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## Note

### **Children in Limbo: The Need for Maximum Limits for Juvenile Pretrial Detention**

**Rebecca Rosefelt\***

“Once it is accepted that non-compliance by the growing child with norms and standards of the adult world is—within certain limits—part of the regular development process, not necessarily requiring full-fledged criminal justice responses, then justification for deprivation of liberty as the strongest instrument of the traditional sanction regime is lost.”<sup>1</sup>

In many parts of the world, children accused of a crime languish in subpar detention facilities, waiting months or years for trials that often never occur. This injustice often traces to minimal judicial resources, corruption, and lack of safeguards such as legislation limiting pretrial detention or availability of pre-sentencing alternatives. The United Nations Convention on the Rights of the Child (CRC)<sup>2</sup> proposes international standards for juvenile justice systems, yet does not elucidate pretrial rights or best practices.

This Note proposes that the Committee on the Rights of the Child (CRC Committee) should incorporate strict, definite limits for the maximum amount of time a child can be detained before

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\* J.D. candidate, 2019, University of Minnesota Law School. Much of the research for this article was done in conjunction with work for Juvenile Justice Advocates International, including the author’s interviews with youth in the justice system in Chihuahua, Mexico. This article and the research within would not have been possible without support from the Law School’s Human Rights Center.

1. William Schabas & Helmut Sax, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty*, in COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 36 (André ALEN et al. eds., 2006).

2. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

trial. Part I documents the long-term harms pretrial detention has on children, from physical and psychological harm to the impact on the child's case. Part II juxtaposes global laws with international protections, and how the CRC has been invoked to enhance the rights of children in regional courts. Part II also presents data from a case study in Mexico that was conducted after the country's new youth justice provisions were enacted in 2016. Part III presents emerging good practices and recommends an international standard that limits juvenile pretrial detention to thirty days and promotes an increase in the collection of data regarding youth courts. The scope of this Note is limited to addressing children involved in the criminal side of the juvenile justice system and does not delve into the complications and injustices related to the detention of immigrants or refugees. This Note concludes that the CRC Committee should recommend a thirty to sixty-day limit for pretrial detention of children, a measure which would reform juvenile justice to truly be in the best interest of the child.

### I. THE DAMAGING EFFECTS OF PRETRIAL DETENTION ON CHILDREN

It has been estimated that at least one-third of all detainees at any given time are still awaiting trial, although many reports from different regions show that pretrial detainees often outnumber prisoners in any given facility.<sup>3</sup> Most detained children are in the pretrial stage, and are frequently found not guilty, or not guilty of an offense that merits deprivation of liberty.<sup>4</sup> Children detained both before and after trial face many challenges, but those in pretrial detention, also known as

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3. U.N. High Comm'r for Human Rights, *Human Rights Implications of Overincarceration and Overcrowding*, ¶ 11, U.N. Doc. A/HRC/30/19 (Aug. 10, 2015) [hereinafter *Human Rights Implications of Overincarceration and Overcrowding*]; DAVID BERRY, OPEN SOC'Y JUSTICE INITIATIVE, *THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION* 15 (Martin Schönteich et al. eds., 2011), <https://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pretrial-detention-02012011.pdf>; MARTIN SCHONTEICH, OPEN SOC'Y JUSTICE INITIATIVE, *PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION* 11 (David Berry & Kate Epstein eds., 2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf>.

4. Office of the High Comm'r for Human Rights et al., *Joint Report on Prevention of and Responses to Violence Against Children Within the Juvenile Justice System*, ¶ 32, U.N. Doc. A/HRC/21/25 (June 27, 2012) [hereinafter *Joint Report*].

remand custody or preventative detention, face unique issues while they are supposedly presumed innocent. Violence is pervasive, and children suffer at the hands of both other detainees and prison officials.<sup>5</sup> Additionally, overcrowding in prisons exacerbates violence and thinning of resources.<sup>6</sup> Because pretrial detainees are theoretically a more temporary population than those imprisoned, authorities generally disregard detainee needs for education and healthcare, believing those resources to be better apportioned for sentenced detainees.<sup>7</sup> A direct effect of taking time off from education is the diminished likelihood of detained youth returning to school, which results in less stable employment and an increased chance of arrest.<sup>8</sup> Children also require a healthy social environment in order to thrive as an adult, and due to their fragile developmental stage may have more harrowing experiences of incarceration than that of a fully matured individual.<sup>9</sup> As once observed by Justice Marshall, the pretrial detention of children “gives rise to injuries comparable to those associated with the imprisonment of an adult.”<sup>10</sup>

#### A. HIGH RISK OF VIOLENCE AND PHYSICAL HARM

Youth in detention face a substantial threat of violence. In principle, children should be separated from adults as well as

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5. DEF. FOR CHILD. INT’L, FROM LEGISLATION TO ACTION? TRENDS IN JUVENILE JUSTICE SYSTEMS ACROSS 15 COUNTRIES 44–47 (2007), <http://www.defenceforchildren.org/wp-content/uploads/2010/04/DCI-JJ-Report-2007-FINAL-VERSION-with-cover.pdf> [hereinafter *From Legislation to Action*].

6. U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 86, U.N. Doc. A/68/295 (Aug. 9, 2013) (“The overuse of imprisonment constitutes one of the major underlying causes of overcrowding, which results in conditions that amount to ill-treatment or even torture.”).

7. BERRY, *supra* note 3, at 22–23.

8. *Id.* at 27, 63 (“The failure of detained juveniles to return to school affects public safety as, according to the U.S. Department of Education, school dropouts are three and a half times more likely than high school graduates to be arrested.”).

9. See David E. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 13–14 (2003).

10. The U.S. Supreme Court found that pretrial detention did not violate a juvenile’s constitutional rights in *Schall v. Martin*, 467 U.S. 253, 291 (1984) (Marshall, J., dissenting).

from the opposite sex.<sup>11</sup> The lack of such separation results in much higher rates of beatings and sexual violence, trauma that children carry for the rest of their lives.<sup>12</sup> Girls suffer sexual violence more frequently than boys (who may still be sexually abused by other boys or men), and there are several examples of wardens complicit with prostitution within a detention facility.<sup>13</sup> However, even for children in kept in center specifically designated for pretrial detainees, conditions are often worse than in juvenile prisons or similar institutions.<sup>14</sup> As a result of fewer resources being allocated to pretrial detainees than sentenced prisoners, pretrial detainees spend more time in their cells and have fewer opportunities to exercise or pursue educational opportunities. Ultimately, such a lack of resources leaves pretrial detainees in a sort of second-class citizenship, with fewer rights they are be able to exercise than if convicted.

Individuals residing in pretrial detention centers make up the vast majority victims of torture in the world.<sup>15</sup> Torture is frequently used to gain confessions, which by nature are extracted in the pretrial process, but is also used as “punishment, intimidation, or to extort money.”<sup>16</sup> Authorities often act with impunity due to lack of oversight, and pretrial detainees are vulnerable, therefore easy victims.<sup>17</sup> In countries

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11. Comm. on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, § 85, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter CRC General Comment 10]; Economic and Social Council Res. 663 C (XXIV) Standard Minimum Rules for the Treatment of Prisoners, art. 8 (July 31, 1957), and 2076 (LXII) (May 13, 1977) [hereinafter Standard Minimum Rules for the Treatment of Prisoners].

12. MORITZ BIRK ET AL., OPEN SOC’Y JUSTICE INITIATIVE, PRETRIAL DETENTION AND TORTURE: WHY PRETRIAL DETAINEES FACE THE GREATEST RISK 18 (2011), <https://www.opensocietyfoundations.org/sites/default/files/pre-trial-detention-and-torture-06222011.pdf>; *From Legislation to Action*, *supra* note 5, at 44.

13. *E.g.*, BIRK ET AL., *supra* note 12, at 32 (citing an interview with a detainee in Paraguay). During the author’s interviews in Chihuahua, Mexico, multiple children reported sexual abuse and rape, both from within the juvenile facility and during time spent in an adult facility before being transferred to the juvenile center. *See generally*, *From Legislation to Action*, *supra* note 5, at 47.

14. BIRK ET AL., *supra* note 12, at 17. *See also* 4 JUVENILE JUSTICE SYSTEMS IN EUROPE: CURRENT SITUATION AND REFORM DEVELOPMENTS 1723 (Dünkel et al. eds., 2010) (“In most European countries, young offenders are subjected to worse conditions of detention than their sentenced counterparts in juvenile prisons . . .”).

15. BIRK ET AL., *supra* note 12, at 17.

16. *Id.* at 30.

17. *See Human Rights Implications of Overincarceration and Overcrowding*, *supra* note 3, ¶ 43; BIRK ET AL., *supra* note 12, at 30.

where corruption is rampant, even basic amenities like water might require payment.<sup>18</sup> Corruption may also prevent poorer detainees from seeking legal services or contacting their families.<sup>19</sup> When detainees do not have family support, they fall to the mercy of the authorities and other detainees.<sup>20</sup>

No matter what type of facility in which a child is detained, incarcerated youth are more likely to engage in self-harm than non-detained youth.<sup>21</sup> Detention generates higher rates of depression for both sexes, but girls are more prone to major depression than boys.<sup>22</sup> Children may resort to self-harm “as an attempt at psychologically mastering an inflicted psychological wound,” such as sexual abuse or torture.<sup>23</sup> Children in adult prisons are more likely to die by suicide than their peers in juvenile detention centers, and are five times more likely to die by suicide than non-detained children.<sup>24</sup>

Overcrowding is endemic in prison facilities around the globe.<sup>25</sup> An overflow of detainees often leads to children being housed with adults, and in places where pretrial detention accommodations are filled or unavailable, accused individuals often live alongside prisoners.<sup>26</sup> Limited healthcare access in crowded pretrial detention facilities lends itself to the spread of disease, and released individuals often bring infectious diseases such as HIV, tuberculosis, and hepatitis C into their homes and communities upon release.<sup>27</sup> There are frequent reports of bed shortages, beds in such cramped conditions as to make living conditions “extremely precarious,” and reports of having to sleep

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18. BIRK ET AL., *supra* note 12, at 30 (indicating this is a common practice in Togo).

19. Comm. Against Torture, Rep. of the Subcomm. on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fifty-Fourth Session, ¶ 78, U.N. Doc. CAT/C/54/2 (Mar. 26, 2015).

20. See BIRK ET AL., *supra* note 12, at 30.

21. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 9 (2006), [http://www.justicepolicy.org/images/upload/0611\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/0611_rep_dangersofdetention_jj.pdf).

22. Arredondo, *supra* note 9, at 25; HOLMAN & ZIEDENBERG, *supra* note 21, at 8.

23. Arredondo, *supra* note 9, at 25.

24. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 201 n.200 (1984).

25. *Human Rights Implications of Overincarceration and Overcrowding*, *supra* note 3, ¶ 43.

26. *Id.* ¶¶ 20, 30; *From Legislation to Action*, *supra* note 5, at 43.

27. Comm. Against Torture, *supra* note 19, ¶ 77; BERRY, *supra* note 3, at 28.

in shifts.<sup>28</sup>

#### B. LONG-TERM EFFECTS OF PRETRIAL DETENTION

Children suffer from physical, intellectual, and social underdevelopment when institutionalized.<sup>29</sup> Youths detained while awaiting trial also experience greater neglect than sentenced youth because resources are prioritized for the individuals who have a more permanent presence in the facility.<sup>30</sup> As a result, children in preventative detention are less likely to have access to healthcare, educational resources, support systems, or activities.<sup>31</sup> The lack of emotional support paired with the stress of detention has irreversible effects on the psychological development of children.<sup>32</sup> Social skills are honed during adolescence, and detention prevents children from learning how to develop healthy relationships.<sup>33</sup> Long periods of incarceration, particularly in places where pretrial detainees are not separated from prisoners, expose kids to more juvenile offenders—leading to a variety of negative outcomes, such as gang recruitment.<sup>34</sup>

Solitary confinement may constitute torture in some circumstances.<sup>35</sup> The UN Special Rapporteur on Torture has called for prohibition of solitary confinement, a punishment that “children perceive as the very worst treatment.”<sup>36</sup> Individuals of different ages experience time differently, and thus every hour

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28. *Human Rights Implications of Overincarceration and Overcrowding*, *supra* note 3, ¶ 43; BIRK ET AL., *supra* note 12, at 30.

29. Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 71, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015).

30. *See generally*, BERRY, *supra* note 3, at 23–24 (discussing the impact on women, ethnic minorities, non-citizens, and other vulnerable groups such as youth).

31. *Id.* at 20.

32. Méndez, *supra* note 29, ¶ 33.

33. *See* Schabas & Sax, *supra* note 1, at 34. *See also* Joint Report, *supra* note 4, ¶ 33 (“Lack of contact with the outside world is less frequent than for sentenced children, which means that children who are ill-treated have fewer possibilities to report incidents.”).

34. Arredondo, *supra* note 9, at 20.

35. CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 153–54 (Said Mahmoudi et al. eds., 2015).

36. *Id.* at 153.

is subjectively longer to a child than an adult.<sup>37</sup> This should be taken into consideration when calculating any type of deprivation of liberty, as “a fifteen-year prison sentence for a teenager, is in context, equal to a lifetime behind bars.”<sup>38</sup>

The ability to access education while in pretrial detention varies, but is generally sparse.<sup>39</sup> Limited access to education in pretrial detention causes children to fall behind in school, often leading to them abandoning their studies after their release, and studies show that higher school drop-out rates are correlated with higher arrest and recidivism rates.<sup>40</sup> Lower education is linked directly to underemployment, systematically setting up detained youth for a future of unstable income and poverty.<sup>41</sup> Detention also exacerbates mental illness, and correspondingly, children with special needs are even less likely to return to school than their non-challenged peers.<sup>42</sup>

Reduced cognitive ability of youths, particularly their impulsivity and increased willingness to take risks, is reflected in the age-crime curve.<sup>43</sup> The “age-crime curve” illustrates the concept that “juvenile delinquency is a ubiquitous and passing phenomenon, linked to age.”<sup>44</sup> More specifically, it shows that individuals are most likely to violate the law during their teenage years, and the chances of offending decrease significantly in one’s mid to late twenties.<sup>45</sup> However, those who start offending from an early age, or are repeatedly incarcerated, are more likely to continue offending into adulthood.<sup>46</sup> This

37. See Arredondo, *supra* note 9, at 18–19.

38. From *Legislation to Action*, *supra* note 5, at 33.

39. *Id.* at 38–39 (“In most Western countries, education . . . [is] well provided, however in other countries such as Albania, Kenya and Palestine opportunities for education were very limited.”).

40. BERRY, *supra* note 3, at 31–32; e.g., Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, 60(3) J.L. ECON. 529, 531 (2017).

41. BERRY, *supra* note 3, at 27.

42. HOLMAN & ZIEDENBERG, *supra* note 21, at 9.

43. See Arredondo, *supra* note 9, at 15.

44. REFORMING JUVENILE JUSTICE 149 (Josine Junger-Tas & Frieder Dünkel eds., 2009).

45. For empirical research discussing the factors that contribute to the age-crime curve, see Elizabeth P. Shulman et al., *The Age–Crime Curve in Adolescence and Early Adulthood is Not Due to Age Differences in Economic Status*, 42(6) J. YOUTH & ADOLESCENCE 848, 848 (2013) (“Scholars may disagree about the underlying causes of the age–crime curve, but there is broad consensus that it is real.”).

46. From *Juvenile Delinquency to Young Adult Offending*, NAT’L INST. JUST. (Mar. 11, 2014), <https://www.nij.gov/topics/crime/Pages/delinquency-to->



pattern may be due to over-detention of youth: incarceration of *any* type may disrupt the development of people “aging out of delinquency.”<sup>47</sup> Reduction of pretrial detention is consequently a preventative measure that may keep juveniles from reoffending.

### C. PRETRIAL DETENTION UNDERMINES JUSTICE SYSTEM AND PROMOTES RECIDIVISM

Even if the child is found innocent, pretrial detention leaves an indelible mark that beckons them back into the justice system.<sup>48</sup> Multiple studies show that children who have experienced pretrial detention have higher recidivism rates,<sup>49</sup> which is alarming when noting that pretrial detention is utilized frequently for misdemeanors.<sup>50</sup> Not only is the likelihood of conviction greater for those held before trial, but also the chance of imprisonment, as opposed to alternative solutions or diversion.<sup>51</sup>

Long periods of remand detention violate the presumption of innocence in multiple ways.<sup>52</sup> Pretrial detention is associated with higher conviction rates, longer sentences, and a higher likelihood of pleading guilty.<sup>53</sup> A guilty plea may be a ticket out of jail, or may put an end to the seemingly indefinite limbo of incarceration that the individual is experiencing, especially when “defendants perceive their detention facility to be worse than wherever they might serve out their sentences” despite not having been sentenced.<sup>54</sup> In kind, it follows that individuals who would not have pled guilty on pretrial release tend to plead guilty more often and sooner in the investigation process if they are detained.<sup>55</sup> However, even plea bargains for pretrial

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adult-offending.aspx#reports.

47. HOLMAN & ZIEDENBERG, *supra* note 21, at 6.

48. *See id.* at 4.

49. BERRY, *supra* note 3, at 14–15, 27; HOLMAN & ZIEDENBERG, *supra* note 21, at 3.

50. *Human Rights Implications of Overincarceration and Overcrowding*, *supra* note 3, ¶ 37; Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

51. Feld, *supra* note 24, at 203.

52. Comm. Against Torture, *supra* note 19, ¶ 76.

53. *See* Leslie & Pope, *supra* note 40, at 548.

54. *Id.* at 552; *see A Deal You Can't Refuse: The Troubling Spread of Plea-Bargaining from America to the World*, ECONOMIST (Nov. 9, 2017), <https://www.economist.com/news/international/21731159-tool-making-justice-swifter-too-often-snares-innocent-troubling-spread>.

55. Leslie & Pope, *supra* note 40, at 548, 554.

detainees tend to be “less favorable” than plea bargains for individuals who were charged but permitted pretrial release.<sup>56</sup> One study found evidence that pretrial detention has a negative effect “on charge reduction conditional on being convicted,” meaning that “detainees are less likely to be convicted of less serious crimes than the one with which they were charged at arraignment.”<sup>57</sup> This perpetuates an increasingly vicious cycle for recidivists, as criminal history is often factored into a sentencing decision.<sup>58</sup> Although some countries keep police records on children confidential, in most of the world a guilty plea will be a detriment to acquiring housing and employment, and will follow the child for the rest of their life.

The use of bail as the primary alternative to pretrial detention works in many ways as a poverty tax.<sup>59</sup> The policy behind bail suggests that it should only be used under the guise of public safety or preventing the flight of an alleged criminal, yet its use today is an arbitrary ritual, trapping the most marginalized individuals in the criminal justice system.<sup>60</sup> A majority of detainees waiting trial are held as a result of their inability to post bail,<sup>61</sup> even though they are often not considered a public threat.<sup>62</sup> Studies have shown that “significant numbers of pretrial defendants” can safely be allowed to be free in society, and such releases “do not increase the failure of defendants to appear in court nor boost the re-arrest rate of defendants awaiting trial.”<sup>63</sup>

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56. *Id.* at 548.

57. *Id.*

58. *Id.*

59. Kahryn Riley, *Cash Bail Hurts Innocent Poor People*, MACKINAC CTR. PUB. POL’Y (Jan. 24, 2018, 4:00 PM), <https://www.mackinac.org/cash-bail-hurts-innocent-poor-people>.

60. See Comm. Against Torture, *supra* note 27, ¶ 78.

61. Leslie & Pope, *supra* note 40, at 530, 554.

62. LAURA & JOHN ARNOLD FOUND, PRETRIAL CRIMINAL JUSTICE RESEARCH 1 (Nov. 2013), [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

63. *E.g.*, Michael Dorman, *Releasing Pretrial Defendants*, N.Y. TIMES (July 6, 1981), <http://www.nytimes.com/1981/07/06/opinion/releasing-pretrial-defendants-dix-hills-ny-among-more-demagogic-propositions.html>.

## II. INTERNATIONAL STANDARDS, EXISTING LIMITATIONS, AND INNOVATIVE SOLUTIONS

### A. THE MAKING OF THE MODERN JUVENILE JUSTICE SYSTEM

The idea of a separate youth justice system was based on the understanding that youth had diminished cognitive abilities and a lower moral capacity.<sup>64</sup> Central to the nineteenth century juvenile justice movement were the goals of rehabilitation and reintegration,<sup>65</sup> the former of which relied heavily on education.<sup>66</sup> The world's first juvenile court opened in Chicago in 1899,<sup>67</sup> and other states were quick to adopt similar measures.<sup>68</sup> Over the next several decades, children's courts were embraced by countries from Europe to Asia.<sup>69</sup> Similar to the traditional adult criminal systems, youth justice systems also emphasize the presumption of innocence.<sup>70</sup> However, there are four unique features of juvenile justice: separation, or keeping children from adult presence except when necessary; confidentiality, or keeping juvenile proceedings out of the public eye; individualized justice, which allows authorities more discretion to consider the child's specific circumstances while conducting an investigation; and community-based alternatives to detention.<sup>71</sup> Modern understanding of psychology continues to

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64. See *Juvenile Justice History*, CTR. JUV. & CRIM. JUST., (last visited Jan. 2, 2018). For a brief history on how childhood has been understood, see generally Edward Rothstein, *How Childhood Has Changed! (Adults, Too)*, N.Y. TIMES: BOOKS (Feb. 14, 1998), <http://www.nytimes.com/1998/02/14/books/how-childhood-has-changed-adults-too.html> (“[A]bout 300 years ago . . . [c]hildren started to be treated as if they were something other than small adults.”).

65. CHILD RIGHTS INT'L NETWORK, HUMAN RIGHTS IMPLICATIONS OF OVER-INCARCERATION AND OVERCROWDING 3 (Apr. 28, 2015), [https://www.crin.org/sites/default/files/crin\\_submission\\_overincarceration.pdf](https://www.crin.org/sites/default/files/crin_submission_overincarceration.pdf). For a nuanced look at the meaning of “rehabilitation,” see Arredondo, *supra* note 9, at 25.

66. See GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD, 35 INT'L STUDIES IN HUMAN RIGHTS 237 (1995) (“[I]t is in the best interests of the child that children are not entitled to refuse education.”).

67. Frank Kopecky, *In Defense of Juvenile Court*, 18 UPDATE L. RELATED EDUC. 33, 33 (1994); see also AM. BAR ASS'N, DIALOGUE ON YOUTH AND JUSTICE 5 (2007), <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>; CTR. JUV. & CRIM. JUST., *supra* note 64.

68. Marjorie Montgomery Bowker, *Juvenile Court in Retrospect: Seven Decades of History in Alberta (1913-1984)*, 24 ALTA. L. REV. 234, 234 (1986).

69. *Id.*

70. SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 686–87 (1999).

71. Kopecky, *supra* note 67, at 34–35.

advocate for individualized justice that takes into account, among other things, the age and maturity of the accused minor, and mandates that any punishment be graded to the child's developmental phase.<sup>72</sup> The ultimate goal of all juvenile justice systems should be full reintegration of the child back into society, where they can be a productive member of the community.<sup>73</sup>

Who qualifies as a juvenile, and who can be punished as one? Pinpointing the age at which a child can be held accountable, known as the “minimum age of criminal responsibility,” often determines the minimum age at which an individual can be detained by police or other authorities in the criminal justice system.<sup>74</sup> The minimum age of criminal responsibility varies not only on an international level, but within nations themselves. The highest minimum ages hover around eighteen years, as adopted by Guatemala,<sup>75</sup> or seventeen years old, as implemented in Poland.<sup>76</sup> The lowest minimum age is seven years old, and is applied in countries as diverse as Trinidad and Tobago, Qatar, and Tanzania.<sup>77</sup> Many countries, including Luxembourg, have no absolute minimum at all.<sup>78</sup> Each state in the US determines its own minimum age, and over half have no statutory minimum.<sup>79</sup> Mississippi has enacted the

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72. *Id.*

73. STEPHANIE RAP & IDO WEIJERS, *THE EFFECTIVE YOUTH COURT: JUVENILE JUSTICE PROCEDURES IN EUROPE* 26 (2014).

74. David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J. L. & PUB. POL'Y 403, 428–29 (2015).

75. CONSTITUCIÓN POLÍTICA REFORMADA POR ACUERDO LEGISLATIVO NO. 18-93, [CONSTITUTION WITH 1993 REFORMS] Nov. 17, 1993, art. 20 (Guat); CODIGO CIVIL [CIVIL CODE] art. 8 (Guat).

76. KODEKS POSTĘPOWANIA KARNEGO [CODE OF CRIMINAL PROCEDURE] June 6, 1997, art. 10, § 1 (Pol).

77. PENAL CODE, CAP. 16, 1981 § 15 (Tanz.); Comm. on the Rights of the Child, Initial Reports of State Parties due in 1994, Addendum: Trinidad and Tobago, ¶ 29, U.N. Doc. CRC/C/11/Add.10 (June 17, 1996); *Minimum Ages of Criminal Responsibility Around the World*, CHILD RTS. INT'L NETWORK, <https://www.crin.org/en/home/ages> (last visited Jan. 04, 2018). The lowest minimum age of criminal responsibility (six years old) that this study found is in the state of North Carolina, which, because it is not a country, will not be counted for these purposes. N.C. GEN. STAT. ANN. § 7B-1501(7) (West 2017).

78. See FRA: EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, CHILDREN'S RIGHTS AND JUSTICE: MINIMUM AGE REQUIREMENTS IN THE EU, fig.5 (2018), <https://fra.europa.eu/en/publication/2018/minimum-age-justice>; *Minimum Ages of Criminal Responsibility in Europe*, CHILD RTS. INT'L NETWORK, <https://www.crin.org/en/home/ages/europe> (last visited Jan. 4, 2018).

79. See *Minimum Ages of Criminal Responsibility in the Americas*, CHILD RTS. INT'L NETWORK, <https://www.crin.org/en/home/ages/Americas> (last visited

highest minimum age in the US, at thirteen years.<sup>80</sup> The CRC Committee considers a minimum age of fourteen to sixteen years “commendable,” and anything below the age of twelve to be unacceptable.<sup>81</sup>

Critics of more rehabilitative approaches claim that punitive measures will more effectively deter future crime—an underlying theory of adult systems.<sup>82</sup> This has been refuted by multiple studies showing higher rates of recidivism for children who have experienced pretrial detention.<sup>83</sup>

Over half of the world’s nations ban life sentences for children,<sup>84</sup> a practice that reflects a widespread recognition that children are psychologically different from adults. Courts in the US, on the other hand, have only recently held life sentences for nonhomicide offenses without regular review and parole to be unlawful for children.<sup>85</sup> Other phases of the judicial process often have established time limits, such as the duration in police custody before being presented with a charge. In contrast, fewer countries specifically limit the duration an accused individual can spend in pretrial detention, and many do not have separate limitations when the accused is a child.<sup>86</sup> Without a specific youth standard, children are subject to detention for the same amount of time as an adult. This practice fails to consider that time is experienced differently as one grows older—any period of time seems longer to young persons, because it makes up a greater percentage of their lived experience.<sup>87</sup>

Progressive juvenile justice measures began to regress towards the end of the twentieth century due in part to a perceived increase in childhood crime.<sup>88</sup> By the 1990s, the US, Canada, and other countries experienced a rise in youth

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Jan. 4, 2018).

80. MISS. CODE § 43-21-151(3) (West 1972).

81. CRC General Comment 10, *supra* note 11, ¶¶ 32–33.

82. Kopecky, *supra* note 67, at 34.

83. HOLMAN & ZIEDENBERG, *supra* note 21, at 4–5.

84. See generally Michael Garcia Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, HUM. RTS. WATCH (2016), <https://www.hrw.org/world-report/2016/children-behind-bars>.

85. See *Graham v. Florida*, 560 U.S. 48, 81–82 (2010) (reaffirming the link between the CRC, international law, and the Eighth Amendment: age is relevant; also claiming that although the U.S. has not ratified the CRC, it is in line with “basic principles of decency”).

86. See TON LIEFAARD, DEPRIVATION OF LIBERTY OF CHILDREN IN LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS 40–41 (2008).

87. Arredondo, *supra* note 9, at 18–19.

88. See Bowker, *supra* note 68, at 253.

incarceration rates.<sup>89</sup> Countries enacted progressive laws with child-specific protections that concurrently permitted harsher sanctions of youth offenders, a trend reflected in parts of North America, Latin America, and Europe.<sup>90</sup> For example, Canada's Youth Criminal Justice Act introduced special juvenile courts, but allowed (and continues to allow) minors over the age of fourteen who have been accused of serious crimes to be sentenced as adults.<sup>91</sup> Latin America sheds light on recent retrogressive measures. In Panama, the perceived increase in crime led the legislature to repeal several protections for juvenile offenders, such as a provision that forbade the extension of pretrial detention,<sup>92</sup> and Uruguay extended the maximum pretrial detention for juveniles from sixty to ninety days.<sup>93</sup> Several African and Asian countries have been part of this punitive shift as well. Japan was admonished in 2004 by the CRC Committee for lowering its minimum age of criminal responsibility from sixteen years to fourteen, and doubling its limit on pretrial detention from four to eight weeks.<sup>94</sup> In 2015, the CRC Committee expressed "concern at the existence of an alarming social perception regarding an increase in juvenile

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89. *Id.*; CTR. JUV. & CRIM. JUST. *supra* note 64; *see also* THE HANDBOOK OF JUVENILE DELINQUENCY AND JUVENILE JUSTICE (Marvin D. Krohn & Jodi Lane eds., 2015).

90. *From Legislation to Action*, *supra* note 5, at 14–17. *See generally* John Muncie *The 'Punitive Turn' in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA*, 8(2) YOUTH JUST. 107, 108–110 (2008) (describing a shift in juvenile justice policy, in the US and Western Europe, which resulted in more punitive measures and higher rates of incarceration).

91. *From Legislation to Action*, *supra* note 5, at 14–17; *see also* John Winterdyk, *One Size Does Not Fit All: Juvenile Justice in the International Arena and a Call for Comparative Analysis*, 2013 ANALELE UNIVERSITATII DIN BUCURESTI: SERIA DREPT 28, 29 (2013) (Rom.)

92. Comm. on the Rights of the Child, Fifty-Eighth Session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Concluding Observations: Panama, ¶ 74, U.N. Doc. CRC/C/PAN/CO/3-4 (Dec. 21, 2011).

93. Comm. on the Rights of the Child, Sixty-Eighth Session, Concluding Observations on the Combined Third to Fifth Periodic Reports of Uruguay, ¶ 69, U.N. Doc. CRC/C/URY/CO/3-5 (Mar. 5, 2015).

94. Comm. on the Rights of the Child, Thirty-Fifth Session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Concluding Observations: Japan, ¶ 53, U.N. Doc. CRC/C/15/Add.231 (Feb. 26, 2004); *see also* Linda Sieg, *Japan Stiffens Law on Youth Crime Amid Social Angst*, REUTERS (May 25, 2007, 12:55 A.M.), <https://www.reuters.com/article/us-japan-crime-youth/japan-stiffens-law-on-youth-crime-amid-social-angst-idUST35450920070525> (discussing "a trend toward stiffer penalties reflecting growing angst about grisly crime").

delinquency, which is not grounded on reality or on official data,” in particular addressing Panama and Uruguay.<sup>95</sup> The Council of Europe has similarly concluded that imprisonment and crime rates are not related.<sup>96</sup> In Europe, the widespread increased incarceration of juveniles has disproportionately impacted minorities and immigrants.<sup>97</sup>

## B. PROTECTIONS FOR CHILDREN IN INTERNATIONAL LAW

The leading legal framework for human rights of children is the 1989 UN Convention on the Rights of the Child (CRC), a treaty that has been ratified by 196 countries (notably excluding the US).<sup>98</sup> The CRC was designed to enhance existing protections for children in human rights treaties, and, above all, “*the best interests of the child* shall be a primary consideration.”<sup>99</sup> In the context of juvenile justice, the CRC Committee has defined “the protection of the best interests of the child” as giving primacy to “rehabilitation and restorative justice objectives” over “traditional objectives of criminal justice, such as repression/retribution.”<sup>100</sup>

The CRC’s provisions regarding juvenile arrest, detention, and imprisonment were incorporated from the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty.<sup>101</sup> An underlying principle in both the CRC and the Beijing Rules is that “any involvement in the juvenile justice system can be ‘harmful’ per se” and that such

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95. Concluding Observations on the Combined Third to Fifth Periodic Reports of Uruguay, *supra* note 93; Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Concluding Observations: Panama, *supra* note 92.

96. Muncie, *supra* note 90, at 117.

97. *Id.* at 112.

98. The only U.N. member state that has not ratified the treaty is the US, although it did become a signatory in 1995. CRC, *supra* note 2; TON LIEFAARD & J. E. DOEK, LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE 1 (2015); *see also* U.N. Office of the High Comm’r for Human Rights, Status of Ratification Interactive Dashboard (Apr. 5, 2018), <http://indicators.ohchr.org>.

99. CRC, *supra* note 2, art. 3(1) (emphasis added); *see* DETRICK, *supra* note 70, at 2–3.

100. CRC General Comment 10, *supra* note 11, ¶ 10.

101. G.A. Res. 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (Nov. 29, 1985) [hereinafter Beijing Rules]; *see* DETRICK, *supra* note 70, at 630.

systems ought to “take account of a child’s sense of time.”<sup>102</sup> The CRC Committee has acknowledged the obstacles presented by the trend of states regressing to more punitive youth justice systems.<sup>103</sup>

CRC rights for juvenile offenders directly expand on articles in the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty that has been ratified by 170 countries.<sup>104</sup> Guarantees for personal liberty in the ICCPR<sup>105</sup> are reflected in Article 37 of the CRC, which declares, “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort and for the shortest appropriate period of time.*”<sup>106</sup> The latter clause, which serves as a minimum standard, was adapted from Article 13 of the Beijing Rules, which aspired to detention being for the “shortest possible period of time.”<sup>107</sup>

Article 40 of the CRC addresses procedural rights. Where the ICCPR requires juveniles to be “brought as speedily as possible for adjudication[.]”<sup>108</sup> the CRC guarantees children accused of violating criminal law the right “[t]o have the matter determined without delay . . . .”<sup>109</sup> Article 40 further emphasizes that states must recognize “the child’s sense of dignity and worth” by “tak[ing] into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”<sup>110</sup>

In 2007, the CRC Committee issued General Comment 10, which noted that “[t]he duration of pretrial detention should be limited by law and be subject to regular review.”<sup>111</sup> General

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102. VAN BUEREN, *supra* note 66, at 175.

103. Winterdyk, *supra* note 91, at 30.

104. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]. The US ratified the ICCPR in 1992. For a full list of countries who have ratified the treaty and what their reservations are, see *Status of Ratification Interactive Dashboard*, *supra* note 98.

105. ICCPR, *supra* note 104, art. 9(3) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other [authority] . . . and shall be entitled to trial within a reasonable time or to release.”).

106. CRC, *supra* note 2, art. 37(b) (emphasis added).

107. Beijing Rules, *supra* note 101, art. 13(1) (emphasis added); see Schabas & Sax, *supra* note 1, at 83–84.

108. ICCPR, *supra* note 104, art. 10(2)(b).

109. CRC, *supra* note 2, art. 40(2)(b)(iii).

110. CRC, *supra* note 2, art. 40(1).

111. CRC General Comment 10, *supra* note 11, § 80.



Comments are interpretations of substantive provisions made by the treaty committee that, while not legally binding, are highly authoritative.<sup>112</sup> Specifically, the Committee recommended that the legality and justification of the detention be reviewed every two weeks, and that the child should not be detained longer than thirty days before being formally charged.<sup>113</sup> Finally, the Comment urged States to ensure “a final decision on the charges not later than six months after they have been presented.”<sup>114</sup> In other words, the CRC Committee, in General Comment 10, found it acceptable to hold a child in detention for six months before trial, a period for which the accused child should be presumed innocent.

Countries that have ratified the CRC have an obligation to report to the CRC Committee every five years on the status of children’s rights in their country.<sup>115</sup> In these “periodic reviews,” the Committee evaluates a country’s report alongside comments and other input from civil society groups, and then issues “concluding observations” for the country—an influential but nonbinding document that points out areas for improvement and includes recommendations.<sup>116</sup> Nearly all of the Committee’s concluding observations regarding child justice reforms recommend that the nation in question utilize tools created by international organizations that specialize in juvenile justice in order to develop domestic systems in line with CRC recommendations.<sup>117</sup> However, without guidance on an

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112. U.N. Office of the High Comm’r for Human Rights, Human Rights Treaty Bodies—General Comments, <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (last visited Mar. 1, 2018). See generally Gerald L. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members 4–7* (HARV. HUM. RTS. PROGRAM, Research Working Paper Series HRP 16-002, 2016) (arguing for the credibility of views and General Comments written by the Human Rights Committee, particularly in regard to the ICCPR).

113. CRC General Comment 10, *supra* note 11, ¶ 83.

114. *Id.*

115. U.N. Office of the High Comm’r for Human Rights, Monitoring Children’s Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited Jan. 18, 2019).

116. *Id.*

117. See, e.g., Concluding Observations on the Combined Third to Fifth Periodic Reports of the Uruguay, *supra* note 93, ¶ 73; Comm. on the Rights of the Child, Fifty-Ninth Session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Concluding Observations: Thailand, ¶ 80, U.N. Doc. CRC/C/THA/CO/3-4 (Feb. 17, 2012); Comm. on the Rights of the Child, Fifty-Eighth Session, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Concluding Observations: Panama,

acceptable limit for pretrial detention, such tools cannot be employed to ensure that countries ensure that pretrial detention is for the “shortest appropriate period of time.”<sup>118</sup> Not only is it imperative for the CRC Committee to adopt specific standards, including absolute ceilings on the duration of pretrial detention, but it should also recommend these specific best practices to countries in its concluding observations.

### C. A GLOBAL SURVEY OF EXISTING NATIONAL LAWS<sup>119</sup>

Individual countries have developed a multitude of methods to limit the amount of time children spend in remand detention.<sup>120</sup> Out of the world’s nearly 200 nations, the following research presented covers 119.<sup>121</sup> The chart below shows a breakdown of countries researched in the five UN regional groups and whether they have enacted a child-specific limit on pretrial remand. Countries which could be confirmed to lack any legislation addressing pretrial detention limits are included in these statistics, whereas those for which adequate resources could not be found, such as translations or current legislation, are not counted as having been researched.

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*supra* note 92, ¶ 77.

118. See CRC, *supra* note 2, art. 37(b).

119. This research was done for Juvenile Justice Advocates International, which has also published results and observations of the survey. Douglas Keillor et al., *Children in Pretrial Detention: Promoting Stronger International Time Limits*, 23–35, JUV. JUST. ADVOC. INT’L (May 28, 2018), <https://jjimexico.org/wp-content/uploads/2018/05/JJAI-Children-in-Pretrial-Detention-28-May-2018.pdf> [hereinafter *Children in Pretrial Detention*]. Part 3, *Global Survey of Child Pretrial Detention Limits*, was primarily written by Douglas Keillor and Rebecca Rosefelt.

120. When pretrial detention is legislatively addressed, it is usually done so the criminal procedure code. JUVENILE JUSTICE SYSTEMS IN EUROPE: CURRENT SITUATION AND REFORM DEVELOPMENTS, *supra* note 14, at 1723. As countries continue to enact children’s acts, special provisions for youth remand are generally put in a section regarding juvenile offenders.

121. This figure includes Hong Kong. See *Children in Pretrial Detention*, *supra* note 119 **Error! Bookmark not defined.**, app. 1 (mentioning that China and Hong Kong are treated as two jurisdictions).

Figure 1: Total Coverage by UN Regional Group<sup>122</sup>

| Region                    | UN State Parties | Total # Countries Researched | Countries Specifically Limiting Pretrial Detention |      | Countries Addressing, NOT Limiting, PTD |     |
|---------------------------|------------------|------------------------------|--|------|---|-----|
| Africa                    | 54               | 32                           | 24   | 75%  | 8                                       | 25% |
| Asia-Pacific              | 55               | 28                           | 20   | 71%  | 8                                       | 29% |
| Eastern Europe            | 23               | 14                           | 14   | 100% | 0                                       | 0%  |
| Latin America & Caribbean | 33               | 26                           | 17   | 65%  | 9                                       | 35% |
| Western Europe & Others   | 29               | 19                           | 12   | 63%  | 7                                       | 37% |
| Global                    | 194              | 119                          | 87   | 73%  | 32                                      | 27% |

### 1. Base Limits and Extended Limits

For each country, a “base limit” and “extended limit” is calculated. The “base limit” is the maximum number of days a child can be legally held without taking into account potential exceptions or extensions. The “extended limit” is the maximum number of days a child can be legally held under the most extreme circumstances anticipated—applying every extension or exception possible.<sup>123</sup> Cameroon’s Code of Criminal Procedure provides a straightforward example.<sup>124</sup> Article 221 of Cameroon’s Code allows a warrant for remand custody to last up to six months, but the statute also permits that the duration “may be extended, by reasoned order, not more than twelve months in the case of a crime and six months in the case of an offense.”<sup>125</sup> Thus, for Cameroon, the base limit is the initial six months. Adding the longest possible extension of twelve months to the base limit produces an extended limit of eighteen months.

Notably, not every state has an extended limit. While some states may have exceptions in practice that do not appear in the statute, others do not limit the time or number of extensions allowed, which could result in indefinite detention. For example,

122. Adapted from *Children in Pretrial Detention*, *supra* note 119, at 24 fig.3.1.

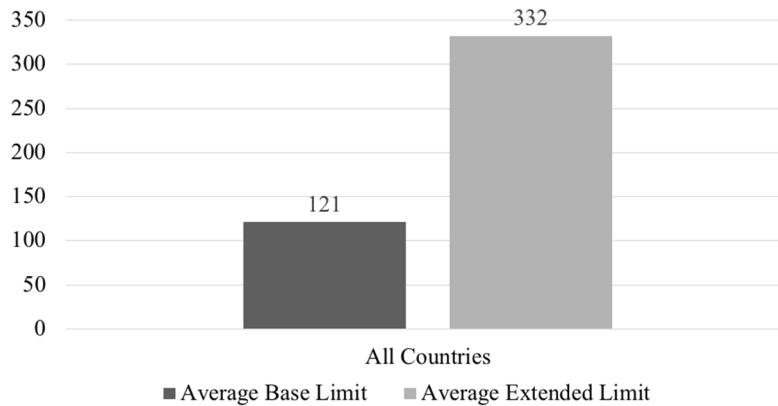
123. *Id.*

124. Code de Procédure Pénale (Loi No. 2005/007) art. 221 (Cameroon).

125. *Id.*

Libya's base limit is thirty days, but its statute permits consecutive forty-five-day extensions "until the end of the investigation."<sup>126</sup>

*Figure 2: Global Average Duration of Pretrial Detention<sup>127</sup>*



The global "average base limit" for pretrial detention, without exceptions or extensions applied, is 121 days, or just shy of four months. The lowest base limit found in this research is seven days and is enacted in the laws of Afghanistan<sup>128</sup> and the United Arab Emirates.<sup>129</sup> Nonetheless, the three countries tied for the highest base limit, at 730 days (two years) are scattered around the globe: Hungary (the only one of the three to apply

126. CODE OF CRIMINAL PROCEDURE AND SUPPLEMENTARY LAWS arts. 122–23 (Libya). This statute applies to the entire population, including juveniles. *Id.* art. 320 ("Procedures that apply to misdemeanour shall be adhered to before the Juvenile Court in all cases except where a legal text stipulates otherwise.").

127. Adapted from *Children in Pretrial Detention*, *supra* note 119 **Error! Bookmark not defined.**, at 24 fig.3.2.

128. Criminal Procedure Code (Presidential Decree No. 137 of Feb. 23, 2014) art. 100 (Afg.), *translated in* Justice Sector Support Program (Mar. 9, 2014), [https://www.unodc.org/res/cld/document/criminal-procedure-code\\_html/Criminal\\_Procedure\\_Code\\_-\\_Endorsed\\_by\\_President\\_EN\\_2014\\_03\\_14\\_with\\_TOC.pdf](https://www.unodc.org/res/cld/document/criminal-procedure-code_html/Criminal_Procedure_Code_-_Endorsed_by_President_EN_2014_03_14_with_TOC.pdf).

129. Federal Law No. (9) of 1976, Concerning Delinquent Juveniles and Homelessness, art. 28/2 (U.A.E.).

specifically to children),<sup>130</sup> Mongolia,<sup>131</sup> and Paraguay.<sup>132</sup>

The global “average extended limit” for pretrial detention with the harshest exceptions applied (such as greater times for crimes that merit longer sentences) is approximately eleven months, at 332 days. Indonesia’s juvenile remand detention limit, with its one exception applied, appears to be the world’s lowest extended limit at twenty-five days.<sup>133</sup> Of countries for which an extended limit could be calculated, Cape Verde<sup>134</sup> and Turkey<sup>135</sup> tie at 1095 days, or three years (although neither statute is child-specific). The average extended limit does not include the fourteen countries whose statutes do not include any cap to the number of permissible extensions, such as Libya.

## 2. Child-Specific vs. Generally Applicable Statutes

The second way this data was disaggregated was by who the time limit applies to: “child-specific” limits refer to statutes that apply only to children, whereas limits that apply to both children and adults are referred to as “generally applicable” limits. Estonia, for example, permits initial pretrial detention for six months, *unless* the suspect is a minor, in which case they cannot be held longer than two months.<sup>136</sup> Of the fifty nations (accounting for 50.4% of those in the study) that limit pretrial detention specifically for minors, the global average base limit (without exceptions applied) is 93 days, compared to 160 days for generally applicable limits. The average limit with all exceptions applied is 211 days for child-specific statutes, and 484 for adults.<sup>137</sup>

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130. 1998. évi XIX. büntetőeljárás törvény [Act XIX of 1998 on Criminal Proceedings] art. 455 (Hung.).

131. Bureau of Democracy, Human Rights and Labor, *Mongolia 2016 Human Rights Report*, 6, U.S. DEPT STATE (2017), <https://www.state.gov/documents/organization/265568.pdf>.

132. CODIGO PROCESAL PENAL [Criminal Procedure Code], Ley No.1286/98, art. 236 (Para.).

133. Sistem Peradilan Pidana Anak (Juvenile Criminal Justice System), Undang-Undang Nomor 11 Tahun 2012, art. 35 (Indon.).

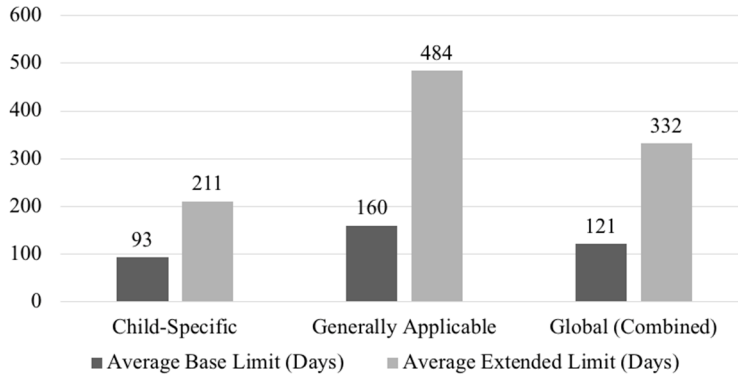
134. Código de Processo Penal [Criminal Procedure Code], Decreto-Legislativo n°2/ 2005, art. 279 (Cape Verde).

135. Ceza Muhakemesi Kanunu [Criminal Procedure Code] art. 102 (Turk.), *translated* in Turkish Criminal Procedure Code (U.N. Off. on Drug & Crime Org., 2009), [https://www.unodc.org/res/cld/document/tur/2005/turkish\\_criminal\\_procedure\\_code\\_html/2014\\_Criminal\\_Procedure\\_Code.pdf](https://www.unodc.org/res/cld/document/tur/2005/turkish_criminal_procedure_code_html/2014_Criminal_Procedure_Code.pdf).

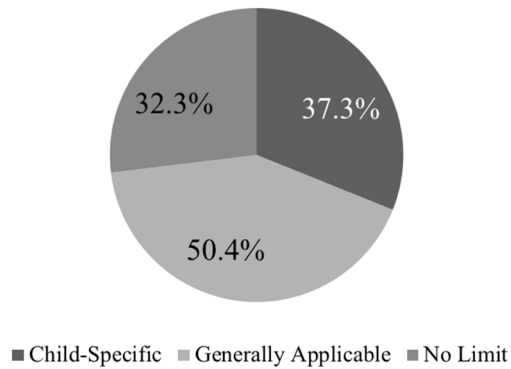
136. CRIMINAL CODE art. 131 (Est.).

137. The child-specific average extended limit is somewhat misleading

*Figure 3: Averages of Child-Specific versus Generally Applicable Statutes<sup>138</sup>*



*Figure 4: Percentage of Countries by Child or General Limit<sup>139</sup>*



Comparing statutes designed for children with those applicable to an entire population indicates a consensus that

because it includes Hungary's unusually high child-specific base limit of two years. 1998. évi XIX. büntetőeljárás törvény [Act XIX of 1998 on Criminal Proceedings] art. 455 (Hung.).

138. Adapted from *Children in Pretrial Detention*, *supra* note 119, at 27 fig.3.5.

139. *Id.* at 25 fig.3.3.

youth should be subject to shorter terms of pretrial detention. Child-specific limits are largely shorter than generally applicable limits, indicating that just the existence of child-specific limit may, in fact, better protect suspected youth offenders from lengthy periods of pretrial detention.<sup>140</sup> Furthermore, roughly half of the countries with a child-specific limit (twenty-five out of fifty-one) have a base limit of sixty days or less, indicating that such legislation is becoming an emerging international practice.<sup>141</sup>

### 3. Blanket Limits and Extensions

Pretrial detention duration limits and their exceptions can generally be placed into two categories: first, “blanket limits,” which apply to everyone covered under the statute, and second, limits that permit an extension based on specific grounds. The simplest type of statute is the blanket limit, which may apply specifically to children or may apply to all citizens. This type of statute does not allow a judge to extend pretrial remand for any reason, nor does it build in exceptions, such as longer limits for particularly egregious crimes. Lesotho provides a very straightforward child-specific blanket statute, mandating that “remand in custody shall be for the shortest period possible and shall not exceed three months.”<sup>142</sup>

The most common type of statute is a blanket limit with exceptions. These exceptions may be based on the crime with which the child is charged or the potential sentence that crime could merit, the age of the child, or procedural justifications ranging from investigatory need to “good cause.” The Children’s Act of each Ghana<sup>143</sup> and Kenya,<sup>144</sup> for example, feature a blanket limit of three months, but carve out exceptions for six-month custody if the child is held for a serious crime, or one punishable by death, respectively. The exceptions permitted may not always have a durational cap. Grenada’s statutory structure is similar to those of Ghana and Kenya and mandates that a child should be released from pretrial detention after six

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140. *See also id.* at 26.

141. *See id.* app. 3 for a complete list of all researched countries and their respective limits.

142. Children’s Protection and Welfare Act (Act No. 7/2011) § 132 (Lesotho).

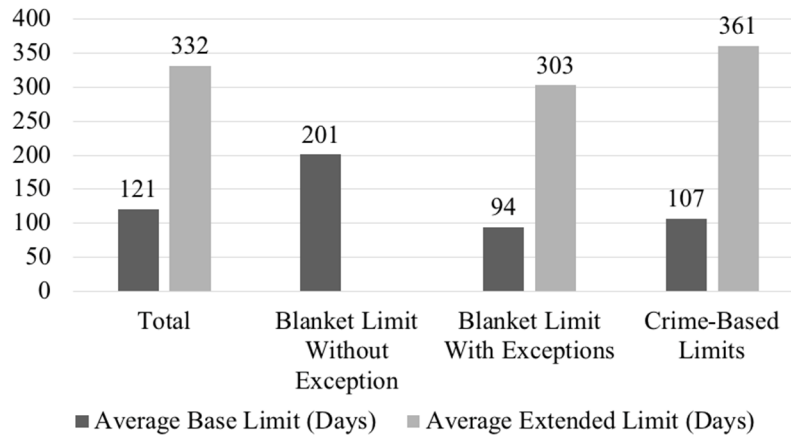
143. Juvenile Justice Act of 2003 (Act No. 653) § 23 (Ghana).

144. The Children Act (2001) Cap. 141 § 194 (Fifth Sched. § 10) (Kenya).

months.<sup>145</sup> However, Grenada’s crime-based exceptions justify pretrial detention for an indefinite period if the alleged crime is murder, manslaughter, or rape.<sup>146</sup>

As seen in the chart below, the average base limit for blanket statutes with exceptions is less than half the duration of the average base limit for blanket limits without exceptions. Further study would be required to determine why this is so, but it is possible that blanket limits with exceptions allow pretrial detention to be strictly limited in most cases, but provides a backup, or “safety valve,” for particularly complex cases.<sup>147</sup>

*Figure 5: Averages of Blanket Limits, Blanket Limits with Exceptions, and Crime-Based Limits<sup>148</sup>*



In many countries, there is no base limit. Statutes without a base limit are built on a scale based on the crime, sentence, or age of the offender. For example, Afghanistan predicates its limits, which are applicable to the general population, on whether the crime was a misdemeanor (twenty-day limit) or a felony (sixty-day limit).<sup>149</sup> Many other nations do not provide a

145. Juvenile Justice Act (Act. No. 24/2012) art. 48 (Gren.).

146. *Id.*

147. *Children in Pretrial Detention*, *supra* note 119, at 28.

148. Adapted from *Children in Pretrial Detention*, *supra* note 119, at 29 fig.3.8.

149. Criminal Procedure Code (Presidential Decree No. 137 of Feb. 23, 2014) art. 100(6) (Afg.), *translated in* Justice Sector Support Program (Mar. 9, 2014), <https://www.unodc.org/res/cld/document/criminal-procedure->



static maximum pretrial detention duration. Nepal demonstrates a common yet frustrating obstacle to calculating the maximum duration of pretrial detention by allowing remand custody up to the maximum potential sentence,<sup>150</sup> but then fails to clarify how long a minor over fourteen can potentially be sentenced.<sup>151</sup> While Nepal's Children's Act curbs the sentence for minors between the ages of ten and fourteen to six months, or a maximum pretrial detention of three months, youth older than fourteen years can face up to half the sentence of an adult—yet adult sentences do not appear to be limited by statute.<sup>152</sup>

Age-based and procedure-based limits are uncommon as a primary determination for the duration of pretrial detention, and more frequently serve as grounds for extension limits. Only four countries in this study styled limits based on the offender's age, and therefore data from more age-based statutes would be needed to discern trends. Age-based limits generally permit longer detention periods for older minors, although the term "minor" is subject to different definitions in different countries. For example, Cambodia's Criminal Procedure Code provides different limits for offenders ages fourteen to fifteen as opposed to those ages sixteen to eighteen, and further prescribes different limits for each group for both misdemeanor and felony violations—essentially designing a sliding scale of remand custody from 60 to 180 days.<sup>153</sup> Additionally, Cambodia only allows preventative detention if the potential sentence is at least one year.<sup>154</sup>

Procedural statutes vary in complexity. Cape Verde's Criminal Procedure Code mandates release from pretrial detention if certain milestones have not been reached within the specified time, ranging from 120 days without charge to 660 days without a final judgment.<sup>155</sup> Albania has a more intricate, procedure-based statute permitting pretrial detention for

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code\_html/Criminal\_Procedure\_Code\_-\_Endorsed\_by\_President\_EN\_2014\_03\_14\_with\_TOC.pdf.

150. Muluki Ain [General Code], No. 119 of Chapter on Court Proceedings (Nepal).

151. Children's Act (Act No. 2048/1992) art. 11 (Nepal), *translated in* Nepal Democracy, [http://www.nepaldemocracy.org/documents/national\\_laws/children\\_act.htm](http://www.nepaldemocracy.org/documents/national_laws/children_act.htm).

152. *Id.*

153. Criminal Procedure Code art. 213-214 (Cambodia).

154. *Id.* art. 204.

155. Código de Processo Penal [Criminal Procedure Code], Decreto-Legislativo n°2/ 2005, art. 279 (Cape Verde).

specific periods depending on the step in which the case is, such as the filing of documents.<sup>156</sup> Nonetheless, Albania's absolute limit is one year, and there do not appear to be any juvenile provisions in regard to pretrial detention.<sup>157</sup>

Of the eighty-seven countries that limit the duration of pretrial detention, the most common type of limit is a blanket limit with extensions, utilized in forty-eight countries. The second most common type of limit is based on the type of crime, as seen in nineteen countries. An additional twenty countries permit extensions based on the type of crime. Fifteen countries have enacted a strict blanket limit. Four countries have statutes that vary by age, two of which also permit exceptions based on the age of the offender. Another four nations base their pretrial detention limits on the procedural step, and eight more allow extensions based on procedural phase. Many countries have a combination of the two, such as Nepal, *supra*, which limits remand custody based on both the alleged violation and the offender's age.<sup>158</sup>

#### 4. Observations from the global survey

It is abundantly clear that the issues surrounding the pretrial detention of children are pervasive around the globe. Economic status or regional placement does nothing to indicate potential laws or practices. The laws themselves, however, do not reflect national practices, and the CRC Committee has found several countries that subject children to pretrial detention for longer periods than statutorily permitted.<sup>159</sup> To gauge the effect of legal limits on national practice, data must be collected on the amount of time children are being held in pretrial detention in different countries.

The chart below highlights the idea that child-specific limits for preventative detention best safeguard the best interests of

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156. Criminal Procedure Code (Law No. 7905) art. 263 (Alb.).

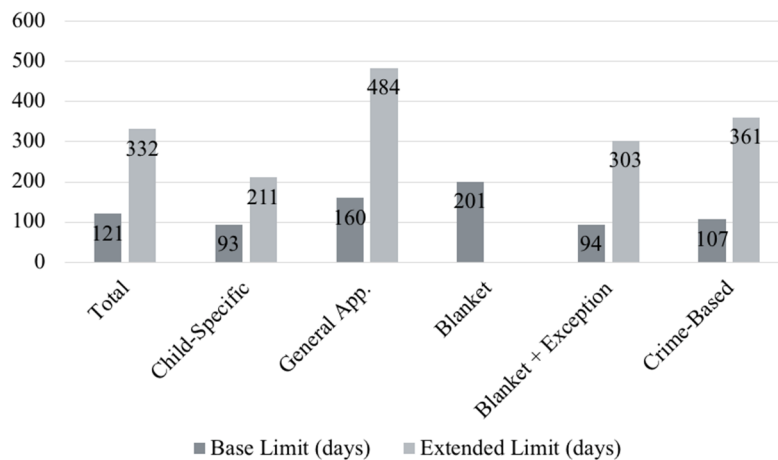
157. *Id.*

158. Children's Act (Act No. 2048/1992) art. 11 (Nepal), *translated in* Nepal Democracy, [http://www.nepaldemocracy.org/documents/national\\_laws/children\\_act.htm](http://www.nepaldemocracy.org/documents/national_laws/children_act.htm).

159. *E.g.*, Comm. on the Rights of the Child, Fifty-Seventh Session, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Cambodia, ¶ 76, U.N. Doc. CRC/C/KHM/CO/2-3 (Aug. 3, 2011) ("Approximately half of children in prison are being held in pretrial detention, often beyond the legal time limit of two months.").

the child. The countries that have enacted child-specific limits have lower base limits—in fact, the global average base limits reveal that child-specific limits are only 58% as long as generally applicable limits. This is in line with the principle of specialization within the child justice system.<sup>160</sup> Blanket limits with exceptions appear to strike the best balance between due process concerns and punitive preventative detention limits, as the base limit is lower when exceptions are available.<sup>161</sup> Such flexibility appears to also be reflected in child-specific limits that permit exceptions.

Figure 6: Global Averages by Type of Statute<sup>162</sup>



The frequency with which nations hinge duration of pretrial detention on the alleged crime is troubling. A total of thirty-nine countries factor the alleged crime or the potential sentence it could carry into the maximum amount of time a child can be detained before adjudication. International standards are clear that pretrial detention should never be prescribed based solely on the alleged crime, because it violates the presumption of

160. Human Rights Comm., General Comment No. 35, Article 9 (Liberty and security of person), ¶ 38, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter HRC General Comment No. 35].

161. *Children in Pretrial Detention*, *supra* note 119, at 34.

162. Adapted from *Children in Pretrial Detention*, *supra* note 119, at 34 fig.3.13.

innocence.<sup>163</sup> It thus follows that not only the *prescription* of, but also the *duration* of pretrial detention should also not be based on the crime charged.

Two recommendations by national child advocates provide an interesting comparison. In 2012, the Ombudsman for Children in Sweden (a country which has no pretrial detention limit) conducted an extensive study during which he interviewed children in remand prison.<sup>164</sup> A year later, the Ombudsman presented his findings to the Swedish government, a paper in which he recommended a thirty-day limit for children in pretrial detention.<sup>165</sup> This recommendation carefully considers both the “best interest of the child” and the “shortest appropriate period of time.” In contrast, the American Bar Association, the largest legal organization in the US, recommends a cap of six months on pretrial detention,<sup>166</sup> a recommendation that is out of sync with standards and practices within its own country. The limit for juvenile pretrial detention for federal crimes in the US is a much more reasonable thirty days,<sup>167</sup> and the average pretrial detention base limit among the thirty-eight states that have enacted their own limits is forty-four days, or a mere quarter the Association’s recommendation.<sup>168</sup> Furthermore, twenty-one states already have a limit at or below thirty days.<sup>169</sup> The fact that a national body can make a recommendation in line with CRC commentary, yet still be more punitive in nature than the statutes and practices already in place, indicates that the CRC Committee’s recommendations no longer reflect more progressive views on the “best interest of the child” and the “shortest appropriate period of time.” A recommendation for a dangerously long six-month duration of pretrial detention opens the door for jurisdictions to adopt more punitive measures that fly in the face of the spirit of the CRC.

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163. See, e.g., HRC General Comment No. 35, *supra* note 160, ¶ 38.

164. CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD, *supra* note 35, at 151–54.

165. *Id.*

166. *Handbook of International Standards on Pretrial Detention Procedure*, 23, A.B.A. (2010), [https://www.americanbar.org/content/dam/aba/directories/roli/misc/handbook\\_of\\_international\\_standards\\_on\\_pretrial\\_detention\\_procedure\\_2010\\_eng.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/roli/misc/handbook_of_international_standards_on_pretrial_detention_procedure_2010_eng.authcheckdam.pdf).

167. Speedy Trial, 18 U.S.C.A. § 5036 (permitting extensions for the duration of pretrial detention “in the interest of justice in the particular case” or “extraordinary circumstances”).

168. *Children in Pretrial Detention*, *supra* note 119, app. 4.

169. See *id.*

Many countries lack limitations on the duration of preventative detention, or otherwise allow extensions or exceptions without limits. The global survey identified thirty-two countries with no limit, and an additional forty-eight countries with no limit to the exceptions. The pervasiveness of indefinite or extremely prolonged maximum pretrial detention periods clearly indicates a need for an international standard on extended limits on pretrial detention, which should include permissible but narrowly-defined exceptions. A child-specific base limit of thirty to sixty days would align with the time limits of about half of the countries included in this study. Additionally, narrowly defined exceptions that allow the time to be extended for a maximum of another thirty or sixty days would be a pretrial detention limit that appropriately echoes the principles behind justice for children. Implementing recommendations along these lines reflect emerging practices and addresses important issues largely left unaddressed in the arena of pretrial detention limits.<sup>170</sup>

#### D. MOVING FORWARD: INTERNATIONAL LEGAL CHALLENGES

Laws adopted by regional groups are able to provide some redress and hold individual countries accountable, but little has been addressed in regard to pretrial detention limits. Both the American Convention on Human Rights and the European Convention on Human Rights borrow heavily from the CRC in regard to childhood rights. The American Convention on Human Rights specifies that juvenile offenders “shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.”<sup>171</sup> In various cases, the Inter-American Commission and Inter-American Court have invoked Article 19 of the American Convention, addressing the rights of children, as grounds for absorbing all protections of the CRC.<sup>172</sup> In this respect, the American Convention also reflects the CRC’s lack of limit for juvenile pretrial detention. If the CRC Committee was to incorporate an extended limit on pretrial detention, it would likely find teeth to be enforced in regional courts.

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170. *See id.* at 35.

171. Organization of American States, American Convention on Human Rights art. 5 § 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

172. *Id.* art. 19; *see, e.g.*, Minors in Detention, Case 11.491, Inter-Am. Ct. H.R., Report No. 41/99, ¶ 124 (Mar. 10, 1999).

The European Convention adopted an article addressing personal liberty with a specific provision allowing for detention of minors “for the purpose of educational supervision or . . . for the purpose of bringing him before the competent legal authority.”<sup>173</sup> European Court of Human Rights jurisprudence has developed a presumption for bail unless it can be reasonably asserted that remand detention is necessary, which then is only legal for a “reasonable” amount of time before trial, and applies to all alleged offenders, even those accused of serious offenses.<sup>174</sup> The court has also ruled mandatory pretrial detention unlawful, and has upheld principles respecting the “best interests of the child” by demanding that reasons for pretrial detention are reassessed regularly.<sup>175</sup> Importantly, the law maintains a rehabilitative aspect by requiring detention to include educational components.<sup>176</sup> However, lack of a time limit for pretrial detention leaves the ruling open to abuse, as practices are generally difficult to discern, and remedy is out of reach for many children and their families. When litigation is one of few means for recourse, a prohibitively expensive option for most, the issue remains largely ignored. A legislative gap that is only addressed in repeat litigation fails to adequately safeguard children of an entire nation or multi-nation entity.

Most cases of significance regarding juvenile pretrial detention have been brought before the European Court of Human Rights, but the court’s jurisprudence doesn’t provide a clear limit on how long a country should permit a child to await trial in detention.<sup>177</sup> In 1998, in *Assenov v. Bulgaria*, the court affirmed that remand should only be ordered in “exceptional circumstances” for a minor, and emphasized the need for a speedy trial.<sup>178</sup> Since then, the court has addressed more specific time periods for remand detention. The most recent case to address this before the European Court of Human Rights is *Grabowski v. Poland*, in which a teenager was held for three months in pretrial detention during the initial investigation, and then served another five months pending trial after his request

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173. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR].

174. THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 137–38 (Steve Peers et al. eds., 2014).

175. *Id.*

176. *Id.*

177. LIEFAARD, *supra* note 86, at 183.

178. *Assenov v. Bulgaria*, App. No. 24760/94, Eur. Ct. H.R. (1998).

for release was denied.<sup>179</sup> He was ultimately sentenced to two years of probation, a punishment that did not require him to spend any time in custody.<sup>180</sup> The court ruled the pretrial detention unlawful and ordered Poland to “stop the practice of detaining juveniles subject to correctional proceedings without a specific judicial decision.”<sup>181</sup>

*Grabowski* expands on a 2003 European Court of Human Rights case, which held that “[j]ustification for any period of [pretrial] detention, no matter how short, must be convincingly demonstrated by the authorities.”<sup>182</sup> In the same year, the court defined continued detention as being justified “only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.”<sup>183</sup> *Bouamar v. Belgium*, another notable European Court of Human Rights decision, ruled that the applicant’s nine remand orders, totaling 119 days, collectively failed to meet Belgium’s statutory requirement that remand detention be executed with the goal of educational supervision.<sup>184</sup>

The CRC Committee, without a judicial enforcement mechanism, is most influential in its comments and recommendations.<sup>185</sup> It is thus essential that the Committee promulgate progressive pretrial detention practices. It is in the specific language that courts take refuge, and CRC Committee support for a specific ceiling on pretrial detention limits is ultimately how child advocates can petition their nations and regional groups to enforce best practices and standards in their respective child justice systems.

#### E. PROGRESS IN CHIHUAHUA, MEXICO: A CASE STUDY

Mexico’s recent overhaul of its juvenile justice system provides insight into the difference a statutory limit on pretrial

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179. *Grabowski v. Poland*, App. No. 57722/12, Eur. Ct. H.R. (2015).

180. *Id.*

181. See generally Marina Ilminska, *Pretrial Detention of Juveniles: As Common as It Is Wrong*, OPEN SOCIETY FOUND. (Sept. 1, 2015), <https://www.opensocietyfoundations.org/voices/pretrial-detention-juveniles-common-it-wrong>.

182. *Shishkov v. Bulgaria*, App. No. 38822/97, Eur. Ct. H.R. (2003).

183. *Smirnova v. Russia*, App. Nos. 46133/99 and 48183/99, Eur. Ct. H.R. (2003).

184. *Bouamar v. Belgium*, ¶¶ 50–52, App. No. 9106/80, Eur. Ct. H.R. (2008).

185. See Neuman, *supra* note 112, at 4–7.

detention can make. In 2016, a federal juvenile penal code went into effect, replacing the previous system wherein juvenile offender rights varied by state.<sup>186</sup> The new juvenile justice law mandates that children can only be detained for up to five months, and only for specific crimes.<sup>187</sup> Prior to the new law coming into effect, the state of Chihuahua permitted juvenile pretrial detention of up to one year.<sup>188</sup> The new federal law only permits the detention of children fourteen and older, although younger accused offenders may be subject to alternative measures.<sup>189</sup> The statute also capped the maximum youth sentence to five years, whereas Chihuahua's previous statute permitted sentences up to fifteen years, and this led to the automatic release of those who had served the new maximum time and the issuance of prorated sentences for other children.<sup>190</sup> Between the summers of 2016 and 2017, provisions in the new penal code, along with better diversion and alternative dispute mechanisms, caused the juvenile prison population to drop by two-thirds.<sup>191</sup>

A series of interviews with children involved in the justice

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186. Doug Keillor, *Diagnóstico del Sistema de Justicia para Adolescentes del Estado de Chihuahua: Buenas Prácticas para las Alternativas a la Detención*, JUSTICIA JUVENIL INT'L 1, 4, 6 (2017), <https://jjimexico.org/wp-content/uploads/2018/04/Chihuahua-Diagnostico-2017-Septiembre.pdf> [hereinafter *Diagnóstico 2017*].

187. Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [LNSIJPA], art. 122, Diario Oficial de la Federación [DOF] 16-06-2016 (Mex.) (limiting pretrial detention to five months, and only allowing detention of children at least fourteen years old). In 2017, the Supreme Court of Mexico upheld the five-month pretrial detention limit against parties trying to end all juvenile pretrial demand, period. *Suprema Corte de México Avala Prisión Preventiva para Adolescentes*, EFE (May 9, 2017), <https://www.efe.com/efe/america/mexico/suprema-corte-de-mexico-avala-prision-preventiva-para-adolescentes/50000545-3260503>.

188. Ley de Justicia Especial para Adolescentes Infractores del Estado de Chihuahua [LJEAIIEC], art. 63, Diario Oficial de la Federación [DOF] 16-06-2016, últimas reformas DOF 07-05-2011 (Mex.), *repealed by* Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [LNSIJPA].

189. Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [LNSIJPA], art. 122.

190. *Id.* art. 145. The five-year maximum applies to adolescents between the ages of sixteen and eighteen, whereas youth who have reached fourteen years but not sixteen can be sentenced to a maximum of three years. *See Grave Error que la Nueva Ley de Justicia para Adolescentes Reduzca Penalidades*, EL DIARIO (June 25, 2016), <http://eldiariodechihuahua.mx/Opinion/2016/06/25/grave-error-que-la-nueva-ley-de-justicia-para-adolescentes-reduzca-penalidades/>; *see also* *Diagnóstico 2017*, *supra* note 186, at 4.

191. *Diagnóstico 2017*, *supra* note 186 **Error! Bookmark not defined.**, at 13.



system revealed common challenges unique to pretrial detention. The nonprofit group Juvenile Justice Advocates International (JJAI) facilitated interviews between law students and children in Mexico's justice system over the summers of 2016 and 2017.<sup>192</sup> The interviews took place in the northern Mexican state of Chihuahua, in the cities of Chihuahua and Juarez, which are home to the state's two juvenile detention centers, CERSAI No. 1 and No. 3, respectively. Interviewees at the detention centers included both youth in pretrial detention and those serving sentences. Other interviews were conducted at each city's district attorney's office with children in pretrial release, many of whom experienced some length of detention while their case was being processed. In 2016, forty-eight children were interviewed, and in 2017 seventy-five were interviewed. The 2016 interviews took place after the June implementation of the new juvenile penal code, but those new provisions only applied to new cases.

#### 1. On the Ground: Difficulties Revealed by Children

Despite international standards against keeping pretrial detainees with sentenced prisoners,<sup>193</sup> around 70% of the pretrial detainees found themselves rooming with persons already declared guilty.<sup>194</sup> This did not include brief interactions, such as meal times or group activities. During the first few days at CERSAI, children in pretrial frequently found themselves in small cells for up to twenty-four hours a day. Commonly, children only left their cells for an hour or two a day, either during mealtimes or for activities. Although there were separately designated daytime activities (often skills workshops) for pretrial detainees and sentenced prisoners, many children in preventative detention reported that they participated in the activities generally reserved for prisoners. There was some façade of separation: many children explained that they were not allowed to mix with the sentenced population, which in turn precluded them from participating in many activities where

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192. Disclosure: author was the law student interviewing children in 2017.

193. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 11, art. 8.

194. Seventy-two percent of the 2017 interviewees said they were living with guilty individuals versus seventy percent in 2016. This figure includes children in pretrial release who experienced pretrial detention for any period of time including those later given pretrial release.

prisoners were present. This mixed dynamic was also evident in the number of children who participated in support groups, a popular distraction among the youth. Only around 16% of the pretrial detention population attended, compared to the 45% turnout of sentenced youths.<sup>195</sup> Indeed, when JJAI conducted its monthly “know-your-rights” seminar during weekend visiting hours, the detention staff permitted prisoners to attend, as well as their visiting parents, but JJAI was not permitted to extend an invite to pretrial detainees.<sup>196</sup>

Data from the interviews reveals that the children in pretrial detention faced greater obstacles to educational resources than those who were sentenced. There are several reasons why pretrial detainees have less access to education than their sentenced counterparts. The first reason is due to limitations preventing pretrial detention detainees from interacting with convicted children. The second is that CERSAI must wait for the child’s school to forward paperwork to prove their education level—a waiting period that is prolonged for students who live in more rural areas with fewer means of rapid communication, even in the age of the internet. In 2017, 56% of interviewees in pretrial detention attended classes, compared to 83% of those serving a sentence.<sup>197</sup> Fifty-nine percent of pretrial detainees attended class in 2016, and several interviewees (from both years the interviews were conducted) expressed a desire to return to school and understood they were falling behind their peers outside the detention center.<sup>198</sup> However, students are not always being presented with adequately advanced educational opportunities, and some were repeating high school classes. When subtracting the number of detainees who already graduated from high school from the statistics, the pretrial detention education figures jump to 67% for 2017 and 72% for 2016. There is insufficient accommodation for students at higher

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195. The pretrial detention population includes those in pretrial release who experienced pretrial detention for any period of time including those later given pretrial release. The question regarding support groups was not asked consistently in 2016 and thus is not reflected in this statistic.

196. This may have been a result of the prison staff being extra vigilant in enforcing policy while JJAI was present.

197. The 56% includes children in pretrial release who experienced pretrial detention for any period of time, including those later given pretrial release.

198. Only twelve sentenced individuals were interviewed in 2016, and, because of the small sample, the data is not conclusive. Of the twelve, eight prisoners were high school graduates, and six prisoners were participating in class. It is not clear whether the high school graduates participating in classes were pursuing further education or repeating high school curriculum.

levels, such as those who have finished high school or have started college courses. In both 2016 and 2017, there were more sentenced individuals attending classes than there were individuals who had not yet graduated from high school. Available post-educational measures ranged from test-prep classes for college to classes to earn the equivalent of a GED, but one high-school graduate behind bars described the online college courses she was offered to be sub-par and often easier than her high school curriculum.<sup>199</sup>

Children awaiting trial reported more frequent contact with their families than sentenced children during both years of interviews. The largest determination of frequency of contact was the detention center at which the child resided, which is one of many examples showing that research is needed in many more facilities to illustrate a fuller picture of the impact of the 2016 reforms. In CERSAI No. 3, children more commonly reported having to pay a fee to use a phone.<sup>200</sup> In both facilities, some children mentioned that they were required to call their parents weekly from the psychologist's office, a communication for which they did not need to pay.<sup>201</sup> The sentenced children indicated the calls from the psychologist's office were a new rule, a requirement at which several children balked, particularly those who had been incarcerated for a year or more.<sup>202</sup> In contrast, pretrial detainees, younger detainees, and newcomers expressed that they would like to speak with their parents more often.<sup>203</sup>

*Figure 7: Frequency of Family Contact by Detainees*

| <b>Location</b> | <b>Type of Detention</b> | <b>Average # of Days in 2016</b> | <b>Average # of Days in 2017</b> |
|-----------------|--------------------------|----------------------------------|----------------------------------|
| CERSAI 1        | Pretrial                 | 9.6                              | 3                                |
|                 | Sentenced                | 30                               | 5                                |
| CERSAI 2        | Pretrial                 | 9.4                              | 6                                |
|                 | Sentenced                | 13                               | 8                                |

199. On file with author.

200. On file with author.

201. On file with author.

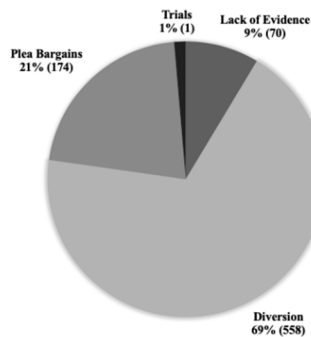
202. On file with author.

203. On file with author.

## 2. Concrete Data: Revealing the Impacts

Chihuahua has slowly increased use of alternatives to pretrial detention since 2006.<sup>204</sup> The alternatives, meant to reform the child justice system, have included supervised pretrial release, increased diversion, and “modified plea bargaining.”<sup>205</sup> In 2014, roughly half of adolescents were permitted pretrial release, and by 2016, that portion jumped to nearly three-fourths.<sup>206</sup> Pretrial release is often granted with conditions, such as staying in school or work, visiting a psychiatrist, and checking in with the district attorney’s office at regular intervals. In 2016, Chihuahua used diversion and plea bargaining to resolve nearly all its cases, with only 1% going to trial—meaning that over 99% of children with alternatives to pretrial detention completed the required conditions.<sup>207</sup> These changes do not seem to correlate with the average durations of pretrial detention over the same period.

*Figure 8: Cases by Resolution Mechanism, 2016*<sup>208</sup>



An analysis of the number of individuals in Chihuahua’s CERSAI No. 1 shows the difference a shortened pretrial detention time would have on the daily prison population.<sup>209</sup>

204. *Children in Pretrial Detention*, *supra* note 119, at 38; *see also Diagnóstico 2017*, *supra* note 186, at 12.

205. *Children in Pretrial Detention*, *supra* note 119, at 38.

206. *Diagnóstico 2017*, *supra* note 186, at 12.

207. *Id.*

208. Adapted from *Diagnóstico 2017*, *supra* note 186, at 12.

209. *Id.* at 6–7. Although this data uses figures from 2016, it does not reflect

According to data collected by Chihuahua's court system, an adolescent in the state of Chihuahua spent an average of 291 days in pretrial detention in 2016.<sup>210</sup> This resulted in an average daily prison population of 124 non-sentenced youths. If the average stay had instead been sixty days, the average daily pretrial detention population would have been twenty-six children.<sup>211</sup> If there was a statutory thirty-day cap on pretrial detention, and every single child ended up spending the full month in detention, the average daily pretrial detention population would be a mere thirteen children—in other words, with a strict limit of thirty days that is not met by every individual, the population would be reduced by around 90%.<sup>212</sup> When using the information obtained through interviews in lieu of 2017 data from the court system, the average number of days in pretrial detention for children interviewed between June and August 2017 was seventy-nine days. In comparison, the average for 2016 interviewees was 145 days, although there were about half as many interviewees in 2016 as there were in 2017.<sup>213</sup>

Chihuahua is an example of how concerted efforts can make a change, as well as an illustration of the amount of effort it takes to meaningfully reduce pretrial detention durations. The state's judicial system still suffers from a lack of resources, and judges still have overwhelming caseloads.<sup>214</sup> While statutory and policy changes are significant, the state must dedicate greater financial investment and increased personnel to enforce and monitor progress.

### III. INTERNATIONAL BEST PRACTICES AND RECOMMENDATIONS

Pretrial detention may be an indispensable tool in three situations: to ensure that the child appears in court; to protect an individual or society from potential violence; and to prevent

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the impact the new juvenile law had, because the law was not in force until June of that year.

210. *Id.* at 6.

211. *Id.* at 7.

212. *Id.*

213. The 2016 average includes data from one child who was in pretrial detention for over a year, which had been Chihuahua's maximum pretrial detention limit. This was a significant outlier among the other numbers.

214. See also Caroline C. Beer, *Judicial Performance and the Rule of Law in the Mexican States*, 48(3) *LATIN AM. POL. & SOC'Y* 33, 40 (2006).

the alleged offender from interfering with the investigation.<sup>215</sup> These “procedural necessities” should be rare in the interest of preserving the presumption of innocence.<sup>216</sup> Overall, locking up children comes with great social costs, and it is to a community’s advantage to limit such practices to when it is absolutely necessary. Safeguarding the best interests of the child and ensuring a smooth reintegration into society starts with abbreviated pretrial detention.

#### A. EFFECTIVE PRACTICES TO REDUCE THE USE OF PRETRIAL DETENTION

Diversion, defined as “measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings[,]”<sup>217</sup> should be the first option discussed when assessing an alleged juvenile offender and should be the first presumed solution for children accused of misdemeanors and non-violent offenses. Such a minimum intervention model, which may take the form of restitution or suspension, avoids excessive detention, prioritizes education over punishment, and allows the child to avoid stigmatization, which can discourage social interaction.<sup>218</sup> Furthermore, it reduces the court’s caseload, saves financial resources, and has been shown to effectively reduce recidivism rates.<sup>219</sup>

If formal proceedings are necessary, measures permitting pretrial release should be considered before pretrial detention. Alternative measures, such as custody under a parent or guardian, a restraining order, police supervision or parole, or temporary residency in an educational facility, should be considered at the first arraignment hearing.<sup>220</sup> Some regions in the US have found success using electronic monitors,<sup>221</sup> which

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215. SCHONTEICH, *supra* note 3, at 8.

216. *Id.* at 1; *see also* CRC General Comment 10, *supra* note 11, ¶ 80 (conceding that pretrial detention should be based on procedural need, or individual or community safety).

217. CRC General Comment 10, *supra* note 11, ¶ 27.

218. REFORMING JUVENILE JUSTICE, *supra* note 44, at 149.

219. *Id.* at vi, 149.

220. *Id.*

221. *E.g.*, Patrick Webb & William Allen Kritsonis, *Controlling those Kids: Social Control and the Use of Pretrial Detention among Youth in the United States of America: National Implications*, 9, 3(1) NAT’L J. PUB. & MENTORING DOCTORAL STUDENT RES. 1, 9 (2006).

provide the added advantage of allowing the child to continue attending their regular school.<sup>222</sup> The first hearing, and indeed all those that may follow, should uphold the principle of individualization, wherein the developmental needs of the child are considered and prioritized over the general ramifications of the alleged offense.<sup>223</sup> If violent tendencies are at issue, a court should take the child's home life into consideration and assess other methods that would achieve the same means as detention.<sup>224</sup>

Should custodial detention be determined the best option, it must not be used in lieu of welfare or social services. It has been observed in Pakistan and El Salvador, for example, that when a court considers a child's specific situation, they find detention to be the best option for children who live in the streets or whose families are otherwise untraceable.<sup>225</sup> Social services should aim to reduce pretrial detention by aiding children to reenter a family environment.<sup>226</sup>

Bail, a default alternative in many jurisdictions around the globe, is an inadequate method of limiting the number of individuals in pretrial detention and instead interjects wealth as a factor in assessing public safety, and thus should be an alternative of last resort.<sup>227</sup> If bail is to be perpetuated as a regular practice, it must be *affordable* bail that is tailored to the specific circumstances of an individual.<sup>228</sup> This applies even more so to children, because arbitrary bail violates the principle of pretrial detention as the last resort.<sup>229</sup>

Every country should enact a statute that places a base limit on the amount of time children can be detained. Such a limit should ideally be no more than thirty to sixty days, and pretrial detention should only be imposed if a judge has determined there to be procedural necessity. If an extension is needed, it should be granted only once and for no more than an additional thirty

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222. LIEFAARD, *supra* note 86, at 585.

223. Arredondo, *supra* note 9, at 19–20.

224. See LIEFAARD, *supra* note 86, at 585.

225. VAN BUEREN, *supra* note 66, at 210.

226. CRC, *supra* note 2, art. 9(1) (“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child.”).

227. SCHONTEICH, *supra* note 3, at 1.

228. *Human Rights Implications of Overincarceration and Overcrowding*, *supra* note 3, ¶ 55.

229. LIEFAARD, *supra* note 86, at 191.

days, and again only for procedural necessity. Once a child has been in pretrial detention for sixty days or an otherwise determined ceiling, they should be released. Release is not only in the best interest of the child, but the potential consequences for the court may compel judicial compliance.<sup>230</sup> Pretrial detention should be reviewed every week to ensure that it is still necessary and that alternative mechanisms could not achieve the same goals as detention.<sup>231</sup>

Rehabilitative measures can, in themselves, encompass “consequences that will serve as deterrents to delinquent behaviors and that will provide for community safety,” quelling concerns that only punitive measures will teach a child a lesson.<sup>232</sup> It is in the best interest of both the child and society to find appropriate rehabilitative, and, when necessary, limited punitive measures, designed to benefit all parties in a timely manner.

#### B. NEXT STEPS FOR GOVERNMENTS, ADVOCATES, AND CIVIL SOCIETY

The current data on rates of juvenile pretrial detention is woefully insufficient.<sup>233</sup> Information is often supplied by prison authorities, whose data may be inconsistent and nonquantitative.<sup>234</sup> Both governments and third parties must be encouraged to collect systematic, detailed information on a regular basis. Data points should include the duration for every step of every case, including the time a child spends in pretrial detention; locations individuals were detained before trial; and what diversionary or alternative mechanisms were employed at which points in the case, as well as rates of compliance with pretrial release.<sup>235</sup> Such information would allow both the court system and civil society to better understand where

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230. BART LUBOW, ANNIE E. CASEY FOUND., *TIMELY JUSTICE: IMPROVING JDAI RESULTS THROUGH CASE PROCESSING REFORMS* 11 (2017), <http://www.aecf.org/m/resourcedoc/aecf-TimelyJustice-2017.pdf>.

231. *Id.* at 25 (“The general lesson from weekly detention reviews is that greater accountability for specific actions to resolve cases produces timely case processing.”).

232. Arredondo, *supra* note 9, at 18.

233. Muncie, *supra* note 90, at 116.

234. SCHONTEICH, *supra* note 3, at 13.

235. *See id.* at 5. For an example of what data was collected and how it was disaggregated in the Chihuahua study, *see Diagnóstico 2017*, *supra* note 186, app. 1. This data is only available in Spanish.



inefficiencies are taking place, and allocate the appropriate resources to rectify them. This information should be disaggregated by violation, age, gender, and, if racial or minority discrimination is an issue, that information should be collected and disaggregated as well. Disaggregation can help pinpoint where systematic inequalities prevent the administration of justice.

In 2016 the UN launched the Global Study on Children Deprived of Liberty (the Global Study).<sup>236</sup> The goal is to “shed light on the scale and conditions of children deprived of liberty,” and identify and recommend good practices around “key concepts” related to children’s rights, including pretrial detention.<sup>237</sup> Specifically, the Global Study seeks to “ensur[e] compliance with the principle that deprivation of liberty of children should be used only as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pretrial detention for children.”<sup>238</sup> In 2018, the Global Study’s Independent Expert distributed a questionnaire intended “to provide a snapshot of the number of children detained at that specific point in time,”<sup>239</sup> which was to be filled out by as many jurisdictions as possible on the same day (June 26, 2018). In the questionnaire, pretrial detention is addressed by three data points: (1) the record of the population of children in remand on the designated day; (2) the record of the total number of children taken into detention each year from 2008-2017; and (3) the available alternatives to pretrial detention.<sup>240</sup>

By failing to measure the duration for which each child is held, the questionnaire is a woefully inadequate way to tackle the many of the challenges associated with over-detention. The

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236. G.A. Res. 69/157, ¶¶ 27–30, 52(d) (Feb. 3, 2015); *see also* U.N. Office of the High Comm’r for Human Rights, Children Deprived of Liberty – The United Nations Global Study, <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx> (last visited Aug. 1, 2018).

237. *Goal of the Study*, GLOBAL STUDY ON CHILD. DEPRIVED LIBERTY, <https://childrendeprivedofliberty.info/about/goal-of-the-study/> (last visited Aug. 1, 2018).

238. G.A. Res. 69/157, *supra* note 236, ¶ 30.

239. *Questionnaire*, GLOBAL STUDY ON CHILD. DEPRIVED LIBERTY 1, 2, [https://childrendeprivedofliberty.info/wp-content/uploads/2018/07/Questionnaire\\_EN.pdf](https://childrendeprivedofliberty.info/wp-content/uploads/2018/07/Questionnaire_EN.pdf) (last visited Aug. 1, 2018).

240. *Id.* These data points were asked in questions four, six, and thirteen, respectively. JJAI was one of the NGOs consulted for the Global Study, but JJAI’s suggestion to measure the duration of pretrial detention did not make it to the final version of the questionnaire.

only way to acquire such data is by requesting it from the government itself, and therefore civil society organizations cannot be relied upon to provide numbers to advance child-rights advocacy. If the study were to include a question asking how long each child (as counted by the first data point above) has been held in pretrial detention, it would provide essential information that would help inform how each government could reassess its alternatives to pretrial detention to alleviate the strain on the courts and detention centers. Filling out this questionnaire must become a regular government duty and should be presented to the CRC Committee at each country's periodic review. The more a government becomes transparent and accountable, the easier it is for civil society groups to partner with their local jurisdictions to reduce the time children spend behind bars.

Resources need to be invested into the juvenile justice system. Government funding should be dedicated to reducing delays and excessive pretrial detention.<sup>241</sup> Justice sector officials of all levels, including judges, prosecutors, and defense attorneys, should be expected to prioritize juvenile cases and otherwise participate in creating systematic change.<sup>242</sup> Investing in the pretrial phase will generate savings for all subsequent steps and lighten caseloads for the courts.<sup>243</sup> Civil society groups can contribute as well by collecting data, facilitating diversion programs such as community service, or advocating for stronger social services in their jurisdictions.<sup>244</sup>

## CONCLUSION

The children at risk of negligent and arbitrary judicial processes are commonly “the most stigmatized children of society: street children, vagrants, children in conflict with the law, children with behavioral and/or mental health problems, young (un)accompanied refugees or children in need of alternative care.”<sup>245</sup> These are the children who can benefit most from a humane justice system that emphasizes rehabilitative measures or community-based solutions—programs that are needed before a child is ever arrested, and essential to keeping pretrial detention a last resort.

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241. SCHONTEICH, *supra* note 3, at 6.

242. *Children in Pretrial Detention*, *supra* note 119, at 54.

243. SCHONTEICH, *supra* note 3, at 6.

244. *See id.*

245. LIEFAARD, *supra* note 86, at 653.

Neglecting to ask governments to measure the amount of time that children—who are presumed innocent until trial—are held behind bars is antithetical to encouraging progressive legislation and policy around the issue. The CRC Committee should utilize its unique influential position to demand the collection of such data as well as recommend the prevailing best standards, so that when the Committee recommends working with international organizations to advance child rights, these organizations can effectively work with both governments and civil society organizations.

Effective limits on pretrial detention are essential to building a system that truly upholds the best interest of the child, and it is imperative that the CRC Committee advocates for strict, progressive standards, including child pretrial detention durations that are limited to thirty to sixty days, and reviewed regularly. Use of alternative custody measures or conditions are invaluable to prevent a child from recidivating, and it is a country's duty to do everything possible to keep a child with their family, school, and community. The high costs of incarceration to each child, whether pretrial or as a sentence, reverberate deeply into society.