

Mechanisms Used to Translate the International Prohibition on Child Recruitment to Armed Non-State Actors in The Democratic Republic of Congo

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Abstract

Armed conflict in the twenty-first century is largely characterised by armed non-state actors (ANSAs), a phenomenon that is not reflected in international legal provisions. ANSAs generally have little regard for international law, as demonstrated by their continuous indifference towards humanitarian norms. They are the most prolific recruiters of child soldiers globally, with ANSAs operating within the Democratic Republic of Congo (DRC) being some of the most prolific offenders. This paper provides a fresh analysis of the suitability of the mechanisms utilised by national and international actors to translate the prohibition of child recruitment from international law to ANSAs in the DRC. This was achieved by conducting empirical research in the DRC to understand the intricacies of the voluntary and coercive mechanisms being utilised, comprising ten interviews with NGO employees involved with the DRC. This research highlights three mechanisms of voluntary compliance used by both local and international NGOs, as well as one coercive compliance mechanism, prosecution by the International Criminal Court. This paper identifies a myriad of factors specific to the DRC that inhibit efforts to translate the prohibition on child recruitment. It then argues for the systemic reinforcement of the prohibition through the application of a variety of mechanisms in order to support norm diffusion and eventual norm internalisation.

1 Introduction

Hottinger contends that ‘there is no discussion: whether we like it or not, today NSAs [Non-State Actors] are the main feature of violent conflicts both within States and at a regional level’.¹ The international legal instruments that govern armed conflict, however, remain inherently state-centric, being mostly designed, ratified, and implemented by state actors. Krieger argues that, in legal terms, armed non state actors (‘ANSAs’ hereafter) are not equal to state actors, and benefit from an asymmetry of rights and obligations.²

Humanitarian norms are established by the international community and ‘comprise shared understandings of appropriate behaviour reflecting legitimate social purpose[s] for actors with a given identity’.³ Whilst there are examples of academic scholarship analysing mechanisms of achieving the translation of humanitarian norms from international law to ANSAs, there is little research focussing on the diffusion of specific norms, such as the prohibition of the recruitment and use of child soldiers.⁴ This is concerning as ANSAs are currently the most prolific users of child soldiers.⁵ In February 2019 it was reported that there had been a 159 per cent increase in the recruitment of child soldiers in the previous five years, which serves to highlight the severity and urgency of the situation.⁶

¹ Julian Thomas Hottinger, ‘The Engagement to Respect Humanitarian Law and Human Rights: A Prerequisite for Peace Negotiations, or a “Future” Component within Peace Negotiations?’ in Geneva Call (ed), *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law Conference Report* (November 2008) 26.

² Heiker Krieger, *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2015) 2.

³ Melissa Labonte, *Human Rights and Humanitarian Norms, Strategic Framing and Intervention: Lessons for the Responsibility to Protect* (Routledge 2013) 4.

⁴ Krieger (n 2).

⁵ Editorial, ‘Child Soldiers’ (*Their World*) <<https://theirworld.org/explainers/child-soldiers#section-2>> accessed 15 September 2020.

⁶ Anna Varfolomeeva, ‘Number of Child Soldiers Involved in Conflicts Worldwide

This paper focusses on the specific case study of the Democratic Republic of Congo (DRC), as the country has one of the highest rates of child recruitment in armed conflict in the world.⁷ This situation persists despite the DRC being a signatory to Additional Protocol II of the Geneva Convention, the United Nations Convention on the Rights of the Child and its Optional Protocol, as well as the Rome Statute.⁸ These core international treaties prohibit the use of child soldiers. For example, Article 4(3)(c) of Additional Protocol II to the Geneva Conventions, states that ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups, nor allowed to take part in hostilities’.⁹ This provision binds all armed groups party to a conflict and is therefore applicable to ANSAs.¹⁰ Whilst the international human rights community has, on the whole, enjoyed a marked success in reducing the use of child soldiers by the DRC's state armed forces, this has not been replicated within ANSAs.¹¹

Jumps 159% in 5 Years’ (*The Defense Post*, 11 February 2019)

<<https://www.thedefensepost.com/2019/02/11/child-soldiers-global-increase/>>
accessed 13 August 2020.

⁷ Editorial, “‘Our Strength Is in Our Youth’: Child Recruitment and Use by Armed Groups in the Democratic Republic of the Congo 2014–17’ (*MONUSCO*, January 2019) 9.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 (Protocol II); Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1990) 1577 UNTS (CRC); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS (Optional Protocol); Rome Statute of the International Criminal Court (adopted 17 July 1995, entered into force on 15 July 2002) 2187 UNTS.

⁹ Protocol Additional to the Geneva Conventions (n 8).

¹⁰ Protocol Additional to the Geneva Conventions (n 8).

¹¹ Office of the Special Representative of the Secretary General for Children in Armed Conflict, ‘Children, Not Soldiers’ (*UN*)

<<https://childrenandarmedconflict.un.org/children-not-soldiers/>> accessed 27 May 2020.

ANSAs in the DRC have been consistently listed by the UN Special Representative of the Secretary-General for Children and Armed Conflict for the continued utilisation of child soldiers, and recruitment levels continue to rise.¹² These factors suggest that international instruments are not influencing the behaviour of ANSAs and that the translation of the prohibition of the recruitment and use of child soldiers has not enjoyed substantial success on the ground. There is a need to understand, develop, and adapt mechanisms that may then be utilised as effective tools to improve the diffusion of the prohibition amongst ANSAs.

This paper offers an analysis of the mechanisms utilised by international and local actors in the DRC to translate the norm on the prohibition of child soldiers to ANSAs. As the prohibition of the use of child soldiers exists at an international legal level, this paper will investigate the process by which this norm is diffused into the domestic context. It will employ Finnemore and Sikkink's concept of international norm dynamics, which posits that 'norm entrepreneurs' — those interested in changing social norms — attempt to 'socialize' ANSAs into becoming 'norm followers'.¹³ Norm entrepreneurs, often local, national, or international human rights NGOs, are the 'driving force for the emergence of new norms', calling attention to issues and attempting to persuade a mass of individuals to accept the prohibition of child recruitment.¹⁴ Once norm entrepreneurs have promoted the norm and framed it in a way that the public is receptive of, the norm 'cascades

¹² Child Soldiers International, 'Child Soldier Levels Doubled Since 2012 and Girls' Exploitation is Rising' (*ReliefWeb*, 11 February 2019) <<https://reliefweb.int/report/world/child-soldier-levels-doubled-2012-and-girls-exploitation-rising>> accessed 20 September 2020.

¹³ Cass R Sustein, 'Social Norms and Social Roles' (1996) 96 *Colum L Rev* 903, 909; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *INTL ORG* 887, 895.

¹⁴ Finnemore and Sikkink (n 13) 897; Müller Harald and Carmen Wunderlich, *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (University of Georgia Press 2013) 25.

through the rest of the population'.¹⁵ As a result of this process, 'norm internalization' may occur, meaning that the prohibition of child recruitment 'acquires a taken-for-granted quality and is no longer a matter of broad public debate'.¹⁶ Mechanisms utilised by 'norm entrepreneurs' within the DRC will therefore be evaluated in order to understand the extent to which they support or fail to support the diffusion of the norm.

This paper divides its understanding of translation mechanisms used by norm entrepreneurs into two categories: voluntary and coercive. A voluntary compliance mechanism is a technique where ANSAs freely engage with actors, with the aim of facilitating translation of the norm. A coercive translation mechanism is a technique utilised to induce or force compliance by ANSAs. This study combines both desk-based and empirical qualitative research carried out between May and October 2020. It reports the findings of ten interviews with research participants. Nine of these interviews involved local NGOs and aimed to reveal the nuances of the translation mechanisms employed, their local application, and their perceived effectiveness.¹⁷ A further interview was conducted with an employee of Geneva Call, with a view to understanding the role of international NGOs (INGOs) in this area. This interview data was supplemented by a survey of local NGOs operating in the DRC, which received 17 completed responses.

The paper commences by analysing three voluntary mechanisms identified within the empirical data. These are: ad hoc negotiations; unilateral declarations; and the education and training of ANSAs. An additional coercive translation mechanism is also analysed — the work of the International Criminal Court (ICC) — as this was found to be the most prominent coercive mechanism identified by research participants. The analysis here focusses on two prosecutions of ANSA

¹⁵ *ibid* 895.

¹⁶ *ibid* 895.

¹⁷ Carl Auerbach and Louise B Silverstein, *Qualitative Data: An Introduction to Coding and Analysis* (NYUP 2003) 32.

leaders for the recruitment and use of child soldiers. For each mechanism a summary is provided, revealing the intricacies of how this mechanism is employed in the DRC. Throughout, this paper aims to understand the suitability of particular mechanisms in translating the norm. Herein, suitability is defined as ‘[t]he quality of being right or appropriate for a particular person, purpose, or situation’.¹⁸ The appropriateness of each mechanism to translate the prohibition of child recruitment and use to ANSAs in the DRC is critically analysed.

2 Case Study Organisations

Action Chretienne Pour La Paix Et Le Développement (ACPD) — ACPD operates in Eastern DRC, in North Kivu Province, and supports youth economically, socially, and educationally.

Action Communautaire pour le Developpement du Kivu (ACDK) — ACDK's mission is to promote and supervise women and children based in the North Kivu.

Centre Resolution Conflits (CRC) — CRC is a peacebuilding organisation working across 38 communities in North Kivu.

Coalition des Volontaires pour la Paix et le Développement (CVPD) — CVPD looks to support the promotion and defence of human rights, peace, good governance, and community development in North Kivu.

Geneva Call — Geneva Call is an international NGO headquartered in Geneva, Switzerland. It has offices in the DRC, based in Goma, and its primary focus is engagement with ANSAs, with the aim of facilitating compliance with humanitarian norms.

¹⁸ ‘Suitability’ (*Lexico*) <<https://www.lexico.com/definition/suitability>> accessed 5 June 2021.

Jeunesse a l'Oeuvre de la Charite et du Développement (JOCHADEV) — JOCHADEV's main focus is on peacebuilding, community development, humanitarian action and conservation in South Kivu.

Organisation for Peace and Development (OPD) — OPD operates in South Kivu and focusses on the promotion of sustainable peace, democracy, and development.

Synergy of Great Lakes Initiatives (SYNIGL) — SYNIGL is headquartered in South Kivu and its main focusses are peace, community development, health, and human rights.

Union des Juristes Engagés pour les Opprimés, la Paix et le Développement (UJEOPAD) — UJEOPAD is mostly active in eastern DRC and focusses on ensuring the protection of vulnerable individuals, specifically conflict victims.

3 Voluntary Translation Mechanisms

3.1 *Ad Hoc* Agreements

3.1.1. Summary

This study found that ad hoc agreements are usually made between an ANSA and another entity (eg a local NGO) to encourage compliance with a humanitarian norm. Ad hoc arrangements to release child soldiers was the most commonly identified mechanism to be used by the local NGO research participants. These arrangements directly support the translation of the prohibition on child recruitment by securing the release of children from an ANSA's control as well as often trying to dissuade the ANSA from recruiting further. Participant responses suggest that organisations usually follow a similar process in negotiating the release of child soldiers with ANSAs. The methods of one NGO, ACDK, are examined in detail.

ACDK's executive director explained that the decisions to embark upon negotiations with ANSAs to release child soldiers most typically originate in 'complaints from parents of children, other actors in civil society or other community organisations'.¹⁹ ACDK manages this process by employing the SMART — 'specific, measurable, attainable, realistic and temporary' — method of communication to negotiate the release of child soldiers with ANSAs, when defining the objective of the communication with the ANSA.²⁰ Achieving the release of child soldiers involves identifying 'advocacy targets', defining the message to send to the 'decision maker' (derived from in-depth research), identifying allies (influencers or intermediaries), analysing the risk and success factors, developing an action plan, and advocating with groups.²¹

A number of participants noted difficulties in communicating with ANSAs on the issue of child soldiers. Several representatives described a significant lack of trust, as ANSAs fear that NGOs will disclose to the authorities their location, their '*modus operandi*', and instances of child recruitment or abuse.²² Participants emphasised that gaining trust was therefore an essential prerequisite for any engagement with ANSAs. They listed various ways of establishing trust with groups, including sending intermediaries who are of the same ethnicity and who speak the same language as the group; meeting in neutral places; frequent courtesy visits; offering aid to the wounded; offering training; staying with the group and sharing a meal; and ensuring confidentiality.²³ Building a rapport with a network of ANSAs facilitates translation of

¹⁹ Interview with Participant D, executive director, Action Communautaire pour le Developpement du Kivu (ACDK) (12 September 2020).

²⁰ *ibid* 187; Interview with Participant D (n 19).

²¹ *ibid*.

²² Anonymous survey response; interview with Participant B, executive director, Jeunesse a l'Oeuvre de la Charite et du Developpement (JOCHADEV) (11 September 2020).

²³ Interview with Participant J, national coordinator, Union des Juristes Engagés pour les Opprimés, la Paix et le Développement (UJEOPAD) (23 September 2020).

the norm, as ANSAs are more likely to be receptive to NGO influence if trust is established.

3.1.2 Suitability of the Mechanism

The national coordinator of UJEOPAD asserted that securing the release of child soldiers is one of their organisation's 'most important and privileged activities'.²⁴ Survey responses, however, indicated that their negotiations to release child soldiers were only partially effective. An important question for reflection is whether the release of child soldiers is a mechanism that assists the translation of the prohibition of the recruitment and deployment of child soldiers. Owing to the ad hoc nature of negotiations to release child soldiers, it is questionable how far these impromptu negotiations can assist in the broader translation of the prohibition. This is a particularly pressing concern when negotiations are being used by certain organisations as the sole method of norm translation.

In terms of process, the national coordinator of ACPD explained that they first present ANSA leaders with their release proposal. In any response, the ANSA's leadership will typically include requests that the NGO will have to comply with in order to secure the release of the child. These requests often include financial incentives or specific measures, such as requiring that children be placed in demobilisation centres.²⁵ However, when negotiations are based on a mutually beneficial exchange, the release of the child can become transactional, rather than amounting to any acceptance or translation of the norm. The ACPD coordinator suggested that ANSAs continue to recruit children, as having them in their ranks places the group in a position to negotiate with organisations.²⁶ They explained that, if an ANSA has child soldiers, INGOs and local NGOs will approach the group in an attempt

²⁴ *ibid.*

²⁵ Interview with Participant K, national coordinator, Action Chretienne Pour La Paix Et Le Développement (ACPD).

²⁶ *ibid.*

to release them.²⁷ This places the ANSA in a position to negotiate the release and ask for something in return.²⁸ Hottinger warns that ‘once you are caught in such a dynamic, where every issue is up for a bargain, you are bound to create more harm than good’.²⁹ This suggests a complete lack of translation of the norm as the motivation for granting the release is based on ensuring a benefit.

A number of participants claimed that armed groups often request items of monetary value in exchange for the release of children. One survey respondent highlighted that for ‘any communication with them, you need financial motivation’.³⁰ This requirement was illustrated by the executive director of ACDK, who reported that, despite completing all of the above stages, the organisation had to pay 100 US dollars to secure the release of one child in 2017.³¹ Whilst an effective way of securing the freedom of children, practices such as the exchange of an item of monetary value for the release of a child soldier can be detrimental to the translation of the norm, owing to its incentive capacities. This is largely analogous to the ransom dilemma that often characterises hostage situations. Outlining the ‘complicity objection’ theory, Howard argues that ‘[t]hose who pay ransoms to unjust organisations, become reluctant accomplices to those organisations’ unjust activities’.³² If this hostage dilemma is applied, it can be argued that, by giving money to an ANSA in exchange for a child, the NGO is contributing to or financing further child recruitment.

A local NGO, ACPD, has, however, devised a method to ensure that the pecuniary benefits of a transactional negotiation are directed

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Hottinger (n 1) 25.

³⁰ Anonymous survey response.

³¹ Interview with Participant D (n 19).

³² Jeffrey Howard, ‘Kidnapped: the Ethics of Paying Ransoms’ (2018) 35(4) *J Applied Phil* 681.

towards the children.³³ The national coordinator explained that the ANSA will agree to release the children if the NGO has the correct funds to support their demands.³⁴ These funds, however, will not be utilised by the ANSA for their financial gain but instead used on the condition that NGO funds and facilitates the release of child soldiers into demobilisation centres.³⁵ This particular type of negotiation indicates the diffusion of the norm as a group can only make financial requests that will benefit the children. It remains, however, a transactional exchange, as the research participant warned that, if the NGO does not have enough funding, the deals will often fall through. This is a crucial limitation in this type of negotiation.³⁶

The research carried out highlighted that not all negotiation techniques employed by local NGOs are transactional in their nature. The national coordinator of UJEOPAD explained that the substance of their negotiations with ANSA leaders focussed solely on the ‘national and international legal instruments that protect children and prohibit their recruitment’ and informs them of the risk of keeping children in the group.³⁷ The participant stated that, after presenting this information through talks, as well as providing supporting documentation, they leave the group and wait for the leadership to call with their decision.³⁸ This process is arguably more effective at norm translation, as pecuniary incentives are removed from the decision-making process. When financial benefits are discounted, the decision to release may be more likely to be based on a belief that children should not be members of that group. However, the data here does not indicate whether any decisions to discontinue such practices result from a fear of potential sanctions or a recognition on the part of the ANSA leadership that child

³³ Interview with Participant K (n 25).

³⁴ Interview with Participant K (n 25).

³⁵ Interview with Participant K (n 25).

³⁶ *ibid.*

³⁷ Interview with Participant J (n 23).

³⁸ Interview with Participant J (n 23).

recruitment is morally wrong. One might doubt the efficacy of this negotiation style owing to its lack of incentive for the ANSA. It has, however, been relatively successful — UJEOPAD has secured the release of 600 children from ANSAs since 2014.³⁹ This amounts to 4 per cent of the overall approximate number of children released over this time period.⁴⁰ It is significant that this has been achieved by one NGO, utilising one method. If applied by other of NGOs and supplemented by additional mechanisms, it may have significant potential in translating the norm.

3.2 Education/Training of Armed Group Members

3.2.1 Summary

The empirical data collected also pointed to the delivery of training for ANSA members as another mechanism often employed by NGOs to support the prohibition of child recruitment and use. The data suggests that there are two different approaches typically employed by NGOs when offering training for ANSA members. These alternative approaches represent norm entrepreneurs' different ways of 'framing' the issue of child recruitment. This strategic framing can be understood as 'an integral vehicle for transmitting norms, [as it helps to] create shared understandings ... that further legitimate and motivate collective action'.⁴¹ Framing is employed with the aim of 'actively assess[ing] the content of a particular ... norm ... and "chang[ing] their minds"'.⁴² The first framing approach employed by NGOs focusses on educating

³⁹ Interview with Participant J (n 23).

⁴⁰ United Nations Security Council, 'Children and Armed Conflict in the Democratic Republic of the Congo Report of the Secretary-General' (UN DOC S/2018/502, 25 May 2018) 18; United Nations Security Council, 'Children and Armed Conflict in the Democratic Republic of the Congo Report of the Secretary-General' (S/2020/1030, 19 October 2020) 1.

⁴¹ Labonte (n 3) 4.

⁴² Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke LJ* 621, 635.

ANSA leaders as to the laws prohibiting the use of child soldiers at both national and international levels, as well as the potential consequences of non-compliance. In addition to providing training to ANSAs on the legal framework, OPD also offers technical training to assist ANSAs in applying the law on the ground. For example, they offer training on determining the age of new recruits and how to review identity documents, evaluate physical appearances, and conduct interviews with children.⁴³ An alternative framing approach is utilised by other NGOs, and is aimed at educating ANSAs on the psychosocial consequences of recruiting child soldiers. ACPD prefers to focus on such implications, designing and delivering workshops entitled ‘What If It Was Your Child?’ In framing their activities in this way, the organisations are emphasising the pain of parents when children are forcibly taken or when they voluntarily join armed groups.⁴⁴

3.2.2 Suitability of the Mechanism

Within the context of this study, NGOs generally supported the training and education of ANSAs, with 60 per cent (n=9) of survey respondents explaining that these measures are extremely important in preventing the use of child soldiers. The national coordinator of ACPD, for example, argued that the most efficient way to induce the release of child soldiers is through the provision of educational workshops.⁴⁵ The data did, however, highlight disagreements as to which approach is the most effective method to translate the prohibition to ANSAs. Within the literature, David Capie emphasises that ‘[i]t is the quality of their ideas and the nature of their reasoning that results in a particular norm's adoption by targets’, thus highlighting the importance of the ‘framing’ of the norm in the provision of training.⁴⁶

⁴³ Interview with Participant E, Executive director, Organisation for Peace and Development (OPD) (14 September 2020).

⁴⁴ Interview with Participant K (n 25).

⁴⁵ Interview with Participant K (n 25).

⁴⁶ David Capie, ‘Influencing Armed Groups: Are There Lessons to Be Drawn from Socialization Literature?’ in Geneva Call (ed) (n 1) 87.

Participants who had delivered training stated that their work mainly focussed on the legal framework concerning the use of child soldiers. This reflects Heffes's point that 'providing information and training on IHL [international humanitarian law] is ... essential to increase ANSAs respect for this legal framework', as very often ANSAs 'have little knowledge of the actual content ... of IHL'.⁴⁷ According to Goodman and Jinks' accumulation theory, group actors experience pressure to comply with group norms. New group members are exposed to, and experience pressure to comply with, group norms via a process of 'cuing', which prompts them to re-evaluate their beliefs in relation to those of the group.⁴⁸

Further findings raised doubts as to the sustainability of solely educating ANSAs on the legal consequences of child recruitment. All interview participants stated that ANSA leaders were aware of the illegality of child soldier recruitment, and the threat of prosecution by the ICC. The national coordinator of ACPD explained that their organisation only broaches the legal prohibitions and risk of being prosecuted at the end of the training they provide, owing to armed groups having little fear of this consequence, as they have an awareness that prosecutions due to non-compliance are extremely rare.⁴⁹ This line of argument points to a lack of effectiveness in the deterrent role of legal prohibitions. Additionally, this counters Heffes's claim that ANSAs have minimal awareness of international humanitarian law. If there is no perceived 'cost' of using child soldiers, educating armed groups on the laws prescribing its prohibition is arguably of little use in translating the norm and ensuring compliance.

⁴⁷ Ezequiel Heffes, 'Non-state Actors Engaging Non-state Actors: The Experience of Geneva Call in NIACs' in Ezequiel Heffes, Marcos D Kotlik and Manuel J Ventura (eds) *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (Asser Press 2020) 7.

⁴⁸ Goodman and Jinks (n 42) 637.

⁴⁹ Interview with Participant K (n 25).

An alternative approach is applied by ACPD. The national coordinator explained that the NGO finds it more beneficial to play on the emotions of the ANSA members, in an attempt to induce an empathic response.⁵⁰ Such a technique may involve asking ANSA members to imagine that their child was recruited and had endured such horrific experiences.⁵¹ For the national coordinator of UJEOPAD, the ‘personal convictions’ of the leadership are one of the most important factors in determining whether an ANSA will release children.⁵² A recent study conducted by Martinez and others found evidence that ‘perspective-taking propensities relate to the tendency to experience empathic-concern, which influences guilt-proneness; this propensity to experience guilt, in turn, negatively predicts criminal behaviour’.⁵³ This technique is apparent in the ACPD’s methods, as teaching ANSA members to see the harms as if they were committed on their own child can introduce an emotional connection to child recruitment.⁵⁴ This ‘give[s] rise to the capacity to experience anticipatory distress, (guilt) should one face the option to’ accept a child into the armed group.⁵⁵ Evidence suggests that this process may influence and possibly change an individual’s personal conviction that child recruitment and use is acceptable.⁵⁶ This can be seen as an effective mechanism in achieving translation of the norm, for those who are susceptible to emotional influence. This framing could apply particularly to ANSAs that are unresponsive to the perceived threat of formal prosecution.

⁵⁰ Interview with Participant K (n 25).

⁵¹ Interview with Participant K (n 25).

⁵² Interview with Participant J (n 23).

⁵³ Martinez Andres, Jeffrey Stuewig, and June P Tangney, ‘Can Perspective-Taking Reduce Crime? Examining a Pathway Through Empathic-Concern and Guilt-Proneness’ (2014) 40(12) *Personality and Social Psychology Bulletin* 1659, 1664.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

Geneva Call's approach attempts to combine the teaching of international law with appropriate technical training based on the needs of the ANSA, similar to OPD. An interviewee explained that the context, size, and structure of the group will affect who the organisation carries out training with and what is focussed upon.⁵⁷ Geneva Call's engagement with one ANSA, the Alliance of Patriots for a Free and Sovereign Congo (ACPLS), is demonstrative of this, with the ACPLS requesting training 'on age assessment methods and processes, as they were lacking the capacity to carry them out'.⁵⁸ In their study, Rojas and Fresard found that simply having knowledge of the law does not mean 'that combatants will conform to it in a real-life situation'.⁵⁹ It could therefore be argued that it is counterintuitive to educate ANSAs on the law and not educate them on how to implement it — the provision of training solely on legal provisions is an unsuitable mechanism in norm translation.

It has been established that '[i]t is critical to analyse the context, such as the NSA's structure [and] motivations', before commencing training.⁶⁰ It will then be possible to formulate a realistic strategy, appropriate to the group it is being provided to. Training that is aligned with the ANSAs ideology is more likely to translate the prohibition than a one size fits all approach used for all groups.

⁵⁷ Interview with Participant G, employee, Geneva Call (5 August 2020).

⁵⁸ Pascal Bongard and Ezequiel Heffes, 'Engaging Armed Non-State Actors on the Prohibition of Recruiting and Using Children in Hostilities: Some Reflections from Geneva Call's Experience' (2019) 101 *Int'l Rev Red Cross* 603, 614.

⁵⁹ Daniel Munoz-Rojas and Jean-Jacques Fresard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 *Int'l Rev Red Cross* 189, 196.

⁶⁰ Greta Zeender, 'Protecting the Internally Displaced: an Opportunity for International NGOs to Engage NSAs' (2005) 24(3) *Refugee Survey Q* 96, 105.

3.3 Unilateral Declarations

3.3.1 Summary

Rojas and Fresard argue that, ‘as far as combatants are concerned, if IHL is to be respected, it is more important to influence behaviour than attitudes’.⁶¹ Declarations signed by ANSAs provide an express and written commitment on the prohibition of child soldier recruitment and attempt to bind ANSAs to change their behaviour. In the DRC, local NGOs have designed unilateral declarations that allow ANSAs to make signed commitments not to recruit children. For example, local NGO UJEOPAD explained that they had designed three different standard forms of unilateral declaration: 1) a document for ANSAs to sign and ‘commit to no longer recruiting or using child soldiers’; 2) a declaration that states they are ‘not to recruit again the children whose release we have already negotiated’; and 3) a more comprehensive document that is an agreement to ‘respect the norms of war, the protection of civilians, national and international legal texts for the protection of the rights of the child, that the groups sign after each training’.⁶²

Local NGO Centre Resolution Conflicts (CRC) has designed what they call ‘a deed of engagement’⁶³ mirroring Geneva Call's internationally renowned ‘Deed of Commitment’. This deed is signed by ANSAs that commit ‘not to recruit any more children’.⁶⁴ Geneva Call's ‘Deed of Commitment’ (DOC) was developed primarily for use with ANSAs. The DOC is signed by ANSA leaders and countersigned by Geneva Call and the Government of the Republic and Canton of Geneva.⁶⁵ Geneva

⁶¹ *ibid* 205.

⁶² Interview with Participant J (n 23).

⁶³ Interview with Participant F, employee, Centre Resolution Conflicts (CRC) (26 September 2020).

⁶⁴ *ibid*.

⁶⁵ Pascal Bongard and Jonathan Somer, ‘Monitoring Armed Non-state Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment’ (2011) 93 *Int'l Rev Red Cross* 673, 684.

Call has engaged with seven ANSAs in the DRC.⁶⁶ The organisation has successfully facilitated the signing of one declaration in 2016, with the ACPLS, a commitment focussed on the protection of children in armed conflict.⁶⁷ This includes both negative and positive obligations ‘to ensure that children are not recruited into our armed forces, whether voluntarily or under duress’.⁶⁸

3.3.2 Suitability of the Mechanism

Despite the fact that ANSAs are bound by international law, which prohibits the recruitment and use of child soldiers, alongside the abstract nature of international norms and their lack of involvement in its creation, ANSAs often feel as if they are not bound by the provisions of international law.⁶⁹ Unilateral declarations are excellent tools in empowering ANSAs to commit to humanitarian norms, as the powers of persuasion utilised by NGOs are ‘a communication act intended to modify the mental state of an individual in a context where he retains or believes that he retains a certain freedom’.⁷⁰ Through the process of adoption, ANSAs are in effect making their own written and formal commitments to humanitarian law. The national coordinator of UJEOPAD suggested that ANSAs are more likely to ‘keep to their promises’ if the declaration is written.⁷¹ This attitude was generally reflected across the research participants, but some did express concerns relating to ANSAs not abiding by the declarations, highlighting issues

⁶⁶ Geneva Call, ‘Where We Work’ <<https://www.genevacall.org/where-we-work/>> accessed 28 September 2020.

⁶⁷ Acte d'Engagement auprès de l'Appel de Genève pour la Protection des Enfants des Effets des Conflits Armes (*Their Words*, 21 November 2016) <http://theirwords.org/media/transfer/doc/signed_doc_apcls-bed635e4c57888eb0d30381a66c53166.pdf> accessed 28 September 2020.

⁶⁸ Article 4 of DOC signed with Geneva Call.

⁶⁹ ICRC, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts International Committee of the Red Cross Geneva’ (ICRC, February 2008) 19.

⁷⁰ Munoz-Rojas and Fresard (n 59) 205.

⁷¹ Interview with Participant J (n 23).

in the translation of the norm.⁷² The executive director of OPD argued that, whilst there has been positive, personal, and collective engagement with declarations, perhaps inevitably, ‘signing was something and execution of release and liberation of children was another thing’.⁷³ This behaviour suggests that the ANSAs that sign the declarations may concede that the use of child soldiers ‘is contrary to morality in absolute terms’, yet they will tell themselves ‘that circumstances render it not only admissible but also necessary’ to recruit them.⁷⁴ There is, as such, evidence of a disconnect between commitments made and actions taken.

The executive director of OPD, however, maintained that the mechanism is efficient only if there is permanent and consistent monitoring, which will in turn encourage implementation and thus increase diffusion of the norm.⁷⁵ NGOs, however, require adequate resources to carry out this monitoring, which is often an issue for smaller, more local organisations. One interviewee pointed to the notion that declarations are often used by more financially endowed NGOs.⁷⁶ However, a local NGO, CRC, has managed to develop a more resourceful and cost-effective method of monitoring violations to their ‘deed of engagement’. An employee explained that, once there has been a report of a child in an ANSA that has signed a deed of engagement with the CRC, the organisation will request that the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) collect the child from the ANSA.⁷⁷ Under MONUSCO's Disarmament, Demobilization and Reintegration programme, they release children from ANSAs and place them in the

⁷² Interview with Participant J (n 23); interview with Participant E (n 43); interview with Participant K (n 25).

⁷³ Interview with Participant E (n 43).

⁷⁴ Munoz-Rojas and Fresard (n 59) 198.

⁷⁵ Interview with Participant E (n 43).

⁷⁶ Interview with Participant B (n 22).

⁷⁷ Interview with Participant F (n 63).

care of NGOs that MONUSCO has a relationship with.⁷⁸ This is a more cost-effective method for local NGOs as negotiation, retrieval, and monitoring responsibilities are transferred to MONUSCO, with local NGOs focussing on rehabilitation and reintegration. The CRC employee described this as an extremely effective method, resulting in a ‘containment site’ being constructed to accommodate all of the children whose release had been facilitated by this mechanism.⁷⁹

Large INGOs, such as Geneva Call, must still take resources into consideration. An employee explained that a deed of commitment will only be proposed if Geneva Call has the capacity to follow up on the deed, its implementation plan, and monitoring.⁸⁰ Geneva Call has been successful with its monitoring programme, as ‘[n]o signatory has ever refused to receive a Geneva Call delegation, even following allegations of non-compliance’, suggesting that ANSAs are willing to be monitored.⁸¹ The organisation has also installed permanent staff in the DRC to facilitate easier access to local NGO partners and ANSAs for communication and monitoring purposes.⁸² The signing of any declaration is only effective in diffusing the norm if it is implemented and consistently complied with. Monitoring is therefore arguably an essential condition to bolster compliance and subsequent translation of the norm. However, this can render this mechanism inaccessible to smaller, local NGOs that lack the capacity to carry out sustained monitoring.

3.4 Summary

This section has considered three voluntary translation mechanisms used in the DRC to help translate the international prohibition on child soldier recruitment to ANSAs, namely ad hoc agreements, education,

⁷⁸ Pardonne interview.

⁷⁹ Interview with Participant F (n 63).

⁸⁰ Interview with Participant G (n 57).

⁸¹ Bongard and Somer (n 65) 695.

⁸² Interview with Participant G (n 57).

and unilateral declarations. Empirical findings suggest that negotiations to release child soldiers that lack a transactional exchange are more effective in translating the norm. With reference to the provision of training for ANSAs, it has been illustrated that in-depth research is required before conducting training that the ANSA will be receptive to. Declarations not to use child soldiers seem to be effective in translating the norm, but only when the declaration is followed by monitoring activities to ensure implementation. The empirical data suggests that each of these mechanisms suffers drawbacks and that the use of single mechanisms alone is unlikely to be effective in translating the prohibition of child recruitment and use. The data suggests that the most suitable way to translate the prohibition is through sustained engagement with ANSAs, utilising a variety of mechanisms. This can, however, be difficult to maintain, as the conflict in the DRC involves a multitude of ANSAs that regularly fragment and change leadership.⁸³ Furthermore, many NGOs do not have the capacity or resources to employ multiple mechanisms and to ensure follow-up visits, which inhibits success. For those ANSAs that do not wish to voluntarily comply with the norm or require an extra push, a form of coercive translation may be required. In the DRC, the International Criminal Court (ICC) is a prominent force and its work is subject to analysis in the next section of this paper.

4 Coercive Translation Mechanisms

4.1 Prosecution by the International Criminal Court (ICC)

Formed in 2002, the ICC is a permanent judicial organisation situated in The Hague, the Netherlands.⁸⁴ The Rome Statute, which established the court and outlined its jurisdiction, was ratified by the DRC two months before it came into force, which points to a clear commitment

⁸³ Interview with Participant G (n 57).

⁸⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS), art 13.

to its jurisdiction at the nation state level.⁸⁵ The court is unique, as it has the power to prosecute any individual under the following conditions: where that person is a national of a state that is party to the Rome Statute, or where the state accepts the court's jurisdiction, or where the offence took place in a state that is party to the statute.⁸⁶ The court may exercise its jurisdiction when a crime is referred to the prosecutor by a state party, where the prosecutor has independently initiated an investigation, or where a crime has been referred to the prosecutor by the UN Security Council.⁸⁷ In addition, under the legal principle of 'complementarity', the court will only exercise jurisdiction when the state party 'is unwilling or unable genuinely to carry out the investigation or prosecution' and the individual has not already been tried for the specific complaint.⁸⁸ As rampant impunity is central to the DRC conflict, the court is therefore in a unique position, in that such countries that lack the power or political will to prosecute can refer crimes to the ICC.

4.2 ICC Prosecutions

President Joseph Kabila of the DRC sent a case referral to the ICC prosecutor Luis Moreno Ocampo on 3 March 2004.⁸⁹ The ICC's investigations began on 21 June 2004 and have been based predominantly 'on alleged war crimes and crimes against humanity, committed mainly in eastern DRC', To date, the ICC has successfully prosecuted three individuals relating to crimes committed in the DRC — two of whom were prosecuted for the enlistment and conscription of

⁸⁵ *ibid.*

⁸⁶ *ibid* art 12.

⁸⁷ *ibid* art 13.

⁸⁸ *ibid* art 17(1).

⁸⁹ ICC, 'ICC — Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo' (*ICC*, 19 April 2004) <<https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo>> accessed 25 September 2020.

children under the age of 15.⁹⁰ This section focusses on the prosecution of those two defendants — Thomas Lubanga and Bosco Ntaganda.⁹¹

Thomas Lubanga was the leader of the Union des Patriotes Congolais (UPC), an ANSA that operated in the Ituri region until 2003.⁹² Prosecutors in the case stated that, ‘at the height of the conflict in 2003, as many as 30,000 children ... were part of Mr Lubanga's militia’.⁹³ Human Rights Watch reported locals in Ituri regularly describing the UPC as ‘an army of children’.⁹⁴ As a result, in January 2006 the ICC prosecution filed an arrest warrant for Thomas Lubanga, who was detained and subsequently transferred to The Hague. At the trial's conclusion in 2012, Lubanga was charged as co-perpetrator for three counts of the war crime: of ‘conscripting or enlisting children under the age of fifteen years, into armed forces or groups, or using them to participate actively in hostilities’ contrary to Article 8(2)(e)(vii) of the Rome Statute.⁹⁵ Lubanga was sentenced to 14 years' imprisonment on 10 July 2012.⁹⁶ On subsequent appeal, both the conviction and sentence were upheld by the ICC.⁹⁷

⁹⁰ ICC, *Situation in the Democratic Republic of the Congo* (ICC-01/04); *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06.

⁹¹ *Thomas Lubanga Dyilo and Bosco Ntaganda* (n 90).

⁹² Alicia Mazurek, ‘Prosecutor v Thomas Lubanga Dyilo: The International Criminal Court as It Brings Its First Case to Trial’ (2009) 86 U Det Mercy L Rev 535.

⁹³ Simons Marlise, ‘Congo Warlord's Case Is First for International Criminal Court’ *New York Times* (New York, 10 November 2006) <<https://www.nytimes.com/2006/11/10/world/europe/congo-warlords-case-is-first-for-international-criminal-court.html>> accessed 29 September 2020.

⁹⁴ Editorial, ‘The Democratic Republic of Congo: ITURI: “Covered in Blood” Ethnically Targeted Violence in North-Eastern DR Congo’ (2003) 15(11A) Human Rights Watch 47.

⁹⁵ Rome Statute of the International Criminal Court (n 85).

⁹⁶ *Thomas Lubanga Dyilo* (n 90) 2901.

⁹⁷ *Thomas Lubanga Dyilo* (n 90) 3122.

Bosco Ntaganda, nicknamed ‘The Terminator’, was the deputy chief of general staff and commander of military operations of the Patriotic Forces for the Liberation of Congo (FPLC), the military wing of the UPC.⁹⁸ The ICC issued a sealed arrest warrant in August 2006, followed by an unsealed arrest warrant in 2008.⁹⁹ Having surrendered voluntarily at the US Embassy in Rwanda, Ntaganda's trial began in The Hague on 2 September 2015. The judgment was given on 8 July 2019, with Ntaganda found guilty of 18 counts of war crimes and crimes against humanity committed between 2002 and 2003 in Ituri, DRC.¹⁰⁰ He was found to be an indirect perpetrator of all other crimes, including child recruitment and use.¹⁰¹ He has been sentenced to 30 years’ imprisonment.

4.2.1 Suitability of the Mechanism

When applied to the crime of child recruitment and deployment in armed conflict, the deterrent function of the ICC is of particular significance in the DRC, given that the ‘abysmal’ national criminal justice system lacks the impartiality, resources, and authority to penalise members of ANSAs.¹⁰² Research participants consistently stated that the lack of prosecution of those individuals involved in the recruitment of child soldiers continues to contribute to poor translation

⁹⁸ Sarah T Deutch, ‘Putting the Spotlight on “The Terminator”’: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence During Conflict’ (2016) 22 *Wm & Mary J Women & L* 3 655, 678.

⁹⁹ The ICC sealed the arrest warrant ‘because public knowledge of the proceedings in this case might result in Bosco Ntaganda hiding, fleeing, and/or ... endangering ... the Court’. Owing to the failure to arrest Ntaganda, the ICC made the decision to unseal the arrest warrant on 28 April 2008. cf ICC, ‘DRC: ICC Warrant of Arrest Unsealed Against Bosco NTAGANDA’ (ICC) <https://www.icc-cpi.int/pages/item.aspx?name=drc_+icc+warrant+of+arrest+unsealed+against+bosco+ntaganda> accessed 29 September 2020.

¹⁰⁰ *Bosco Ntaganda* (n 90) 2359.

¹⁰¹ *ibid.*

¹⁰² International Refugee Rights Initiative, *Steps Towards Justice, Frustrated Hopes: Some reflections on the experience of the International Criminal Court in Ituri* (Civil Society, International Justice and the Search for Accountability in Africa 2012) 2, 8.

of the prohibition on child recruitment to ANSAs. When asked about the significance of prosecutions in preventing the use of child soldiers, 86 per cent (n=13) of survey respondents stated that prosecutions at an international level were either very or extremely effective, emphasising the value of ICC prosecutions.

After a visit to the DRC, ICC Prosecutor Fatou Bensouda made a statement in which deterrence was a common theme.¹⁰³ Bensouda discussed two different forms of deterrence theory: prosecutorial deterrence and social deterrence.¹⁰⁴ Emphasising prosecutorial deterrence, Bensouda described the almost ‘omnipotent’ strength of the court to prosecute any individual that commits such heinous crimes as child recruitment, reflecting Simmons's theory that prosecutorial deterrence amounts to ‘anticipated legalized, court-ordered punishment’.¹⁰⁵ Social deterrence theory is also deployed by Bensouda, as she claims that it ‘is the responsibility of all’ to ensure the translation of humanitarian law owing to the ‘extra-legal social costs associated with law violation’.¹⁰⁶ Jo and Simmons argue that the ICC is highly influential when ‘prosecutorial and social deterrence reinforce one another’.¹⁰⁷ This occurs when legal, social, domestic, and international mechanisms interact to reduce the perpetration of crimes and thus increase diffusion of the norm.

¹⁰³ ICC, ‘Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC: “The Fight Against Impunity and the Critical Prevention of Crimes Under the Rome Statute are Essential for Social Stability”’ (ICC, 4 May 2018).

¹⁰⁴ Hyeran Jo and Beth A Simmons, ‘Can the International Criminal Court Deter Atrocity?’ (2016) 70 *International Organization* 443.

¹⁰⁵ *ibid.*

¹⁰⁶ ICC, ‘Statement by the ICC Prosecutor, Fatou Bensouda, at the Conclusion of Her Visit to the DRC: “The Fight Against Impunity and the Critical Prevention of Crimes Under the Rome Statute are Essential for Social Stability”’ (n 103).

¹⁰⁷ Jo and Simmons (n 104) 444.

I. Prosecutorial Deterrence

Based on a rationalist model, deterrence is predicated on the conscious choice of whether or not to commit a crime.¹⁰⁸ Rational choice theory, developed by Becker, consists of two elements.¹⁰⁹ First, individuals will commit a crime when the predicted utility of committing the crime is greater than the objective probability of being prosecuted for it¹¹⁰ and, second, where the predicted utility minus the punishment is greater than the objective probability of being prosecuted.¹¹¹ This theory is, however, based on individuals being able to understand the likelihood of being captured and prosecuted. It is difficult to apply this theory in protracted, complex contexts, as it is based on predictions concerning constantly shifting variables. When examining the activities of members of ANSAs in the DRC that operate largely ‘in the bush’ and off grid, with groups frequently fragmenting, it is difficult to conceive that members would objectively be able to weigh the probability of punishment.

The most significant criticism of rational based deterrence theories, according to Pogarsky, is that they rest on the predicted behaviour of the ‘rational’ individual, or the ‘deterable’ individual.¹¹² This is an individual or group that has the potential to be influenced by the threat of prosecution and is likely to be more receptive to accepting the norm.¹¹³ There are, however, individuals who do not react ‘rationally’ in certain situations, or at all. In the literature, these individuals have

¹⁰⁸ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1907); Cesare Beccaria and Marchese di Voltaire, *Essay on Crimes & Punishments* (Stephen Gould 1809).

¹⁰⁹ Gary S Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 J Poli Econ 169.

¹¹⁰ Ross L Matsueda, Derek A Kreager, and David Huizinga, ‘Deterring Delinquents: A Rational Choice Model of Theft and Violence’ (2006) 71(1) Am Socio Rev 95.

¹¹¹ *ibid.*

¹¹² Greg Pogarsky, ‘Identifying “Deterrable” Offenders: Implications for Research on Deterrence’ (2002) 19 Justice Q 3.

¹¹³ *ibid.*

been described as ‘incorrigible offenders’, owing to their unresponsiveness to an increased risk of formal sanction.¹¹⁴ The executive director of ACDK explained that ‘leaders of the armed groups are aware of the threat of prosecution from the ICC’ yet, they have a tendency ‘to pretend and ignore this institution’ and continue to recruit children.¹¹⁵ Tom Farer supports this proposition, as he writes that a ‘remote threat of criminal sanctions ... will not resonate in the paranoid world of domestic armed conflict’.¹¹⁶ Such an interpretation indicates the difficulties that the ICC faces in diffusing the prohibition of child recruitment.

The perceived threat of prosecution may also be counterbalanced by knowledge that spheres of influence will protect the individual. Broache's study suggests that the Ntaganda ICC warrant lacked a deterrent effect — multiple CNDP/M23 officers reported Ntaganda's lack of fear both of arrest and of the ICC more generally.¹¹⁷ Ntaganda's initial lack of response to the release of his arrest warrant can, however, be attributed to the fact that he had been promoted to a general in the DRC's national armed forces, thus ensuring his protection. President Kabila of the DRC refused to hand Ntaganda over to the ICC, publicly claiming that Ntaganda was an ‘important partner for peace’.¹¹⁸ This was a flagrant violation of Article 12 of the Rome Statute, to which the DRC is a signatory, which states that the state party ‘shall cooperate with the Court without any delay or exception’.¹¹⁹ This is of particular

¹¹⁴ *ibid.*

¹¹⁵ Interview with Participant D (n 19).

¹¹⁶ Tom J Farer, ‘Restraining the Barbarians: Can International Criminal Law Help?’ (2000) 22 *HuM RTs Q* 90, 98.

¹¹⁷ M Broache, ‘Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case’ (2016) 10 *IJTJ* 402.

¹¹⁸ Editorial, ‘DR Congo: Arrest Bosco Ntaganda for ICC Trial President Suggests He's Willing to Apprehend General Wanted for War Crimes’ (*Human Rights Watch*, 13 April 2012) <<https://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial>> accessed 29 September 2020.

¹¹⁹ Rome Statute of the International Criminal Court (n 84).

poignancy within the DRC, where the state itself has referred the armed conflict to the prosecutor as clear bias and political influence was shown as to who the state feels should be prosecuted and who should not. This significantly weakens the legitimacy of the court in the DRC and consequently its deterrent effects. This weakness is often attributed to the fact that the ICC requires cooperation by states and does not have the jurisdiction to carry out the arrest warrant alone. A national coordinator of a local NGO, ACPD, explained that the ICC's main technique is 'intimidation of perpetrators', yet the ICC often fails to implement its mandates owing to its lack of power, leading ANSAs to continue flouting the law, thus reducing the ICC's effectiveness.¹²⁰

The ICC's focus on the 'big fish' such as Lubanga and Ntaganda may also be a reason for the lack of deterrence.¹²¹ 'Small fries', suggests Alexander, may fail to be intimidated and thus perceive the risk of being prosecuted as little to non-existent.¹²² The national coordinator of ACPD agreed with this point, as he posited that the ICC's impact was limited by the fact that it has only prosecuted leaders, and that its impact could be increased if it prosecuted those who directly recruit child soldiers in the field.¹²³ Owing to resources and time constraints, the court aims to only indict those 'who bear the greatest responsibility', which, Alexander argues, has a greater chance of deterring other 'big fish'.¹²⁴ This method also relies on the 'big fish', translating the prohibition of the use of child soldiers vertically to regional commanders. Broache found that a significantly lower number of atrocities were committed after Ntaganda's surrender.¹²⁵ The executive director of the OPD also argued that prosecutorial deterrence is in play,

¹²⁰ Interview with Participant I, employee, Coalition des Volontaires pour la Paix et le Développement (CVPD) (14 September 2020).

¹²¹ James F Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2009) 54 *Vill L Rev* 17.

¹²² *ibid.*

¹²³ Interview with Participant K (n 25).

¹²⁴ Alexander (n 121).

¹²⁵ Broache (n 117).

as he stated that ANSAs release child soldiers because, according to them, the ICC ‘apprehends even the most powerful ... It is not of their free will that they do it, it is under the constraint of justice.’¹²⁶ The analysis has demonstrated the general premise that an ‘increase in the certainty, severity, or celerity of potential punishment, increases the perceived costliness of the contemplated offense and can thereby discourage it’ is not as straightforward as it seems when applied to complex conflicts.¹²⁷

II. Social Deterrence

Analysis of the ICC's potential powers of prosecutorial deterrence has revealed that, owing to a lack of resources and the length of proceedings, very few individuals can be prosecuted by the ICC, thus decreasing its ability to deter individuals. The successful prosecution of Lubanga and Ntaganda has, however, raised awareness of the illegality of child recruitment, provided clarification of the law, and exposed the horrific effects of child soldiering. These consequences of the ICC prosecutions can also produce wider social deterrent effects. Jo and Simmons describe social deterrence as a process whereby ‘community norms are challenged in a clear way (signalled, for example, by ICC actions’), which provides ‘significant potential for a social reaction to law violations’.¹²⁸ Finnemore and Sikkink postulate that ‘[w]e only know what is appropriate by reference to the judgments of a community or a society’.¹²⁹ ‘We recognise norm-breaking behaviour because it generates disapproval or stigma.’¹³⁰

One of the central issues with child soldiering is its wide acceptance in countries such as the DRC, where children's association with groups ‘is

¹²⁶ Interview with Participant E (n 43).

¹²⁷ Pogarsky (n 112).

¹²⁸ Jo and Simmons (n 104).

¹²⁹ Finnemore and Sikkink (n 14) 892.

¹³⁰ Finnemore and Sikkink (n 14) 892.

considered acceptable and even desirable'.¹³¹ Multiple research participants disclosed that ANSAs often recruit children and are subsequently reluctant to release them, for reasons that include the belief that children have mystical powers, that they hold the rites of war, and that they are war charms that protect the group from confrontation.¹³² Child soldiers were described by a survey respondent as 'the raw materials of these rebels'.¹³³ In addition, many families voluntarily send their children to join armed groups or are coerced by ANSAs. An interviewee reported that 'in some communities families have to send a child to the armed group in exchange for community protection'.¹³⁴ Matambura writes that many in the DRC 'have misunderstood this progressive socialization of children into adult life ... holding children and youth as responsible for the defense of the community'.¹³⁵ Social acceptance of the prohibition of child soldiering, is therefore a necessary prerequisite for complete translation of the norm. This is particularly poignant where community values 'are strong, but the formal institutions of law — policing, courts and formal confinement capacities — are weak', analogous to the situation in the DRC.¹³⁶

The prosecution of Lubanga and Ntaganda for the crime of child recruitment and use has elevated a widely accepted practice to one of serious international awareness and concern. All interview participants indicated fear of ICC prosecution as a motivation for releasing child soldiers. This is hugely significant, highlighting the previous lack of awareness of the illegality of child recruitment at an international level.

¹³¹ Coalition to Stop the Use of Child Soldiers, *Briefing Paper: Democratic Republic of Congo, Mai Mai Child Soldier Recruitment and Use, Entrenched and Unending* (2010) 1.

¹³² Interview with Participant D (n 19); interview with Participant E (n 43); anonymous survey response.

¹³³ Survey response.

¹³⁴ Interview with Anonymous Participant A (20th August 2020).

¹³⁵ *ibid.*

¹³⁶ Jo and Simmons (n 104) 450.

This has additionally been reflected in evidence stated in the Human Rights Watch report, which emphasised civilian awareness of the illegality and negative effects of children joining ANSAs.¹³⁷ The report stated that ‘child protection agencies admitted that the Lubanga case seems to have reached out to families in the region, much more effectively than years of their own campaigning’.¹³⁸ A report on the ICC's experience in the DRC additionally purports that ‘children themselves had been educated about their rights and sensitised to their roles, as both victims and perpetrators, in a way which may impact their own future behaviour’.¹³⁹

There have, however, been claims that greater social awareness of the ICC prosecutions and the illegality of child recruitment has affected child recruitment. A Human Rights Watch report states that, before the charges were brought against Lubanga, ‘leaders openly admitted ... numbers of children in their ranks and handed children over.’¹⁴⁰ ‘Following the confirmation of charges against Lubanga ... many denied having children under their command.’¹⁴¹ Activists dubbed this phenomenon ‘Lubanga syndrome’.¹⁴² This phenomenon appears to still exist. The secretary general of CVPD claimed that ANSAs now refuse to admit that they use child soldiers, and ‘continue to use them in secret, hiding their age, their identity cards, hiding them during visits’.¹⁴³ Multiple participants further disclosed that communication and

¹³⁷ Editorial, ‘Courting History: The Landmark International Criminal Court's First Years’ (*Human Rights Watch*, July 2008). Human Rights Watch separate interviews with MONUC, UNICEF, and Save the Children, Bunia, 2–3 May 2007, and ONUC, Goma, 10 May 2007.

¹³⁸ *ibid.*

¹³⁹ International Refugee Rights Initiative (n 102) 10.

¹⁴⁰ ‘Courting History: The Landmark International Criminal Court's First Years’ (n 137).

¹⁴¹ ‘Courting History: The Landmark International Criminal Court's First Years’ (n 137).

¹⁴² ‘Courting History: The Landmark International Criminal Court's First Years’ (n 137).

¹⁴³ Interview with Participant I (n 120).

meaningful dialogue between local NGOs and ANSAs were affected by the fear that NGO workers will report examples of child recruitment to the authorities, causing them to be prosecuted.¹⁴⁴ This is particularly problematic, as the prosecutions appear to have impacted on meaningful discussions between NGOs and ANSAs, thus making it more difficult to engage with ANSAs using mechanisms of voluntary translation. The majority of the survey respondents expressed the view that prosecutions were the most effective mechanism for norm translation, with 81 per cent (n=16) stating that the prosecutions of Thomas Lubanga and Bosco Ntaganda have been effective in reducing the use of child soldiers. However, whilst reflecting on these answers in their subsequent interviews, many participants did raise doubts about the overall, long-term effectiveness of prosecutions in reducing the use of child soldiers.

4.3 Summary

The analysis has revealed that theories of prosecutorial and social deterrence are difficult to apply to protracted, complex armed conflicts, such as in the DRC, as a plethora of factors are in play. Owing to the rampant impunity and political connections of ANSA leaders in the DRC, an ICC arrest warrant may not have the effect of acting as a deterrent against further crimes, as the certainty of prosecution is perceived to be low. The prosecutions have certainly increased awareness of the illegality of child recruitment and use and the perceived certainty of prosecution, contributing to an increased translation and acceptance of the norm more generally. In reaction to increased enforcement, ANSAs appear to have adapted their behaviours to facilitate the continued recruitment of child soldiers, suggesting that there is a lack of reinforcement of both theories of deterrence, which is required for full translation of the norm.¹⁴⁵ It could therefore be

¹⁴⁴ Interview with Participant C, deputy director, Synergy of Great Lakes Initiatives (SYNIGL) (15 September 2020); interview with Participant B (n 22); anonymous survey response.

¹⁴⁵ Jo and Simmons (n 104) 450.

suggested that sensitisation to the norm is required on the ground, by NGOs and INGOs, to encourage diffusion of the norm and in the reinforcement of the theories of deterrence. Deterrence is therefore required at both a prosecutorial and a social level to achieve norm translation.

5 Conclusion

Using the case study of the DRC, this paper has sought to evaluate the suitability of mechanisms employed to translate the prohibition of child recruitment and use to the activities of ANSAs. It has drawn upon the findings of an empirical research project involving ten interviews and a small survey carried out with NGO representatives. In doing so, the paper has explored and analysed the most utilised and prominent mechanisms employed by both national and international actors. It has offered a novel case study evaluation of a norm's translation, as well as an exploration of the variety of unique factors that inhibit NGOs' efforts to translate the norm which prohibits the use of child soldiers in armed conflict in the DRC. Notable factors that were identified through the course of the research were: the plethora of ANSAs; the rate at which they fragment and cease to exist; the 'incurable nature' of the individuals responsible for the recruitment of child soldiers; and the social acceptance of child recruitment. Given the range of these factors, it is apparent that it can be exceedingly difficult for one mechanism to successfully translate the norm. The research findings indicate that there is a need for systemic reinforcement of the prohibition norm through a variety of methods, to allow the international prohibition to cascade and eventual internalise within ANSA leadership and the wider DRC.¹⁴⁶ This suggests that effective translation requires a hybrid approach — combining voluntary and coercive translation mechanisms. The responses of survey participants supported this mixed approach, with 81 per cent (n=16) of survey respondents supporting mixed mechanisms to successfully prevent the use of child soldiers. A hybrid

¹⁴⁶ Finnemore and Sikkink (n 13) 895.

approach does not, however, reduce the utility of each mechanism. It became evident during the course of this research that each ANSA is unique in its leadership, nature, and personnel, meaning that certain mechanisms are more effective at translating the norm with some individuals and/or groups than others.

With regard to voluntary translation mechanisms, three mechanisms and their application by local NGOs have been examined, providing a level of detail not previously available within the literature. This paper has argued that negotiations to release child soldiers were more effective in translating the norm when they were not transactional in nature, in the context of the DRC. Where NGOs provide training on the use of child soldiers, it has been suggested that educating ANSAs in the legal provisions alone was less successful at diffusing the norm when not supplemented by technical training on the implementation of these provisions. An alternative approach which promotes empathy by emphasising the impact on the children, their families, and communities was considered to be preferable for norm translation, particularly for individuals unresponsive to the threat of prosecution. Overall, the signing of unilateral declarations was considered to be the most effective voluntary mechanism, when two conditions are present to induce compliance and reduce relapse: 1) the application of alternative mechanisms, in which the declaration can be used to solidify a commitment to not recruit children, and 2) the ability of the NGO to carry out monitoring of the ANSA, to ensure compliance with the deed of commitment and hence increase translation.

For all three mechanisms of voluntary translation to have a greater chance at ensuring translation, research by the NGOs into the ANSAs prior to engagement allowed organisations to adjust their approach to suit the style of the ANSA. It appears that doing so may increase the receptiveness of the ANSA in accepting the norm and may promote successful engagement with the mechanisms. Participants also reported that the three mechanisms were commonly not applied in isolation and often complemented one other, each incrementally bolstering the

translation norm. However, such a mixed approach may be unavailable to smaller NGOs owing to resource constraints, whereas INGOs can often offer a more sustained engagement package. Further research identifying ideal combinations and situational applications of voluntary translation mechanisms may provide local NGOs with the opportunity to direct their resources more appropriately.

The most frequently cited coercive translation mechanism by research participants was prosecution by the ICC. Deterrence theory, which forms part of the narrative adopted by ICC prosecutors, was used to analyse this mechanism and revealed two different, yet complementary, theories: prosecutorial and social deterrence. It has been argued that the ICC needs to successfully deter ANSAs on both of these levels to achieve norm internalisation. The analysis revealed that rational choice theories are extremely difficult to apply in complex, protracted conflicts such as in the DRC, as many other factors often outweigh the (remotely) perceived formal sanction. Prosecutions are considered, however, to have increased the overall social awareness of the illegality of child recruitment and use, and have contributed to the diffusion of the norm throughout the wider DRC population. The generally held view is that this may have increased perceived stigma relating to child soldier recruitment among some ANSAs, which is a step closer to acceptance and internalisation of the norm. There are, similarly, a multitude of factors that limit the deterrence capabilities of the ICC in the DRC, suggesting that the ICC's remote and abstract nature is not conducive to ensuring successful translation of the norm alone. The ICC's work requires supplementary sensitisation by NGOs on the ground, increasing awareness of the illegality of child recruitment and use and the psychosocial consequences on children.

This reinforces the argument supporting a hybrid approach. Utilising a mixture of both voluntary and coercive mechanisms is the most suitable approach to achieve norm internalisation within ANSAs operating in the DRC. It would seem that the most effective approach to achieve ANSAs' internalisation of the norm involves a combined intervention.

This would, ideally, comprise a mixture of direct NGO interaction (training, negotiations, and signed commitments) together with prosecutorial deterrence. It is to be hoped that broader social acceptance of the prohibition will ensure its greater and more effective internalisation by the ANSAs. While literature that analyses one type of mechanism exists, this piece has highlighted the utility of allowing the coercive and voluntary mechanisms to complement each other. More research needs to be carried out to understand how coercive and voluntary mechanisms can interact and reinforce each other to better inform the DRC community, so as to ensure greater translation of the norm.