and Blattman, 'The Logic of Child Soldiering and Coercion'.

in hostilities, by selecting and analysing only those motivations that resonate with the specific features of child soldiering.

4.2 NSAGs as rational actors

First of all, it must be clarified that the compliance with the relevant IHL prohibition, or lack thereof, is construed in this thesis as the final outcome of a rational decision-making process. Pros and cons of respect for said legal norm are assigned different weights depending on a complex series of interrelated factors linked to the specific nature and characteristics of the group – including the personal traits of its leadership, in addition to an almost infinite number of external circumstances capable of influencing the group's behaviour. Therefore, an analysis of the underlying mechanisms of this weighing process can only be conducted on a case-by-case basis, and is thus left to future research.

The interpretation of compliance with the law as a logical decision implies that NSAGs are treated as minimally rational actors. Admittedly, this assumption may be contested for any kind of social group, and hence *a fortiori* for a group that by definition operates under the most destabilising and volatile circumstances. However, it has been noted how 'few people are aware [that indeed t]he rules of international humanitarian law (IHL) are discussed not only with outsiders but also within armed groups and particularly by their leadership'.[92] Thinking of NSAG leaders as 'minimally rational – that is, calculating, self-interested, and maximizing'[93] can be taken simply as a method for presenting the possible motivations of an armed group in an orderly manner, with no presumption of reflecting the actual reality of how a decision is made within any such group.[94]

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[92] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 354.

[93] Beber and Blattman, 'The Logic of Child Soldiering and Coercion', 68.

[94] An additional problem arises once it is acknowledged that compliance with IHL, especially in contemporary NIACs, is highly volatile: the degree of respect for specific norms may well vary depending on the phase of the conflict, and the fact that an NSAG agreed to comply with one rule says nothing about the fact that it may simultaneously be blatantly violating another one; see Bongard and Heffes, 'Engaging ANSAs on the Prohibition of Recruiting and Using Children in Hostilities', 619–20.

Rejecting the idea that respect for the law can be characterised as a black-and-white condition, and accepting the view that it should instead be more realistically understood on a continuum,[95] it is then posited that an NSAG will be more IHL-compliant (or at least, it will commit violations less persistently) if the whole of reasons against child soldiering prevails over the reasons in favour, whilst it will tend more towards non-compliance if the pros outweigh the cons. Although this may be difficult to establish in practice, this thesis distinguishes, for sake of clarity, between 'law-abiding NSAGs', 'unwilling NSAGs', and 'unable NSAGs'. There are two reasons for this: first, it is logical to think separately of the reasons why a group does not want to refrain from using children and of those why a group cannot do so, even if in principle it would agree with the prohibition; second, such distinction allows for a clearer separation, at a second stage, between the incentives that can be devised to either convince or enable an NSAG to comply with the law.

4.3 Reasons why NSAGs are willing to comply with the law

The main arguments in favour of an armed group's decision to refrain from recruiting and using child soldiers can be grouped under six categories: the NSAG's aim and need for support; its convictions and the local norms and values; the group's self-image; short-term military disadvantages; the negative long-term consequences of child soldiering; and the reaction of the international community to persistent violations.

4.3.1 The group's aim

Most armed groups claim to engage in forms of violent opposition against the government (and/or against other groups) on behalf and for the benefit of a local community, if not the entire population of a region or country. By way of example, the Alliance pour un Congo libre et souverain (APCLS) in the Democratic Republic of the Congo (DRC) is a Mai-Mai militia largely based on the Hunde ethnic group, and opposing the Tutsi.[96] The government is often blamed for failing to discharge its IHRL obligation to respect, protect and fulfil. Whether or not such intent is genuine, the declared objective of acting in representation of a 'constituency' –

[95] Jo, 'Compliance with IHL by Non-State Armed Groups', 65–66.

[96] Deibert, *The Democratic Republic of Congo*, 150.

be it supported by religious, ethnic or ideological justifications – inevitably goes hand in hand with a strong interest in a compliant population. Such compliance is crucial for the assurance of political support (or at least the avoidance of outright opposition), and more importantly for the provision of information, shelter, resources and new recruits, at times indispensable for the very survival of the group.[97]

Intuitively, committing abuses against a local community will not be conducive to securing its acquiescence. This is true in two respects: not only is a population more likely to withdraw its backing for the group if it is made the object of its violations; popular support for an NSAG's cause also increases the probability that more adult recruits will come forward, thus mitigating the group's necessity of resorting to their child counterparts.[98] This point is however far from unambiguous. It can in fact be argued that, depending on the territorial reach of the armed group, children may be recruited from villages not strictly falling within the group's 'constituency'. If that is the case, then this reason is not valid. For instance, in his last report to the UNSC on children and armed conflict in the DRC, the UN Secretary-General found that at least some violations (albeit admittedly a scarce minority) were not even committed on Congolese territory, 'as children were either recruited and/or abducted across borders and subsequently brought and used in the Democratic Republic of the Congo, where the violations were verified'.[99]

Furthermore, even when children are recruited from the relevant community, the validity of this argument usually depends on the method of recruitment. Especially if it is a mere acceptance of (voluntary) enlistees, child recruitment can be envisaged as just another way to engage the local community in its own protection against the oppression by governmental forces or by other NSAGs acting on behalf of different communities. By way of example, certain armed groups mention the provision of self-defence training to children as a justification for their unlawful practice.[100] It must also be born in mind that in the case of most NSAGs engaged in guerrilla warfare, where the distinction between members of the armed group and members of

[97] Murray, 'Engaging Armed Groups Through the Development of Human Rights Obligations', 135–36.
[98] Beber and Blattman, 'The Logic of Child Soldiering and Coercion', 80.
[99] *Report of the SG on CAAC in the DRC* of 10 October 2022, para. 20.
[100] Falchetta and Withers. *A Law unto Themselves?*, 17–18.

the local community is far from clear-cut, children may be involved in hostilities almost automatically if they are directly born to members of the NSAG.[101]

Lastly, a population's compliance is not exclusively achieved by respecting and protecting it. Controlling a community through forms of selective terror,[102] including violent abduction and conscription of children – whether or not accompanied by other appalling violations against them – is proven to be, under some circumstances, an unfortunate valid alternative of securing compliance.[103]

4.3.2 The group's convictions

According to most scholars, one strength of IHL lies in its ability to resonate with values and principles that have informed the ways in which the conduct of war has been prescribed in almost every culture since time immemorial.[104] Even besides the formulation of a principle of humanity, the very *raison d'être* of this body of international law is precisely its explicit goal to humanise warfare by limiting what is permitted on the battlefield for achieving a military advantage.[105] Surely, divergences between local customs and IHL norms exist, and may at times be simply irreconcilable. However, it is no surprise that, notwithstanding certain peculiarities of specific normative frameworks, at least the core underlying idea of avoiding blatant expressions of inhumanity – a 'common denominator that is in accord with human nature' – is found in all ethical systems across time and space.[106]

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[101] Drumbl and Barrett, 'Introduction to the *Research Handbook on Child Soldiers*' consider this as a third method of child recruitment (in addition to enlistment and conscription), and blame its being highly under-researched despite its frequency (p. 8).

[102] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 373–74.

[103] As such, it constitutes a reason for violating the law, discussed under 4.4.4 below.

[104] O'Connell, 'Historical Development and Legal Basis', 25–27.

[105] 'The necessities of war ought to yield to the requirements of humanity, [... for t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'; Saint Petersburg Declaration, recitals 1st-3rd of the Preamble.

[106] Bello, *African Customary Humanitarian Law*, Foreword by Jean Pictet (p. vii).

Therefore, the prohibition to enrol children could easily be consonant with an armed group's own convictions – be they of a religious, political, traditional, cultural or moral nature[107] – and in that case it would of course be irrelevant that children are not recruited/used for reasons other than an explicit acknowledgement of the international law proscription by the group.[108] Whether or not the requirement to spare children the horrors of war is found in local customs and norms, and whether or not such customs and norms are shared by any NSAG clearly depends on the specific nature and characteristics of the group itself, and often of its leadership. It is thus impossible to reach any abstract conclusion on this point.

However, a brief overview of some general attitudes towards the involvement of children in warfare that are common to most traditional societies across the African continent, and that could thus have an impact on the convictions of specific armed groups, may prove useful to better illustrate the argument just made. There seem to co-exist, in essence, two parallel trends. On the one hand, against the participation of children in war is an overall tendency to spare, protect and have additional special regard for the innocent, vulnerable and defenceless, however brutal the fighting.[109] By way of example, any form of ill-treatment of children (and women) was strictly prohibited by the Nuer people of the Upper Nile region long before the advent of modern IHL.[110] This is notwithstanding the fact that a contemporary NSAG known as the White Army, having that ethnic group (the second-largest of today's South Sudan) as its basis, has been repeatedly listed in the annual reports of the UN Secretary-General (SG) for recruitment and use of children.[111]

The attitude just described is perfectly in line with the classical protectionist approach to children's rights.[112] Although perhaps bordering on the anecdotal, a contribution critically reviewing a number of common proverbs known amongst the Shona and Ndebele of Zimbabwe

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[107] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 359–60.

[108] Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs' stress the 'often underestimated genuine desire of many armed groups to respect human dignity' (p. 195).

[109] *Machel Report*, para. 4.

[110] Bello, *African Customary Humanitarian Law*, 54–55.

[111] In 2006 (for Sudan) and then again between 2014 and 2018 (for South Sudan).

[112] Bantekas and Oette, *International Human Rights Law and Practice*, 544–45.

concludes that the protection of children from harmful practices is a major point of contact between the values of those cultural settings and the guiding principles of the CRC.[113] Specifically on child soldiering, it has been noted that many African tribes traditionally reserved the right to serve as fighters to men who were either married or had already turned eighteen or twenty.[114]

On the other hand, certain widespread trends seem to stand in favour of child recruitment. As such, they constitute an opposite reason, i.e. why NSAGs are not willing to comply with the law.[115]

4.3.3 The group's image

It has been pointed out that, depending on the NSAG's aim and needs, its leadership may be particularly concerned for gaining and maintaining representational legitimacy vis-à-vis the local population and/or some degree of external support for its actions. Hence, an armed group may be especially interested in preserving a positive self-image. This entails being able to depict itself as a respectable group – with or without the corollary of making the State or enemy NSAGs look bad for their own violations, and thus standing out as the more law-abiding party to the conflict –, and being perceived as such from the outside, via a focused public relations strategy.[116] If this holds true in general, it is arguably an even stronger argument in the case of child soldiering, given its being a particularly odious practice and extremely hard to justify, at least from the point of view of the 'Western' society, which so often draws from a highly stereotyped imagery of child soldiers, depicted as the victims par excellence.

It is no coincidence that one cornerstone of the main strategy adopted by the UN on child soldiering leverages precisely this preoccupation. The second component of this policy, the

[113] Mangena and Ndlovu, 'Shona and Ndebele Proverbs and Children's Rights'. However, the same authors equally stress the Western-biased, and hence debatable, international law divide between child and adult, which is discussed below, under 4.5.3.

[114] Bennett, *Customary Law in South Africa*, 5.

[115] Therefore, they are briefly presented under 4.4.3 below.

[116] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 360–61.

Monitoring and Reporting Mechanism (MRM), hinges upon the findings of reports submitted annually by the SG to the UNSC and UNGA.[117] Parties to armed conflicts (both States and non-State actors) are included in lists annexed to said reports if their conduct in hostilities has been reported as entailing one or more of the six identified 'grave violations' against children: in addition to recruitment and use, killing and maiming, rape and other sexual violence, attacks on schools and hospitals, abduction, and denial of humanitarian access.[118] The listing and de-listing procedure has the practical objective of selecting the parties that must engage in dialogue with the SRSG-CAAC and take measures to address the violations, specially by means of signing an Action Plan.[119] However, an inevitable secondary consequence for the States and NSAGs listed in the annexes is that they are singled out as (grave) violators of children's rights, including as child recruiters.

It remains uncertain whether and to what extent the practice of naming and shaming carried out under the MRM has any tangible impact on the self-image of groups engaging in child recruitment and use. A simple Google search query for 'Ansar Dine child soldiering' generates almost sixty-seven as many entries as the ones generated by the query 'Mouvement national de libération de l'Azawad child soldiering'.[120] Both armed groups have been playing a leading role in the ongoing Mali War, fighting at the same time against the State and against each other. Both have been present in the annexes to the SG's annual reports for ten consecutive years.[121] However, the number of documented violations committed by the MNLA is incomparably higher than those committed by Ansar Dine: of the total 516 cases of recruitment/use reported in Mali in 2020, the former was responsible for 132 violations, and the latter for only four.[122]

This admittedly simplistic comparison may be taken to remind of the extreme complexity of determining a concept so abstract and vague as (self-)perception. At a minimum, it must be

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[117] OSRSG-CAAC, UNICEF, and DPKO, 'Field Manual', 35–36.

[118] Hamza, 'Engaging with Non-State Armed Groups through *Ad Hoc* Commitments', 16–17.

[119] OSRSG-CAAC, UNICEF, and DPKO, 'Field Manual', 46.

[120] The former yields around 2,060,000 results; the latter around 30,800.

[121] Ansar Dine appears with the slightly different spelling 'Ansar Eddine' in the reports since 2016, and it is included as part of a larger group, JNIM, in the 2022 report (the last available at the time of writing); the MNLA is also included as part of a larger group, the CMA, in the 2022 report.

[122] *Report of the SG on CAAC in Mali* of 11 November 2020, para. 14.

observed how the degree of (negative) international attention drawn to an NSAG is far from an accurate reflection of the seriousness of its verified violations. In addition, and most importantly, as aptly noted by Int.4: however relevant the UN practice of international blaming of armed groups recruiting children (and any other similar policy), it is eventually only up to States, i.e. NSAGs' potential supporters and sponsors, to act upon it, and interests of national security will hardly give way to concerns of human rights abuses and other violations of international law.

4.3.4 Short-term military disadvantages

IHL is grounded in a balance sought between the principles of humanity and military necessity. As a consequence, norms under this branch of international law are devised in a way that permits each party to an armed conflict to carry out its military operations, albeit with some constraints. Hence, an IHL provision is at times complied with simply because a law-abiding behaviour is in the military self-interest of the belligerent.[123] Children typically lack the discipline and discernment that are normally required of any fighter.[124] Moreover, their usually reduced ability to perceive danger, and more in general of fully appreciating the consequences of their actions may be deemed a good reason to not use them as front-line soldiers, although admittedly this same feature is at times listed under the characteristics that make them preferable to adults in non-combat roles.[125] Consequently, having children – or at least too many of them – within its ranks may prove counterproductive to the smooth carrying out of an armed group's military operations.[126]

4.3.5 Long-term consequences

One reason why child soldiering has reached international renown in recent decades, to the point of being included in the agenda of the UNSC, the organ bearing the 'primary

[123] Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs', 194.

[124] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 354.

[125] See 4.4.2 below.

[126] Int.1 interestingly noted that, even if perhaps true, this concern – just like any other military issue – can never realistically be mentioned upon humanitarian engagement with rebel leaders.

responsibility for the maintenance of international peace and security',[127] concerns the well-documented dire impact that this phenomenon in the long-run has, both on the children who have been recruited or used in hostilities and on the community to which they belong(ed). As regards the former, many contributions on child soldiers have explored the psychological dimension of both the factors explaining why children and youth engage in forms of political violence, and of the consequences that such engagement has on their development and well-being.[128] The difficulties of reintegrating former child soldiers into society, reconciling them with their conflict-afflicted communities and families and allowing them to transition back to civilian life are all the more evident in the cases of those children whose only, or at least primary, socialisation was into violence within the ranks of the armed group, and/or who were incited or forced to commit atrocities, potentially against members of their own village.[129]

With respect to society as a whole, the economic and material devastation brought about by any civil war is usually accompanied by an immeasurable social and emotional toll caused by the commission, by either side of the conflict, of abuses against the local community. To the well-established awareness that gross human rights violations function as multipliers and facilitators of NIACs,[130] one should add the observation that a significant involvement of children in hostilities exponentially increases the efforts needed to achieve a robust and long-lasting peace.[131] Armed conflicts that have seen an extensive participation of children last longer and claim more victims.[132]

From this perspective, child soldering is one of the areas where the interdependence between the negative and positive dimensions of peace is most evident. The former reflects the more classical definition as the absence of war. The notion of positive peace,[133] on the other hand,

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[127] Thus the function of the SC as per UN Charter, art. 24(1).

[128] Abbott, 'Child Soldiers'.

[129] Ramos, 'Dominic Ongwen on Trial', 387, who borrows Ervin Goffman's concept of total institution (one 'in which all spheres of life take place under the same authority') to describe Joseph Kony's LRA.

[130] Skarstad, 'Human Rights Violations and Conflict Risk'.

[131] Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs', 195.

[132] Haer and Böhmelt, 'Could Rebel Child Soldiers Prolong Civil Wars?'

[133] A first formulation of the concept appears in Galtung, 'Violence, Peace, and Peace Research'.

refers to the presence of a wide array of elements such as equal enjoyment of rights, the elimination of poverty, discrimination and exclusion, a fair distribution of resources,[134] and it has recently been recognised as entailing a fully-fledged right by the UN.[135] This in turn reminds of the availability of education and of adequate socio-economic opportunities, which are well-known factors discouraging children to join armed groups. It is no coincidence that a large part of the literature on this topic has been dedicated to exploring the (actual or desirable) role played by former child soldiers in peace processes.[136]

It is crucial to note that the long-term consequences of child soldiering on the prospects of a peaceful (in both senses) society are not necessarily a concern only for those NSAGs that are aiming at displacing the incumbent government. This assumption is consonant with the approach taken by this thesis, i.e. recognising at least a minimal degree of rationality to belligerents: if it is true that 'men make war so that they can live in peace',[137] then NSAGs should be concerned with the dire consequences of their conduct regardless of their politico-military goal, at least if they claim to be fighting on behalf of a specific community:[138] respecting the local population means at a bare minimum not making it the object of abuses, which cannot be limited to the short-term acts of violence, but rather equally encompasses long-term social, political and economic impact.

4.3.6 The international response

To conclude this section, one last reason capable of explaining why NSAGs may decide to refrain from recruiting and using child soldiers refers to the possibility that the international community adopts a series of coercive measures to punish a group for its unlawful practices. In

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[134] Bailliet, 'Researching International Law and Peace', 5.

[135] '[P]eace is not only the absence of conflict but also requires a positive, dynamic participatory process'; Declaration on the Right to Peace, 17th recital of the Preamble.

[136] Cf. Wessells, 'Child Soldiers, Peace Education, and Postconflict Reconstruction for Peace'.

[137] Aristotle, *Nicomachean Ethics*, Book 10, 1177b5–6.

[138] Cf. the argument made above, under 4.3.1.

addition to measures like arms embargoes, travel bans and asset freezes, the one undoubtedly most pertinent as a response to child soldiering is criminal prosecution.[139]

The significant level of disagreement amongst different scholars around the relevance of this point cannot be ignored. Some highlight the merits of ICL in this area as providing a strong deterrent for rebel leaders: especially in consideration of the persistent uncertainty as to the scope of obligations for NSAGs under other branches of international law, or in any event the possible consequences of a violation under those regimes, establishing individual criminal liability for a specific conduct should be persuasive enough at least for those at the top of their chains of command.[140] Furthermore, the criminalisation of child recruitment and use is praised by some commentators in so far as it entails an expansive and progressive interpretation of the corresponding IHL and IHRL norms which has been proving useful for refining 'the meaning and parameters of an otherwise ambiguously-defined prohibition'.[141]

Others are much more sceptical about the reach of international criminal justice, and maintain that rebel leaders' fear of being prosecuted for their war crimes should not be overestimated.[142] Surely, a certain apprehension was emerging amongst militia commanders in the wake of Lubanga's arrest by the ICC and his transfer to The Hague, particularly in the DRC or in neighbouring CAR.[143] Nevertheless, it seems that such emotion quickly evolved more into a symbolic preoccupation than a concrete fear.[144] Lubanga was the first ever to be convicted at the ICC in 2012,[145] and exclusively on charges of child conscription, enlistment, and use. In the decade that followed, however, the potential of this instrument proved to be much more modest than expected: out of 31 cases (involving a total of 51 defendants), only five individuals have so far

139 Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs', 195.

140 McBride, *The War Crime of Child Soldier Recruitment*, 35–38.

141 Owiso, 'International Law and the Protection of Children Associated with Armed Forces and Armed Groups', 259.

142 Jenks and Acquaviva, 'The Role of International Criminal Justice in Fostering Compliance with IHL'.

143 Darehshori, *Selling Justice Short*, 125–27.

144 Rukooko and Silverman, 'The International Criminal Court and Africa'.

145 Sentence confirmed on appeal on 1 December 2014.

been convicted.[146] In particular, of the six men accused of counts of child soldier recruitment or use, two were convicted and are serving their sentences (Bosco Ntaganda and Dominic Ongwen); one is currently under trial (Alfred Yekatom); and for one a hearing for the confirmation of charges is scheduled for 22 August 2023 (Maxime Jeoffroy Eli Mokom Gawaka).

It is however worth noting that the impact of ICL in this field was a source of major divergences also amongst the interviewees. Int.1 wholly rejected the argument that prosecution before an international tribunal may be relevant in an NSAG leader's decisions, for the reason just mentioned. Int.3 noted that, notwithstanding the statistically insignificant likelihood of actual conviction at The Hague, criminal prosecution does play a role, albeit indirectly: some NSAG leaders are incredibly interested in avoiding being compared to people who have already being labelled as war criminals, and this is of course all the more pressing the symbolically 'closer' the convicted criminal was to a given NSAG. (As such, this would however constitute more an argument of self-image than of fear of an international response proper).

Finally, it should still be noted that the judicial and quasi-judicial bodies empowered to mete out punishments to child recruiters in Africa have been increasing significantly in recent years: in addition to the ACmHPR (in place since 1986), the last three decades have seen the establishment of the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the ICC, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the ACtHPR, the Extraordinary African Chambers (EAC) for Chad, the Special criminal Court (SCC) for CAR, in addition to the proposal of an ambitious African Court of Justice and Human Rights (ACJHR).[147] This trend may continue in the future, and it is at a minimum a signal of an international and regional intention to avoid impunity for

[146] Excluding those found 'guilty of various offences against the administration of justice' (contempt of the court); see https://www.icc-cpi.int/defendants?f%5B0%5D=accused_states%3A358 [accessed 20 August 2023].

[147] Strong doubts have nonetheless been raised about the potential effectiveness of the ACJHR; cf. Amnesty International, *Malabo Protocol*.

individuals responsible for war crimes, including for recruitment and use of children in hostilities.[148]

4.4 Reasons why NSAGs are not willing to comply with the law

The main explanations of an armed group's choice to avail itself of child soldiers can be grouped in four categories: the need for (more) fighters; the specific qualities of children as soldiers; the nature of the international law prohibition on child soldiering; and the support sought from the local population.

4.4.1 A simple matter of supply and demand

Arguably the most intuitive motivation is a group's persistent need for soldiers. Research has shown how higher rates of child soldiering tend to go hand in hand with a higher degree of involvement of children in other adult economic activities, typically within households from rural areas of sub-Saharan Africa.[149] Hence, it may be useful to adopt a child-labour lens: recruitment and use in armed conflict, in addition to being the object of the IHL and IHRL norms discussed so far, and albeit only in its coerced form (conscription), has been recognised as one of the worst forms of child labour.[150]

Even irrespective of those specific features of children which might make them more palatable than adults for an armed group,[151] having a larger recruit pool allows a safe increase of members for the NSAG over a shorter span of time. This is taken to imply that, if no distinction is made between the two categories according to other criteria, a certain number of children will be recruited alongside adults. The more fighters the better, irrespective of who they are.[152] An

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[148] Criminal prosecution before domestic courts is not considered since it can occur also for the mere participation in hostilities, combatant status being non-existent in NIACs and armed groups being by definition unlawful under the domestic legal systems of any country; therefore, the specific fear of being prosecuted for child soldiering (or, for that matter, for any other IHL norm) is not a concern for NSAGs' leaders or members.

[149] Andvig and Gates, 'Recruiting Children for Armed Conflict', 80.

[150] ILO, C182, art. 3(a).

[151] Dealt with under 4.4.2 below.

[152] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 354.

unfortunate addendum is that such necessity of quickly gathering as many (human) resources as possible normally arises during 'an escalation of hostilities and periods of heavy and deadly fighting',[153] including in the final desperate moments of existence of an armed group,[154] which evidently makes it even more dangerous for children to be involved in the conflict, even when not employed in combat functions.

The supply-and-demand argument must be completed with some related considerations. Firstly, the countries where child soldiering occurs most often are characterised by extremely young and demographically unbalanced populations. From the point of view of a potential recruiter, establishing an 18-year threshold can mean two very different things in countries like Uganda, Mali, Chad, the DRC, Burundi, Burkina Faso and Liberia, where more than half of the population is below that age,[155] compared to (mostly Western) countries where the same figure is well above 40 years.[156] In addition to the disproportionate availability of very young (unlawful) combatants, anthropological research hints at the inevitable chronological compression of the various stages of development of a person living in such a society,[157] a fact which in turn relates to the co-existence of different conceptions of childhood across different societies.[158]

Secondly, NSAGs' claim that they cannot 'afford' to distinguish between adults and children in their recruiting processes is often justified by reference to the inherent asymmetry of non-international armed conflicts in which they operate.[159] States can count on armed forces made of trained professionals, armed groups must rely on what they have at their disposal. This line of reasoning cannot as such be accepted under international law.[160] Nevertheless, there still exists, at a minimum, a growing support from the literature for the argument that respect for the

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[153] Bongard and Heffes, 'Engaging ANSAs on the Prohibition of Recruiting and Using Children in Hostilities', 613.

[154] Andvig and Gates, 'Recruiting Children for Armed Conflict', 89–90.

[155] https://www.cia.gov/the-world-factbook/field/median-age/ [accessed 31 July 2023]. Other African countries having experienced child soldiering – Sudan, Somalia, South Sudan, Nigeria, Sierra Leone, CAR and Côte d'Ivoire – still have a very low median age, comprised between 18.3 and 20.3 years.

[156] Ibid.

[157] Diamond and Plattner, *Democratization in Africa*, 55.

[158] Discussed under 4.5.3 below.

[159] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 372–73.

[160] Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs', 192.

principle of belligerent equality, whereby both parties to a conflict are bound to the exact same obligations, cannot realistically be demanded in a NIAC, and thus different obligations should be devised for actors with very different capacities.[161]

Lastly, as mentioned in the literature review under part 2, it is paramount to take supply-based incentives into account. Again from a child-labour perspective, having a larger recruit pool at an NSAG's disposal increases the risk of child soldiering. Relatedly, it has been demonstrated that the number of orphans and the level of poverty, both typical indicators of one or more of these 'push factors', do not account for the variance in the incidence of child soldiering in countries from sub-Saharan Africa.[162] Varying percentages of child soldiering are much better explained by the degree of protection and securitisation of the civilian population, especially in refugee and IDP camps,[163] a finding that reinforces the idea that demand-based reasons are crucial to understanding the phenomenon at hand: the more children meet NSAGs' demand, the more will be drawn into their ranks, as long as they are perceived as perfect substitutes for adults (in an economic sense).[164]

4.4.2 Military advantage

It has been argued so far that a child may be recruited and/or used by an armed group not *qua* child, but simply because he/she is just as good as any other soldier.[165] However, under certain circumstances, violating the IHL prohibition on child recruitment may actually yield some undisputable short-term benefits. This is true in two respects.

First, some specific features of children make them preferable to adults. The former are in fact generally easier to recruit and to retain. They are faster to indoctrinate and manipulate, cheaper to sustain (in terms of both food and salaries), more obedient and responsive to coercive

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[161] Cf. Sassòli and Shany, 'Should the IHL Obligations of States and Armed Groups Be Equal?'

[162] Achvarina and Reich, 'No Place to Hide'.

[163] Ibid.

[164] Andvig and Gates, 'Recruiting Children for Armed Conflict', 79–80.

[165] Especially given the loss of adults' comparative advantage as fighters, brought about by the unchecked proliferation of AK-47s and similarly light and intuitive weapons; Singer, *Children at War*, 44–49.

methods, less aware of danger.[166] They stay longer than adults in the group, since they are more prone to altruism and more likely to bond quickly with other group members, responding more automatically to 'solidarity benefits' (compared to purely economic gains). They are less concerned than adults to go back to their families and, especially if the group is frequently on the move, they find it much harder to trace their way back to their village, hence making desertion much rarer.[167]

If all these aspects hold true in general, the benefit of deploying child soldiers is all the more evident in the context of guerrilla warfare, since this kind of prolonged low-intensity fighting envisages many more roles for which the smaller size and reduced 'visibility' of children prove particularly apt: reconnoitring, spying, scouting, sabotaging, and acting as decoys or couriers (transporting supplies and delivering messages) are all examples of activities that are best fulfilled by children.[168]

The second reason why child soldiers entail an undisputable military advantage is the peculiar form of 'immunity' that this category of fighters enjoys, thus making children especially valuable in combat. On the one hand, it has been observed that adults, and in particular trained members of professional armed forces, are normally highly reluctant to attack children; being compelled to do so has extremely negative consequences on the troops' morale, not to mention the risk of post-conflict depression and the burden of having to justify such conduct before the public opinion not to lose support for the military engagement.[169] This is notwithstanding that, from a strictly legal point of view, children who are taking active part in hostilities lose the protection they otherwise enjoy as civilians,[170] and can thus be lawfully targeted and killed.[171]

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[166] Int.1 found this aspect doubtful.

[167] Andvig and Gates, 'Recruiting Children for Armed Conflict'; and *Machel Report*, para. 34.

[168] Brett and MacCallin, *Children: The Invisible Soldiers*, 123–29.

[169] Singer, 'Western Militaries Confront Child Soldiers Threat', 9.

[170] GCs, common art. 3(1)(a) and APII, arts 4(1)-(2)(a) and 13(3).

[171] Melzer, *Interpretive Guidance on Direct Participation in Hostilities under IHL*, 60.

On the other hand, there exist a persistent legal loophole concerning children aged between fifteen and seventeen, since they represent an entire group of soldiers for whose even most horrific crimes nobody can be held accountable; not the children themselves because minors are not prosecuted at the ICC,[172] and not their recruiters because of their conduct falling outside the material scope of the relevant war crime (only covering children aged fourteen and below).[173] Most commentators agree that this lacuna should be addressed as soon as possible, as it effectively constitutes an incentive to get children to commit atrocities.[174] However, it is also true that a) alternative avenues to criminal prosecutions exist at the ICC;[175] b) tribunals other than the ICC may adopt different approaches;[176] and most importantly c) paths beyond criminal prosecution exist, and are perhaps more effective, for holding former child soldiers accountable for their actions, while at the same time reconciling them with their conflict-afflicted communities.[177]

4.4.3 Illegitimacy of the legal norm

A third factor explaining child recruitment concerns the very nature and content of the IHL prohibition, which is sometimes rejected by an NSAG's leadership. This may occur for a number of reasons. One of the most common causes mentioned in the literature is the fact that this legal provision (just like any other international law norm, for that matter) has been neither negotiated, nor agreed to, by the armed groups which it binds.[178] Such claim may or may not be accompanied by the corollary of explicitly condemning the invalidity of a legal agreement that was entered into by the very entity (the State) that the group is fighting against. The belief that violations of IHL are motivated (also) by a perceived lack of 'sense of ownership' over its provisions is at the foundation of the numerous activities carried out by various humanitarian

[172] Rome Statute, art. 26.

[173] Drumbl, 'The Effects of the *Lubanga* Case on Understanding and Preventing Child Soldiering', 92.

[174] Ramos, 'Dominic Ongwen on Trial'.

[175] For instance through the doctrine of command responsibility (i.e. finding a mode of liability other than direct perpetration) envisaged under Rome Statute, art. 28.

[176] Even though also the SCSL Prosecutor explicitly refused to indict minors.

[177] Cf. Musila, 'Challenges in Establishing the Accountability of Child Soldiers for Human Rights Violations'; and Among, 'The Application of Traditional Justice Mechanisms to the Atrocities Committed by Child Soldiers in Uganda'.

[178] This is one of the main points of Bellal and Casey-Maslen, 'Enhancing Compliance with International Law by ANSAs'.

actors upon negotiation with NSAGs.[179] The former are increasingly interested in engaging the latter in making public commitments to increase their level of compliance with specific norms of international humanitarian law. This can occur via adoption of an array of different instruments: unilateral declarations, special agreements envisaged under article 3 common to the GCs,[180] cease-fire agreements and other *ad hoc* agreements.[181] The praiseworthy efforts of Geneva Call's Deeds of Commitment, or of the UN's Action Plans, are crucial in two respects: in addition to the practical result of convincing former IHL violators to abide by higher standards of legal protection in war, in fact, they contribute to the doctrinal debate around the status of NSAGs under international law, i.e. their ability to both being bound by IHL and IHRL norms, and to create IHL and IHRL provisions that are applicable to them.[182]

Furthermore, just like it is true that certain armed group's convictions, whether or not reflective of local norms and values, may be in contrast with an involvement of children in armed hostilities,[183] the opposite can be true for other groups. As already noted, the extent to which this argument is valid depends entirely on the characteristics of any given NSAG. As a general observation, the link between warfare and concepts of heroism and martyrdom is far from rare. Soldiers are often celebrated for having taken up arms in order to defend their villages. For instance, the Sierra Leonean TRC found in its final report that '[v]iolence became glorified during the conflict [and combatants] were celebrated and revered [...] the more brutal and violent the violations they committed.'[184] Sadly, this sense of pride and belonging was even more intense for children, given their higher need for group acceptance and their higher susceptibility to peer pressure.[185] Moreover, initiation of young boys into military life is one extremely common form of rite of passage from childhood to adulthood.[186]

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[179] Rousseau and Sommo Pende, 'Humanitarian Diplomacy'.

[180] Heffes and Kotlik, 'Special Agreements as a Means of Enhancing Compliance with IHL in NIACs'.

[181] The directory 'Their Words', run by Geneva Call, has collected almost 600 humanitarian commitments made by around 360 NSAGs from sixty-six countries in the course of over eight decades, on twenty-six different thematic areas including, of course, CAAC: see http://theirwords.org/?keyword__0_id=58&keyword__0_type=keyword [accessed 18 August 2023].

[182] Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts'.

[183] See 4.3.2 above.

[184] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth*, Volume Three B, 188.

[185] Ibid., 288.

[186] Kyulanova, 'From Soldiers to Children'.

Another form of illegitimacy concerns the objective unfairness of the human rights prohibition on child soldiering, which is simply much more demanding for armed groups than it is for States.[187] The provision relevant to NSAGs reads:

> Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.[188]

It must be acknowledged how: i) any kind of use is prohibited to NSAGs, while only direct participation is banned for States; ii) eighteen years is the age threshold for NSAGs, but States can lawfully recruit 16-year-olds; iii) the child's consent is deemed irrelevant for NSAG recruitment, whilst State recruitment operates a distinction between enlistment and conscription; and iv) NSAGs are subject to a complete ban, whereas States are only required to take 'all feasible measures' to ensure that the law is not violated.[189]

Lastly, irrespective of the substantive content of the provision, the legal requirement may be deemed illegitimate simply because it belongs to an 'alien' legal regime, given the difficult relationship between Africa and IHL mentioned in the literature review.[190]

4.4.4 Terror and self-reproduction

Amongst the reasons why an armed group may be willing to refrain from recruiting and using children, the first one mentioned in the previous section was almost any NSAG's interest in a compliant population, with the ensuing need for its support.[191] 'One of the paradoxes of several modern conflicts is [however that certain] armed groups attack the very people on whose behalf

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[187] Surprisingly, the divergence between IHL and IHRL was the main concern mentioned by Int.1, but wholly rejected as irrelevant by Int.2.

[188] OPAC, art. 4(1).

[189] The norms relevant to States are found under OPAC, arts 1-3.

[190] Cf. third paragraph of section 2.3.

[191] See 4.3.1.

they claim to be fighting.'[192] The Lord's Resistance Army (LRA) is a paradigmatic example: loosely based on the Acholi people of northern Uganda, the armed group led by Joseph Kony has been at war, with many fluctuations, against the governments of its country, of the DRC, of South Sudan, and of the CAR for over thirty-five years. Allegedly aiming at governing the whole of Uganda in accordance with a fundamentalist interpretation of Christian values, the group has constantly been reported as committing four 'grave violations' against children – abduction, recruitment (especially forced) and use, killing and maiming (including intentional mutilations), rape and other sexual violence (including sexual slavery of young girls) – in addition to a wide range of other abuses against the civilian population that can safely be labelled as terroristic in nature. This brutality is mandated by Kony, officially a fugitive from international justice since 8 July 2005, when a warrant of arrest was issued for him by the ICC. His figure has always been shrouded in a veil of mysticism, with many former LRA child members claiming that they truly believed him to possess magical powers, which enabled him to maintain a complete control over his fighters.[193]

Int.4 suggests to operate a distinction between 'depraved armed groups' and 'ideology-driven armed groups'. The former category, to which would undoubtedly belong the LRA, includes NSAGs resorting to violence for violence's sake, while the latter comprises a myriad of historical liberation movements that fought for what would nowadays be considered 'the right cause', yet they relied heavily (at least in their infancy) on the involvement of youth and children in organised violence.[194] Although some commentators maintain that the LRA's recourse to terror and brutality against what should be its very 'constituency' can and should be interpreted as part of a precise military strategy,[195] thoroughly understanding the rationale behind the wanton

[192] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 373.

[193] Ramos, 'Dominic Ongwen on Trial'.

[194] It could be recalled that an extraordinary number of political parties from contemporary Africa, ruling in their respective countries, began their activities as unlawful movements fighting against the oppression of European colonialism and that many of them – notwithstanding the nobility of their goal – openly engaged in forms of fighting that amount to (what today would be referred to as) violations of the IHL applicable to NIACs, including the recruitment and use of children.

[195] Vinci, 'The Strategic Use of Fear by the Lord's Resistance Army'.

violence carried out by certain NSAGs would be too onerous a task for the limited scope of this analysis.[196]

A parallel argument concerns self-reproduction, also mentioned by Int.4. Although this and terror are not comparable aspects, they are presented together here since both refer to some form of 'automatic' involvement, whereby children become affiliated with an armed group not as a consequence of a rational weighing of benefits and drawbacks of having children engage in warfare. Just like any other social group, NSAGs too need to survive, and at times it is only natural to keep doing what they have always done.[197]

4.5 Reasons why NSAGs cannot comply with the law

After having assessed – with the (limited) information at its disposal and subject to the specific circumstances ruling in a given phase of the conflict – all the possible advantages and drawbacks of conscripting, enlisting and using children in hostilities, an armed group's leadership may rationally conclude that it is better to refrain from doing so, for the whole-of-reasons against child soldiering outweigh those in favour. The NSAG, however, could still be unable to adopt a law-compliant behaviour, and this may happen for a number of reasons, of which four are examined in the following: ignorance of the law and/or lack of clarity of the law; differing definitions of 'child'; the inability to translate an abstract commitment into practice; and the inability to ensure compliance by the whole group.

4.5.1 Ignorance of the law

The inevitable point of departure is that *ignorantia legis non excusat*, i.e. not knowing what the law prescribes cannot be accepted as a legal justification for violating it.[198] On the other hand, individuals who commit a crime may in practice be genuinely unaware that their conduct is in fact prohibited by the law. NSAGs and their leaderships, in particular, can seldom rely on the

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[196] And to some extent, it would run counter to the initial assumption of rebel leaders' rationality.

[197] As such, terror and self-reproduction entail arguments related to, yet distinct from, the need for more combatants discussed under 4.4.1 above.

[198] A different but related argument would concern the potential lack of clarity of the law.

'legal sophistication' that States can (indeed, must) provide to their armed forces via legal advice and training by IHL experts.[199] The validity of this argument is not linked exclusively to an absolute ignorance of the existence of a legal provision, and may cover many different degrees of lack of awareness: from a substantially incorrect knowledge of the content of such provision, to a comprehension that is correct yet insufficient, or limited to basic principles.[200] Also from the angle of procedural ICL, mistake of law is technically envisaged as a potential defence to be raised on trial: at the ICC, it 'shall not be a ground for excluding criminal responsibility [unless] it negates the mental element required by [the] crime, or as provided for in article 33.'[201] Leaving aside the latter possibility, which refers to an obedience to superior orders, even the former is extremely unlikely to be accepted in practice.[202]

Nonetheless, during the first trial at the ICC, mistake of law was raised by Lubanga's defence counsel, albeit framed as an issue of non-retroactivity: his attorneys, in fact, argued that not enough publicity had been given to the ratification of the Rome Statute by the DRC, moreover that the specific prohibition on accepting the voluntary enrolment of children was made explicit under neither CRC nor APII, and that for these reasons the indictee had no knowledge of the penal relevance of his actions.[203] Such justification was rejected by the Pre-Trial Chamber, which found that the term 'recruitment' was widely understood (including by Lubanga) as encompassing enlistment as well, the ignorance as to the correct distinction between the specific terms employed by art. 8(2)(e)(vii) of the Rome Statute (i.e. enlistment and conscription) being irrelevant.[204]

[199] API, art. 82; also recognised as customary in nature by the *ICRC Customary IHL Study*, rule 141 (it is worth noting that practice 'does not indicate that any distinction is made between advice on [IHL] applicable in [IACs] and that applicable in [NIACs]').

[200] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 369–70.

[201] Rome Statute, art. 32(2).

[202] Cassese et al., *Cassese's International Criminal Law*, 219–22.

[203] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, decision on the confirmation of charges (ICC-01/04-01106).

[204] What matters is not a legally exact awareness of the specific objective element of the crime, knowing in general terms that having children within military ranks is not lawful is enough to establish intent; McBride, *The War Crime of Child Soldier Recruitment*, 171–72.

Hence, for a mistake of law defence to apply, a defendant would need to have been wholly unaware of the have to demonstrate a complete lack of awareness of the general prohibition on recruiting/using below-15-year-olds. Such possibility was already contested a decade ago (for Lubanga) and is increasingly unsustainable today, given the worldwide attention given to the protection of children in armed conflict, including the scourge of child soldiering: after such long-lasting presence in legal developments, regional trends, media and public opinion, UN policies, and NGO campaigning, 'any future defendant would find proving this degree of unawareness to be an onerous task'.[205]

4.5.2 Incompatible definitions

An armed group's leadership may in principle embrace the goal of keeping children away from armed hostilities, yet disagree on who should be considered a child for the purpose of this ban.[206] Childhood, puberty, adolescence and adulthood are all socially constructed concepts: as much as grounded in biological and psychological observations, they inevitably reflect customs and traditions that vary greatly across different cultures around the world including, of course, on the African continent. Hence, the purely chronological divide favoured by the international law on children's rights may be contested as not necessarily suitable to reflect the liminal experience[207] of an individual who stops being a child and begins their adult life.[208] For example, many African traditional societies construe childhood by reference to the relative stage of development of one's life (puberty), or even in relational terms (i.e. depending on the relationship with family members).[209]

What is more, even accepting a chronological demarcation between childhood and adulthood does not help in any way to solve the conflict between an international law position defining a

[205] Ibid., 207.

[206] Children is one of the two categories – the other one being civilians – that are most frequently interpreted in good faith by NSAGs but in ways incompatible with the IHL definitions, according to Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 382–83.

[207] Liminality is a concept in cultural anthropology defined as a 'transitional or indeterminate state between culturally defined stages of a person's life, [ofttimes] occupied during a ritual or rite of passage'; cf. https://www.oed.com/dictionary/liminality_n?tab=meaning_and_use&tl=true#12021030 [accessed 17 August 2023].

[208] Drumbl, 'The Effects of the *Lubanga* Case on Understanding and Preventing Child Soldiering', 90; 92.

[209] Mangena and Ndlovu, 'Shona and Ndebele Proverbs and Children's Rights', 662.

child as any individual aged below eighteen years[210] (notwithstanding the abovementioned inconsistencies between the IHL, IHRL and ICL provisions) and the age threshold identified by other normative frameworks. Islamic cultures, for instance, consider 13-year-old persons to be adults.[211] It is worth recalling that of the five situations with the highest numbers of children recruited and used in 2022, four are countries with a largely-Muslim-majority population, and of those, two are African – Mali and Somalia.[212] In particular, the Jama'a Nusrat ul-Islam wa al-Muslimin (JNIM) from Mali and Al-Shabaab from Somalia, both extensively recruiting children, have an explicit religious connotation.[213] It should be noted, however, that this problem may be often over-estimated. Three considerations are in order.

First, a very common argument put forward in the cultural relativism v. universalism debate, for instance to oppose the practice of FGM, still widespread especially around the Sahelian region, is that cultural traditions and practices simply cannot be used to justify a conduct clearly constituting an abuse.[214] The same could be applied to child soldiering: one thing is to envisage different ages at which a child becomes an adolescent and an adolescent becomes an adult; a very different thing is to state that it is a good idea for a child to be involved in warfare as a rite of passage into adulthood.[215]

Second, it should be noted that also in 'Western' cultures, the prevailing trends of which have come to establish the 18-year divide, there hardly exists only one 'age of majority': individuals go through legal age thresholds that at times vary significantly even within the same society, e.g. to express valid sexual consent, enter into marriage, adopt a child, cease to attend compulsory education, purchase and consume alcoholic beverages, purchase and make use of tobacco products, gamble, vote in and stand for different types of public elections, obtain a licence to drive different types of vehicles, and, of course, accede to military service. This is not to

[210] CRC, art. 1.

[211] Jo, 'Compliance with IHL by Non-State Armed Groups', 72.

[212] *Annual Report of the SG to the UNSC and UNGA on CAAC* of 23 June 2022. The fifth country (DRC) is also from the African continent.

[213] Ibid.

[214] Alston, *The Best Interests of the Child*, 20.

[215] De Bondt, 'Child Soldiers Caught in a Cultural Kaleidoscope'.

mention a wide variety of other religious, cultural or social practices that are only accessible to persons above a certain age, whether or not requiring some form of rite of passage. Consequently, it is not necessarily incoherent to maintain that a young girl may be considered a woman at 16 for some purposes, and at 21 for others.

Third and last, the earliest instruments of contemporary IHL were drafted a long time ago, and since then a clear trend undoubtedly emerged signalling the acceptance, also all across Africa, of the mentioned 'straight-18 position'. Not only has an African child been defined under relevant legal instruments as any African individual aged seventeen or younger,[216] but many scholars would agree that the African legal regime is not significantly less 'protectionist' than the CRC vis à vis children's rights.[217]

4.5.3 Inability to transform willingness into practical compliance

The Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict[218] has been signed by only two African armed groups: the Sudan People's Liberation Movement–North (SPLM-N) from Sudan on 30 June 2015,[219] and the APCLS from the DRC on 21 November 2016.[220] Ironically, both groups have continued to be listed in the annexes to the annual reports of the Secretary-General abundantly after the signing of their respective commitments: the APCLS have continuously been present since 2013, and the SPLM-N since 2012. As such, the two groups are amongst the thirteen 'gravest violators' appearing on those lists.[221] What is more, both always appear in the first section of the annexes, the one including parties that 'have not put in place adequate measures to improve the protection

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[216] ACRWC, art. 2.

[217] E.g. Lloyd, 'A Theoretical Analysis of the Reality of Children's Rights in Africa'; and Olowu, 'Protecting Children's Rights in Africa'.

[218] Its art. 3 goes significantly beyond the objective element of the child soldier war crime, proscribing even mere association, and the last recital of its Preamble defines a child according to the 'straight-18 position' (and demands that they be considered as one by the NSAG in case of doubt).

[219] Available at http://theirwords.org/media/transfer/doc/2015_30june_splmn_sudan_children-406c76b0626-f4229f17dbb29bdf5da68.pdf [accessed 19 August 2023].

[220] Available at http://theirwords.org/media/transfer/doc/signed_doc_apcls-bed635e4c57888eb0d30381a66c-53166.pdf [accessed 19 August 2023].

[221] Of the 81 NSAGs that have ever been listed in the annexes to the SG's annual reports, thirteen are particularly persistent violators, as they have been present in these reports for over one decade.

of children during the reporting period' (parties are listed in the SG's reports also if they have put in place certain measures, but grave violations against children have nonetheless occurred during the reporting period).[222] Determining whether such commitments were part of a larger public opinion policy aimed at attaining a better image on the international stage,[223] or whether they indeed reflected a genuine willingness to comply with IHL, but not (yet) mirrored by the ability to do so, is beyond the scope of this section.

However, the cases of APCLS and SPLM-N are two possible examples suggesting that it is extremely difficult to understand why an NSAG would publicly commit to respect an IHL norm only to continue violating it in practice. For example, certain armed groups engage in what has been termed 'lawfare', i.e. the use of IHL not by reason of a genuine desire to abide by its provisions, but rather as a 'soft weapon' against the opposing party to the armed conflict,[224] usually in order to entice it into behaving in a certain way.

Nevertheless, it is reasonable to assume that a NSAG may genuinely be willing to respect IHL, yet not be able to comply with its provisions in practice. Of the many different measures of implementation, that are to be adopted for translating an otherwise only abstract commitment,[225] the one most clearly relevant for the prohibition on child soldiering is seeking access to birth certificates or other documentation that could attest to a child's age, such as school diplomas.[226] Other age verification mechanisms can also be envisaged, that may be necessary in countries or regions where such documentation is scarcely issued by the public authorities (whether or not as a consequence of the ongoing conflict), or if it is anyway not made available to NSAGs. These include relying on alternative sources like photographs or testimonies from people who know the (potential) child.[227]

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[222] Cf. for instance the last available report: UN Doc. A/76/871-S/2022/493, Annex I(A), pp. 41-42.

[223] See 4.3.3 above.

[224] Bangerter, 'Reasons Why Armed Groups Choose to Respect IHL or Not', 355.

[225] The others are mentioned under 4.5.4 below.

[226] Falchetta and Withers. *A Law unto Themselves?*, 47.

[227] Ibid.

In this regard, it is useful to recall what is the *mens rea* required for the war crime of child recruitment and use (at least at the ICC). The relevant norm is silent on the matter, since it only defines the objective elements of the crime as '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.[228] Further, the specific article on mental element provides that, '[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime […] if the material elements are committed with intent and knowledge.'[229] However, precisely the beginning of the latter provision suggests that a lower mental element than intent and knowledge may be sufficient to find criminal liability, if it is so provided elsewhere. And such is precisely what the Court established upon adoption of the Elements of Crimes in 2010, which clarify that, for the relevant crime to have been committed, '[t]he perpetrator knew *or should have known* that [the children] were under the age of 15 years.'[230] Hence, the necessary mental element is gross negligence,[231] a much lower threshold than intent, defined as the 'failure to comply with accepted standards of conduct [that] may bring about harmful effects [… when] the actor believes that the harmful consequences of his conduct will not occur, thanks to the measures he has taken, or is about to take.'[232] This entails that refraining from accepting enlistees – not to mention forcibly recruiting individuals – that are clearly below a certain age, perhaps by relying only on a potential recruit's physical appearance to guess their age,[233] is not enough. A positive obligation is attached, whereby concrete steps must be taken to verify that a prospective NSAG member is above the necessary age, with the corollary that in case of doubt (i.e. if their age cannot be verified and the person may realistically be a child), they shall not be enrolled.

4.5.4 Inability to enforce respect

Finally, strictly related to the point just made is the possibility that a commitment made by a NSAG's leadership is not followed by an actual compliance with such commitment throughout the armed group. Besides the specific aspect of age verification mechanisms mentioned in the

[228] Rome Statute, art. 8(2)(e)(vii).

[229] Ibid., art. 30(1).

[230] Elements of Crimes, element (3) of article 8(2)(e)(vii), p. 39 (emphasis added).

[231] Also culpable negligence or advertent negligence (*culpa gravis*).

[232] Cassese, *The Oxford Companion to International Criminal Justice*, 433.

[233] *Machel Report*, para. 36.

above section, there exist a wide range of other practical measures of implementation, often constituting the core of the dialogue and engagement initiated by humanitarian actors with NSAGs. These include: the adoption of internal rules and regulations, the dissemination of norms and the engagement in trainings to ensure adherence thereto, the identification and release of already recruited children, the imposition of sanctions for non-compliant group members, the agreement to have the group's progress monitored and reported on by an independent actor.[234]

Overall ability to transform commitment into practice depends essentially on the leadership's perceived authority and the 'grip' it has over rank-and-file behaviour, the group's size and its degree of internal cohesion, the level of organisational control and the liberty left to the single NSAG members. One aspect that seems to be particular influential in this regard concerns the internalisation of the legal (or other) norm by the single members of an armed group.[235] Clearly, this process is all the more difficult the more individual combatants are used to think of child participation as a natural product of the outbreak of armed hostilities. A process that cannot be taken for granted especially in the cases of long-lived armed groups that have always resorted to child recruitment or use, in a more or less automatic way:[236] it is incredibly hard for a former child soldier who stayed in an NSAG long enough to become a fully-fledged adult member thereof to internalise a directive issued by the group's leaders and repress their own instinct to recruit new children. Int.3 stressed the importance of distinguishing between IHL violations that are committed as the outcome of a specific policy adopted by the armed group as such, and violations that result from individual behaviour and are thus intimately connected to an 'emotional component' which is extremely complex to negotiate.

[234] Falchetta and Withers. *A Law unto Themselves?*, 43–51.

[235] Bongard and Heffes, 'Engaging ANSAs on the Prohibition of Recruiting and Using Children in Hostilities', 608.

[236] Cf. the point made under 4.4.4 about child recruitment as a natural component of a group's tendency to self-reproduction.

5 Discussion

The analysis conducted so far has painted a complex picture, briefly touching upon a multitude of factors that may have a more or less significant and more or less direct impact on a NSAG's practice of recruiting or using child soldiers. The results highlight that four dimensions – cutting across the different reasons mentioned – arguably bear a high relevance, which has been confirmed by the interviewees: the NSAG's relationship to the local population; its relationship to the State; its relationship to the international community (including international law); and the NSAG's intrinsic characteristics. A deep and accurate knowledge of the interplay between all these dimensions is key for the design of correct and effective incentives upon humanitarian engagement with each group.[237] Therefore, the incentives discussed in this section can be thought of as valuable 'lessons learnt' from the analysis constituting the core of this thesis. Before turning to a presentation of such incentives, some caveats are in order.

First, it is worth stressing once again that incentives must be tailored to the specific armed group: what is ideal for a small-scale NSAG with a significant 'legal sophistication' cannot be envisaged for a sizeable NSAG made primarily of semi-illiterate fighters, and vice versa; however, given the theoretical nature of this thesis, only abstract generalisations are possible. Second, suitable incentives frequently vary depending on the phase of the conflict: what is applicable when an NSAG has just started its fight against governmental forces may be totally unreasonable when that same group has agreed to enter into peace negotiation a few years later. Third, different humanitarian actors will rely on different kinds of incentives: it is not just coherent but also inevitable that the ICRC, Geneva Call, UNICEF, the OSRSG-CAAC, etc., adopt even significantly different approaches to the same issue, in so far as they have different capacities (expertise, skills, resources, legal empowerment) and different interests; many different methods and strategies can still be aimed at a shared ultimate goal. Fourth, incentives need be adapted to the hierarchical level of the NSAG that is engaged in humanitarian dialogue: the group's leadership may be much more interested in the potential criminal liability based on

[237] The term 'incentive' is here interpreted loosely as any measure – be it of a military, legal, political or other nature – that can be adopted by third actors to enhance an armed group's compliance with the prohibition on child soldiering.

command responsibility, while the rank and file may be more in need of practical training on the implementation of age verification mechanisms.

5.1 Specific incentives

There exist a number of incentives that the examination of a specific NSAG's reasons allows to explore, and that do not always necessarily transpire from other mainstream approaches to child soldiering. Those are (presented approximately in ascending order of practicality and specificity):

a) Whilst the regional trend is undisputed, it would still be useful to clarify the international legal framework – IHRL/IHL/ILL/ICL – on the crime of recruitment and use, overcoming the inconsistencies across different legal regimes, and settling once and for all for an age threshold through the adoption of a straight-18 approach;

b) It is paramount to equally clarify the international and regional legal framework on accountability for crimes committed by child soldiers, which should never go unpunished,[238] without however implying that children should be treated in the same way as adults;[239]

c) In essence, to paraphrase Sassòli's everlasting plea, armed groups should be taken seriously.[240] This entails, amongst other things, that NSAGs should never be labelled as terrorist when they are clearly not, and under no circumstances should impartial humanitarian organisations be prevented from engaging in humanitarian dialogue with those groups; that States should always be encouraged to grant amnesties for the mere (IHL-consistent) participation in hostilities; that, without for this reason recognising them any higher degree of legitimacy, NSAGs should be engaged as much as possible in the development of the law – IHL and IHRL – applicable to them; that any effort to abide by higher standards than the ones for example

[238] Paris Principle 8.6.

[239] Cf. CtRC, General Comments No. 10 and 24 on juvenile justice.

[240] Sassòli, 'Taking Armed Groups Seriously'.

required of States should be explicitly praised (e.g. when NSAGs actively engage in the protection of, or provision of services to, 'their constituencies'); that humanitarian actors should always understand the specific NSAG's reasons for engaging in unlawful practice before attempting at convincing or enabling such group to comply with the law (and in particular not focus exclusively on existence of reasons for non-compliance); that humanitarian actors should always consider what the best way is to frame a legal issue in the dialogue with armed groups, be it IHL, IHRL, domestic law or local customs and values;[241] that humanitarian negotiation should be devised in a 'clever' way, e.g. by not immediately requiring that all children below eighteen be demobilised during the first meetings with a group if more egregious violations have already been reported;[242]

d) Hopefully under the auspices of organisations such as the ICRC or Geneva Call, the level of coordination between NSAGs and the relevant State(s) should be increased as much as possible, with a view to – amongst other things – providing armed groups access to children's birth certificates and other documentation useful to verify their age.[243]

5.2 General preventive measures

Both the academic debate and the already established policies on child soldiering frequently refer to certain aspects that remain extremely relevant and are thus in no way challenged by this thesis, yet they do not derive from a comprehension of NSAGs' points of view, constituting the core findings of the above analysis. It is still crucial to equally consider all these forms of prevention jointly, for they all support and reinforce one another. Thus, the second category of measures includes the following (again roughly listed from the most general and abstract to the most concrete and specific):

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[241] 'The role of law is vital in setting standards, but encouraging individuals to internalize the values it represents through socialization is a more durable way of promoting restraint'; Terry and McQuinn, *The Roots of Restraint in War*, 9.

[242] This reflects Int.2's pragmatic (as opposed to purely legalistic) approach.

[243] This was specifically included as a recommendation to the relevant government in the first decision of the ACERWC, *Hunsungule v. Uganda*.

e) Though obvious and apparently simplistic, the most effective way to mitigate the impact of armed conflicts on children's rights is to prevent their outbreak in the first place.[244] Beyond the evident underlying moral aspiration, conflict prevention has been at the centre of a decades-long development of international law and policy fostered by a myriad of international and regional organisations. From constituting one of the very purposes of the United Nations in the form of 'maintenance of international peace and security',[245] through the elaboration of ideals of 'co-operation and peaceful co-existence',[246] it eventually evolved into a much broader recognition of a 'right to peace'. While this turn is evident in the adoption of the 2016 Declaration on the Right to Peace by the UNGA, some progressive scholarship had already envisaged the emergence of a 'human right to peace' as early as the late 1970s.[247] The significance of this development lies in both the inception of a legal entitlement, both individual and collective, and in its going beyond a mere applicability to inter-State relations, as it clearly covers 'internal peace' too. Notably, the ACHPR is the only instrument of international law recognising a (group) 'right to *national* and international peace' in a legally binding form;[248]

f) Besides the State obligations ensuing from such right – to do everything feasible to deter the outbreak of armed hostilities, it is no coincidence that precisely one of the pillars of the later stages of this development is education to peace: it is acknowledged that, long before politics, diplomacy and, *a fortiori*, military operations, peace is built in schools.[249] Hence, putting an end to child soldiering would require a major cultural shift, whereby societies should seriously reconsider the way in which war and veterans are displayed, especially in schools and through media intended for children: precisely given their tendency to be more easily indoctrinated than adults, socialising them from a very early age in a setting that glorifies fighting could not but increase the chances that a child opt for the worst alternative, were they presented the possibility

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[244] *Machel Report*, para. 253.

[245] UN Charter, art. 1(1); also stressed already in the 1st, 5th, and 6th recitals of the Preamble.

[246] Cf. the Declaration on Friendly Relations and Co-operation of 1970 and the Manila Declaration on the Peaceful Settlement of Disputes of 1982.

[247] Cf. Alston, 'Peace as a Human Right', referring to the 1978 Declaration on the Preparation of Societies for Life in Peace, art. I(1) of which reads: 'Every nation and every human being [...] has the inherent right to life in peace.'

[248] ACHPR, art. 23(1) (emphasis added).

[249] UDHR, art. 26(2); CRC, art. 29(1)(d); ACRWC, art. 11(2)(b) and (d); Declaration on the Right to Peace, art. 4.

of joining an armed group. Child soldiering has been recognised as often being accompanied by '[p]ublic displays of war paraphernalia, funerals and posters of fallen heroes; speeches and videos, particularly in schools; and heroic, melodious songs and stories all serv[ing] to draw out feelings of patriotism and create a compelling milieu – indeed, a martyr cult.'[250] Armed conflict and any other forms of organised violence should always be explained as bad and entailing suffering and destruction, and never as an opportunity to die as a hero. Societies should foster a 'culture of peace', especially for their children;

g) Since one of the main undisputed factors behind the very emergence of the child soldier phenomenon is the development and spread of small arms, substantial efforts must be directed at this issue as well. Whilst technological progress cannot be reversed, State control over the dissemination of light weapons can and must be achieved, and their unlawful commerce and large availability on grey and black markets around the world must be stopped.[251] That arms transfers may have an extremely negative impact on the enjoyment of a wide array of human rights has already been extensively recognised.[252] Without venturing too deep in discussing what measures could be taken to prevent such dire impact, suffice it to recall how some of the countries with the worst records of child soldiers – the DRC, Sudan, South Sudan, Somalia, Uganda – are not even parties to the Arms Trade Treaty (ATT), the most concrete effort made in recent years in the field of arms control;[253]

h) Surely, in order to provide an effective 'education to peace' to children, a proper public school system must be up and running, free and accessible to all as demanded under international human rights law.[254] Further, States should endeavour to fulfil as much as possible a large set of related second-generation rights of children (including in prospective DDR programmes, to create valid exit options for NSAG members): it is undisputed that they often join armed groups also as a way to secure the education, care, health, food, shelter, etc. they are not

[250] Somasundaram, 'Child Soldiers', 1269.
[251] Cf. Florquin, Lipott, and Wairagu, *Weapons Compass*.
[252] HRC Ress 32/12; 41/20; 47/17.
[253] https://thearmstradetreaty.org/treaty-status.html?templateId=209883 [accessed 24 August 2023].
[254] UDHR, art. 26; ICESCR, art. 13; CRC, art. 28; ACHPR, art. 17; ACRWC, art. 11.

provided by other institutions. In addition, one civil right is of crucial importance in this area: the right to be registered at birth,[255] with the attached issuance of adequate documentation.[256]

[255] ICCPR, art. 24(2); CRC, art. 7(1); ACRWC, art.6(2).

[256] In much broader terms, Int.3 called for a deep re-thinking of the ways in which any policy potentially affecting children is implemented.

6 Conclusion

This thesis approached the topic of child soldiering, one of the most unpleasant features of contemporary armed conflicts, by focusing on the occurrence of such phenomenon within the ranks of NSAGs operating on the African continent. Having identified a gap in the existing literature on the specific issue of what reasons may explain NSAGs' willingness, unwillingness and inability to comply with the IHL/IHRL prohibition on child soldiering, the analysis conducted allows to answer the research question as follows: armed groups are not perfectly rational actors, but it is useful to nevertheless treat them at least as minimally rational, by acknowledging that the majority of them do not engage in unlawful conduct simply for the sake of violating the law. There exist many different reasons capable of explaining NSAGs' behaviour, and their examination cannot be separated from a practical understanding of the specific characteristics of each concrete group, namely its relationship with the local population, the State authorities, and the international community.

6.1 Relevance, recommendations, and limitations

The importance of understanding NSAGs' own reasons, and taking into consideration NSAGs' own interests and concerns, many of which may well be conducive to a greater compliance with the law, is arguably the main contribution of this thesis, which in turn suggested a series of possible incentives for a law-abiding behaviour. Since the analysis conducted here neither evaluated the effectiveness of already existing policies, nor did it suggest new ones, the primary 'lesson learnt' is thus precisely the crucial need to take armed groups seriously and strive to understand their internal logic, which has extremely practical implications for military leaders, advocates, policy-makers, legal advisors and humanitarian actors alike.[257]

On the other hand, one main limitation must be acknowledged here, and it is purely methodological: the analysis conducted is theoretical and says therefore very little on how concrete humanitarian engagement with specific NSAGs should take their reasons into account. However,

[257] Beber and Blattman, 'The Logic of Child Soldiering and Coercion', 67.

precisely the method employed allows to formulate a solid recommendation for future studies on specific NSAGs' reasons for recruiting child soldiers, since it has been argued that '[t]he integrative literature review plays an important role in stimulating further research on the topic'.[258] Such research efforts could fruitfully take the shape of case studies or, perhaps even better, comparative designs,[259] aimed at re-formulating some of the assumptions put forward by the present thesis in the form of hypotheses, to be tested in practical cases of recruitment of children by one or more specific NSAGs. Additional limitations would concern the challenge of generalisability of the findings,[260] considering the explicit geographical focus of this thesis.

To be sure, there are many things that cannot be done about child soldiers. Certain groups demonstrate a low level of rationality and predictability in their conduct of hostilities, some other groups violate the law because truly terrorist and thus have the violations as their very objective.[261] Additionally, some features of child soldiering can simply not be addressed by legal developments or preventive policies, except in a very indirect way: ease to manipulate small arms, demographically unbalanced societies, reluctance of adults to target children, suitability for roles typical of guerrilla warfare, and many more. Everything else can and must be done, if it is true that '[c]hildren are both our reason to struggle to eliminate the worst aspects of warfare, and our best hope for succeeding at it'.[262]

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[258] Torraco, 'Writing Integrative Literature Reviews', 364.

[259] Cf. Andreassen, 'Comparative Analyses of Human Rights Performance'.

[260] Creswell, *Research Design*, 157.

[261] This is arguably true for two major child recruiters such as Al-Shabaab from Somalia and Boko Haram operating in and around Nigeria; cf. Falchetta and Withers, *A Law unto Themselves?*, 5.

[262] *Machel Report*, para. 6.

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International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by UNGA Res. 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976 (999 UNTS 171).

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Appendix: Interview Guide

a. Could you briefly describe your educational and professional history?

b. How does your past/present employment relate to the conduct of organised armed groups?

c. How does it relate to the child soldiering phenomenon?

d. In your experience, is it more common for an armed group to be unable or unwilling to comply with the prohibition on the recruitment and use of so-called child soldiers?

e. Of all the reasons that may affect an armed group's decision to recruit and/or use 'child soldiers', which ones are the most frequently mentioned by the group itself?

f. Which reasons weigh the most, in your opinion, for the final decision to comply or not with the relevant prohibition?

g. What role, if any, does the fear of criminal prosecution play in the armed group's decision? if criminal prosecution is mentioned by the armed group, is it referred to national courts, regional bodies, or the ICC?

h. What role, if any, does the alleged lack of legitimacy of the legal norm play in the armed group's decision?

i. Do the reasons you have mentioned so far substantially differ from the reasons normally given for not respecting other legal provisions relevant to the conduct of hostilities?

j. Could you tell me a bit about how the negotiation process works?

k. How is the negotiation affected by the realisation that the armed group is unwilling or genuinely unable to comply with the legal prohibition?

l. Upon negotiation with an armed group, how much reference is made to the law and how much appeal is made to extra-legal concerns, such as practical, moral or political considerations?

m. If the law is mentioned, what instruments are usually referred to? national, regional, or international?

n. If the prohibition of 'child soldiering' is presented as a matter of international law, is it framed as a provision of IHL, IHRL, ICL, …?

o. Besides the incentives that are specific to any given armed group, are there any overarching trends, such as legal developments or policies, that could contribute to limiting the phenomenon of 'child soldiering'?