

# DEPRIVATION OF LIBERTY AS A LAST RESORT: UNDERSTANDING THE CHILDREN’S RIGHTS LAW MANDATE FOR YOUTH JUSTICE

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*International law is consistent in affirming that the deprivation of liberty should be a “last resort” for children. This norm is affirmed by the extensive evidence that detention is detrimental to the wellbeing and healthy development of young people. Yet while it is broadly understood that detention of children and youth should be uncommon, there is much less clarity around what the “last resort” mandate means in practice—that is, under what circumstances is detention permissible and what, if anything, must states do prior to considering the detention of a young person. Drawing on scholarship on criminal justice and human rights, the work of international treaty bodies, and other human rights sources, this Article explores the meaning of “last resort” under international law, focusing in particular on the use of arrest, detention, and imprisonment in the youth justice context. The Article then proposes a framework for operationalizing the “last resort” mandate so that governments can respond in a more rights-affirming manner to children who are in conflict with the law.*

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## I. INTRODUCTION

On any given day, hundreds of thousands of children around the globe are being detained in the administration of justice,<sup>1</sup> with significant adverse consequences for their wellbeing and development.<sup>2</sup> In 2019, the United Nations commissioned an expert to conduct a global study on children deprived of their liberty. The resulting U.N. Global Study on Children Deprived of Their Liberty (U.N. Global Study) called upon states to “most rigorously apply the requirement of article 37(b) of the Convention on the Rights of the Child that deprivation of liberty shall be applied only as a measure of last resort.”<sup>3</sup>

To properly heed this call, states must know how to comply with this requirement. However, the Convention on the Rights of the Child (CRC) does not define or elaborate on the meaning of “last resort,” and the last resort requirement has no precedent in international treaty law.<sup>4</sup> This leaves the exact requirements open to interpretation by states. Further, international bodies have yet to develop a widely accepted framework that states can follow to ensure that they use deprivation of liberty truly as a last resort in matters involving children. Without such additional clarity, states have few constraints on their use of detention and other practices that deprive children of their liberty.

Some scholars take the last resort requirement at face value, stating that the CRC “establishes the clear obligation for ratifying States to use detention as a last resort.”<sup>5</sup> However, the last resort concept is thus-far undertheorized, resulting in a

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<sup>1</sup> Manfred Nowak (Independent Expert), *The United Nations Global Study on Children Deprived of Liberty*, ¶ 40, U.N. Doc. A/74/136 (July 11, 2019) [hereinafter U.N. Global Study].

<sup>2</sup> U.N. Children’s Fund, *Estimating the Number of Children Deprived of Liberty in the Administration of Justice*, 6, UNICEF (Nov. 14, 2021) [hereinafter *Estimating*]; U.N. Global Study, *supra* note 1, ¶¶ 24, 26.

<sup>3</sup> U.N. Global Study, *supra* note 1, ¶ 100.

<sup>4</sup> Ton Liefwaard, *Juvenile Justice from an International Children’s Rights Perspective*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN’S RIGHTS STUDIES 234, 253 (Wouter Vandenhoe et al. eds., 2015) [hereinafter *Juvenile Justice*]; see also Barry Goldson & Ursula Kilkelly, *International Human Rights Standards and Child Imprisonment: Potentialities and Limitations*, 21 INT’L J. CHILD. RTS. 345, 347 (2013).

<sup>5</sup> See, e.g., Anna Tomasi, *A Global Study on Children Deprived of Liberty – Creating an International Priority*, in TODAY’S CHILDREN ARE TOMORROW’S PARENTS 5, 6 (Philip D. Jaffé & Snezana Sulima eds., 2017).

lack of clarity around when detention is permitted and under what circumstances.

Generally, prior assessments of the last resort requirement have highlighted that there should be alternatives to detention, that children should be deprived of liberty only in particularly serious cases, and that legislatures have a duty to codify measures to ensure deprivation of liberty is used as a last resort.<sup>6</sup> However, because the CRC does not expressly prohibit detention outright, these general principles leave many questions unanswered that implicate when and under what circumstances a young person can be deprived of their liberty.<sup>7</sup>

For example, for which crimes is detention permissible in the youth justice context, and what, if anything, must states do prior to considering the detention of a young person? Can a state immediately incarcerate a child who committed a murder or other serious crime? What if they stole a car or assaulted a teacher? What about youth who are repeatedly in conflict with the law? One can readily imagine different scenarios where a child's age, history of maltreatment and other trauma, or home environment may impact the decision of whether to detain them. Are states required to take those factors into account, and if so, how should they impact the decision? And does that apply to all offenses, or can a state detain children in certain cases without taking preventative measures or providing rehabilitative services? Finally, for lesser offenses, is detention ever permissible? These and other questions remain unanswered when treaty bodies and other stakeholders insist, without further elaboration, that detention must be a "last resort."

This Article examines the meaning of "last resort" to more concretely delineate its requirements so that states can more effectively implement and affirm the rights of all children. As we discuss below, the last resort requirement applies broadly to deprivations of liberty, including institutional care, immigration detention, and imprisonment. However, this Article focuses more narrowly on the meaning of "last resort" as applied to the use of arrest, detention, and imprisonment within the juvenile justice system.<sup>8</sup> To illustrate the urgency of this matter, Part I begins by detailing the current state of children deprived of their liberty and the impact of detention on children. Part II reviews relevant rules and guidelines adopted by U.N. bodies and other organizations to determine the meaning and scope of "last resort" and to provide states with a more complete framework for the use of deprivation of liberty as a last resort. This framework can also be used to better assess whether states' practices comply with the last resort requirement in their administration of youth justice. Part III provides recommendations that can help states implement and

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<sup>6</sup> See generally Ursula Kilkelly, *Translating International Children's Rights Standards into Practice: The Challenge of Youth Detention*, in PROTECTING CHILDREN AGAINST TORTURE IN DETENTION: GLOBAL SOLUTIONS FOR A GLOBAL PROBLEM 39 (American University Washington College of Law Center for Human Rights and Humanitarian Law ed., 2017) (discussing various measures that can help realize the international standard of detention as a last resort); Ton Liefwaard, *Deprivation of Liberty of Children*, in INTERNATIONAL HUMAN RIGHTS OF CHILDREN 321 (Ursula Kilkelly & Ton Liefwaard eds., 2018) [hereinafter *Deprivation of Liberty*] (noting that international standards lack clarity on procedural matters); Goldson & Kilkelly, *supra* note 4 (affirming that state authorities must implement existing standards to ensure detention is a last resort for children).

<sup>7</sup> *Juvenile Justice*, *supra* note 4, at 253. In fact, the CRC expressly prohibits only the use of the death penalty and the penalty of life imprisonment without possibility of parole. See G.A. Res. 44/25, Convention on the Rights of the Child, art. 37(a) (Nov. 20, 1989) [hereinafter CRC].

<sup>8</sup> Arguably, there is much less justification for depriving children of their liberty in care contexts or immigration proceedings, where, unlike the youth justice context, there may have been no violation of law.

achieve full compliance with the mandate that children be deprived of their liberty only as a last resort. Finally, in Part IV, we address other relevant considerations and issues integral to ensuring children’s rights in this context.

## II. CHILDREN DEPRIVED OF THEIR LIBERTY

Estimates of the number of children detained through criminal justice systems on any given day range from 160,000 to more than one million.<sup>9</sup> According to the U.N. Global Study, at least 410,000 children are held in pretrial remand centers and post-conviction prisons every year.<sup>10</sup> In a report released in November 2021, the U.N. Children’s Fund (UNICEF) estimated the global number at 261,200, but warned that incomplete record-keeping and underdeveloped administrative data systems in many countries make the actual number unknown and possibly much higher.<sup>11</sup>

Although the precise number of children deprived of their liberty may be difficult to ascertain, the scale of the above estimates raises questions as to whether states are complying with the CRC’s last resort requirement.<sup>12</sup> This issue is particularly concerning both because children deprived of their liberty are at significant risk of having many of their rights violated (including their rights to be protected from violence and cruel, inhuman and degrading treatment, their rights to education, health care, and an adequate standard of living, and more),<sup>13</sup> and because of the significant disparities in the use of detention across racial and ethnic groups in many countries.<sup>14</sup> As described below, children deprived of their liberty frequently are exposed to violence in detention, experience adverse health consequences, have their education disrupted, and are deprived of basic necessities vital to their wellbeing and development.<sup>15</sup> These immediate harms—and rights violations—jeopardize

<sup>9</sup> *Estimating*, *supra* note 2, at 4.

<sup>10</sup> U.N. Global Study, *supra* note 1, ¶ 40.

<sup>11</sup> *Estimating*, *supra* note 2, at 14.

<sup>12</sup> *See, e.g., Estimating*, *supra* note 2, at 4; U.N. Global Study, *supra* note 1, ¶ 10; Tomasi, *supra* note 5, at 6.

<sup>13</sup> *Juvenile Justice*, *supra* note 4, at 252; Goldson & Kilkelly, *supra* note 4, at 346; *see also* CRC, *supra* note 7, arts. 18(2), 24, 27, 28, 29, 37.

<sup>14</sup> *See, e.g., Joshua Rovner, Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT (Dec. 12, 2023), <https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/> [https://perma.cc/8DEV-W5TS] (“As of 2021, Black youth were 4.7 times as likely to be placed (i.e., detained or committed) in juvenile facilities as their white peers.”); *Racial and Ethnic Disparity in Juvenile Justice Processing – Literature Review: A Product of the Model Programs Guide*, OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity> [https://perma.cc/4QN3-2U5Z] (last updated Mar. 2022) (“Data have shown that youths of color are more likely than white youths to be arrested and subsequently go deeper into the juvenile justice system.”).

<sup>15</sup> Goldson & Kilkelly, *supra* note 4, at 358, 362–367. It bears noting that many children who end up in detention have experienced adverse health issues and disruptions to their education prior to their time in detention. *See, e.g.,* Manfred Nowak, The U.N. Global Study on Children Deprived of Liberty 117, 120 (Nov. 2019), [https://www.chr.up.ac.za/images/publications/UN\\_Global\\_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf](https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf) [https://perma.cc/9RYE-5Z8Z] [full report] (noting that many children deprived of their liberty have existing health issues and a lack of access to needed care, and “there are also some reasons to suspect that deprivation of liberty might be associated with improvements in some aspects of health, at least for some children, in some settings.”); *Youth Involved with the Juvenile Justice System*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system> [https://perma.cc/6LEX-DHPQ] (last visited Jan. 28, 2024) (“Nearly half of all students who enter

children's healthy development and wellbeing over their lifetime.<sup>16</sup>

Children in detention are often subject to violence by both inmates and staff.<sup>17</sup> Numerous research and investigative reports have found instances of guards in juvenile prisons using excessive force and even torturing some children as a means of controlling behavior.<sup>18</sup> In some instances, guards have been found to encourage and reward children for beating each other.<sup>19</sup> In addition, despite the CRC's express prohibition, children are often detained with adults, which increases their risk of sexual assault.<sup>20</sup>

Young people suffer a breadth of physical health issues in detention, some of which persist after their incarceration.<sup>21</sup> Additionally, detention increases the risk for anxiety, depression, post-traumatic stress disorder, suicidal ideation, self-harm, and sleep difficulties, and it exacerbates these conditions in those youth who enter the system already experiencing these issues and other harms.<sup>22</sup> The conditions children face in detention, including isolation in cramped quarters for extended periods of time as a punishment for bad behavior, have adverse consequences for both their physical and mental health.<sup>23</sup>

Deprivations of liberty also have negative consequences for children's education.<sup>24</sup> Education programs are often inadequate in detention facilities, resulting in children falling further behind in schooling or having their education disrupted.<sup>25</sup>

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residential juvenile justice facilities have an academic achievement level that is below the grade equivalent for their age.”); *Education for Youth Under Formal Supervision of the Juvenile Justice System*, OFFICE OF JUV. JUST. AND DELINQ. PREVENTION (Jan. 2019), [https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/education\\_for\\_youth\\_under\\_formal\\_supervision\\_of\\_the\\_juvenile\\_justice\\_system.pdf](https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/education_for_youth_under_formal_supervision_of_the_juvenile_justice_system.pdf) [<https://perma.cc/A585-8RXJ>] [hereinafter OJJDP Education] (reporting on educational status of children in the juvenile justice system).

<sup>16</sup> Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENTENCING PROJECT 5 (Dec. 2022), <https://www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf> [<https://perma.cc/7PZE-4MYX>] [hereinafter Sentencing Project] (“Studies find that incarceration in juvenile facilities also reduces college enrollment and completion and lowers employment and earnings in adulthood” and that “[i]ncarceration in juvenile justice facilities is associated with shorter life expectancy.”).

<sup>17</sup> *Juvenile Justice*, *supra* note 4, at 252.

<sup>18</sup> See, e.g., Michael Garcia Bochenek, *The Global Overuse of Detention of Children, in PROTECTING CHILDREN AGAINST TORTURE IN DETENTION: GLOBAL SOLUTIONS FOR A GLOBAL PROBLEM* 3, 17 (American University Washington College of Law Center for Human Rights and Humanitarian Law ed., 2017); see also Alan Judd, *Georgia's Juvenile Prisons: Assaults by Guards, Strip Searches, Chaos*, ATLANTA JOURNAL-CONSTITUTION (Nov. 17, 2019), <https://www.ajc.com/news/crime—law/violence-permeates-youth-prisons/7YRQTDEnIT20hGVEjnybP/> [<https://perma.cc/H9U8-HZWK>]; Richard A. Mendel, MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE, THE ANNIE E. CASEY FOUNDATION 3 (2015) <https://assets.aecf.org/m/resourcedoc/aecf-maltreatmentyouthuscorrections-2015.pdf> [<https://perma.cc/6XSS-C6HY>] (“Since 2000 alone, systemic maltreatment has been documented in the juvenile corrections facilities of 29 states, with substantial evidence of maltreatment in three other states.”).

<sup>19</sup> Bochenek, *supra* note 18, at 12.

<sup>20</sup> CRC, *supra* note 7, art. 37(c); Bochenek, *supra* note 18, at 4, 17.

<sup>21</sup> Sentencing Project, *supra* note 16, at 16.

<sup>22</sup> Bochenek, *supra* note 18, at 18–19.

<sup>23</sup> Bochenek, *supra* note 18, at 4, 12, 18; Kilkelly, *supra* note 6, at 47.

<sup>24</sup> OJJDP Education, *supra* note 15, at 12 (“[C]ontact with the juvenile justice system can result in more negative educational outcomes.”).

<sup>25</sup> *Id.* at 7 (“Studies have found that education within facilities may not meet the same standards as education in the community.”); Molly McCluskey, *What If This Were Your Kid?*, THE

Indeed, many children go without any formal education during the time they are detained.<sup>26</sup>

Additionally, children in detention are often deprived of basic necessities required for an adequate standard of living, healthy development, and, simply, respect for their human dignity.<sup>27</sup> For example, detention can deprive children of appropriate medical care, proper nutrition, and family contact.<sup>28</sup> Girls in detention are often deprived of privacy, sanitation, and materials needed to manage menstruation.<sup>29</sup> In short, detention affects numerous aspects of children’s development and well-being and, in many cases, it compounds the harms that at-risk children and youth have experienced prior to encountering the youth justice system.<sup>30</sup>

The conditions in which most children are detained diverge so greatly from what human rights law requires that some scholars have suggested juvenile detention be completely abolished.<sup>31</sup> Buttrressing that argument is the fact that many youth detention facilities offer little in the way of rehabilitation,<sup>32</sup> which leads to higher rates of recidivism than other responses to criminal offenses.<sup>33</sup> At a minimum, it is imperative that deprivation of liberty is used only as a last resort, consistent with the mandate of children’s rights law.<sup>34</sup>

### III. UNPACKING THE “LAST RESORT” REQUIREMENT

Article 37(b) of the Convention on the Rights of the Child (CRC) states that “the arrest, detention, or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>35</sup> There are two distinct components to this requirement: (1) “last resort” and (2) “shortest appropriate period of time.” The last resort component refers to the choice to arrest, detain, or imprison a child, while the time period is a matter of how long the child stays detained once that choice is made. This Article focuses on compliance with the last resort requirement, though we briefly address questions related to the length of detention and other related issues in Part IV.

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ATLANTIC (Dec. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/> [<https://perma.cc/573Q-X85T>]; *see also* Sentencing Project, *supra* note 16, at 14–15.

<sup>26</sup> Bochenek, *supra* note 18, at 18.

<sup>27</sup> U.N. Global Study, *supra* note 1, ¶ 96; *Deprivation of Liberty*, *supra* note 6, at 2.

<sup>28</sup> Goldson & Kilkelly, *supra* note 4, at 362; *Deprivation of Liberty*, *supra* note 6, at 2.

<sup>29</sup> Bochenek, *supra* note 18, at 13.

<sup>30</sup> Sentencing Project, *supra* note 16, at 16 (“The damage caused by incarceration exacerbates the serious health problems experienced by many youth who enter correctional facilities.”).

<sup>31</sup> Goldson & Kilkelly, *supra* note 4, at 370–71.

<sup>32</sup> Notably, there are detention centers that are more child-centered and supportive, but our research found those examples, while encouraging, to be more the exception than the rule. For a more positive model, see, URSULA KILKELLY & PAT BERGIN, *ADVANCING CHILDREN’S RIGHTS IN DETENTION: A MODEL FOR INTERNATIONAL REFORM* (2023), in which the authors discuss the model they implemented in Oberstown Detention Centre in Ireland and explain how “a children’s rights approach [to detention] prioritizes child-centred care for all children under 18 years, while assuring to every child the rights to protection from harm, participate in decision-making and enjoy provision of their basic needs.” *Id.* at 16.

<sup>33</sup> Bochenek, *supra* note 18, at 17; Kilkelly, *supra* note 6, at 46.

<sup>34</sup> Goldson & Kilkelly, *supra* note 4, at 371; *see also* CRC, *supra* note 7, art. 37(b).

<sup>35</sup> CRC, *supra* note 7, art. 37(b).

Because Article 37 uses the word “shall” and includes no caveats or limiting language, states parties are legally obligated to meet this mandate of the CRC for every single child upon ratification.<sup>36</sup> Article 37 says only that “arrest, detention, and imprisonment” must be measures of last resort, but in other U.N. documents, the last resort requirement also applies to separation from parents, institutionalization, and the broader “deprivation of liberty.”<sup>37</sup> The Committee on the Rights of the Child (CRC Committee) has issued two General Comments on children’s rights in juvenile justice, but both only acknowledge that deprivations of liberty must be a “last resort,” without providing any analysis of that term’s meaning.<sup>38</sup>

Although the General Comments do not provide additional guidance on the last resort requirement, the meaning of this provision in the CRC can be interpreted using other related human rights documents. The CRC’s concept of measures of last resort is taken from the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)<sup>39</sup> and also appears in the U.N. Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules)<sup>40</sup> and the U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).<sup>41</sup> Although not legally binding, these international instruments are widely recognized as authoritative frameworks, carry significant weight with the CRC Committee, and “paint a detailed and comprehensive picture of the principles that should inform the approach of states parties” in implementing the last resort requirement.<sup>42</sup> In addition, the CRC Committee adopted General Comment No. 10 on Children’s Rights in Juvenile Justice in 2007 to:

encourage States parties to develop and implement a comprehensive juvenile justice policy . . . based on and *in compliance with* [the] CRC, . . . [t]o provide States parties with guidance and recommendations for . . . the *interpretation* and implementation of all other provisions contained in articles 37 and 40 of [the] CRC, [and] [t]o promote the integration . . . of

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<sup>36</sup> CRC, *supra* note 7, art. 4 (setting forth that states’ obligations with respect to children’s civil and political rights are not subject to resource limitations).

<sup>37</sup> G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice, ¶¶ 18.2 (commentary), 19.1 (Nov. 29, 1985), [hereinafter Beijing Rules]; G.A. Res. 45/113, annex, U.N. Rules for the Protection of Juveniles Deprived of their Liberty, ¶ 2 (Dec. 14, 1990) [hereinafter Havana Rules].

<sup>38</sup> U.N. Comm. on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, ¶ 79, U.N. Doc. CRC/C/GC/10 (2007) [hereinafter GC 10] (acknowledging that the last resort requirement is a “leading principle” of deprivation of liberty); U.N. Comm. on the Rights of the Child, General Comment No. 24 on Children’s Rights in the Child Justice System, ¶ 85, U.N. Doc. CRC/C/GC/24 (2019) [hereinafter GC 24] (similarly acknowledging the last resort concept as a “leading principle” related to detention of juveniles).

<sup>39</sup> CRC, *supra* note 7, preamble; Beijing Rules, *supra* note 37, ¶¶ 13.1, 19.1.

<sup>40</sup> Havana Rules, *supra* note 37, ¶¶ 1–2.

<sup>41</sup> G.A. Res. 45/112, annex, U.N. Guidelines for the Prevention of Juvenile Delinquency, ¶ 46 (Dec. 14, 1990) [hereinafter Riyadh Guidelines].

<sup>42</sup> See Kilkelly, *supra* note 6, at 42; Ton Liefwaard, *Juvenile Justice*, in THE OXFORD HANDBOOK OF INTERNATIONAL CHILDREN’S RIGHTS LAW 279, 281 (Jonathan Todres & Shani King eds., Oxford University Press 2020) (highlighting the importance of these three instruments and their influence on the Committee’s work).

other international standards.<sup>43</sup>

In particular, General Comment No. 10 encourages states to integrate the Beijing Rules, the Havana Rules, and the Riyadh Guidelines into their comprehensive juvenile justice systems.<sup>44</sup> Reflecting the importance of the issue, in 2019, the CRC Committee updated its guidance to states parties, by adopting General Comment No. 24 on Children’s Rights in the Child Justice System, to provide a “contemporary consideration of the relevant articles and principles” in the CRC while still “guid[ing] states toward a holistic implementation of child justice systems that promote and protect children’s rights.”<sup>45</sup> Accordingly, although the CRC is the only legally binding convention of these international instruments, the CRC Committee and other stakeholders have recognized the importance of these other instruments in interpreting and implementing the language of the CRC.

#### A. *The Scope of the Last Resort Requirement*

Relevant international documents apply the last resort requirement to different measures both inside and outside the juvenile justice system. These measures include institutional care,<sup>46</sup> pre-trial detention,<sup>47</sup> incarceration,<sup>48</sup> family/parent separation,<sup>49</sup> solitary confinement,<sup>50</sup> and, within the context of arrest, police transportation or cells.<sup>51</sup> However, according to the express language of Article 37(b) of the CRC, the last resort requirement applies most clearly within the juvenile justice system, given that arrest, detention, and imprisonment are primarily related to criminal proceedings.<sup>52</sup> When the CRC was drafted, the drafters attempted to make Article 37 consistent with the Beijing Rules<sup>53</sup> which state, “Deprivation of personal liberty shall not be imposed . . . unless there is no other appropriate response.”<sup>54</sup> A preliminary draft of the CRC read, “Deprivation of liberty shall be used only as a measure of last resort.”<sup>55</sup> But several delegations preferred more specific language because “deprivation of liberty” could include “educational and other types of

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<sup>43</sup> GC 10, *supra* note 38, ¶ 4, (emphasis added); *see also* CRC, *supra* note 7, art. 40(3) (addressing states’ duties to establish comprehensive juvenile justice policies).

<sup>44</sup> GC 10, *supra* note 38, ¶ 4.

<sup>45</sup> GC 24, *supra* note 38, ¶ 6(a).

<sup>46</sup> Beijing Rules, *supra* note 37, ¶ 19.1; Riyadh Guidelines, *supra* note 41, ¶ 46; *see also* U.N. Human Rights Comm., General Comment No. 35, Article 9 (Liberty and security of person), ¶ 62, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (“Placement of a child in institutional care amounts to a deprivation of liberty within the meaning of article 9.”).

<sup>47</sup> Beijing Rules, *supra* note 37, ¶ 13.1; Havana Rules, *supra* note 37, ¶ 17.

<sup>48</sup> Beijing Rules, *supra* note 37, ¶ 19.1 (commentary); Havana Rules, *supra* note 37, ¶ 1 (“imprisonment”).

<sup>49</sup> GC 24, *supra* note 38, ¶ 11.

<sup>50</sup> GC 24, *supra* note 38, ¶ 95(h).

<sup>51</sup> GC 24, *supra* note 38, ¶ 85.

<sup>52</sup> “Detention” is used other contexts, such as immigration. However, arrest and imprisonment typically imply the criminal justice context.

<sup>53</sup> U.N. Comm’n on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, ¶¶ 537, 546, U.N. Doc. E/CN.4/1989/48 (1989) [hereinafter Working Group].

<sup>54</sup> Beijing Rules, *supra* note 37, ¶ 17.1(c).

<sup>55</sup> Working Group, *supra* note 53, ¶ 536.



deprivation of liberty applied to minors besides detention, arrest, or imprisonment.”<sup>56</sup> The drafters ultimately settled on the narrower “arrest, detention or imprisonment” rather than the broader “deprivation of liberty.”<sup>57</sup>

But the Havana Rules, which were adopted immediately following the CRC in 1990, opted for broader language, naming “deprivation of liberty” as a disposition of last resort.<sup>58</sup> In recent years, the CRC Committee has recommended states parties implement the Havana Rules on several occasions.<sup>59</sup> Further, General Comment No. 24 also says that “deprivation of liberty” should be used only as a measure of last resort.<sup>60</sup> Both the Havana Rules and the CRC Committee’s General Comment No. 24 define deprivation of liberty as “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.”<sup>61</sup> Specifically, the inclusion of “private custodial settings” and “administrative or other public authority” in this definition means that “deprivation of liberty” applies in situations other than just the juvenile justice system. Therefore, despite the CRC drafters’ attempt to limit the scope of measures of last resort to the juvenile justice system, international law now requires more—any measure that places children in a custodial setting where they are not permitted to leave should be a measure of last resort.<sup>62</sup>

Nonetheless, as noted in Introduction, we limit our discussion to the meaning of “last resort” as applied to the use of arrest, detention, and imprisonment within the juvenile justice system. While the resulting framework is, therefore, primarily applicable in the juvenile justice context, in Part IV of this Article, we address its relevance to other contexts in which children are deprived of liberty.

### B. “Last Resort” Defined

Examining the language of the CRC through the lens of international instruments, the CRC Committee’s General Comments reveal that the last resort requirement has two major components: (a) states must use alternative approaches and measures first, and (b) if such alternatives are not sufficient, deprivation of liberty is permitted only in exceptional circumstances. These components can be broken down chronologically to give states a clearer understanding of what is required at each stage of a child’s progression toward conflict with the law and, thus, their increasing risk of being deprived of their liberty. The backdrop to this discussion is the overarching need to develop strong community-based support systems for children, youth, and families, so that vulnerable children do not come into conflict with the law.<sup>63</sup>

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<sup>56</sup> *Id.* ¶ 556.

<sup>57</sup> *Id.* ¶¶ 556–60.

<sup>58</sup> Havana Rules, *supra* note 37, ¶ 2; *see also* TON LIEFAARD, INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS REGARDING DEPRIVATION OF LIBERTY OF CHILDREN 53 (2008).

<sup>59</sup> *Deprivation of Liberty*, *supra* note 6, at 9.

<sup>60</sup> GC 24, *supra* note 38, ¶ 73.

<sup>61</sup> Havana Rules, *supra* note 37, ¶ 11(b); GC 24, *supra* note 38, ¶ 8.

<sup>62</sup> *See Deprivation of Liberty*, *supra* note 6, at 8–9.

<sup>63</sup> Although some of the language from international instruments that is synthesized in this Section focuses primarily on the decision making process in the individual case, a robust children’s rights

### 1. *Alternative Measures*

Though somewhat obvious, a measure cannot be the *last* resort if it is the only available measure. Article 40 of the CRC is explicit about this component of the last resort requirement as applied in the juvenile justice context, stating that a “variety of [non-custodial] dispositions . . . shall be available to ensure that children are dealt with in a manner appropriate to their well-being.”<sup>64</sup> General Comment No. 24 emphasizes “[e]xpanding the use of non-custodial measures to ensure that detention of children is a measure of last resort.”<sup>65</sup> The use of alternative, non-custodial measures is also a common theme throughout relevant human rights documents. The Beijing Rules state that “[w]henver possible, detention pending trial shall be replaced by alternative measures.”<sup>66</sup> Similarly, Paragraph 17 of the Havana Rules states that pre-trial detention “shall be avoided to the extent possible” and “all efforts shall be made to apply alternative measures.”<sup>67</sup> Therefore, “as a last resort” requires the availability and use of alternative measures.

General Comment No. 24 outlines three types of alternative, or non-custodial, measures that must be applied chronologically as the risk of deprivation of liberty increases. Because the “holistic” implementation of a juvenile justice system that “protect[s] children’s rights at all stages of the system” starts before a child ever comes in contact with that system,<sup>68</sup> states first should take steps to prevent children from coming into conflict with the law (Prevention).<sup>69</sup> Second, if a child is in conflict with the law, states must apply measures to divert children away from the judicial system (Diversion).<sup>70</sup> Third, if the competent authority—usually a prosecutor—initiates judicial proceedings, states must apply other, non-custodial measures to pre-trial detention and sentencing (Judicial Proceedings).<sup>71</sup>

It is important to note that the specific examples of preventative measures discussed below are taken from international instruments and are not an exhaustive list. As a result, this review of existing international instruments does not necessarily reflect current best practices. As General Comment No. 24 notes, states should consult “research on root causes of children’s involvement in the child justice system and undertake their own research to inform the development of a prevention strategy.”<sup>72</sup> The best implementation of the last resort requirement involves thoughtful consideration of the overall goal of prevention and should include new and evolving efforts to that end that address individual, relationship, community, and

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approach would entail developing and maintaining a comprehensive system whereby children’s rights—including housing, health care, education, and other rights—are secured to support their healthy development, and early intervention and diversion are employed to ensure that detention is used only as a last resort.

<sup>64</sup> CRC, *supra* note 7, art. 40(4).

<sup>65</sup> GC 24, *supra* note 38, ¶ 6(c)(iii).

<sup>66</sup> Beijing Rules, *supra* note 37, ¶ 13.2.

<sup>67</sup> Havana Rules, *supra* note 37, ¶ 17.

<sup>68</sup> GC 24, *supra* note 38, ¶¶ 6(a)–(b).

<sup>69</sup> *Id.* ¶¶ 6(b), 9.

<sup>70</sup> *Id.* ¶¶ 6(c)(ii), 13(a), 72.

<sup>71</sup> *Id.* ¶¶ 6(c)(iii), 13(b).

<sup>72</sup> *Id.* ¶ 9.

societal level factors that shape young people's development and well-being.<sup>73</sup>

a. Prevention

Although the CRC itself does not explicitly address preventing children from committing offenses, General Comment No. 24 does. A primary objective of General Comment No. 24 is “[t]o reiterate the importance of prevention and early intervention.”<sup>74</sup> The Beijing Rules explain that “care measures for the young, before the onset of delinquency, are basic policy requisites designed to obviate the need for the application of the Rules.”<sup>75</sup> Thus, theoretically, if states would take measures to provide appropriate support to children and their families and to prevent children from committing offenses, there would be no need to address detention and imprisonment.

To prevent children from coming into conflict with the law, international law requires states to take a three-pronged approach. First, they must implement structural measures that promote the well-being of all children and broadly reduce the conditions and risk factors that lead children to commit offenses.<sup>76</sup> Second, they need to identify individual children who demonstrate a higher risk of offending and assist them before they become involved with justice system.<sup>77</sup> And third, they must take measures to decriminalize acts which are better handled by the family, school, and community without the involvement of the juvenile justice system.<sup>78</sup>

As to the first prong, the Beijing Rules address the broad measures by stating, “Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to [risky] behaviour, will foster a process of personal development and education that is as free from crime . . . as possible.”<sup>79</sup> The Beijing Rules also encourage states to take “positive measures . . . for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law.”<sup>80</sup> The Riyadh Guidelines, which are wholly dedicated to the prevention of juvenile delinquency, state that prevention policies should involve “[s]pecialized philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and a service delivery network aimed at reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions.”<sup>81</sup>

These international instruments specifically mention a number of conditions relevant to preventing children from coming into conflict with the law, including

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<sup>73</sup> On the use of the socio-ecological model in prevention of harm, see, for example, Centers for Disease Control and Prevention (CDC), *The Social-Ecological Model: A Framework for Prevention*, <https://www.cdc.gov/violenceprevention/about/social-ecologicalmodel.html> [https://perma.cc/N6H8-DTMS] (last modified Jan. 18, 2022).

<sup>74</sup> GC 24, *supra* note 38, ¶ 6(b).

<sup>75</sup> Beijing Rules, *supra* note 37, ¶ 1 (commentary).

<sup>76</sup> See *generally infra* notes 79-92 (citing relevant law, rules, and guidelines).

<sup>77</sup> Riyadh Guidelines, *supra* note 41, ¶ 5(a).

<sup>78</sup> GC 24, *supra* note 38, ¶ 12; Riyadh Guidelines, *supra* note 41, ¶ 56.

<sup>79</sup> Beijing Rules, *supra* note 37, ¶ 1.2.

<sup>80</sup> *Id.* ¶ 1.3.

<sup>81</sup> Riyadh Guidelines, *supra* note 41, ¶ 5(b).

family stability and support, access to education, and the general wellbeing of the child. Family supportive measures can include providing adequate and safe childcare,<sup>82</sup> developing programs that promote positive parent-child relationships,<sup>83</sup> and adopting policies that discourage separating children from their parents.<sup>84</sup> On education, states must not only make public education accessible to all children, but education should also include teaching basic values and respect for culture, human rights, and fundamental freedoms.<sup>85</sup> Education should also support the full development of children's personality, talents, and mental and physical abilities,<sup>86</sup> in addition to providing vocational training and career development.<sup>87</sup> The Riyadh Guidelines emphasize that such programs for juveniles should focus primarily on the wellbeing of children.<sup>88</sup> States "should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services."<sup>89</sup>

General Comment No. 24 points out that "investment in early childhood care and education correlates with lower rates of future violence and crime," and that Articles 18 and 27 of the CRC require states to provide assistance to parents in their child-rearing responsibilities.<sup>90</sup> Specifically, Article 18 states that parents "have the primary responsibility for the upbringing and development of the child," but states must provide "appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities" and "ensure the development of institutions, facilities and services for the care of children."<sup>91</sup> Article 27 establishes that children have a right to a standard of living adequate for their healthy development, and parents have the primary responsibility to provide that standard of living.<sup>92</sup> States must take appropriate measures to assist parents with implementing and securing this right. Providing these supports can help ensure that children have the housing, education, health care, and other services needed to address the root causes of many of the risk factors for coming into contact with the law.

However, from a practical standpoint, states are limited by the availability of funding and prioritization of resources, and detention is very expensive.<sup>93</sup> We explore this issue and the implication of other CRC provisions in Part IV of this Article.

As to the second prong, identifying and assisting at-risk children, General Comment No. 24 specifically focuses on early social interventions for children below

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<sup>82</sup> *Id.* ¶ 12; *see also* CRC, *supra* note 7, art. 18(3).

<sup>83</sup> Riyadh Guidelines, *supra* note 41, ¶ 16; GC 24, *supra* note 38, ¶¶ 9–10.

<sup>84</sup> Riyadh Guidelines, *supra* note 41, ¶ 17; Beijing Rules, *supra* note 37, ¶ 18.2 (commentary).

<sup>85</sup> Riyadh Guidelines, *supra* note 41, ¶¶ 20, 21(a).

<sup>86</sup> *Id.* ¶ 21(b).

<sup>87</sup> *Id.* ¶¶ 10, 21, 21(f).

<sup>88</sup> *Id.* ¶ 4.

<sup>89</sup> *Id.* ¶ 45.

<sup>90</sup> GC 24, *supra* note 38, ¶ 10; *see also* Riyadh Guidelines, *supra* note 41, ¶ 12 ("The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children. Adequate arrangements including day-care should be provided.").

<sup>91</sup> CRC, *supra* note 7, art. 18.

<sup>92</sup> *Id.* art. 27.

<sup>93</sup> Justice Policy Institute, *Sticker Shock 2020: The Cost of Youth Incarceration 1-5* (2020), [https://justicepolicy.org/wp-content/uploads/2022/02/Sticker\\_Shock\\_2020.pdf](https://justicepolicy.org/wp-content/uploads/2022/02/Sticker_Shock_2020.pdf) [<https://perma.cc/L7Q4-SRNH>].

the minimum age of criminal responsibility.<sup>94</sup> It explains that “intensive family- and community-based treatment” programs that target “the various social systems (home, school, community, peer relations) that contribute to the serious behavioural difficulties of children reduce the risk of children coming into child justice systems.”<sup>95</sup> Early intervention for children below the minimum age of criminal responsibility “*requires* child-friendly and multidisciplinary responses to the first signs of [potentially criminal] behavior.”<sup>96</sup> Additionally, early intervention “*must* be preceded by a comprehensive and interdisciplinary assessment of the child’s needs.”<sup>97</sup> The goal is to recognize risk and vulnerability earlier, so that child-friendly interventions can be implemented in a non-judgmental way that is supportive of the child and their family. Aside from these two requirements, states are only given guidance on what intervention measures *should* do.

These programs should focus on “support for families, in particular those in vulnerable situations or where violence occurs.”<sup>98</sup> States should develop evidence-based programs “that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience.”<sup>99</sup> “As an absolute priority, children should be supported within their families and communities.”<sup>100</sup>

Generally, children who are at high risk for juvenile delinquency are those who are “demonstrably endangered or at social risk.”<sup>101</sup> More specifically, the Riyadh Guidelines suggest intervention and special assistance for those children who stop attending school,<sup>102</sup> whose families are in conflict or unstable,<sup>103</sup> who use drugs or alcohol,<sup>104</sup> who are homeless,<sup>105</sup> or who suffer from abuse, neglect, victimization, or exploitation.<sup>106</sup> For these children, the Riyadh Guidelines emphasize the role that schools can play in providing or referring children to much needed services like education about drug and alcohol treatment or trauma counseling.<sup>107</sup>

In outlining these needed interventions, the CRC Committee stops short of affirming that they are mandated.<sup>108</sup> However, because the ultimate purpose is to ensure that deprivation of liberty is used only as a last resort, they may indeed be required by the language in CRC Article 37.

As to the third prong, decriminalization, General Comment No. 24 and the Riyadh Guidelines urge states to remove status offenses—acts that are not considered

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<sup>94</sup> GC 24, *supra* note 38, pt. IV, § A.

<sup>95</sup> *Id.* ¶ 9.

<sup>96</sup> *Id.* ¶ 11 (emphasis added).

<sup>97</sup> *Id.* ¶ 11 (emphasis added).

<sup>98</sup> *Id.* ¶ 9.

<sup>99</sup> *Id.* ¶ 11.

<sup>100</sup> *Id.* ¶ 11.

<sup>101</sup> Riyadh Guidelines, *supra* note 41, ¶ 5(a).

<sup>102</sup> *Id.* ¶ 30; *see also* GC 24, *supra* note 38, ¶ 9.

<sup>103</sup> Riyadh Guidelines, *supra* note 41, ¶ 13.

<sup>104</sup> *Id.* ¶¶ 25, 45.

<sup>105</sup> *Id.* ¶ 38.

<sup>106</sup> *Id.* ¶¶ 26, 51.

<sup>107</sup> *Id.* ¶¶ 24, 26.

<sup>108</sup> *See generally* GC 24, *supra* note 38 (containing no mandate).

crimes if committed by adults—from their statutes.<sup>109</sup> For example, children should not be charged as criminals for “school absence, running away, begging or trespassing, which often are the result of poverty, homelessness or family violence.”<sup>110</sup> States should also avoid criminalizing child behavior that does not cause harm to others or to the child’s development.<sup>111</sup> Elimination of status offenses “clos[es] pathways into the child justice system” and redirects children where these issues are more properly addressed—by their families, schools, and communities.<sup>112</sup>

#### b. Diversion

Article 40 of the CRC requires states to establish laws and procedures for diversion of children “alleged as, accused of, or recognized as having infringed the penal law.”<sup>113</sup> Diversion measures redirect children away from the formal criminal justice system.<sup>114</sup> Usually, diversion involves referring children to programs and services,<sup>115</sup> but sometimes nonintervention is best, particularly where the offense committed is not serious and “where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.”<sup>116</sup>

Diversion measures should be “the preferred manner of dealing with children in the majority of cases” and should be available from the earliest point of contact.<sup>117</sup> “The [state’s] law should indicate the cases in which diversion is possible.”<sup>118</sup> Diversion should not be limited to petty cases<sup>119</sup> and should extend to serious offenses “where appropriate.”<sup>120</sup> Police and prosecution must be allowed to use their discretion not to pursue criminal charges against a child and instead offer the child diversion.<sup>121</sup> If the child is referred to a diversion program and satisfactorily

<sup>109</sup> *Id.* ¶ 12; Riyadh Guidelines, *supra* note 41, ¶ 56.

<sup>110</sup> GC 24, *supra* note 38, ¶ 12. To be clear, the call to not charge children as criminals for truancy or other status offenses does not mean that an intervention isn’t needed. Rather, international human rights law makes clear that criminal law and related punitive measures are not the appropriate vehicle for addressing status offenses.

<sup>111</sup> Riyadh Guidelines, *supra* note 41, ¶ 5.

<sup>112</sup> GC 24, *supra* note 38, ¶ 12.

<sup>113</sup> CRC, *supra* note 7, art. 40(1).

<sup>114</sup> GC 24, *supra* note 38, ¶ 15; *see also* Beijing Rules, *supra* note 37, ¶ 11.1.

<sup>115</sup> GC 24, *supra* note 38, ¶ 15; Beijing Rules, *supra* note 37, ¶ 11 (commentary).

<sup>116</sup> Beijing Rules, *supra* note 37, ¶ 11 (commentary).

<sup>117</sup> GC 24, *supra* note 38, ¶¶ 16, 72.

<sup>118</sup> *Id.* ¶ 18(c).

<sup>119</sup> Beijing Rules, *supra* note 37, ¶ 11 (commentary).

<sup>120</sup> GC 24, *supra* note 38, ¶ 16.

<sup>121</sup> Beijing Rules, *supra* note 37, ¶ 11.2. On opportunities to reduce the number of youth in the juvenile justice system through prosecutorial discretion, *see, for example*, Mary Willis, *Utilizing Prosecutorial Discretion to Reduce the Number of Juveniles with Disabilities in the Juvenile Justice System*, 2016 BYU EDUC. & L.J. 191 (2016); Kristin Henning, *Correcting Racial Disparities in the Juvenile Justice System: Refining Prosecutorial Discretion*, in *A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* 193 (Nancy Dowd, ed., NYU Press 2015). On police discretion, *see, for example*, William J. Flynn & Brian McDonough, *Police Work with Juveniles: Discretion, Model Programs, and School Police Resource Officers*, in *JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE* 199 (Albert R. Roberts, ed., 2004).

completes the program, the formal court process should be terminated, and the case should be closed definitely and finally.<sup>122</sup>

However, diversion has potential pitfalls that should be avoided. The CRC Committee has stated that diversion “should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding.”<sup>123</sup> Therefore, formal criminal justice interventions, including diversion, should not be used when police or prosecutors are merely suspicious<sup>124</sup> of a child or to punish the child for some unrelated reason. Nor should diversion be used to elicit a child’s confession, particularly because Article 40 of the CRC requires that a child accused of a crime has the right not to be compelled to confess guilt.<sup>125</sup> States should take care to “minimize the potential for coercion and intimidation.”<sup>126</sup> For the child to consent freely and voluntarily, they must have “adequate and specific information on the nature, content and duration of the measure” and understand “the consequences of a failure to cooperate or complete the measure.”<sup>127</sup>

To allow for the discretionary disposition of juvenile cases, states should make available programs and services like community service, temporary supervision and guidance, restitution, compensation of victims, family conferencing, and other restorative justice options.<sup>128</sup> Children should be involved in formulating, developing, and implementing these programs.<sup>129</sup> And, of course, these programs should not include the deprivation of liberty.<sup>130</sup>

### c. Judicial Proceedings

Even during the pretrial stage, diversion reduces the use of detention and should still be an available option throughout the judicial process.<sup>131</sup> Otherwise, states should prioritize noncustodial measures to restrict the use of pretrial detention.<sup>132</sup> Specifically, “alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home” should replace pretrial detention.<sup>133</sup>

Regarding the final disposition of a child’s case, the CRC requires that a variety of dispositions are available.<sup>134</sup> Further, General Comment No. 24 states that a wide variety of noncustodial sentencing options should be codified, and laws should

<sup>122</sup> GC 24, *supra* note 38, ¶¶ 18(f), 72.

<sup>123</sup> *Id.* ¶ 18(a); *see also* Riyadh Guidelines, *supra* note 41, ¶ 50. *But see* Beijing Rules, *supra* note 37, ¶ 11.3 (suggesting that a child’s parent or guardian may consent for the child).

<sup>124</sup> *See* GC 24, *supra* note 38, ¶ 43.

<sup>125</sup> CRC, *supra* note 7, art. 40(2)(b)(iv).

<sup>126</sup> Beijing Rules, *supra* note 37, ¶ 11 (commentary).

<sup>127</sup> GC 24, *supra* note 38, ¶ 18(b).

<sup>128</sup> *Id.* ¶¶ 15–17; Beijing Rules, *supra* note 37, ¶ 11.4.

<sup>129</sup> Riyadh Guidelines, *supra* note 41, ¶ 50.

<sup>130</sup> GC 24, *supra* note 38, ¶ 18(e).

<sup>131</sup> *Id.* ¶¶ 16, 86.

<sup>132</sup> *Id.* ¶ 86.

<sup>133</sup> Beijing Rules, *supra* note 37, ¶ 13.2.

<sup>134</sup> CRC, *supra* note 7, art. 40(4).

expressly prioritize their use.<sup>135</sup> Specifically, “[s]tates parties should have in place a probation service or similar agency” to implement “measures such as guidance and supervision orders, probation, community monitoring or day reporting centres, and the possibility of early release from detention.”<sup>136</sup> The CRC requires various options because the sentence must be “appropriate to [the child’s] well-being and proportionate both to their circumstances and the offence.”<sup>137</sup> Providing sufficient variety may require full use of the range of existing alternative sanctions and development of new alternative sanctions.<sup>138</sup>

## 2. *Exceptional Circumstances*

Assuming states meet their obligations under alternative measures, children should only be deprived of their liberty in exceptional or serious circumstances.<sup>139</sup> The CRC itself does not explicitly indicate what circumstances justify the use of deprivation of liberty. However, examining other CRC provisions in concert with other international instruments provides a workable framework for balancing the relevant circumstances to determine whether depriving a child of their liberty is appropriate.

Deprivation of liberty has three specific restrictions. First, the CRC Committee acknowledges that “preservation of public safety is a legitimate aim of . . . the child justice system,” but “recommends that no child be deprived of liberty, unless there are genuine public safety or public health concerns.”<sup>140</sup> The CRC Committee does not elaborate on what makes a concern genuine, nor does it give examples of genuine concerns. Does it require that the concern is in good faith or that the concern is an objectively legitimate one that justifies detention? Perhaps both? Does “safety” apply to circumstances in which bodily harm is at stake, or does it also apply to circumstances where property is at risk? Which public health concerns are

<sup>135</sup> GC 24, *supra* note 38, ¶ 73; *see also* Beijing Rules, *supra* note 37, ¶ 18.1.

<sup>136</sup> GC 24, *supra* note 38, ¶ 19. However, probation systems have been subject to significant criticism in the United States in recent years. *See generally, e.g.*, Komala Ramachandra, “Set Up to Fail”: *The Impact of Offender-Funded Private Probation on the Poor*, HUMAN RIGHTS WATCH (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor> [<https://perma.cc/V5Z6-AGZW>] (criticizing the impact of private probation and the creation of “offender-funded” systems); Andrea Young, *How Georgia’s Probation System Squeezes the Poor and Feeds Mass Incarceration*, ACLU (Nov. 13, 2018), <https://www.aclu.org/news/criminal-law-reform/how-georgias-probation-system-squeezes-poor-and-feeds-mass-incarceration> [<https://perma.cc/9EEX-ZKZN>] (“[P]robation, which is promoted as a way to keep people out of jail and prison, is actually one of Georgia’s main feeder systems of incarceration.”). Thus, any probation service or similar agency must be structured to not impose additional burdens on youth who should be diverted from, and not further snared in, the youth justice system.

<sup>137</sup> CRC, *supra* note 7, art. 40(4); *see also* Beijing Rules, *supra* note 37, ¶ 17.1(a).

<sup>138</sup> Beijing Rules, *supra* note 37, ¶ 17 (commentary).

<sup>139</sup> *Id.* ¶ 17.1(c); GC 24, *supra* note 38, ¶¶ 6(c)(v), 86; Havana Rules, *supra* note 37, ¶ 2;

<sup>140</sup> GC 24, *supra* note 38, ¶¶ 3, 89; *see also* Beijing Rules, *supra* note 37, ¶ 17 (commentary). Public order and public health have long been recognized as acceptable justifications for limitations on rights. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 29(2) (Dec. 10, 1948), affirming that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. *Id.*



serious enough circumstances to justify detention? Although decisionmakers can make their own assessments, they should also factor in whether public safety or public health risks outweigh the trauma inflicted on the youth by detention.<sup>141</sup>

Second, an objective of General Comment No. 24 is ensuring that deprivation of liberty is applied to older children only.<sup>142</sup> Therefore, the CRC Committee “encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age.”<sup>143</sup>

Third, General Comment No. 24 states that “[p]retrial detention should not be used except in the most serious cases.”<sup>144</sup> The Beijing Rules add that deprivation of liberty “shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences.”<sup>145</sup> In other words, deprivation of liberty should only be used where the child poses a risk to public safety, is above the minimum age for deprivation of liberty (age 16 is recommended), and has been accused or adjudicated of committing a serious offense. To be clear, these three requirements are a floor—even where these requirements are met, deprivation of liberty may still not be justified or appropriate. Further, there are additional sets of limitations that apply separately to pretrial detention and the final disposition of a case.

#### a. Pretrial Detention

General Comment No. 24 says that “the use of pretrial detention . . . should be *primarily* for ensuring appearance at the court proceedings *and* if the child poses an immediate danger to others.”<sup>146</sup> Because deprivation of liberty in general is already limited to cases where the child poses a danger to public safety or health, states may consider the need to ensure that a child appears in court only where the child also poses a danger. Additionally, pretrial detention may not be applied as a punishment because that directly conflicts with the child’s right to the presumption of innocence until proven guilty according to law.<sup>147</sup>

No further definitions or explanations are provided for determining the circumstances that allow pretrial detention, and the use of the word “primarily” leaves open the possibility of other unknown uses. Similarly, the general limitation of using deprivation of liberty in only the “most serious cases” remains too vague.

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<sup>141</sup> See generally Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES OF GEN. PSYCHIATRY 403 (2004) (reporting on prevalence of trauma and PTSD among youth in detention). It bears noting that a judge or police officer’s concern for the safety of others is not a circumstance of the case, but rather that person’s assessment of the circumstances. Further, in some cases, it may be the child that is at risk of harm.

<sup>142</sup> GC 24, *supra* note 38, ¶ 6(c)(v).

<sup>143</sup> *Id.* ¶ 89.

<sup>144</sup> *Id.* ¶ 86.

<sup>145</sup> Beijing Rules, *supra* note 37, ¶ 17.1(c).

<sup>146</sup> GC 24, *supra* note 38, ¶ 87 (emphasis added).

<sup>147</sup> CRC, *supra* note 7, art. 40(2)(b)(i); GC 10, *supra* note 38, ¶ 80.

## b. Disposition

When it comes to the actual disposition of a case, the CRC Committee gives more detailed guidance, and the exceptional circumstances are narrower.<sup>148</sup> Actions taken against a child adjudicated as having infringed penal law must be proportional to three primary considerations: (1) the circumstances and gravity of the offense, (2) the child's personal circumstances which led to the offense, and (3) the needs of society.

First, Article 40 of the CRC requires proportionality in sentencing by stating that children in conflict with the law should be “dealt with in a manner appropriate to their well-being and *proportionate both to their circumstances and the offence*.”<sup>149</sup> Further, General Comment No. 24 and the Beijing Rules add that the reaction to an offense should always be proportionate to the circumstances and the gravity of the offense, the personal circumstances of the child, and to the “*long-term needs of the society*.”<sup>150</sup>

Consideration of the circumstances and gravity of the offense overlaps with the requirement that deprivation of liberty only be applied to serious offenses.<sup>151</sup> Even if the child is convicted of a serious offense, presumably there is still a spectrum of severity among serious offenses, and that severity must be weighed against other factors. Further, children may not be sentenced based on a statutory minimum sentence; General Comment No. 24 explicitly states, “Mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort . . . .”<sup>152</sup>

Second, personal circumstances to be considered include the child's age, lesser culpability, social and family background, education, mental health, and “willingness to turn to [a] wholesome and useful life.”<sup>153</sup> In particular, the CRC requires that “every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner . . . which takes into account the child's age.”<sup>154</sup> Therefore, even when a child is above the minimum age for deprivation of liberty, their age must still be a consideration in balancing the circumstances of the case.<sup>155</sup> The Beijing Rules add that before sentencing, “The background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated.”<sup>156</sup>

Third, in determining the relevant needs of society, states may consider the need for public safety.<sup>157</sup> Although a minimum requirement for deprivation of liberty

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<sup>148</sup> Although detailed guidance on disposition is important, it is perhaps ironic that pretrial detention has fewer limitations, given that innocence is presumed prior to trial.

<sup>149</sup> CRC, *supra* note 7, art. 40(4) (emphasis added).

<sup>150</sup> GC 24, *supra* note 38, ¶ 76 (emphasis added); Beijing Rules, *supra* note 37, ¶¶ 5.1, 17.1(a). The long-term needs of society should include not only public safety concerns but also the healthy development of the child or youth, so that long-term they contribute positively to their communities.

<sup>151</sup> Beijing Rules, *supra* note 37, ¶ 17.1(c).

<sup>152</sup> GC 24, *supra* note 38, ¶ 78.

<sup>153</sup> *Id.* ¶ 76; Beijing Rules, *supra* note 37, ¶¶ 5 (commentary), 16 (commentary).

<sup>154</sup> CRC, *supra* note 7, art. 40(1).

<sup>155</sup> As age must still be considered, it suggests, among other things, that international human rights law does not permit children to be transferred to adult court.

<sup>156</sup> Beijing Rules, *supra* note 37, ¶ 16.

<sup>157</sup> GC 24, *supra* note 38, ¶ 76.

is that the child poses a risk to public safety, states will need to determine the degree of the risk, including the probability and severity of potential harm, and weigh it against other factors, including the recovery and reintegration of the child back into society. States may also consider the need for sanctions.<sup>158</sup> Sanctions can serve many purposes, including individual incapacitation (which correlates with the need for public safety), general deterrence, rehabilitation, and punishment or “just desert.”<sup>159</sup> However, the CRC Committee states that a “strictly punitive approach is not in accordance with the principles of child justice spelled out in [A]rticle 40 (1) of the Convention.”<sup>160</sup> Further, as the Beijing Rules explain, the proportionality principle is an instrument for curbing punitive sanctions.<sup>161</sup> “[I]n cases of severe offenses by juveniles, just desert and retributive sanctions might be considered to have some merit, [but] . . . such considerations should always be outweighed by the interest of safeguarding the well-being and future of the young person.”<sup>162</sup> Meaning, states are allowed to consider punishment or “just desert” as a purpose of sentencing, but a child may never be deprived of their liberty solely for that purpose.<sup>163</sup> Deprivation of a child’s liberty must also serve to protect the public safety, deter other children from committing the same crime, or rehabilitate the child.

However, a sentencing body must be certain that the conditions a child is sentenced to will actually be conducive to their rehabilitation for rehabilitation to be a valid consideration in sentencing. There is scant evidence that prison conditions for juveniles are rehabilitative considering most children in prisons are subject to violence and deprived of medical care, proper nutrition, and family contact.<sup>164</sup> Further, removing a child from the society in which they are expected to function deprives them of the opportunity to practice and to prepare for adulthood. Given the current realities of most youth detention facilities, rehabilitation may rarely, if ever, be a proper justification in sentencing a child to prison.

Once a sentencing body has determined that the minimum criteria for deprivation of liberty have been met and has balanced the circumstances and gravity of the offense, the personal circumstances of the child, and the needs of society, it must still consider the best interests of the child. A core, overarching principle of the CRC is that “[i]n all actions concerning children . . . the best interests of the child shall be a *primary* consideration.”<sup>165</sup> But in determining the disposition of a child’s criminal case, the Beijing Rules specify that the “well-being of the juvenile shall be *the* guiding factor.”<sup>166</sup> This indicates that the child’s wellbeing is more important than whatever goals society may be trying to achieve by incarcerating them.

At a minimum, Article 37 prohibits states from subjecting children to “torture or other cruel, inhuman or degrading treatment or punishment” and Articles 37 and 40 together require that children deprived of liberty be treated with humanity

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<sup>158</sup> *Id.*

<sup>159</sup> Beijing Rules, *supra* note 37, ¶ 17 (commentary).

<sup>160</sup> GC 24, *supra* note 38, ¶ 76; *see also* Beijing Rules, *supra* note 37, ¶ 17 (commentary).

<sup>161</sup> Beijing Rules, *supra* note 37, ¶ 5 (commentary).

<sup>162</sup> *Id.* ¶ 17 (commentary).

<sup>163</sup> *See* CRC, *supra* note 7, art. 3(1).

<sup>164</sup> *See supra* text accompanying notes 15–31.

<sup>165</sup> CRC, *supra* note 7, art. 3(1) (emphasis added).

<sup>166</sup> Beijing Rules, *supra* note 37, ¶ 17.1(d) (emphasis added).

and respect for their dignity and worth.<sup>167</sup> Meaning that, if a state's existing juvenile prison system has not been brought in line with these requirements, sentencing any additional children to a deprivation of liberty under these conditions would also be a violation of the CRC, even if all other requirements for the deprivation of liberty have been met.

Moreover, Article 40 requires every child in the juvenile justice system "be treated in a manner . . . which takes into account . . . the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."<sup>168</sup> The language of Article 40 implies that reintegration is desirable for both the state and the child. As previously stated, removing a child from society is counterproductive to their reintegration, and so deprivation of liberty requires that other considerations outweigh the benefits of reintegration to both society and the child.

In summary, at the disposition of a juvenile case, states may not deprive children of their liberty unless the state has determined that (1) the child poses a risk to public safety, is above the minimum age for deprivation of liberty, and has been adjudicated of committing a serious offense; (2) the sentence is proportionate to the circumstances and gravity of the offense, the personal circumstances of the child, and the needs of society; and (3) the deprivation of liberty is nonetheless in the best interest of the child.

While this list of additional requirements appears to create a very narrow set of circumstances, each factor is still left to the state's discretion. The proportionality of the sentence is left up to the existing norms of the state—what offenses a state considers graver than others, what individual factors lessen a child's culpability, the needs of a society, and how they all weigh against each other are factors that vary from culture to culture and from state to state.

Moreover, the issue of circumstances versus considerations is still at play here. With regard to balancing the child's personal circumstances against other factors, the guidance provides more specific *considerations* but not the particular circumstances that weigh in favor of or against deprivation of liberty. For example, states must consider a child's level of culpability. But what is the level of culpability required for deprivation of liberty? Will a child who participates in a robbery be considered culpable for the fact that another child brandished a weapon? Does that make both children a threat to public safety? While there are more considerations required in the disposition of cases than in pretrial detention decisions, which likely leads to a narrower set of exceptional circumstances, these unanswered questions illustrate the remaining breadth of interpretation.

#### IV. RECOMMENDATIONS

Despite the establishment of specialized child justice systems and the adoption of noncustodial solutions, detention in the context of juvenile justice is still widely used.<sup>169</sup> To clarify the mandate of the last resort requirement and reduce the

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<sup>167</sup> CRC, *supra* note 7, arts. 37(a), 37(c), 40(1).

<sup>168</sup> *Id.* art. 40(1); *see also*, GC 24, *supra* note 38, ¶ 76 ("Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.").

<sup>169</sup> U.N. Global Study, *supra* note 1, ¶¶ 40, 41.

number of children deprived of their liberty, the states should start by implementing the following steps.

#### A. *Comprehensive Data Collection*

To ensure compliance with the mandate that deprivation of liberty be used only as a last resort for children, states must thoroughly measure and evaluate their implementation efforts. During the U.N. Global Study, the majority of states had difficulty providing comprehensive, up-to-date, disaggregated data on the number of children held in detention.<sup>170</sup> As a result, the U.N. Global Study encouraged states to establish entities who “regularly collect reliable data on all situations of children deprived of liberty.”<sup>171</sup> Therefore, to reduce the number of children deprived of their liberty, states must prioritize establishing and maintaining comprehensive and accurate data collection.

To allow for comparative research, states must, to the greatest extent possible, use a common methodology.<sup>172</sup> Drawing on best practices already in use and considering the limited resources of some states, the CRC Committee should encourage and assist states in establishing a common methodology for data collection and reporting.<sup>173</sup> To determine the efficacy and proper use of alternative measures, data should be collected at all stages. This includes measuring the number of children who, among other things, are identified as at risk for coming into conflict with the law, are provided with services as a result, make contact with the justice system, are arrested, successfully complete a diversion program, are placed in pre-trial detention, are sentenced to imprisonment (for which crimes and how long), and are given some noncustodial disposition. States will need to work together to establish common definitions to ensure the accuracy of comparisons, while balancing the need to tailor systems to meet the particular circumstances of states’ rules and cultural practices.

We understand that identification and collection of data on prevention and diversion measures may present more of a challenge, as the goal is to keep children out of the same system that would collect such data. However, data collected by the entities that provide alternative support services could be analyzed alongside data collected in the youth justice system itself to identify correlations between how and to whom those services are provided and the anticipated decrease in children entering the system altogether. In doing so, it will be critical to ensure appropriate privacy protections are in place for children and youth, so that data collection does not create any risk of harm to young people.

We also recognize that some states may have limited available resources to build and maintain data collections systems. However, this step is critical to ensuring children’s civil rights, and states’ obligations under the CRC to ensure civil rights are not subject to available resources.<sup>174</sup> Moreover, there are models of collaborative

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<sup>170</sup> *Id.* ¶ 87; *see also* Bochenek, *supra* note 18, at 5–6.

<sup>171</sup> U.N. Global Study, *supra* note 1, ¶ 145.

<sup>172</sup> *Id.* ¶ 144.

<sup>173</sup> The Committee and states could draw upon expertise of, and partner with, academics and other researchers in developing a common methodology and other aspects of data collection and evaluation systems.

<sup>174</sup> *See* CRC, *supra* note 7, art. 4.

development of data collection infrastructure, including ones from public health disease surveillance, that may offer guidance to states in developing collaborations to support the development of data collection in low resource countries.<sup>175</sup> For example, The Global Health Security Agenda provides support to low resource countries to enhance their capacity to meet the requirements of the International Health Regulations.<sup>176</sup> Similarly, the Centers for Disease Control and Prevention's Field Epidemiology Training Program offers another model of a program that provides support to lower resource areas aimed at building capacity of public health workforces.<sup>177</sup> These and other programs offer models for collaborative training and capacity building that can be adapted and applied to initiatives aimed at improving data collection in the youth justice context.

### B. Simplify and Codify Exceptional Circumstances

States should translate the broad international mandate and guidance on deprivation of liberty into express requirements and rules. To accomplish this, states could codify the circumstances under which diversion and alternative measures must be prioritized and what such measures must include. States could also develop regulations, to be updated regularly, that provide a range of alternatives, such as community service programs that are paired with mentoring. States should also undertake a review of existing laws to determine whether some acts by young people should be decriminalized (e.g., status offenses).<sup>178</sup> In addition, they should codify both the types of infractions for which incarceration is not permitted and the minimum exceptional circumstances that would allow for the deprivation of liberty in other cases—consistent with the best interests of the child principle and recognition of the human dignity in every child. It is important to recognize that those minimum circumstances should never require deprivation of liberty. Article 37 of the CRC prohibits depriving children of their liberty “unlawfully or arbitrarily.”<sup>179</sup> The CRC Committee says that states’ laws should place clear obligations on law enforcement officers in the context of arrest and clearly delineate the criteria for the use of pretrial detention.<sup>180</sup> The CRC Committee is less explicit about laws limiting deprivation of liberty in sentencing and only says that states’ laws should expressly prioritize the use of alternative dispositions to deprivation of liberty.<sup>181</sup> As part of the reporting

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<sup>175</sup> See, e.g., World Health Assembly, *International Health Regulations (2005)*, arts. 5, 44(1) (3d ed. Jan. 1, 2016); *What is the Global Health Security Agenda?*, GLOBAL HEALTH SECURITY AGENDA (last visited Jan. 28, 2024), <https://globalhealthsecurityagenda.org/about/> [<https://perma.cc/TQ22-5R8W>] (noting that its first “key objective” is to “[e]nhance country capacities to prevent, detect and respond to infectious diseases”).

<sup>176</sup> S. Arunmozhi Balajee et al., *Global Health Security: Building Capacities for Early Event Detection, Epidemiologic Workforce, and Laboratory Response*, 14 HEALTH SEC. 424, 424 (2016).

<sup>177</sup> Victor M. Cáceres et al., *Surveillance Training for Ebola Preparedness in Côte d’Ivoire, Guinea-Bissau, Senegal, and Mali*, 23 EMERGING INFECTIOUS DISEASES S174, S174 (2017) (“For over 35 years, CDC’s FETP has helped countries strengthen disease surveillance and epidemiology through mentored, competency-based training in which trainees attain competencies while delivering essential public health services.”).

<sup>178</sup> See Riyadh Guidelines, *supra* note 41, ¶ 56.

<sup>179</sup> CRC, *supra* note 7, art. 37(b).

<sup>180</sup> GC 24, *supra* note 38, ¶¶ 85, 87.

<sup>181</sup> *Id.* ¶¶ 19, 73.

process,<sup>182</sup> when the CRC Committee reviews states' compliance with the CRC, it must check for and insist upon laws that clearly limit the use of deprivation of liberty of children in all areas of juvenile justice and explicitly state the exceptional circumstances in which it is allowed.

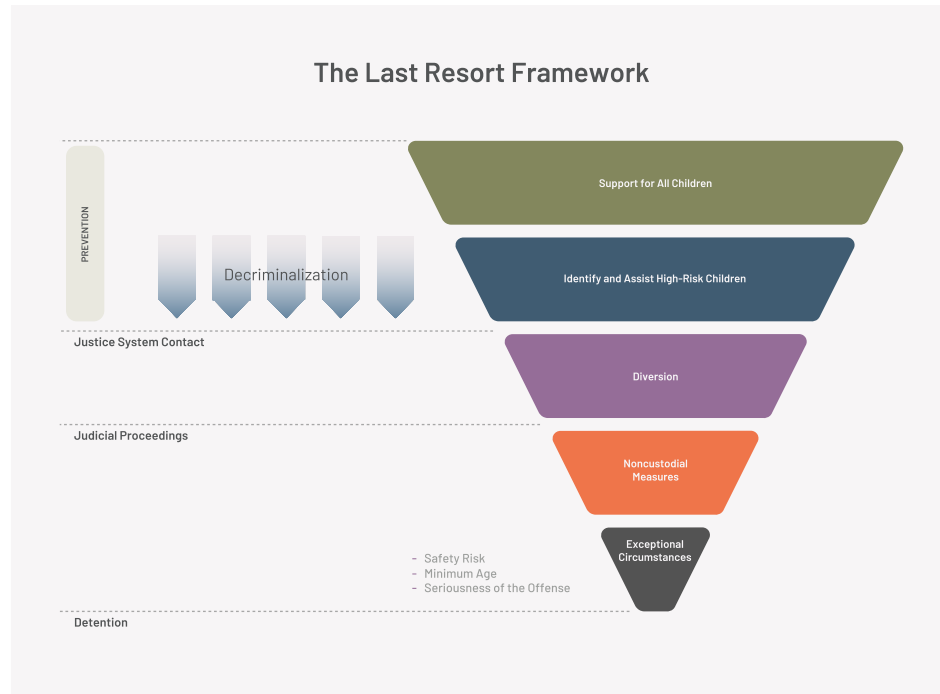


Figure 1. *The Last Resort Framework*

The framework presented in Part II, and shown in Figure 1, is somewhat complex and involves overlapping considerations. The CRC Committee could make their guidelines simpler and easier to codify by focusing on one valid purpose for the deprivation of liberty. That is, the CRC Committee already requires that no child be deprived of their liberty unless they present a genuine public safety concern, and this could be the sole requirement.

Under this option, a state may still consider factors such as the seriousness of the offense, the age of the child, and the child's personal circumstances, but only to the extent that they are necessary and relevant to determining the risk of future harm to the public.<sup>183</sup> The other potential concerns of the state, such as deterrence or just deserts, should never outweigh the child's best interests and their right to be free from deprivation of liberty and the other harms caused by incarceration.

<sup>182</sup> For an explanation of the reporting process, see Charlotte Alexander & Jonathan Todres, *Evaluating the Implementation of Human Rights Law: A Data Analytics Research Agenda*, 43 U. PA. J. INT'L L. 1, 10–13 (2021).

<sup>183</sup> Under this approach, states must avoid equating the severity of the crime with the future risk to public safety. Each child's circumstances must be individually assessed to determine whether there is a genuine public safety concern.

Therefore, the CRC Committee should press states to adopt a policy that children may only be deprived of their liberty in circumstances that indicate that (1) the child is likely to cause harm, that (2) the harm they may cause is sufficiently severe, and that (3) the harm is unlikely to be prevented without the state restricting the child's liberty. Likely to cause harm means that the child is more likely than not to cause harm, but not that there is simply some possibility. Moreover, "sufficient severity" should include physical harm requiring medical treatment or financial harm above some monetary threshold. These determinations should be made by an impartial factfinder—preferably a jury, where available. Focusing on one purpose, and the only legitimate purpose, of depriving a child of their liberty allows for less arbitrariness, ensures deprivation of liberty will only be used as a last resort, and provides a better definition of what that last resort actually is.

States should also consider other new approaches that help give full meaning to the "last resort" requirement. For example, a state might structure their juvenile code in a way that ensures police and prosecutors have discretion in offering diversion or not charging young people, but limits their discretion in the other direction. States could also codify the principles that children may not be sentenced based on a statutory minimum sentence. Additionally, states could adopt a procedural requirement in which the state or judge must explain in writing what alternative measures were attempted prior to incarceration being considered and provide an evaluation as to how detention will be conducive to the child's rehabilitation. Such a process would ensure that diversion was given a fair chance and would also help in terms of data collection and evaluation of states' practices. These are illustrative examples, but states should consider all options that genuinely make deprivation of liberty a last resort.

### C. *Reduction Targets*

While waiting for the availability of more comprehensive data, the CRC Committee can also assess whether a state is depriving children of liberty only as a last resort by asking if the state is making an ongoing, good-faith effort to reduce the number of children detained. The Beijing Rules describe guidelines for justifying deprivation of liberty as "a common starting point."<sup>184</sup> If from that starting point a state is reducing the number of children deprived of their liberty, it is safe to assume that their discretionary interpretation of the last resort requirement does not undermine the goals of the CRC. Ultimately, depriving as few children as possible of their liberty is the goal of the last resort requirement.

Therefore, in making recommendations in response to states parties' required reports, and in addition to examining the measures states parties implement, the CRC Committee should consider, in appropriate cases, targets for each state to reduce their use of deprivation of liberty by the next five-year report. The CRC Committee should also outline specific recommendations for improving the supports available for children and youth so that they can avoid coming into conflict with the law.<sup>185</sup> In other contexts, benchmarks and goals have helped to encourage states to

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<sup>184</sup> Beijing Rules, *supra* note 37, ¶ 17 (commentary).

<sup>185</sup> CRC, *supra* note 7, arts. 44(1)(b), 45(d).



take action and improve outcomes for children.<sup>186</sup> We acknowledge that developing appropriate targets may be challenging and that, similar to quotas, targets can create some potential risks. Further consideration is needed to address these concerns, but the critical point is that creating benchmarks and specific goals can be beneficial,<sup>187</sup> where more general calls for compliance with human rights law has spurred limited action. Providing benchmarks of some sort, along with clear steps that can achieve those goals, will encourage states to implement effective alternative measures and set narrow exceptional circumstances that also fit within their culture and tradition.

## V. ADDITIONAL CONSIDERATIONS

As states work to give effect to the last resort requirement, there are additional considerations that must be addressed. Here, we highlight three issues in particular that are relevant to ensuring that children are rarely, if ever, deprived of their liberty.

First, as noted above, Article 37 of the CRC requires that “the arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>188</sup> While we have focused on the last resort requirement in this article, further attention is needed to ensure that for those children who are detained, such deprivations of their liberty are for the “shortest appropriate period of time.”<sup>189</sup> That means, among other things, that states need to ensure both appropriately short sentences and regular review of detentions to determine whether continued incarceration is still necessary.<sup>190</sup> In addition, more consideration must be given to the interplay between the “last resort” requirement and the “shortest appropriate period of time” mandate. For example, enforcement of the last resort requirement may mean that, on average, sentences will be longer because only the most dangerous children will be held in detention. But states must still ensure that those sentences are only as long as necessary. The “shortest appropriate period of time” principle merits further research, as does its interplay with the “last resort” principle.

Second, the use of deprivation of liberty, its purpose, and when it is appropriate may vary depending on the context. For example, some civil uses of deprivation of liberty, as opposed to criminal justice measures, are especially problematic because those children have not even been accused of a crime, let alone convicted. In the immigration context, the U.N. Global Study recommended that any deprivation of liberty be prohibited by law.<sup>191</sup> However, in other civil contexts, such

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<sup>186</sup> See, e.g., U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2023: SPECIAL EDITION, U.N. Sales No. E.23.1.4 (2023), <https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf> [<https://perma.cc/8925-73DX>] (outlining advocacy for, and states' progress on, the specific benchmarks of the U.N. Sustainable Development Goals).

<sup>187</sup> *Id.*

<sup>188</sup> CRC, *supra* note 7, art. 37(b).

<sup>189</sup> *Id.* art. 37(b).

<sup>190</sup> U.N. Human Rights Comm., General Comment No. 35, *supra* note 46, ¶¶ 21 (“States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.”), 62 (“A decision to deprive a child of liberty must be subject to periodic review of its continuing necessity and appropriateness.”).

<sup>191</sup> U.N. Global Study, *supra* note 1, ¶ 122.

as institutional care arrangements, the justification may be to protect the child, rather than to protect society from a child who has committed a crime.<sup>192</sup> While recognizing that institutional care has a problematic history and is typically significantly inferior to home-based care, there may be situations in which temporary institutional care arrangements help ensure a child is not left homeless or in other dangerous circumstances.<sup>193</sup> Delineating when and under what circumstances deprivations of liberty might be appropriate in the civil context is beyond the scope of this article but merits focused attention from the CRC Committee, states, and other stakeholders.

Third, as many of the international instruments highlight, the root causes of why a child might be facing possible detention go well beyond the issues covered by Articles 37 and 40 of the CRC. Poverty and lack of access to secure housing, quality education, and health care are all important factors, as is structural racism and other societal issues. There is widespread agreement in the field of human rights that rights are interrelated and interdependent.<sup>194</sup> States must address economic, social, and cultural rights in order to secure the civil rights of every child. In short, to successfully fulfill the mandate of Article 37 and develop robust prevention efforts that keep children out of the juvenile justice system, states must ensure children and their families can secure the rights enshrined in CRC Article 27 (the right to an adequate standard of living) and other foundational rights.

The interrelated nature of rights raises a related point regarding states' resources and the mandate of international human rights law. Like other human rights law,<sup>195</sup> the CRC enshrines two different standards for whether a state's available resources limit their obligations, reflecting a historical distinction made between civil and political rights versus economic, social, and cultural rights. Article 4 of the CRC states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in" the CRC, with the exception that "[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources."<sup>196</sup>

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<sup>192</sup> *But see* U.N. Human Rights Comm., General Comment No. 35, *supra* note 46, ¶ 62 ("The Committee acknowledges that sometimes a particular deprivation of liberty would itself be in the best interests of the child," highlighting in particular educational institutions and institutional care where better options do not exist.).

<sup>193</sup> *See also* KILKELLY & BERGIN, *supra* note 32, at 5–19 (discussing some potential benefits, in appropriate cases, of child-centered, rights supportive detention).

<sup>194</sup> *See* U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, ANNEX 5: THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, at 117, U.N. Doc. HR/P/PT/12, U.N. Sales No. E.04.XIV.8 (2005) ("It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."); Philip Alston, *Economic and Social Rights*, 26 *STUD. TRANSNAT'L LEGAL POL'Y* 137, 147 (1994) ("[S]upport for the notion that the two sets of rights [civil and political and economic, social and cultural rights] are interdependent is widespread and is clearly reflected in international human rights instruments.").

<sup>195</sup> *Compare* International Covenant on Civil and Political Rights (Dec. 16, 1966), G.A. Res. 2200A (XXI) (Article 2(1) mandates that states "undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"), *with* International Covenant on Economic, Social, and Cultural Rights (adopted Dec. 16, 1966), G.A. Res. 2200A (XXI), (Article 2(1) mandates that states "undertake[] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . .").

<sup>196</sup> *See also*, Beijing Rules, *supra* note 37, ¶ 1.5 ("These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State."); Riyadh Guidelines, *supra*

This means that a lack of resources is not a valid excuse for not ensuring children's civil rights, but it does limit a state's obligation to fulfill children's economic, social, and cultural rights—including those outlined in the relevant provisions of Articles 18 and 27. But the right to be detained or imprisoned only as a last resort is a civil right. Moreover, the relevant provisions of Articles 18 and 27, which aim to ensure the child's moral and social development, are necessary for the implementation of that right, which includes preventing criminal behavior. Therefore, it can be argued that the relevant provisions of Articles 18 and 27 are required irrespective of the state's available resources—at least to the extent that as many children as possible are prevented from committing crimes. Although answering the difficult question of where to draw that line is beyond the scope of this Article, its impact on the overall implementation of this framework should be examined further.<sup>197</sup>

### CONCLUSION

The U.N. Secretary-General's note on the U.N. Global Study states that “depriving children of liberty should be the last option only, and in principle be avoided.”<sup>198</sup> Another way to say this is that, in the context of youth justice, the last resort standard requires states to apply other noncustodial measures first and use deprivation of liberty only in narrow, exceptional circumstances. States must implement alternative measures to prevent children from encountering the juvenile justice system at all. Where more is required, states should implement measures that redirect children from an actual criminal disposition. For those children that do reach the point of a criminal disposition, states must provide for noncustodial dispositions that do not deprive children of their liberty. Children should be deprived of their liberty only under a narrow set of exceptional circumstances. To achieve this aim, the CRC Committee should more explicitly define the meaning of “last resort” so that the legal mandate of the CRC is clearer, and so that states can better implement and comply with this requirement. As both the CRC Committee and states work to give effect to the “last resort” requirement in law, states can—and must—also act to better protect the liberty of all children, including those who run afoul of the law.

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note 41, ¶ 8 (“The present Guidelines should also be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.”).

<sup>197</sup> For more on the interrelatedness of rights and the core minimum obligations of states, see generally Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 UC DAVIS L. REV. 417, 466 (2007) (“[T]he interrelated nature of rights makes it more difficult to assess the boundaries of rights, but . . . the needs of the most marginalized populations . . . make it imperative that we map the contours of individual rights with greater specificity.”); U.N. Comm’n on Human Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, pt. I.A., ¶ 3, U.N. Doc. No. E/CN.4/1987/17 (Jan. 8, 1987) (“As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.”); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769 (1989); Ida Elisabeth Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, 10 INT’L J. HUM. RTS. 405 (2006).

<sup>198</sup> U.N. Global Study, *supra* note 1, ¶ 19.