IN WHOSE “BEST INTERESTS”? — AN INTERNATIONAL AND COMPARATIVE ASSESSMENT OF US RULES ON SENTENCING OF JUVENILES

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Synopsis

According to numerous sources, both at the international level and within the USA, legal standards governing the treatment of children (commonly defined as persons under 18 years old) — including their treatment at the hands of the judicial system — should reflect an assessment of “the best interests of the child”. An explicit announcement of this principle at the international level appears in the Convention on the Rights of the Child (“CRC”), which nearly all countries in the world have adopted. Article 37 of the CRC elaborates on the “best interests” principle, by prescribing six key standards national juvenile justice systems are to follow when dealing with young people convicted of crimes. Two of the six key standards — prohibiting the imposition on juveniles of either (i) the death penalty or (ii) life imprisonment without possibility of parole — have already generated intense public debate in the USA. This article examines the other four standards, which seem to have much broader practical implications than the first two. The other four standards provide that: (1) imprisonment of juveniles “shall be used only as a measure of last resort”; (2) any such imprisonment shall be “for the shortest appropriate period of time”; (3)

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juveniles who are in prison shall be "separated from adults"; and (4) they shall have the right to maintain "family contact".

The first portion of this article provides a synopsis of these four standards, their status in international law, and their reflection in the practice of several countries around the world. Against the backdrop of this international and comparative law survey, the article then examines legal provisions regarding treatment of juvenile offenders in the USA. First it presents details as to how each of the four standards is reflected in selected formal rules and guidelines in the USA, mainly at the state level, and then it offers a general assessment of the degree to which rules on juvenile sentencing in the USA match (or fail to match) the CRC standards. The general assessment provided is not favorable; it throws into question whether the treatment of juveniles in conflict with the laws of this country does in fact give adequate attention to "the best interests of the child".

I. INTRODUCTION

IA. Juvenile Justice Issues in US and International Context

US standards and practices for juvenile justice are changing — again. Following a period of increasingly harsh punishment of juveniles, often based on the notion of "adult time for adult crime" (i.e., a juvenile who commits an "adult crime" should be sentenced to prison for "adult time"), laws and practices in this country for dealing with juveniles now seem poised to undergo some substantial shifts.¹

¹ See generally HUMAN RIGHTS WATCH AND AMNESTY INTERNATIONAL (JOINT REPORT), THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005), available at http://hrw.org/reports/2005/us1005/ [hereinafter LWOP Report] (referring in the Summary to the phrase "adult time for adult crime" and providing details on US attitudes and legal rules regarding punishment of juvenile offenders). For a survey of how those attitudes and rules changed from the 1970s through the 1990s, see id. at text accompanying notes 19-23 (pointing out that until the 1970s, children in the USA accused of criminal conduct typically were handled separately from adults, but in the 1980s, when "the United States experienced a steep and troubling increase in violent crime, including violent crime by adolescents", a phenomenon that triggered an "anxiety that bordered on panic" and a fear of a new generation of "juvenile super-predators"). For an account of the federal US legislation that these trends in the 1980s and 1990s triggered, see Sharon K. Hamric-Weis, THE TREND OF JUVENILE JUSTICE IN THE UNITED STATES, ENGLAND, AND IRELAND, 13 DICK. J. INT'L L. 567, 572-76 (1995) (summarizing the Violent Crime Control and Law Enforcement Act
For example, in the 2005 case of *Roper v. Simmons*, the United States Supreme Court ruled against the imposition of the death penalty on persons who, at the time they committed a crime, were under the age of 18. The fact that this issue had to rise to the highest court in the land for disposition reflects a reality that embarrasses many Americans: this country is one of the few countries in the world that practice capital punishment on *any* criminals, and one of only about ten countries that have, in modern times, sanctioned the imposition of the death penalty on *juveniles*. of 1994 and the Taking Back Our Streets Act of 1995). Another author offers a specific year — 1986 — as the point at which “the current wave of harsh laws and policies began” in the treatment of juvenile offenders in the USA. See Bernardine Dohrn, *I'll Try Anything Once: Using the Conceptual Framework of Children's Human Rights Norms in the United States*, 41 U. Mich. J. L. Reform 29 (2007). Other discussions of these trends, and of the most recent possible re-direction heralded by *Roper v. Simmons*, 543 U.S. 551 (2005), can be found in the extraordinarily rich literature that has developed in the last few years regarding the US juvenile justice system. See, e.g., *Peter W. Greenwood, Changing Lives: Delinquency Prevention as Crime-Control Policy* (2007) (discusses prevention models that reduce juvenile crime more cost-effectively than does tougher sentencing); *Clemens Bartollas, et al., Juvenile Justice in America* (2007) (examines significant juvenile justice issues, trends, research, and challenges); *Franklin E. Zimring, American Juvenile Justice* (2005) (advocates for juvenile justice policy that recognizes diminished responsibility of youth and allows youth to mature with minimal interruption). 2 543 U.S. 551 (2005). 3 *Id.* at 574, 578. In issuing its ruling against juvenile executions, the Court observed that “the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.* at 578. For an interesting perspective that one of our colleagues at the University of Kansas took on this willingness of the Court’s majority to consider international and foreign law, see David Gottlieb, *We Can Run, But We Can’t Hide: International and Comparative Law Come to Criminal Procedure*, KU Law, Fall/Winter 2007, at 24, 25 (noting that, despite controversy over the use of international and foreign law in US judicial decisions, “it is almost certain that the internationalization of criminal law and procedure will not abate”). 4 For details on the laws and practices of various countries regarding the imposition of the death penalty, see generally Amnesty International, *Death Penalty*, http://www.amnesty.org/en/death-penalty (last visited Mar. 23, 2008). As noted on this Amnesty International website, 135 countries have (as of September 2007) abolished the death penalty, in law or practice, and of all executions that did take place in 2006, 91% occurred in just six countries: China, Iran, Pakistan, Iraq, Sudan, and the USA. See *id.*. Most countries the USA might wish to associate with — for example, Australia, Austria, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, and the UK — have abolished the death penalty for all crimes. See Amnesty International, *Death Penalty: Countries Abolitionist for All Crimes*, http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes (last visited Mar. 23, 2008). 5 For details on the imposition of the death penalty on juveniles, see Amnesty International, *Death Penalty: Executions of Child Offenders Since 1990*, http://www.amnesty.org/en/death-penalty/executions-of-child-offenders-since-1990 (last visited Mar. 23, 2008). As reflected there, Amnesty International reports only 59 executions
For most countries, the pertinent rules in this regard appear in international legal instruments — mainly treaties — that have virtually won global acceptance. For example, both the International Covenant on Civil and Political Rights ("ICCPR") and the UN Convention on the Rights of the Child ("CRC")\(^6\), which most countries in the world have ratified, expressly prohibit capital punishment of juveniles. In this respect, the ruling in *Roper v. Simmons*, prohibiting the imposition of the death penalty on juveniles, puts the USA more in line with the rest of the world.

There is, however, a crucial difference between the US approach toward juvenile executions and the approach taken in most other countries. Namely, the US prohibition on such executions does not rest on international treaty obligations. Unlike most other countries in the world, the USA still has not become a party to the CRC. Moreover, when it ratified the ICCPR, the USA announced a reservation to the ICCPR provision relating to capital punishment for juveniles. In these respects, the USA remains an outlier.\(^7\)

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\(^6\) In international law, the term "state" is typically used to refer to the legal entities — nation-states — that form the international community. Such a "state" is defined as having "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states". Convention on the Rights and Duties of States, Dec. 26, 1933, U.S.T.S. 881, 165 L.N.T.S. 19, available at http://www.molossia.org/monesteemo.html. Some portions of this article focus mainly on this type of "state". Other portions of this article, however, examine legal rules within the subsidiary states that comprise the USA. Therefore, we shall reserve the term "state" for those subsidiary entities (federal states within the USA) and use the more common but less precise term "country" to refer to independent nation-states. Using the terms in this fashion, this article may be seen as comparing rules that "countries" at the international level have created with rules that "states" within the USA have created.


\(^9\) For details on the numbers of countries that are parties to these treaties, see infra notes 38, 52-57 and accompanying text.

\(^10\) The pertinent ICCPR provision asserts that "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age". ICCPR, supra note 7, art. 6(5). The pertinent CRC provision prohibits the imposition of capital punishment "for offences committed by persons below eighteen years of age". CRC, supra note 8, art. 37(a).

\(^11\) See infra note 57 and accompanying text.

\(^12\) A reservation to a treaty is "a unilateral statement . . . made by a State [country], when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to
Now we see a new, closely related question gaining national attention: if capital punishment is inappropriate for juveniles in this country, should life imprisonment without parole (often abbreviated as “LWOP”) also be regarded as inappropriate for juveniles in this country? From a legal perspective, this is a “brother” issue to the capital punishment issue, because the same CRC provision that prohibits capital punishment for juveniles also prohibits LWOP for juveniles.  

exclude or to modify the legal effect of certain provisions of the treaty in their application to that State [country].” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. The reservation the USA entered related to ICCPR Article 6(5), when the USA ratified the ICCPR, states that “the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.” See International Covenant on Civil and Political Rights, N.Y., Dec. 16, 1966, Declarations and Reservations, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp [hereinafter ICCPR Reservation Report]. At least one observer has questioned the legality of this US reservation. See Cathleen Hull, Enlightened by a Humane Justice: An International Law Argument Against the Juvenile Death Penalty, 47 U. KAN. L. REV. 1079, 1106-07 (1999) (asserting, among other things, that the US reservation is invalid because it is incompatible with the object and purpose of the ICCPR). See also Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights, 42 DEPAUL L. REV. 1311, 1335 (1993) (urging that the USA withdraw its reservation regarding ICCPR Article 6(5) or, alternatively, that the Supreme Court of the United States declare the death penalty in violation of the 8th Amendment to the United States Constitution).

As noted below, the USA and Somalia are the only countries that have not become parties to the CRC. See infra notes 52-57. Moreover, the USA is one of only two countries that have entered (and not yet withdrawn) reservations to ICCPR Article 6(5). See ICCPR Reservation Report, supra note 12. The other reservation, entered by Thailand, takes the form of an “interpretative declaration” that explains Thai Penal Code provisions and concludes that, “Thailand considers that in real terms it has already complied with the principles enshrined [in ICCPR Article 6(5)].” Id. Other countries, such as Ireland, entered reservations to ICCPR Article 6(5), but subsequently withdrew them. Id. Some countries — including Belgium, France, Finland, Germany, the Netherlands, Norway, Portugal, and Sweden — filed formal objections to the US reservation. Id.

CRC, supra note 8, art. 37(a): “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age".

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At least 135 countries have abolished LWOP for juveniles, but a majority of US states specifically permit the sentence of LWOP for juveniles, while several others (approximately 10) set no minimum age for LWOP. A report issued in 2005, by Amnesty International and Human Rights Watch, indicates that there are at least 2,225 youth serving LWOP in US prisons for crimes committed before they were 18 years old. The report also reveals that there are only 12 child offenders serving LWOP in the rest of the world. Child advocates in the USA have begun to frame the juvenile LWOP issue as a human rights issue, in hopes that the Supreme Court will abolish juvenile LWOP as it did the juvenile death penalty in Roper v. Simmons.

Questions about the treatment of juveniles in any system of justice extend far beyond the death penalty and LWOP. For example, should juveniles routinely be sentenced to prison as adults are? If imprisoned, should juveniles be confined with, and hence, be influenced by, adult offenders? Should juveniles in prison be given special access to family members, especially parents? As a practical matter, these questions bear more directly on more people — including the juveniles themselves — than do questions of capital punishment and LWOP, which are (thankfully) imposed relatively rarely. Therefore, we predict that, whatever the outcome of the current debate over LWOP for juveniles, the die has been cast for other related issues to be brought into the public discourse over juvenile justice in the USA.

We wish to focus specifically on four such issues. They may be regarded as “first cousins” to the issues of capital punishment and LWOP, because they appear in the CRC directly after the Article 37(a) prohibitions on juvenile death penalties and juvenile LWOP sentences. Paragraphs (b)

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18 See LWOP Report, supra note 1, in “Summary”.

19 Id. at text following note 2.

20 See, e.g., National Juvenile Justice Network, supra note 17.
and (c) of CRC Article 37 impose the following standards applicable to juveniles:

- imprisonment "shall be used only as a measure of last resort";\(^{21}\)

- imprisonment, if used, shall be "for the shortest appropriate period of time";\(^{22}\)

- a juvenile, if imprisoned, "shall be separated from adults";\(^{23}\) and

- a juvenile, if imprisoned, "shall have the right to maintain contact with his or her family".\(^{24}\)

IB. Aims and Structure of this Article

In writing this article, our aim is to contribute to the public discourse over these issues. Section II of the article focuses on international legal standards relating to juvenile justice, paying special attention to how the above noted standards have been widely accepted in the international community, through both treaty commitments and non-binding supplementary instruments. Section III offers a brief illustrative comparative survey of how those international rules have been incorporated into national, legislative or administrative rules in several countries around the world. The aim of Sections II and III, taken together, is to offer a "baseline" against which to compare some aspects of US rules in these areas.

Section IV then turns to those US rules. Again, our goal is to provide enough examples to offer some broad generalizations regarding the match — or mismatch — between US rules and those most countries in the international community have committed themselves to follow. Section V offers concluding observations.

Throughout the article, we focus on formal written rules. Naturally, there can be, and quite often is, a difference between rules as written and rules as applied. Expressed differently, establishing the rules in written form is not, by any stretch of the imagination, a sufficient condition to ensure the application of those rules. However, the inclusion of standards in written

\(^{21}\) CRC, supra note 8, art. 37(b).

\(^{22}\) Id.

\(^{23}\) Id. art. 37(c).

\(^{24}\) Id.
rules would seem to be a necessary condition; hence, it makes sense to focus on whether, and how, various legal systems have promulgated rules relating to certain key requirements for juvenile justice.25

IC. Preview of Conclusions and Significance

The pages that follow will offer these key observations:

- The international community has established clear and detailed standards, both through binding treaties and through supplementary guidelines, relating to juvenile justice in general, and specifically to the four issues under consideration in this article — and practically all countries have formally accepted those rules as binding in their own national legal systems.

- Although the degree to which various countries have promulgated specific rules consistent with those international standards varies in several respects, a number of countries have recently amended their juvenile justice laws and regulations in ways that bring them directly in line with the international standards.

- Some US states have formal laws and regulations that match the pertinent international standards at issue in this article, especially those requiring (i) that alternatives be considered before a child is imprisoned, (ii) that imprisoned children be kept separate in “sight and sound” from adult inmates, and (iii) that confined children be afforded regular contact with their families.

- However, numerous US states have formal laws and regulations that are directly — we think embarrassingly — inconsistent with the pertinent international standards at issue in this article. We note, with disapproval, the rules in various states (i) that allow for preventive detention of juveniles without using the best interests of the child as a determining factor, (ii) that allow juveniles to be sentenced as and incarcerated with adults, and (iii) that do not specifically give confined children a right to regular contact with their families.

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25 Besides, most human rights treaties expressly require that participating countries take formal legislative and administrative measures to implement the rights set forth therein; for those countries, formal adoption of rules constitutes a legal obligation. See, e.g., CRC, supra note 8, art. 4.
Why does any of this matter? We shall offer two general reasons. First, the future of this country and of this world depends on the children and adolescents of today, whose protection and nurturing are entrusted to us. Second, contrary to the isolationist and ultra-nationalist views expressed by some persons in this country, US adherence to international standards would serve the best interests of this country and the world.

II. KEY INTERNATIONAL STANDARDS ON SENTENCING OF JUVENILES

In order to assess how well (or how poorly) legal rules in the USA conform to international standards on sentencing of juveniles, we need to survey what those international standards are. That is our intention in the following paragraphs, though we will begin with some basic definitions, distinctions, and disclaimers.

First, we shall highlight only key international standards on the subject. There are many other standards, and they are ably explained in the impressive literature that has developed around issues of international human rights law applicable to young people. The key international standards we choose to focus on are the four CRC Article 37 standards noted above.

Second, our attention is on international standards. They take two main forms: (i) treaties, which are binding in accordance with international law; and (ii) other sets of guidelines that are not binding per se, but provide interpretative guidance (and, while not asserted here, may be viewed as contributing, in aggregate, to the crystallization of rules of customary international law). We shall see that the CRC sits at the center of the international standards on sentencing of juveniles, because (i) the CRC, unlike other human rights treaties, directly and comprehensively addresses issues on the treatment of juveniles, and (ii) the CRC, unlike any other

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27 See infra note 84 and accompanying text for a definition of customary international law.
guidelines on treatment of juveniles, is binding on those countries that are parties to it.

Third, the rules at issue relate not only to *sentencing*, but also to other closely related matters. These include the detention of a juvenile pending further processing in the criminal justice system; the decision of whether to use imprisonment or some other disposition as society’s response to a juvenile’s criminal behavior; the length of imprisonment to which a juvenile should be subjected; and the treatment of a juvenile while he or she is deprived of his or her liberty while in prison. Hence “sentencing” for these purposes has a broad sweep, but it does not encompass certain other matters relating to the administration of juvenile justice, such as the presumption of innocence and the right to a fair hearing; nor does it include the plethora of other matters — such as freedoms of identity, movement, expression, religion, and association, as well as rights to health care, social security, and education — that are dealt with in the CRC and other guidelines on treatment of juveniles.

Lastly, what is a *juvenile*? This question is answered differently in various legal instruments, which themselves use numerous terms, such as “juvenile”, “child”, “adolescent”, and “minor”, somewhat interchangeably. For our purposes, unless otherwise defined in a particular context, a “juvenile” is a person under the age of 18 years.

IIA. Standards Found in General Human Rights Treaties

Illustration #1 offers a visual representation of how crucial the CRC is to our subject. As Illustration #1 shows, only the CRC (i) has extensive and detailed rules applying specifically to issues of juvenile justice, and (ii) constitutes binding law. Illustration #1 also shows the significance of other treaties, as well as non-treaty international legal instruments. It is to that array of juvenile sentencing standards that we now turn, starting with general human rights treaties.

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28 See CRC, *supra* note 8, art. 40 (enumerating these and other rights relating to the administration of justice for juveniles).

29 The age of 18 years is used in defining “child” in the CRC. See CRC, *supra* note 8, art. 1; see also LWOP Report, *supra* note 1, at “Note” following the “Summary”: “In keeping with international human rights standards, throughout this report we use the terms ‘child’ and ‘children’ to refer to persons under the age of eighteen. Unless otherwise indicated, all referenced so youth, adolescents, minors, and juveniles also refer to persons under the age of eighteen.” For a discussion on the inconsistent use of terms — “child”, “juvenile” — see Schabas & Sax, *supra* note 26, at 33 n.236 (comparing terminology used in various international legal instruments). For a comprehensive review of issues and decisions surrounding the definition of a child, see CRC HANDBOOK, *supra* note 26, at 1-17. See also van Bueren, *supra* note 26, at 171-72.
Numerous international human rights treaties are generally pertinent to juveniles in the same sense that such treaties, in announcing various freedoms and protections, do not expressly exclude juveniles from their applicability.\textsuperscript{30} Viewed from this perspective, it would seem that various populations of juveniles would benefit from the rules set forth in treaties devoted specifically to protecting the rights of women,\textsuperscript{31} fighting racial discrimination,\textsuperscript{32} protecting the rights of migrant workers,\textsuperscript{33} and preventing

\textsuperscript{30} An exception to this generalization appears in the key European human rights treaty, which carves out an exception to its “right to liberty” provision in the case of minors, in certain circumstances. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 1953 U.K.T.S. 71, available at http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. That is, “No one shall be deprived of his liberty [except for a case involving] . . . the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority” \textit{Id.} art. 5(1)(d).


torture.\textsuperscript{34} Therefore, any treatment of juveniles that involves torture, or any form of discrimination prohibited in those general human rights treaties, would constitute violations of international law for states that are parties to such treaties.

The ICCPR also bears on issues of juvenile justice, especially if we focus on such issues by asking: "under what circumstances may a state legitimately deprive a juvenile of his or her liberty?"\textsuperscript{35} The ICCPR has extensive provisions, mainly in Articles 9 and 10, on liberty and the deprivation of liberty. The opening paragraphs of those ICCPR provisions read as follows:

Art. 9(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.\textsuperscript{36}

Art. 10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.\textsuperscript{37}

For our purposes, however, the most important treaty provisions are not ones that would provide protection to juveniles indirectly — that is, by virtue of the fact that juveniles have not been excluded from the provisions’ applicability — but rather those treaty provisions that are, by their own terms, expressly applicable to juveniles. Only a few treaties include such provisions. Aside from the CRC (discussed in more detail below), the key treaties with juvenile-specific provisions include the following (with the number of countries that have expressed their consent to be bound by each of these treaties indicated in parentheses):

- **ICCPR (154 countries)\textsuperscript{38}**

\textsuperscript{35} Such a focus on "deprivation of liberty" is adopted by authors of an especially insightful work on CRC Article 37. See Schabas & Sax, supra note 26, at 33-49, 56-75, especially at 70.
\textsuperscript{36} ICCPR, supra note 7, art. 9(1).
\textsuperscript{37} ICCPR, supra note 7, art. 10(1).
\textsuperscript{38} See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties (2004), available at
Art. 6(5) prohibits the imposition of the death sentence "for crimes committed by persons below eighteen years of age".  

Art. 10(2)(b) requires that "[a]ccused juvenile persons shall be separated from adults". 

Art. 10(3) provides that once convicted and placed within the penitentiary system, "[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". 

Art. 14(4) relates to criminal procedure, and provides that "[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation". 

Art. 24(1) addressing issues specifically relevant to a "child" requires that "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor . . .". 

- **International Covenant on Economic, Social and Cultural Rights** (149 countries) — 

Art. 10(3) notes rather generally that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons".

http://www.unhchr.ch/pdf/report.pdf (listing countries that had ratified or acceded to the ICCPR as of June 2004) [hereinafter Status of Treaty Ratifications].

39 ICCPR, supra note 7, art. 6(5).
40 Id. art. 10(2)(b).
41 Id. art. 10(3).
42 Id. art. 14(4).
43 Id. art. 24(1).
44 See Status of Treaty Ratifications, supra note 38 (listing countries that have ratified or acceded to this treaty).
American Convention on Human Rights (25 countries)\textsuperscript{46} —

Art. 4(5) provides that “[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age”.\textsuperscript{47}

Art. 5(5) requires that “[m]inors while subject to criminal proceedings 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”.\textsuperscript{48}

Art. 19 similar to ICCPR Article 10(3), provides that “[e]very minor child has the right to the measures of protection required by his condition as a minor”.\textsuperscript{49}

African Charter on the Rights and Welfare of the Child (21 countries)\textsuperscript{50}

Art. 17(2)(b) requires that parties shall “ensure that children are separated from adults in their place of detention or imprisonment”\textsuperscript{51}


\textsuperscript{48} American Convention on Human Rights, supra note 47, art. 5(5). Article 5(6) also has indirect relevance to minors, in requiring that “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners”. Id. art. 5(6).

\textsuperscript{49} Id. art. 19.

\textsuperscript{50} See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (listing countries that have ratified or acceded to this treaty), available at http://www1.umn.edu/humanrts/instree/afchildratifications.html.

\textsuperscript{51} Id. art. 17(2)(b), available at http://www1.umn.edu/humanrts/africa/afchild.htm.
IIB. Standards Found in the CRC

Illustration #1 reflects the fact that the three treaties mentioned above — the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights — include a few juvenile-specific provisions. Illustration #1 also emphasizes, however, that the most important treaty in this respect is the CRC, because all of its provisions are juvenile-specific, and several of them focus on sentencing and other criminal justice issues.

Before examining the most pertinent CRC provisions, let us pause to identify another reason the CRC is so centrally important in establishing international law on this subject: the CRC has been overwhelmingly accepted by the international community. As of early 2008, 193 countries have become parties to the CRC.\(^\text{52}\) That is, they have formally expressed their consent to be bound by its provisions. The UN Children’s Fund (UNICEF) points out that “[m]ore countries have ratified the [CRC] than any other human rights treaty in history”.\(^\text{53}\) Indeed, of all the 192 countries that are members of the UN,\(^\text{54}\) only two countries — the USA and Somalia — have declined to ratify the treaty.\(^\text{55}\) (The USA signed the CRC in 1995, but since this signature was not followed by ratification,\(^\text{56}\) the USA is not fully bound by the treaty.\(^\text{57}\))

The provisions found in paragraphs (b) and (c) of CRC Article 37 are most pertinent for our purposes. They read as follows:

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\(^{52}\) See United Nations, Multilateral Treaties Deposited with the Secretary-General: Convention on the Rights of the Child, http://untreaty.un.org/ENGLISH/bible/englishintertebible/partI/chapterIV/treaty19.asp (listing countries that have ratified or acceded to the CRC) [hereinafter CRC Parties].


\(^{55}\) See CRC Parties, supra note CRCPARTYNOTE 1. Three other political entities are not UN members, but they are parties to the CRC – i.e., the Cook Islands, the Holy See (the Vatican), and Niue. Id. The last of these is a Polynesian country (referred to as the “Rock of Polynesia”) that is associated with New Zealand.

\(^{56}\) See CRC Parties, supra note CRCPARTYNOTE 1. Representatives of the USA were, however, involved in drafting the CRC. Dohn, supra note 26, at 30.

\(^{57}\) The CRC provides that any country’s consent to be bound is to be expressed by ratification. CRC, supra note 8, art. 47 (“The present Convention is subject to ratification”).
Art. 37(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The 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.\(^{58}\)

Art. 37(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.\(^{59}\)

Let us consider now the four specific standards that these CRC provisions establish.

IIB1. Imprisonment as a Last Resort

The “last resort” requirement in CRC Article 37(b) may be regarded as reflecting a cost-benefit analysis – that recognizes, as a cost of imprisonment, the negative consequences imprisonment can have for a young person, even if such imprisonment is for a short time and under relatively favorable conditions sensitive to the offender’s tender age. As one authority expressed it, the protective stance taken in the “last resort” requirement “tries to keep the potential negative impact of intervention as small as possible”.\(^{60}\) Thus, the “last resort” requirement mandates that officials involved in dealing with juvenile offenders consider alternatives to imprisonment, on grounds that although imprisonment “constitutes one possible social reaction to a child in conflict with the law, . . . [it is a reaction that has] the most serious impact on the child’s development and [his or her] personal future.”\(^{61}\)

\(^{58}\) CRC, supra note 8, art. 37(b) (emphasis added).

\(^{59}\) CRC, supra note 8, art. 37(c) (emphasis added).

\(^{60}\) Schabas & Sax, supra note 26, at 81. Among the negative consequences is the social stigma associated with conviction and sentence to imprisonment. Id.

\(^{61}\) Id.
One obvious implication of the “last resort” requirement is that far-reaching pretrial detention of juveniles is inappropriate.\(^{62}\) This is true, in part, because such extensive imposition of punishment would run counter to the underlying principle, inherent in the “last resort” requirement: that there should be “a comprehensive understanding of the [juvenile’s] personal development, [as well as the juvenile’s] interaction with his or her environment and others, before considering social reaction to a certain behaviour of the [juvenile]”\(^{63}\). In short, the “last resort” requirement calls for a careful exercise of discretion, instead of an automatic application of pre-adjudication imprisonment, and such exercise of discretion should involve a consideration of alternatives to imprisonment, such as home confinement, community supervision, the use of day or evening reporting centers, and non-secure shelters.\(^{64}\)

IIB2. Imprisonment for the Shortest Appropriate Period

Closely associated with the “last resort” requirement is the “shortest appropriate period” requirement. Indeed, it is somewhat artificial to segregate these two norms found in the second sentence of CRC Article 37(b), which one authority has referred to in tandem as “the two most significant concepts in international treaty law on deprivation of liberty of [juveniles]”.\(^{65}\) The two norms are distinct, though, because the first norm (“last resort”) bears on whether imprisonment should be imposed at all on a juvenile, whereas the second norm (“shortest appropriate period”) bears on how long imprisonment should last, if imposed.

Like the “last resort” requirement, the “shortest appropriate period” requirement seems to demand a case-by-case exercise of discretion, in order to determine what is “appropriate” to the circumstances. Moreover, the issue of “appropriateness” is presumably to be considered from the perspective of the “best interests of the child” principle announced in CRC Article 3.\(^{66}\)

\(^{62}\) See id. at 82.

\(^{63}\) Id. at 81.

\(^{64}\) For an explanation of these incarceration alternatives, see Center on Juvenile and Criminal Justice, Reforming the Juvenile Justice System, http://www.cjcj.org/jjic/reforming.php#mda (last visited Mar. 23, 2008).

\(^{65}\) Schabas & Sax, supra note 26, at 81.

\(^{66}\) CRC Article 3(1) provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. CRC, supra note 8, art. 3(1). For an extensive discussion of the “best interests” concept, see CRC HANDBOOK, supra note 26, at 39-49. This source asserts that the “best interests” concept “has been the subject of more academic analysis than any other concept included in the Convention”. Id. at 39.
Consequently, legislation requiring courts to impose mandatory sentences would seem flatly inconsistent with the CRC provisions. Further, such legislation would be doubly offensive to the CRC obligations if its rationale focused on the best interests of society (and its purported need for protection from juveniles), rather than on the best interests of the particular juvenile at issue (and society's obligation to devote itself to the protection of juveniles from negative implications of inappropriate imprisonment).

Was this pair of norms — the “last resort” requirement and the “shortest appropriate period” requirement — controversial among the authorities drafting the CRC? Of course it was, because it exposed two dramatically conflicting viewpoints as to how deeply a bite the CRC should take out of a country's otherwise largely unfettered prerogative in deciding how to treat juvenile offenders. In describing the intense scrutiny these issues received, and explaining how the “last resort” and “shortest appropriate period” requirements of CRC Article 37(b) reflect an important compromise, one authority offers the following summary:

The drafting history reveals that the second sentence of Article 37(b) was [the] subject of a very controversial debate in the plenary working group [involved in preparing the CRC]. The initial draft proposed by an informal sub-working group consistently referred to deprivation of liberty throughout the article. And while the first sentence of Article 37(b) [which does explicitly refer to deprivation of liberty] was passed without major discussion, heated debate around the second sentence arose. Delegates from Kuwait and the USSR strongly voiced concerns that by adopting these principles ‘the Working Group would be deciding on detailed measures of juvenile punishment without the necessary expertise to do so’. In particular, the USSR representative questioned ‘whether it was the consensus view of experts on juvenile punishment’ that deprivation of liberty should be restricted to the shortest possible period of time. Similarly, the representative of the Federal Republic of Germany opposed the proposal by referring to domestic legislation on custodial sentences which did not include the time limitation. Italy, then, proposed deletion of the second sentence, while Senegal defended its inclusion ‘in order to encourage judges to consider the use of other educational or correctional measures than deprivation of liberty and to ensure that, if at all, custodial measures would only be used as a measure of last resort’. Others proposed the deletion of the limitation on time, until finally, at this stage of
the discussion, the USSR representative suggested ‘that the broad notion of “deprivation of liberty” be replaced by the more precise words “imprisonment, arrest and detention” and that the text should indicate that the measures should be “in conformity with the law”’. This proposal attracted most support in the end, with the USSR, Senegal, the United States and the German Democratic Republic finally stating ‘their preference for a more specific language instead of a general reference such as “deprivation of liberty”, since this term could also cover educational and other types of deprivation of liberty applied to minors besides detention, arrest, or imprisonment’. With a last amendment in order to accommodate concerns about the time limitation (replacing ‘shortest possible’ by ‘shortest appropriate period of time’), the second sentence was finally adopted.\(^{67}\)

This detailed account of the drafting history of CRC Article 37(b) is important for two main reasons. First, it explains why the “last resort” and “shortest appropriate period” requirements apply only to arrest, detention, and imprisonment, and not to other forms of deprivation of liberty outside the criminal justice system. Second, and perhaps more importantly, it reveals the level of care and detailed scrutiny, from a remarkably broad array of countries and legal cultures, that was given to the formulation of the CRC.

IIB3. Separation from Adults

Nearly any adult, and surely every parent, instinctively understands why juvenile offenders should typically be kept away from adult criminals: the risk of negative influence is too high to accept.\(^{68}\) In reflecting this view, CRC Article 37(c) repeats a norm that was formally announced at the international level over a half-century ago\(^{69}\) and set forth as a binding treaty provision in the ICCPR.\(^{70}\)

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\(^{67}\) Schabas & Sax, supra note 26, at 83.

\(^{68}\) The so-called “Beijing Rules” on the administration of juvenile justice, discussed below, refer to this negative influence as “criminal contamination”. See Beijing Rules, infra note 85, at Commentary to Rule 13. The Committee on the Rights of the Child (responsible for facilitating and monitoring the implementation of the CRC) has asserted that, “the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.” Committee on the Rights of the Child, General Comment No. 10, ¶ 85, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), available at http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf.

\(^{69}\) “The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their
The formulation of the “separation from adults” provision in CRC Article 37(c) is noteworthy in several respects.\textsuperscript{71} Let us consider these points: (i) its context within the CRC, (ii) the important exception to which it is subject, and (iii) the reservations that it attracted.

Contextually, the “separation from adults” provision appears in the second sentence of Article 37(c), following a broadly formulated assertion that “e\textsuperscript{very} child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”\textsuperscript{72} This first sentence has two components. The first component requires, in essence, that the state not discriminate against young people by denying them rights guaranteed generally to “persons deprived of their liberty” – namely, that they should be treated humanely.\textsuperscript{73} The second component requires, in essence, that the state discriminate in favor of young people, by giving special consideration to the risk of negative influence. It is against the backdrop of this two-part statement of principle in the first sentence of CRC Article 37(c) that the “separation from adults” requirement is announced. Interpreted in this context,\textsuperscript{74} the “separation from adults” provision seems to require that the separate treatment that juvenile offenders receive must hew to two overriding norms: (i) that treatment is humane, and (ii) it gives attention to the special needs of juveniles.

\textsuperscript{70} ICCPR, supra note 7, art. 10(2) (b) (requiring that “[a]ccused juvenile persons shall be separated from adults”).
\textsuperscript{71} For further discussion, see Schabas & Sax, supra note 26, at 91-93.
\textsuperscript{72} CRC, supra note 8, art. 37(c).
\textsuperscript{73} See ICCPR, supra note 7, art. 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”).
\textsuperscript{74} According to the principal set of rules governing treaties, the meaning of a treaty term is to be determined, in part, by the context in which it appears. See Vienna Convention on the Law of Treaties, supra note 12, art. 31.
\textsuperscript{75} See supra note 70.
\textsuperscript{76} CRC, supra note 8, art. 37(c).
provisions may be relied on for guidance. For example, Article 12(1) would require that the views of the juvenile himself or herself be taken into account in determining whether it would be in his or her best interest not to be separated from adults while in detention or prison.

Even with the exception described above, the CRC Article 37(c) “separation from adults” requirement generated enough concern among several countries to prompt them to enter reservations when agreeing to the CRC. Australia, Iceland, Japan, New Zealand, and the United Kingdom all entered reservations expressly limiting or excluding the application (with respect to their own official government action) of the “separation from adults” requirement. For the rest of the international community, however, the CRC Article 37(c) “separation from adults” requirement is fully applicable and obligatory on its parties. It reiterates and formalizes a long-standing rule intended to protect juveniles from undue influence by adult criminals. Still, the “separation from adults” requirement is subject to a substantial exception with important limitations.

IIB4. Right of Family Contact

The last of the four CRC Article 37 provisions discussed in this article requires that a juvenile deprived of liberty (in detention or prison), “shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.” Let us examine this provision in the light of three related concepts: “tender age”, “best interests”, and “exceptional circumstances”.

Like the “separation from adults” requirement, the “family contact” requirement appears immediately after a general statement in the first sentence of CRC Article 37(c). That general statement, requiring that a juvenile deprived of liberty be treated in a manner that “takes into account the needs of persons of his or her age”, reflects the view that juveniles are, quite simply, different from adults. According to this view, juveniles – being of tender age, easily influenced, and at a point in their lives where

77 Id. art. 10(1) (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”).
78 As noted above, a “reservation” is a statement made by a country when expressing its consent to be bound in general by a treaty, whereby it purports to exclude or to limit the legal effect of certain provisions of the treaty in respect of that country. See supra note 12.
79 See CRC Parties, supra note 52. Reservations and declarations issued by some other countries were of such a general nature that they might also be relied on to escape from Article 37(c) obligations. One such reservation was entered by Djibouti, which stated that it “shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values.” Id.
rehabilitation is more plausible – deserve special treatment. The type of special treatment the “family contact” requirement brings into focus is this: a juvenile should benefit from the values that generally come from association with his or her parents. The same underlying theme — that children typically should be with their parents — also finds expression in other CRC provisions. For example, CRC Article 9(1) opens with the general proposition that “a child shall not be separated from his or her parents against their will”.

This general proposition, however, can be displaced in some circumstances. Some parents are bad influences. In such cases, the presumption in favor of having a child with his or her parent(s) would be “trumped” by the more fundamental principle on which the entire CRC turns — that ultimately the treatment a young person receives from official representatives of society must be in the “best interests of the child”. Reflecting such possibility, CRC Article 9(1) provides an explicit exception to its “no-separation-from-parents” rule. The rule will not apply “when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child.” The same provision goes on to explain that, “[s]uch determination may be necessary in a particular case . . . involving abuse or neglect of the child by the parents.”

This pair of competing principles — (i) that children typically should be with their parents, and (ii) that ultimately what counts is a genuine determination of the “best interests of the child” — may be seen in the formulation of the “family contact” requirement of CRC Article 37(c). The provision first announces that juveniles in prison (or some other setting in which they are deprived of their liberty) should be permitted to maintain family contact in some feasible way (through visits and correspondence), but then provides an escape clause to that rule in “exceptional circumstances”. As explained by CRC experts, that exception can be invoked only if it is in the best interests of the child.

IIC. Standards Found in Other International Legal Instruments

Now we shall look briefly beyond treaties. In doing so, we move from rules that are directly binding in international law to those that are not. A highly detailed and sophisticated cluster of guidelines, declarations, and standards has emerged in recent years, partly inspired by the CRC, to form what we regard as a “supplementary penumbra” to the binding treaty rules.

80 CRC, supra note 8, art. 9(1).
81 Id. art. 3(1).
82 Id. art. 9(1).
83 Schabas & Sax, supra note 26, at 93 (citing van Bueren, supra note 26, at 227).
Taken in aggregate, this cluster of guidelines, declarations, and standards might rise to the level of customary international law — that is, rules that are legally binding on all countries because they have crystallized from a “general practice accepted as law”\(^{84}\) — but we shall not attempt to establish that proposition in this article. Here, our goal is more modest; we simply wish to identify some of the more important sets of these supplementary standards and explain how they relate to the four specific CRC Article 37 norms discussed above.

The most important items in the “supplementary penumbra” of standards are: (i) the UN Standard Minimum Rules for the Administration of Juvenile Justice\(^{85}\) (commonly called the “Beijing Rules”); (ii) the UN Guidelines for the Prevention of Juvenile Delinquency (commonly called the “Riyadh Guidelines”)\(^{86}\); and (iii) the UN Rules for the Protection of Juveniles Deprived of Their Liberty\(^{87}\) (commonly called the “JDL Rules”). Let us examine these in the stated order.

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\(^{88}\) Beyond the scope of this article are other sets of guidelines relevant to juvenile rights. These include the following: (i) the Guidelines for Action on Children in the Criminal Justice System (1997) (calling in Article 15 for the use of alternatives to prison, and calling in Article 18 for the placement of juveniles in “closed institutions” only as a last resort and for the shortest period), available at http://www2.ohchr.org/english/law/system.htm; (ii) the Body of Principles for the Protection of All Persons Under Any Form of Detention or
IIC1. The Beijing Rules

The Beijing Rules, adopted by the UN General Assembly in late November of 1985, emerged from efforts carried out over the course of two UN “congresses” on the prevention of crime and the treatment of offenders.\(^89\) Together, there are approximately seventy specific rules, accompanied by extensive commentary. Topics of the rules include the age of criminal responsibility, the aims of juvenile justice, the rights of juveniles to specific procedural safeguards to be applied in investigating and prosecuting crimes by juveniles, the need for specialization within the police (to deal with juveniles), and the rehabilitation and treatment of juvenile offenders.\(^90\)

Several provisions in the Beijing Rules bear directly on the CRC Article 37 norms discussed above. Highlighted below are provisions of those rules most pertinent to the “last resort”, “shortest appropriate period”, “separation from adults”, and “family contact” requirements:

13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.\(^91\)

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.\(^92\)

17.1 The disposition of the competent authority shall be guided by the following principles: . . . (b) Restrictions on the personal liberty of the juvenile

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89 Beijing Rules, supra note 85, preamble (alluding to these congresses and various related meetings and initiatives).

90 See generally Beijing Rules, supra note 85.

91 Beijing Rules, supra note 85.

92 Id.
shall be imposed only after careful consideration and shall be limited to the possible minimum.\textsuperscript{93}

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.\textsuperscript{94}

26.3 Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.\textsuperscript{95}

26.5 In the interest and well-being of the institutionalized juvenile, the parents or guardians shall have a right of access.\textsuperscript{96}

IIC2. The Riyadh Guidelines and the JDL Rules

Five years after adopting the Beijing Rules, the UN General Assembly adopted two other sets of standards relating to juveniles and unlawful behavior. One of these sets of standards, the Riyadh Guidelines, focuses on \textit{preventing} juvenile delinquency.\textsuperscript{97} The other set, the JDL Rules,\textsuperscript{98} focuses on \textit{dealing with} juvenile delinquency through various measures by which a juvenile is deprived of his or her liberty.

Notwithstanding the focus on \textit{prevention} rather than \textit{treatment}, the Riyadh Guidelines include some provisions that bear on juvenile justice. Those Riyadh Guidelines provisions include the following:

\[ 5. \ldots [P] \text{rogressive delinquency prevention policies}\ldots\text{ should involve}: \ldots (e) \text{Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and} \]

\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} See generally United Nations Guidelines for the Prevention of Juvenile Delinquency, \textit{supra} note 86.
\textsuperscript{98} See generally JDL Rules, \textit{supra} note 87.
tends to disappear spontaneously in most individuals with the transition to adulthood.\(^99\)

¶6. . . . Community-based services and programs should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort;\(^100\)

* * *

¶46. . . . The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.\(^101\)

* * *

¶54. . . . No child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.\(^102\)

Two of these provisions relate to the CRC Article 37(b) requirements, asserting that subjecting juveniles to "formal agencies of social control" (described also in the Guidelines as "institutionalization of young persons") should occur only as a means "of last resort",\(^103\) and that institutionalization should be "for the minimum necessary period".\(^104\) In a more general vein, the Riyadh Guidelines assert that, "the best interests of the young person should be of paramount importance" in matters relating to institutionalization.\(^105\) The Guidelines further offer this overarching explanation of why juveniles should be treated differently in cases of juvenile justice: "youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth

\(^{99}\) Riyadh Guidelines, supra note 86.

\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Id.

\(^{103}\) Id. ¶¶ 6, 46.

\(^{104}\) Id. ¶ 46.

\(^{105}\) Id.
process and tends to disappear spontaneously in most individuals with the transition to adulthood".  

The JDL Rules provide extensive details on the topics covered in CRC Article 37. Here are a few highlights:

106 * * *  
11. For the purposes of the Rules, . . . (b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.  

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.  

28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations . . . .  

29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special program that has been shown to be beneficial for the juveniles concerned.  

30. . . . Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. . . .  

59. . . . Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside
In dealing with juveniles, deprivation of liberty should be a disposition of last resort and should be imposed (if at all) for the minimum necessary period.\textsuperscript{108}

Detention of juveniles before trial shall be avoided to the extent possible and limited to exceptional circumstances; and when preventive detention is nevertheless used, high priority is to be given to processing such cases expeditiously, to ensure the shortest possible duration of detention.\textsuperscript{109}

In all detention facilities, juveniles should be separated from adults, unless they are members of the same family.\textsuperscript{110}

Juveniles should be allowed to communicate with their families and to leave detention facilities for a visit to their home and family.\textsuperscript{111}

What emerges from these three sets of standards — the Beijing Rules, the Riyadh Guidelines, and the JDL Rules — is a remarkably sophisticated body of supplementary material relating to the topics covered in CRC Article 37. One of the sets of standards — the Beijing Rules — predates the CRC by a few years and served as inspiration for some of its provisions.\textsuperscript{112} The other

organizations, to leave detention facilities for a visit to their home and family . . . .

60. Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family . . . .

JDL Rules, supra note 87.

\textsuperscript{108} \textit{Id.} \textsuperscript{1} 2. This same principle appears in the preamble to the UN General Assembly Resolution, by which the JDL Rules were adopted. G.A. Res. 45/113, preamble, U.N.Doc. A/RES/45/113 (Dec. 14, 1990) (noting that the General Assembly “[a]ffirms that the placement of a juvenile in an institution should always be a disposition of last resort and for the minimum necessary period”).

\textsuperscript{109} \textit{Id.} \textsuperscript{1} 17.

\textsuperscript{110} \textit{Id.} \textsuperscript{1} 29.

\textsuperscript{111} \textit{Id.} \textsuperscript{1} 59.

\textsuperscript{112} \textit{See} Detrick, supra 26, at 630 (reporting that the CRC Article 37(b) “last resort” and “shortest appropriate period” requirements are based on the Beijing Rules). For a summary of the interaction of the CRC, the Beijing Rules, the Riyadh Guidelines, and the JDL Rules,
two sets of standards emerged shortly after the CRC and make specific reference to it.\(^{113}\) We view this body of supplementary material — while not directly binding in its own right — as a rich source of guidance in interpreting the legally binding provisions of Article 37.

III. ILLUSTRATIVE COMPARATIVE SURVEY OF FORMAL NATIONAL ADOPTION OF INTERNATIONAL STANDARDS

We have now examined four key requirements found in paragraphs (b) and (c) of CRC Article 37 and in various other international legal instruments: the “last resort”, “shortest appropriate period”, “separation of adults”, and “right of family contact” requirements. Let us now consider how these requirements have been incorporated into the legal systems of various countries around the world. Our aim here is not to undertake a comprehensive assessment, but rather only an illustrative survey of how a few countries have adopted or amended their laws and regulations — sometimes as a direct consequence of having ratified the CRC — to bring their own juvenile justice rules in line with international standards as reflected in this treaty.

IIIA. General Observations

Before examining details in this regard, let us step back for a moment and consider two general matters of context: (i) why issues of juvenile justice have gained such international attention, and (ii) how some countries have incorporated the foundational norms — such as the “best interests of the child” principle — into their legal systems. Thus, it is important to ask this question: Why has the international community concentrated so much effort in the past century, and especially since the 1980s, on the treatment that juvenile offenders receive at the hands of society? After all, weaving the elaborate fabric of standards described above — the CRC, the Beijing Rules, the Riyadh Guidelines, the JDL Rules — represents an enormous commitment of time and energy. Why has this commitment been made? Presumably, this is the answer: Enlightened observers and advocates have found juvenile-justice conditions around the world worrisomely, sometimes tragically, inappropriate.

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In many countries, those inappropriate conditions remain. Even a cursory look at news and reports issued by Amnesty International,\(^{114}\) for example, will reveal accounts of insensitive, incompetent, irresponsible, abusive, exploitative, inhumane, and shameful treatment of young people in conflict with the law, carried out by officials, whose conduct warrants society’s most scathing condemnation, and — more importantly than condemnation — society’s action to improve the situation.

Does a country’s acceptance of the CRC and other international standards automatically bring about such an improvement? The answer is, of course not. Evidence of this fact comes from numerous sources, including Amnesty International and other such entities, as well as the Committee on the Rights of the Child, which was established under the CRC to monitor and facilitate its actual implementation by countries accepting its obligations.\(^{115}\) The Committee has received and commented on a great many reports issued by countries\(^ {116}\) regarding their performance under the CRC.\(^ {117}\) In doing so, the Committee has directed pointed criticisms at numerous countries in various regions of the world — including the Caribbean,\(^ {118}\) North America,\(^ {119}\)

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\(^{115}\) See CRC, supra note 8, art. 43(1) (“For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child”).

\(^{116}\) In adopting the CRC, countries “undertake to submit to the Committee . . . reports on the measures they have adopted which give effect to the rights recognized [in the CRC] and on the progress made on the enjoyment of those rights”, and also to “make their reports widely available to the public in their own countries”. CRC, supra note 8, art. 44.

\(^{117}\) For an indexed set of the Committee’s comments on country reports, with excerpts relating specifically to juvenile justice matters, see http://www.universalhumanrightsindex.org/hrsearch/search.do.


Asia,\textsuperscript{120} and Europe\textsuperscript{121} — for their failure to implement changes required under the CRC.

Yet there are some improvements. In recent years, numerous countries around the world have adopted new measures, mainly in the form of statutory or even constitutional rules, that bring them more in line with foundational norms in the CRC. For example\textsuperscript{122}:

- Canada’s new Youth Criminal Justice Act, enacted in 2003, emphasizes that a sentence imposed on young persons is to “promote his or her rehabilitation and \textit{reintegration into society},”\textsuperscript{123} an aim that is consistent with the terms of CRC Article 40 recognizing a juvenile’s right “to be treated in a manner . . . which takes into account . . . the desirability of promoting the \textit{child’s reintegration and the child’s assuming a constructive role in society}.”\textsuperscript{124}

- Ethiopia’s constitution of 1994 provides that “[i]n all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative


\textsuperscript{122} With the kind permission of the editors of the \textit{Law Review}, we have opted to provide streamlined citations to the laws and constitutions of various countries referred to here and in subsection IIIB below. Were we intent on providing a comprehensive set of references for use in further research, we would want to provide full information reflecting dates of enactment, bill or statute numbers, and codification details. However, that is not our intent; instead, we are offering these various country-specific legal citations for illustrative purposes only. Those purposes are served by providing pertinent website addresses, which appear in the following footnotes. Readers may find additional resources at the Harvard-based collection of “laws of the world on children and adolescents”, \textit{indexed at} http://annualreview.law.harvard.edu/population/children/childrenlaws.htm.


\textsuperscript{124} CRC, \textit{supra} note 8, art. 40(1).
authorities or legislative bodies, the primary consideration shall be *the best interest of the child.*"\(^{125}\)

- Tunisia’s Child Protection Code (1995) also explicitly adopts the “best interests of the child” principle.\(^{126}\)

- The same is true of South Africa’s Constitution.\(^{127}\)

- The “declaration of state policy” in the Philippines’ Juvenile Justice and Welfare Act of 2006 announces that that country “shall protect the best interests of the child through measures that will ensure the observance of international standards”,\(^ {128}\) and also “adopts the provisions of” the Beijing Rules, the Riyadh Guidelines, and the JDL Rules.\(^ {129}\)
In Whose "Best Interests"?

- Spain's law on criminal responsibility of minors, enacted in 2000, goes so far as to incorporate by reference the rights set forth in the CRC.\textsuperscript{130}

IIIB. Initiatives Pertinent to the Four CRC Article 37 Standards

The examples offered above show how some countries have adopted certain foundational principles of the CRC. Now, let us narrow our focus to CRC Article 37 in particular. Below we provide an illustrative survey of how some countries have recently changed their laws to put them more in line with the four specific CRC Article 37 obligations on which this article focuses most directly.

IIIB1. Imprisonment as a Last Resort

Several countries have undertaken initiatives to establish the "last resort" standard in their juvenile justice systems. For example:

- The 2006 legislation in the Philippines dealing with juvenile justice provides that, "[e]very child in conflict with the law shall have . . . the right not to be deprived, unlawfully or arbitrarily of his/her liberty; detention or imprisonment being a disposition of last resort".\textsuperscript{131}

- South Africa's Constitution asserts that, "[e]very child has the right not to be detained except as a measure of last resort".\textsuperscript{132}


\textsuperscript{131} Philippine Juvenile Justice and Welfare Act of 2006 §5(c) (emphasis added). This principle is reaffirmed in the specific context of "[i]nstitutionalization or detention of the child pending trial". Id. § 36.

• Canada’s 2003 juvenile justice law contains a less robust form of the “last resort” standard, in requiring that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons”.\(^{133}\) However, the law goes on to provide that, unless a juvenile has committed a violent crime, or a crime of a prescribed degree of severity, or has violated the terms of a diversion (“non-custodial”) order, “a youth justice court shall not impose a custodial sentence . . . unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives” to such custodial sentence.\(^{134}\)

• In Germany, youth prison sentences are only imposed as a matter of last resort (“ultima ratio”).\(^{135}\)

• Legislation enacted in 2001 in Ireland provides that “[t]he court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child . . .”\(^{136}\)

IIIB2. Imprisonment for the Shortest Appropriate Period

The following initiatives illustrate the fact that some countries have incorporated the “shortest appropriate period” standard into their rules for handling juveniles in conflict with the law:

• Spain’s law on criminal responsibility of minors provides that the detention of a juvenile by the police

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\(^{133}\) Canadian Youth Criminal Justice Act §38(2)(d) (emphasis added).

\(^{134}\) Id. §39(2).


cannot last any longer than strictly necessary, and in any event, not more than 24 hours.\textsuperscript{137}

- Tunisia’s Child Protection Code, after asserting that juvenile offenders should be handled, to the extent possible, outside the formal criminal justice system, then requires that if detention is necessary, it should be of the shortest duration possible.\textsuperscript{138}

- South Africa’s constitution provides that a “child may be detained only for the shortest appropriate period of time”.\textsuperscript{139}

- Pakistan’s Juvenile Justice System Ordinance of 2000 provides that “[w]here a child accused of non-bailable offence is arrested, he shall, without any delay and in no case later than twenty-four hours from such arrest, be produced before the Juvenile Court.”\textsuperscript{140}

- The Philippines Juvenile Justice and Welfare Act of 2006 requires that, “[f]rom the moment a child is taken into custody, the law enforcement officer shall . . . [i]mmEDIATELY but not later than eight (8) hours after apprehension, turn over custody of the child to the Social Welfare and Development Office or other accredited NGOs, and notify the child’s

\textsuperscript{137} Spain 2000 Law, art. 17(4): “La detención de un menor por funcionarios de policía no podrá durar más tiempo del estrictamente necesario para la realización de las averiguaciones tendentes al esclarecimiento de los hechos, y, en todo caso, dentro del plazo máximo de veinticuatro horas, el menor detenido deberá ser puesto en libertad o a disposición del Ministerio Fiscal”.

\textsuperscript{138} Code de la Protection de l’Enfant, art. 13 (1995) (Tunis.): “Les dispositions du présent code visent à trouver les solutions adéquates au phénomène des enfants délinquants avant l’intervention des organes de la justice pénale, en se basant sur les principes humanitaires et d’équité. La priorité est donnée aux moyens préventifs et éducatifs. Il est recommandé d’éviter de recourir tant que possible à la garde à vue, à la détention préventive ainsi qu’aux peines privatives de liberté, et surtout les peines de courte durée”.

\textsuperscript{139} S. Afr. Const. 1996 art. 28(1)(b) (emphasis added).

\textsuperscript{140} Juvenile Justice System Ordinance §10(2) (2000) (Pak.), available at http://www.karachieast.org/decfiles/juvenile.doc. The same rule applies to any child under the age of 15 who is detained for an offence, which is punishable with imprisonment for less than ten years. See id. §10(5).
parents/guardians and Public Attorney’s Office of the child’s apprehension."\textsuperscript{141}

IIIB3. Separation from Adults

Several countries have also undertaken initiatives to establish the “separation from adults” standard in their systems of juvenile justice. For example:

- Ethiopia’s constitution provides that “[j]uvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.”\textsuperscript{142}

- Canada’s 2003 juvenile justice law requires that in the case of pre-trial detention, a juvenile “shall be held separate and apart from any adult who is detained or held in custody unless a youth justice court judge or a justice is satisfied that, having regard to the best interests of the young person, \textit{(a)} the young person cannot, having regard to his or her own safety or the safety of others, be detained in a place of detention for young persons; or \textit{(b)} no place of detention for young persons is available within a reasonable distance.”\textsuperscript{143} A similar “separation from adults” rule applies to prison sentences.\textsuperscript{144}

- South Africa’s constitution requires that a child held in detention have the right to be “kept separately from detained persons over the age of 18 years.”\textsuperscript{145}

\textsuperscript{141} Philippines Juvenile Justice and Welfare Act of 2006 §21(i).
\textsuperscript{142} Constitution of the Federal Democratic Republic of Ethiopia, art. 36(3) (1994) (emphasis added).
\textsuperscript{143} Canadian Youth Criminal Justice Act §30(3) (emphasis added).
\textsuperscript{144} \textit{Id.} §84 (Subject to certain exceptions, “a young person who is committed to custody shall be held separate and apart from any adult who is detained or held in custody”). The fact that exceptions do still exist, however, has drawn criticism from the Committee on the Rights of the Child, which in late 2003 commented that although it welcomed some changes made in Canadian law by the Youth Criminal Justice Act, “the Committee is concerned . . . that keeping juvenile and adult offenders together in detention facilities continues to be legal.” CRC Canada Report, \textit{supra} note 119, ¶ 56.
\textsuperscript{145} S. AFR. CONST. 1996 art. 28(1)(b)(i) (emphasis added).
• Tunisia’s Child Protection Code provides that in cases in which imprisonment is necessary, the juvenile should be kept in facilities separate from adults.\footnote{Code de la Protection de l’Enfant, art. 99 (1995) (Tunis.): “Une condamnation pénale peut être infligée à l’enfant s’il s’avère que sa rééducation est nécessaire, . . . . Dans ce cas, la rééducation se fait dans un établissement spécialisé, et à défaut, dans un pavillon de la prison réservé aux enfants”}.

IIIB4. Right of Family Contact

Additionally, some countries have incorporated the “right of family contact” standard into their rules for handling juveniles in conflict with the law:

• The Philippines Juvenile Justice and Welfare Act of 2006 requires that “[a] child in conflict with the law shall have the right to maintain \textit{contact with his/her family} through correspondence and visits, save in exceptional circumstances.”\footnote{Philippines Juvenile Justice and Welfare Act of 2006 §5(d) (emphasis added).}

• In its Juvenile Penal Code, Spain provides that minors in detention have the right to communicate freely with their parents and other family members.\footnote{Spain 2000 Law, art. 56(2)(h) (enumerating various rights that juveniles have even if imprisoned, including the “[d]erecho a comunicarse libremente con sus padres, representantes legales, familiares u otras personas, y a disfrutar de salidas y permisos, con arreglo a lo dispuesto en esta Ley y sus normas de desarrollo”).}

• Canada’s 2003 juvenile justice law announces as one of its principles that “the measures taken against young persons who commit offences should . . . where appropriate, \textit{involve the parents, the extended family}, the community and social or other agencies in the young person’s rehabilitation and reintegration”.\footnote{Canadian Youth Criminal Justice Act §3(1)(c) (emphasis added).}

In light of current juvenile laws and standards of the USA, to which we shall turn in the next section, the above explanations of how other
countries have adopted progressive international standards on the sentencing of juveniles – particularly those referred to in CRC Article 37 – leads to a telling picture of US failures.

IV. ASSESSMENT OF THE FORMAL REFLECTION OF INTERNATIONAL STANDARDS IN THE USA

To repeat, the USA and Somalia are the only two countries in the world that have not ratified the CRC, leaving this country conspicuously out of step with the international community. Rather than adopting the norms and standards that nearly all of the rest of the world has accepted as being in the best interest of all children, the USA has allowed states to fashion laws that are contrary to the wisdom of the international standards. This result is particularly evident when we group the laws of the several states, including the District of Columbia. A survey of state laws, according to their relationship to the four issues on which we are focusing, illuminates a legal landscape of the USA in conflict with the international legal landscape on juvenile justice issues.

IVA. Structure of Juvenile Justice Law in the USA – Focus on States

The juvenile justice system in the USA consists of the individual state systems. Though there are national offices devoted to juvenile justice issues, the federal government has not established mandatory national standards for the sentencing and confinement of juvenile offenders. The USA promulgated national juvenile justice standards through the Office of Juvenile Justice and Delinquency Prevention, but compliance with the

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150 See supra notes 52-57 and accompanying text.
152 When we refer to the “states”, we are also referring to the District of Columbia.
153 In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP Act), 42 U.S.C. §§ 5601- 5792a, reauthorized in 2002, which established the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Among other things, the duties of the OJJDP include, providing evaluation of federally funded juvenile justice programs, developing national juvenile justice standards, and assisting state and local governments in juvenile crime prevention and intervention programs. The Civil Rights Division – Special Litigation Section, acting under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, is another national office that is involved with juvenile justice issues. The Special Litigation Section has the authority to bring actions for equitable relief against any state or state actor that violates the rights of any institutionalized persons, including juveniles. Neither of these offices promulgates binding standards for the sentencing and/or confinement of juveniles.
regulations is not binding on the states. Rather, a state’s compliance determines its ability to receive certain federal funding for juvenile justice programs and facilities.

Consequently, US juvenile justice law is created through Supreme Court decisions responding to state juvenile court matters. The Supreme Court began turning its attention to juvenile justice matters in the 1960s when, in *Kent v. United States*, the Court held that due process mandates that juveniles waived into adult courts receive a hearing, access to a lawyer, and an articulation on the record of the court’s reasons for the waiver decision. *In re Gault* followed, applying due process rights to juvenile proceedings. Subsequently, in judgments issued in the 1970s, the Supreme Court granted several procedural rights to juveniles, in both juvenile and adult court proceedings: *In re Winship*, applying the proof beyond a reasonable doubt standard to juvenile proceedings; *Breed v. Jones*, holding that it violated double jeopardy to prosecute a child in adult court after he or she had been adjudicated delinquent in juvenile court; and *Fare v. Michael*, deciding that whether a child waives his or her right to the assistance of counsel and to remain silent, must be determined by the totality of the circumstances.

However, what is most telling about the state of national laws and standards of juvenile justice in the USA can be found in cases in which the Supreme Court declined to extend to juveniles certain procedural rights and sanctions found in the adult criminal system. For instance, the Court held that fundamental fairness does not require a jury right for juveniles in the 1971 case, *McKeiver v. Pennsylvania*. Perhaps more relevant to this article is *Schall v. Martin*, in which the Supreme Court found that pretrial detention of juveniles did not violate due process. The most recent and significant juvenile justice Supreme Court decision, however, is *Roper v. Simmons*. Decided in 2005, the Court in *Roper* read the Eighth and Fourteenth

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154 OJJDP monitors state compliance with the JJDPA. The four protections offered juveniles through the JJDPA are: (1) the deinstitutionalization of status offenders; (2) the removal of juveniles from adult jails and lockups; (3) the separation of adult offenders from juveniles; and (4) the reduction of disproportionate minority confinement. See U.S. DEP’T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 1 (2007).

155 See id.

161 403 U.S. 528 (1971).
Amendments to prohibit the imposition of the death penalty for crimes committed by a person before he or she reached the age of 18.\textsuperscript{164} Since this decision, the Supreme Court has been silent on all related juvenile justice issues, including juvenile life without parole, and the four "first cousin" issues we view as areas of most concern. Thus, it is to state law that our inquiry regarding US compliance with international juvenile justice standards must turn.

IVB. Details on Legal Standards on the Four Issues

IVB1. Imprisonment as a Last Resort

As previously explained, CRC Article 37(b) requires that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The 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 . . ."\textsuperscript{165} Though the states vary widely in their approaches to juvenile imprisonment, all states provide for some form of detention of juveniles.\textsuperscript{166} Perhaps most troubling, as far as this "last resort" issue is concerned, is the widespread use of juvenile pretrial detention,\textsuperscript{167} commonly known as preventive detention. This practice allows children to be detained without bail, even before they have been adjudicated delinquent. A closer review of state laws is necessary to reveal whether this "preventive detention" is truly designed as a last resort.

Many state laws indicate that juvenile pretrial detention is prohibited unless certain requirements are met. These laws also require courts to consider the interest of the child and available alternatives to determine whether detention is necessary. For instance, New York law only allows the pretrial detention of juveniles when the court finds that, without detention, the child will not return to court "\textit{and} all available alternatives to detention have been exhausted."\textsuperscript{168} In ordering detention, the New York court must state whether reasonable efforts had been made to avoid removing the

\textsuperscript{164} See id.
\textsuperscript{165} CRC, \textit{supra} note 8, art. 37(b) (emphasis added).
\textsuperscript{167} We use the term "pretrial" loosely, recognizing that not all jurisdictions term their juvenile delinquency proceedings "trials". In some jurisdictions, the terms "hearing", "disposition proceedings", or the like, are used instead. However, when we use "pretrial", we are referring to any time prior to a court's determination of whether a juvenile will be categorized as delinquent.
\textsuperscript{168} N.Y. FAM. CT. ACT § 739(a) (2005) (emphasis added).
juvenile from his or her home. Similarly, in Alabama, the law requires arrested juveniles to be returned to their homes, unless they have no suitable guardian, release would pose a threat to others or to themselves, or they have a history of not returning to court. Likewise, Delaware law calls for alternatives to detention to be considered before a child is detained. Even when those alternatives are not present, a juvenile cannot be detained in Delaware until certain requirements, such as dangerousness and failure to comply with court orders, are determined. The District of Columbia is almost identical in its juvenile detention provisions. Additionally, states such as Idaho specifically state that, “the prosecuting attorney may utilize the diversion process and refer the case directly to the county probation officer or a community based-diversion program for informal probation and counseling.” Therefore, at least in the case of some states, it seems as though the imprisonment of juveniles is provided for in “last resort” terms.

Several states also include the welfare of the community, along with the best interests of the child, in making detention determinations. Iowa law clearly provides that the juvenile statutes are to be construed to prefer keeping children in their homes. However, the Iowa Code specifically requires that such decision shall be made in a manner “that will best serve the child’s welfare” and the “best interest of the state.” The Connecticut General Statutes allow a juvenile to be held prior to a hearing with no specific requirements other than that a detention hearing must be held within one day of detention. However, Connecticut law also permits that detention to continue only when there is probable cause to believe that the child has committed the alleged acts, and one of the following requirements is met:

1. a strong probability that the child will run away prior to court hearing or disposition;

2. a strong probability that the child will commit or attempt to commit other offenses injurious to him or to the community before court disposition;

169 See id. § 739(c)(ii).
172 See id.
176 Id.
177 See CONN. GENN. STAT. § 46b-133(d) (2007).
(3) probable cause to believe that the child's continued residence in his home pending disposition will not safeguard the best interests of the child or the community because of the serious and dangerous nature of the act or acts he is alleged to have committed;

(4) a need to hold the child for another jurisdiction; or

(5) a need to hold the child to assure his appearance before the court, in view of his previous failure to respond to the court process.\(^{178}\)

Therefore, Connecticut law requires a consideration of the child's risk of absconding, the child's probability of guilt, and the best interests of the child and the community. Yet, under this law, such determination comes after the child can be held for one day without any stated reasons. Thus, these "welfare of the community" states may signify a move away from using imprisonment as a last resort guided by the best interests of the child, and toward balancing the particular community's desire to see certain child offenders locked up. However, even these laws appear to state a preference against detention.

Even state laws that do not emphasize that a court should attempt to keep a child in the home are still written in a way that would appear to be construed against preventive detention. In Texas, a juvenile must be released prior to adjudication, unless the court finds that the child will leave or be removed from the jurisdiction, may be dangerous to him or herself, or has previously been adjudicated delinquent or criminal.\(^{179}\) Florida law has similar detention requirements,\(^{180}\) and states that a child may not be placed into detention merely:

(a) to allow a parent to avoid his or her legal responsibility;

(b) to permit more convenient administrative access to the child;

(c) to facilitate further interrogation or investigation; or

\(^{178}\) Id. (emphasis added).

\(^{179}\) See TEX. FAM. CODE ANN. §§ 54.02(o)(1)-(3) (Vernon 2002).

\(^{180}\) See FLA. STAT. ANN. § 985.24(1) (West 2007).
(d) due to a lack of more appropriate facilities.\textsuperscript{181}

Though both Texas and Florida allow for preventative detention without stressing that a child should be imprisoned as a last resort, these state laws do indicate that a juvenile should not be detained without the court’s weighing of reasons for doing so.

Some state laws, though, seem to take neither the best interests of the child nor the possibility of alternatives to imprisonment into consideration at all. Hawaii’s juvenile detention primarily considers the welfare of the community, rather than the best interests of the child, in determining whether detention is necessary. Specifically, HRS § 571-31.1 states:

(c) In determining \textit{whether the immediate welfare or the protection of the community requires a minor's detention}, an officer or other person may take into consideration the following, among other pertinent factors:

1. The severity of the violation or violations which the child is reasonably believed to have committed;
2. The frequency with which the child is reasonably believed to have committed such or other violations;
3. The child's age, character, physical, and mental health;
4. The interpersonal relationships between the child, the family, and the community; and
5. Any previous history of referrals to the court.\textsuperscript{182}

Though Hawaii courts are directed to take a child’s “age, character, physical, and mental health” into consideration, in determining whether detention is appropriate, this inquiry is framed within the larger concern for the community’s welfare. Not only is there no mention of the juvenile’s best interest, there is also lack of reference to the consideration of detention alternatives. Notably, Hawaii’s law, unlike the laws of several other states, is

\textsuperscript{181} \textit{Id.} § 985.24(2).
not written to say that detention shall not be imposed unless certain conditions are met.\footnote{Instead, section 571-31.1 defines the term “immediate welfare” as meaning:

(1) The minor is in physical, emotional, or psychological danger, or may be prior to the court's disposition;
(2) No parent or other responsible adult known to the decision-maker is willing and able to provide the type and degree of supervision necessary to protect the minor from that danger;
(3) No other secure facility is appropriate and available.

\textit{Id.} § 571-31.1.}

Kentucky also takes an approach that does not appear to disfavor detention on its face. The pertinent Kentucky statute simply states that both juvenile status offenders and any child accused of committing a public offense “may be detained” for a certain period of time.\footnote{\textit{See KY. REV. STAT. ANN.} § 610.020(58) (LexisNexis 2008). “Status offenders” are those juveniles who commit acts, which if committed by an adult, would not be a crime. \textit{Id.} Status offenses usually include acts such as “skipping school, running away, breaking curfew and possession or use of alcohol.” \textit{Building Blocks for Youth, JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT FACT SHEET, available at http://www.buildingblocksforyouth.org/issues/jjdpa/factsheet.html} (last visited Mar. 26, 2008).} When a detention hearing is held, Kentucky law requires the court to consider several enumerated factors, such as the child’s probable guilt, the seriousness of the offense, and the child’s risk of future dangerousness.\footnote{\textit{Id.} § 610.280(1).} Nowhere on this list of considerations is any reference to detention alternatives, nor even to the best interests of the child. Apparently, while some states present preventive detention as a measure to be employed only if necessary, others allow the more liberal use of detaining children in the first instance.

IVB2. Imprisonment for the Shortest Appropriate Period

The essence of the juvenile court idea, and of the juvenile court movement, is the recognition of the obligation of the great mother state to her neglected and erring children, and her obligation to deal with them as children, and wards, rather than to class them as criminals and drive them by harsh measures into the ranks of vice and crime.\footnote{Hastings H. Hart, \textit{Distinctive Features of the Juvenile Court}, 36 ANNALS AMER. ACAD. POL. & SOC. SCI. 57 (1910).} Hastings Hart used these words in 1910 to describe the Chicago Juvenile Court movement. In 1899, Illinois established the country’s first juvenile court, and instituted it with a rehabilitative, rather than a punitive,
purpose. This model and purpose was rapidly duplicated throughout the country, placing the juvenile justice system in stark contrast to adult criminal courts in the USA. By 1925, forty-six states, the District of Columbia, and three territories had established similar juvenile courts.

Despite this nurturing agenda at the onset, it has become easier and easier for juveniles in the USA to be waived or transferred into the adult criminal justice system. With this transfer comes the imposition of adult sentences, fashioned to be punitive in length, rather than rehabilitative. A counterpart to CRC Article 37(b)'s requirement that juvenile imprisonment be imposed as a last resort is the directive that any imprisonment imposed be "for the shortest appropriate period of time." An examination of laws on waiver to adult court reveal that the shortest appropriate period of time is rarely the driving force behind sentencing juveniles in the USA.

Several state laws make it easy for juveniles to be transferred to and sentenced in the criminal court. Under California law, it is only required that a juvenile be characterized as falling outside the definition of "a fit and proper subject to be dealt with under the juvenile court law." In New Mexico, a court has the discretion to impose either an adult or a juvenile sentence on a child. Similar to California law, an adult sentence can be invoked in New Mexico if the court finds that "the child is not amenable to treatment of rehabilitation as a child in available facilities." The court makes this transfer determination by considering factors, such as the seriousness of the offense, whether injury resulted to any victims, "the sophistication and maturity of the child," and the likelihood of rehabilitating

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187 The USA’s first juvenile court, established in Illinois, was created pursuant to The Juvenile Court Act of 1899. See 1899 Ill. Laws 131-37.
188 See Dr. Frederick Wines, *Discussion, in Proceedings of the Illinois Conference of Charities*, 64 (1898) ("We make criminals out of children who are not criminals by treating them as if they were criminals. That ought to be stopped. What we should have ... is an entirely separate system of courts for children ..."); see also Timothy Hurley, *An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children*, in *Origins of the Illinois Juvenile Court Law* 26-39 (1907) ("[T]he care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents ...")
189 See *Building Blocks for Youth, The Juvenile Court: One Hundred Years in the Making*
190 CRC, *supra* note 8, art. 37(b) (emphasis added).
191 CAL. WELF. & INST. CODE § 707.1(a) (West 2007).
192 N.M. ST. ANN. § 32A-2-20(A) (West 2008).
193 *Id.* § 32A-2-20(B)(1).
the child.\textsuperscript{194} Further, there is a rebuttable presumption that a juvenile should be treated as an adult if he or she has previously been sentenced as an adult.\textsuperscript{195} Neither California nor New Mexico statutes specifically state a preference for the shortest appropriate imprisonment sentence for juveniles. In fact, New Mexico law merely states that if an adult sentence is imposed on a juvenile, “the court \textit{may} sentence the child to less than, but shall not exceed, the mandatory adult sentence.”\textsuperscript{196}

Michigan takes a slightly different approach by introducing the best interests of the child into the waiver determination. In Michigan, a juvenile court may try a juvenile as an adult if it determines that such proceedings would be in “the best interests of the juvenile and the public would be served”.\textsuperscript{197} In making this decision, a court can consider factors such as the seriousness of the offense, the juvenile’s prior record, and the availability of effective programs in the juvenile justice system.\textsuperscript{198} However, it is clear under Michigan law that a court should give “greater weight to the seriousness of the alleged offense and the juvenile's prior delinquency record than to the other factors.”\textsuperscript{199} Once convicted, a Michigan court can impose the same sentence on the juvenile that would be imposed on an adult, but in making this determination, the court need only consider the best interests of the public.\textsuperscript{200} Again, in deciding an appropriate sentence, Michigan law directs a court to give “greater weight to the seriousness of the offense and the juvenile's prior record”\textsuperscript{201} – essentially, all of these states allow for adult punishment for juveniles so long as the child cannot be dealt with through the juvenile system, without any special provision that the child be treated less severely than would an adult.

In certain states, a juvenile cannot be treated as an adult until he or she has reached a certain age, and/or committed a specific offense. For instance, in Minnesota, a juvenile court can certify a child’s case to proceed under the laws governing adult criminal violations if the child is at least 14 years old and has been charged with an offense that would constitute a felony, if committed by an adult.\textsuperscript{202}

\footnotesize{\textsuperscript{194} Id. § 32A-2-20(C).
\textsuperscript{195} See id. § 32A-2-20(D).
\textsuperscript{196} Id. § 32A-2-20(E) (emphasis added).
\textsuperscript{198} See id. §§ 712A.2d(2)(a)-(f).
\textsuperscript{199} Id. § 712A.2d(2).
\textsuperscript{200} See id. § 712A.18(8)(m).
\textsuperscript{201} Id. § 712A.18(8)(m).
\textsuperscript{202} See Minn. Stat. § 260B.125, Subdiv. 1 (2007).}
time of the offense, then certification to adult criminal court is presumed.\textsuperscript{203} Similarly, the laws of both Idaho and Texas provide for juvenile transfer to criminal court when the child has committed certain offenses as a 14-year-old.\textsuperscript{204} Texas law provides the same provision for 15-year-olds.\textsuperscript{205} Further, Idaho law provides for juveniles of any age to be transferred to criminal court if the child is alleged to have committed certain serious and violent offenses.\textsuperscript{206}

The most extreme state laws, though, provide for the mandatory treatment of juveniles as adults. These laws also come in various forms. For example, Texas law, with a few procedural exceptions, mandates the transfer of a juvenile \textit{of any age} to adult criminal court when the child is accused of committing a felony, and has previously been transferred to criminal court.\textsuperscript{207} Oregon’s Measure 11 laws also impose mandatory transfer to adult courts on juveniles who are charged with certain felony offenses.\textsuperscript{208} However, while Measure 11 only applies the mandatory transfer to 15, 16, and 17-year-olds, it has no requirement that the juvenile was transferred to adult court on a prior occasion. Instead, the sole qualification is that the child is accused of committing first-degree arson, child pornography, compelling prostitution, or aggravated vehicular homicide.\textsuperscript{209} Further, the Oregon Measure 11 provides presumptive sentences for these offenses, even for juvenile offenders, ranging from 70 months of imprisonment for compelling prostitution, to 240 months imprisonment for aggravated vehicular homicide.\textsuperscript{210} These mandatory adult prosecution provisions provide no room for a sentencer to focus on more rehabilitative treatment, and they certainly do not stress any

\textsuperscript{203} \textit{See id.} § 260B.125, Subdiv. 3 (2007) (This provision applies where the offense alleged would result in a presumptive commitment to prison under the Minnesota Sentencing Guidelines, or where the offense was a felony committed with a firearm).

\textsuperscript{204} A child of 14 years of age or older at the time he is alleged to have committed the offense can be waived into adult court if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted. \textit{See} TEX. FAM. CODE ANN. § 54.02(a)(1)(A) (Vernon 2007); \textit{see also} IDAHO CODE ANN. § 20-508(1)(b) (2007).

\textsuperscript{205} A child of 15 years of age or older at the time of the alleged offense can be treated as an adult if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted. \textit{See} TEX. FAM. CODE ANN. § 54.02(B) (Vernon 2007).

\textsuperscript{206} A juvenile of any age can be transferred to criminal court if the alleged offense is murder, robbery, rape (other than statutory), or arson, among other offenses. \textit{See} IDAHO CODE ANN. § 20-509 (2007).

\textsuperscript{207} \textit{See} TEX. FAM. CODE ANN. § 54.02(m) (Vernon 2007).

\textsuperscript{208} \textit{See} OR. REV. STAT. § 137.700 (2005).

\textsuperscript{209} \textit{See id.} § 137.7(1)(a).

\textsuperscript{210} \textit{See id.} §§ 137.7(4)(b)-(c).
preference for the shortest appropriate sentence. Instead, these laws focus solely on the offense committed.

However, this is not to say that juveniles only face offense-based sentences when they are transferred to criminal court. Some states have imposed mandatory sentences for children who are sentenced in juvenile court. This is the case in Colorado; when a juvenile classified as an aggravated juvenile offender commits a class 2 felony, the juvenile court must sentence him to imprisonment for 3 to 5 years.\textsuperscript{211} The range increases to a mandatory 3 to 7 years if the aggravated juvenile offender has committed a class 1 felony.\textsuperscript{212} This mandate contrasts other Colorado juvenile sentencing provisions that require mandatory sentences of at least one year out of the home for third time juvenile delinquents, “unless the court finds that an alternative sentence or a commitment of less than one year out of the home would be more appropriate.”\textsuperscript{213} Apparently, the Colorado legislature takes the position that, at some point, the offense trumps the offender, and sentencing juveniles becomes offense-focused rather than tailored to the needs of the child offender.

IVB3. Separation from Adults

As previously discussed, CRC Article 37(c) states that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”.\textsuperscript{214} While the USA has not ratified the CRC, it has ratified the International Covenant on Civil and Political Rights (“ICCPR”),\textsuperscript{215} which requires that youth offenders be imprisoned separate from adults.\textsuperscript{216} This is a hollow commitment, however, because the USA ratified the ICCPR with the reservation that, “in exceptional circumstances,” it can treat juveniles as adults.\textsuperscript{217}

Further, the Justice Juvenile and Delinquency Prevention Act (“JJDP Act”) directs states to separate juveniles from sustained “sight and sound” contact with adult inmates.\textsuperscript{218} However, even the JJDP Act gives the

\textsuperscript{212} See id. § 19-2-601(5)(a)(I)(C).
\textsuperscript{213} Id. § 19-2-908(1)(a).
\textsuperscript{214} CRC, supra note 8, art. 37(c).
\textsuperscript{215} See supra notes 38, 52-57.
\textsuperscript{216} ICCPR, supra note 7, art. 10(2(b).
\textsuperscript{217} See ICCPR Reservation Report, supra note 12, ¶ (5).
exception that juveniles transferred to the jurisdiction of an adult criminal court do not have to be kept separate from the adult inmate population. In any case, a state need only comply with the JJDP Act if the state wishes to receive federal grant money to support the states juvenile justice system. Otherwise, there is no requirement for state compliance. Therefore, not only do the state courts in the USA waive juveniles into criminal court, to be tried and sentenced as adults, but the state laws and national standards also allow juveniles to be imprisoned with adults in certain circumstances.

Though unusual, there are states, such as Connecticut, with laws that completely prohibit confining juveniles in adult facilities. However, the more usual case is for states to allow the imprisonment of children in adult facilities, so long as the juvenile is separated from adults. Kansas law generally provides that “[n]o juvenile shall be detained or placed in any jail”, with the term “jail” being defined as an adult lockup or a facility in the same building as an adult lockup. However, Kansas does allow a juvenile to be detained temporarily in an adult jail for processing, so long as the child is held outside of the sight and sound of adult prisoners. With this practice, the child cannot remain in the adult facility for more than six hours, or stay overnight. Arkansas, Idaho, Louisiana, and Maine statutes are nearly identical in substance. California has a similar provision that prohibits any juvenile sentenced to an adult facility from coming into contact with adult inmates. In Florida, the law allows for only “haphazard or accidental” contact between juveniles and adult inmates. Though Texas law gives more leeway by prohibiting contact between juvenile and adult inmates, the separation need only be maintained “to the extent practicable”.

Other states use age as the determining factor for when a juvenile can be confined with adult inmates. In Michigan, a child cannot be imprisoned

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220 See CONN. GENN. STAT. § 46b-133(d) (2007) (“In no case shall a child be confined in a community correctional center or lockup, or in any place where adults are or may be confined, except in the case of a nursing infant; nor shall any child at any time be held in solitary confinement.”).
221 KAN. STAT. ANN. § 38-2332(a) (2006).
222 See id. § 38-2302 (h).
223 See id. § 38-2332(b).
224 See id.
226 See CAL. WELF. & INST. CODE § 208(a) (West 2007).
227 See FLA. STAT. ANN. § 985.265(b) (West 2007).
228 See TEX. FAM. CODE ANN. § 54.02 (Vernon 2002).
with adults unless the child is at least 17 years old.\textsuperscript{229} The same is true for Massachusetts.\textsuperscript{230} New York law sets the age for confining a child in the general adult population to 16 years old.\textsuperscript{231} However, New York law also allows for juveniles under the age of 16 to be imprisoned with adults on a case-by-cases basis, with the approval of the state division for youth.\textsuperscript{232} In sum, all of these approaches allow persons under the age of 18 to be imprisoned with adults in contravention of international standards.

IVB4. Right of Family Contact

The last of the four issues is the CRC Article 37(c) requirement that a confined juvenile "\textit{shall have the right to maintain contact with his or her family} through correspondence and visits, save in exceptional circumstances."\textsuperscript{233} While there may not be any state laws that specifically prohibit confined juveniles from having contact with their families, many state detention rules are silent on any substantive right to family contact. However, we discovered some state laws that at least suggest a juvenile should be able to visit with family. The laws of the District of Columbia provide for juveniles to be permitted weekly family visits, unless a judge determines that such visits would be detrimental to the child.\textsuperscript{234} The visitation requirement is at least two hours each week in Idaho.\textsuperscript{235} Though these state laws do not specify how such visitation rights are to be enforced, it is encouraging to see that these provisions exist.

Other states, though, are much less specific in their juvenile visitation requirements. Ohio's Allen County Common Pleas Juvenile Rules merely require that, upon the detention of a juvenile, the admissions officer shall advise the child's guardian of the time they may visit the child.\textsuperscript{236} Ohio law contains nothing more on the required frequency of such visits. In Mississippi, the law gives minimum standards for juvenile detention.\textsuperscript{237} As far as visitation is concerned, Mississippi law states that juvenile facilities shall:

\textsuperscript{232} See id.
\textsuperscript{233} CRC, \textit{supra} note 8, art. 37(c).
\textsuperscript{234} See D.C. Code § 16-2310(d) (1981).
\textsuperscript{236} See OH. ALLEN COUNTY R. JUV. P. 14.01(B) (2008).
. . . provide sufficient space for a visiting room, and the facility shall encourage juveniles to maintain ties with families through visitation, and the detainees shall be allowed the opportunity to visit with the social workers, counselors and lawyers involved in the juvenile's care . . . 238 Therefore, although Mississippi law encourages juveniles to have contact with their families, the law does not clearly give juveniles the right to maintain contact with their families. The same is true for Tennessee, which vaguely states that the purpose of its juvenile correction system is to "preserve the relationship between the child and the family." 239 Unlike Mississippi and Tennessee, the law in Missouri does specifically give juveniles the right to communicate with their guardians, attorneys, and significant others. 240 However, Missouri detention standards only require that facilities make provisions for such visits, and do not specifically require regular visits. 241 Overall, the states do not appear to make family contact a priority in the confinement of juveniles.

IVC. Moving from Details to General Assessment: Areas of Match and Mismatch Between US Law and International Standards

A brief overview of state laws suggests that US juvenile law has several matches with international standards. Out of the four issues examined, the USA seems most compatible with international standards on the imprisonment of juveniles as a last resort, the separation of juveniles from adults, and the right to family contact. As demonstrated, US rules pertinent to these three issues do not explicitly conflict with international standards.

For instance, no state law prohibits courts from considering detention alternatives. In fact, as discussed above, some state laws require alternative considerations before detaining a child; all other states impose some sort of restrictions on the pretrial detention of children. The same is true for US conformity with the "separation from adults" standard reflected in the CRC. Due to the JJDP Act, calling for the separation of juveniles from adult inmates, several states statutes now prohibit varying degrees of such contact. Both the CRC's "last resort" and "separation from adult" requirements are designed to lessen potential negative influences associated with imprisonment. Many state laws on juvenile detention also reflect this

238 Id. § 43-21-321(6)(v) (emphasis added).
241 Id. 111.03, App. A , 8.2.
concern, by constraining the uses of juvenile detention and generally disallowing the mingling of adult and juvenile offenders. Likewise, while several states are silent on the exact requirements for family contact, few, if any, restrict family contact explicitly and completely. This leaves US methods of imprisoning juveniles as, perhaps, most at odds with the international standard of imprisoning children for the shortest appropriate period. The treatment of children as adults, including mandatory sentencing, conflicts with a system that finds it in the best interest of children not to subject them to long, punitive sentences.

Thus, a cursory survey seems to suggest that US rules relating to three out of the four CRC Article 37 "first cousin" issues are consistent with international standards. However, a closer review of specific state laws reveals that, when "the best interests of the child" are considered, US juvenile standards reflect more discord than congruence with international standards. It is to this closer review that we now turn.

Every state in the USA, including the District of Columbia, allows for pretrial confinement, or preventive detention, of juveniles.\(^{242}\) We previously recognized that many states only allow the detention of juveniles after considering alternatives or meeting some other requirement. Ultimately, though, the US approach on this issue is incompatible with the "best interests of the child" purpose of the CRC. Juvenile justice laws in the USA allow for considerations other than the best interests of the child to come into the decision of whether to detain a juvenile. Even the Supreme Court upheld the use of preventive detention, reasoning that it served a legitimate state objective "of protecting both the juvenile and society from the hazards of pretrial crime".\(^{243}\) As previously discussed, some states introduce the welfare of the community into the evaluation. Others fail to stress the importance of first considering appropriate alternate placements. These errant approaches may, and often do, lead to imprisonment as a first resort.

More than 300,000 youth are detained each year prior to adjudication or trial.\(^{244}\) Of those juveniles detained, studies show that less than one-third are charged with violent acts.\(^{245}\) As a whole, more children are detained for status offenses, related court order violations and failures to comply with

\(^{242}\) See Tinkler, supra note 166, at 497.
\(^{245}\) See ANNIE E. CASEY FOUNDATION, PATHWAYS TO JUVENILE DETENTION REFORM: PLANNING FOR JUVENILE DETENTION REFORMS, A STRUCTURED APPROACH 5 (1999) (results from a one-day snapshot of juvenile detention taken in 1995).
conditions of supervision, than for violent delinquent behavior. According to a national report released by the American Bar Association Juvenile Justice Center, Juvenile Law Center, and Youth Law Center, "[j]uveniles who are securely detained prior to adjudication — rather than released to parents or placed in community-based programs — are much more likely to be incarcerated at disposition than youth who have not been detained, regardless of the charges against them." State studies also reveal that children who are subject to preventive detention are more likely to be imprisoned upon adjudication. There are several reasons for this result, ranging from decreased access to counsel to lack of opportunity to demonstrate positive behavior in a home environment. This consequence of preventive detention makes the US practice of detaining juveniles before adjudication even more ominous. Because state laws allow for the pretrial detention of children, more children are likely to be imprisoned as a final disposition. Thus, rather than being a last resort, juvenile imprisonment in the USA has become a likely result.

A similar issue is that of imprisonment for the shortest appropriate period. With imprisonment as a likely result for adjudicated juveniles in the USA, the length of imprisonment imposed becomes even more far-reaching. The ease with which courts can sentence children as adults indicates a shift toward punitive, offense-based sentencing of juveniles. The National Juvenile Defender Center reported that between 1992 and 1995, forty states passed laws making it easier to try juveniles as adults, and eighteen states expanded their transfer laws between 1998 and 2002. Estimates also reveal that each year, approximately 20,000 juveniles are automatically transferred to the criminal court, mostly because their age or offense directly defines them as adults pursuant to state laws. As a result, we continue to see juveniles serving lengthy sentences, even outside of the LWOP context.

246 See id.
248 See NAT’L JUVENILE DEFENDER CTR., supra note 244, at 1 (citing MID-ATLANTIC JUVENILE DEFENDER CENTER, VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 2 (2002); TEXAS APPLESEED, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 13 (2000)).
249 See id. at 4.
In 1999, the Tenth Circuit upheld an Oklahoma sentence totaling 100 years for home burglary, forcible sodomy, rape, and robbery with a dangerous weapon committed by a defendant at age 13.252 A New Mexico court, in 2002, allowed the imposition of a sentence of 91 and one-half years for sexual and violent felonies committed by a 15-year-old.253 In both cases, the children were sentenced as adults.254 In the New Mexico case, the court expressed the following sentiments:

The Legislature has told the Courts that, while most of the time juveniles should be looked upon with forgiveness and with their best interests foremost in mind, there will be those times and those perpetrators who do not fit the mold: those for whom the offenses are not youthful pranks, or even misguided excess that can be treated and put in the past. The Legislature has said that, sometimes, the Court will encounter a juvenile whose crimes, and whose history and circumstances, and whose prospects for rehabilitation are so threatening to society, that the juvenile philosophy of patient correction and nurturing simply does not apply.255

Once in the adult system, juveniles are no longer seen as children, making any consideration of the “best interests of the child” wholly inapplicable. This approach is clearly a violation of the CRC’s requirement that imprisonment of juveniles, if employed at all, be for the shortest appropriate period.

The US stance on keeping juvenile offenders separate from adult inmates is a less clear violation of international standards, but is incongruent, nonetheless. According to the Campaign for Youth Justice, there are about 7500 juveniles held in adult jails on any given day.256 As explained previously, many states require “sight and sound” separation of juveniles and adults. However, some states allow juveniles to be incarcerated with adults in certain circumstances. While it is true that the CRC does not require separation when “it is considered in the [juvenile’s] best interest not to do so”,257 states find their basis for justification through less subjective means. As already discussed, the age of the child, rather than the welfare of the child, is the basis that determines whether a child can be imprisoned with

252 See Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999).
254 See Hawkins, 200 F. 3d at 1280; Ira, 43 P.3d at 364.
255 Ira, 43 P.3d at 364.
256 See Cohen, supra note 251.
257 CRC, supra note 8, art. 37(c).
adults in some states. In other states, even though separation is required, children can still be incarcerated in adult facilities. Both approaches are contrary to the best interests of the child. Studies find that children incarcerated in adult facilities are 7.7 times more likely to commit suicide, five times more likely to be sexually assaulted, twice as likely to be assaulted by guards, and 50 percent more likely to be attacked with a weapon than children incarcerated in juvenile institutions.258 Thus, allowing children to be incarcerated in adult facilities, and even co-mingling with adult inmates, on such a widespread scale does not follow the CRC’s narrow mandate; only when it is in the best interests of the specific child.

Finally, US laws are not in accord with the CRC directive that juveniles have a right to maintain contact with his or her family. The CRC only limits this right in “exceptional circumstances.”259 While state laws do not appear to prohibit family contact, with few exceptions, they are largely silent on the parameters of such contact. Only a few states specifically set forth the number of family visits a juvenile must receive. Other states vaguely encourage or allow family visits. While these US standards do not clearly violate international juvenile justice standards, it is clear the USA does not endorse the importance of the right of imprisoned children to have regular contact with their families (absent exceptional circumstances rendering such contact against the best interests of the child). Therefore, close inspection of state laws uncovers true discord between US laws and widely supported international standards.

V. CONCLUDING OBSERVATIONS AND NEXT STEPS

In the USA, juvenile justice once traveled a road very different from that of the adult criminal system. Today, however, the two systems resemble each other in many unsettling respects. The US government has had the opportunity to follow the rest of the world in adopting international juvenile justice standards that recognize “the best interests of the child” as their guiding principle. However, as discussed in this article, the USA has failed to travel that course directly. Instead, the USA has given states room to meander along various routes on several critical juvenile justice issues.

259 CRC, supra note 8, art. 37(c).
In a recent and notable exception, the Supreme Court closed off at least one errant road to states when, in *Roper v. Simmons*, it prohibited states from continuing to execute persons who were under the age of 18 when they committed a crime. Since this 2005 ruling, it has been said that “[t]he challenge of Roper is to integrate international human rights law and the practice of other nations with our own constitution and traditions.” Now, with the US position on the juvenile death penalty falling in line with international standards, the time is ripe for the USA to comply further with international legal norms. We already see a call for such compliance in the juvenile LWOP context. However, we submit that the four “first cousin” issues we have examined above will be the next stops the US juvenile justice system approaches on the road to reform.

What we have found in our survey of US rules on those four issues is not encouraging. As these rules currently stand, it is clear that the USA does not follow the “best interests of the child” principle on which the international standards are based. That is, in studying the states’ varied approaches to juvenile imprisonment, we do not find that such imprisonment is employed as a last resort, for the shortest period appropriate, separate from adults, and with family contact. Instead, several states depart from most or all of those four standards, by placing the welfare of the community, the seriousness of a child’s offense, or the child’s record at the forefront of juvenile incarceration decisions.

Perhaps some observers would be unbothered by these findings. Perhaps they would argue that unlike some of the other countries, whose rules we highlighted above, the USA is more experienced in formalized juvenile justice issues, and thus, takes a more seasoned approach that takes into account multiple competing considerations — i.e., considerations beyond the best interests of the child. Alternatively, those observers might also point out that a country’s acceptance of the CRC and other international rules does not automatically bring about systematic improvements in that country’s juvenile justice system, so that even if the international community is correct in giving primacy to the best interests of the child, it is of little real consequence whether a country does or does not adopt international legal instruments announcing that principle.

While such observations are not totally without merit, we find them ultimately unpersuasive. Yes, it is true that the USA has long and valuable experience in grappling with juvenile justice issues — but not more than the rest of the world combined. It is also true that formal adoption of rules will

261 *Id.* at 578.
262 Dohrn, *supra* note 26, at 41.
matter little without implementation, because performance counts more than promise. Still, there can be immense value, substantive and symbolic, in the process of discussing, developing, and then officially declaring a code of guiding principles for a country’s juvenile justice system. Without engaging in such a process, it will be nearly impossible to implement or to identify those principles that are important to the society in handling juvenile justice issues in an enlightened manner. We are of the opinion that making rules in the USA more consistent with the four CRC Article 37 standards discussed above — underscored by an adoption of the “best interests of the child” principle as a central legal criterion — would simultaneously serve the best interests of this country and the world.

Of course, we are not alone in this respect. Our views favoring the “best interests of the child” principle find support, not only in the international community, but also among many people in this country as well. The MacArthur Foundation and the Center for Children’s Law and Policy recently released results of a national poll indicating widespread public support for rehabilitating youths rather than incarcerating them.263 Some states have responded by reducing (though not eliminating completely) the punitive nature of their juvenile justice laws. For instance, in 2006, Colorado replaced juvenile life without parole with the possibility of parole after 40 years.264 In August 2007, Colorado Governor Bill Ritter issued

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263 See Cohen, supra note 251.
264 See COLO. REV. STAT. § 17-22.5-104 (2006).
SECTION 1. Legislative declaration.
(1) The general assembly hereby finds that:

(a) Under the existing sentencing laws, a juvenile who is convicted as an adult of a class 1 felony is automatically sentenced to life imprisonment without the possibility of parole, which is the same sentence that applies to an adult who is convicted of a class 1 felony and who does not receive a death sentence;

(b) Persons younger than eighteen years of age may commit crimes that are sufficiently serious, violent, or heinous to warrant punishment in the adult correctional system, and it is in the interest of public safety to ensure that a juvenile who commits an adult-level crime receives an appropriately severe degree of punishment in correlation to the level of crime committed;

(c) Because of their level of physical and psychological development, juveniles who are convicted as adults may, with appropriate counseling, treatment services, and education, be rehabilitated to a greater extent than may be possible for adults whose physical and psychological development is more complete when they commit the crimes that result in incarceration;

(d) A sentence to lifetime imprisonment without the possibility of parole for a juvenile who is convicted as an adult of a class 1 felony condemns the juvenile to a lifetime of incarceration without hope
Executive Order B-009-07, establishing a Juvenile Clemency Advisory Board to review clemency and commutation requests by juveniles who had been tried as adults and sentenced to state prison.265 In light of these shifts, the USA should follow the lead of numerous other countries in specifically incorporating into their national laws the four CRC Article 37 international standards that we have discussed. In doing so, and in embracing the “best interests of the child” as the benchmark for all juvenile justice decisions in the USA, this country will have joined the world in a journey toward protecting the rights of all humans, including our children.


and, in most cases, without education or rehabilitation services, and results in the irredeemable loss of a person to society.

(2) The general assembly finds, therefore, that it is not in the best interests of the state to condemn juveniles who commit class 1 felony crimes to a lifetime of incarceration without the possibility of parole. Further, the general assembly finds that it is in the interest of justice to recognize the rehabilitation potential of juveniles who are convicted as adults of class 1 felonies by providing that they are eligible for parole after serving forty calendar years of their sentences.