



Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies

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Abstract

This article explores the underlying explanations of the high reliance on pre-trial detention of children across contemporary Western societies, with a particular focus on the Netherlands. Empirical research findings are used to identify patterns and functions of pre-trial detention in the administration of youth justice. In addition, two driving forces behind pre-trial detention decision-making are explored after scrutinizing the penological underpinnings of youth justice and youth crime control in Western societies. Ultimately, the article addresses to what extent and how international children's rights standards can effectively protect child suspects and accused from excessive, unlawful and arbitrary pre-trial detention.

Keywords

bail, children's rights, deprivation of liberty, juvenile court, juvenile justice, pre-trial detention, remand, youth court, youth justice

Introduction

Based on data collected by the Independent Expert leading the *UN Global Study on Children Deprived of Liberty* (Nowak, 2019), it is estimated that on any given day between 160,000 and 250,000 children¹ are deprived of their liberty in detention facilities and prisons around the world, because they allegedly committed a criminal offence. Annually, at least 410,000 children who are perceived to be in conflict with the law are deprived of their liberty in such facilities (UN Doc. A/74/136, para. 40; Nowak, 2019).² The vast majority of these detained children are not yet convicted, but are awaiting trial in pre-trial detention. According to recent estimates, child pre-trial detainees make up for roughly two-thirds of the total number of children deprived of liberty in the administration of

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youth justice and criminal justice across the globe. Worldwide, an estimated 297,200 children spent time in pre-trial detention in 2018 (Nowak, 2019).

While the almost universally ratified Convention on the Rights of the Child (CRC, 1989) requires states to ensure that pre-trial detention shall be used only as a measure of last resort, in exceptional circumstances, and for the shortest appropriate period of time, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment points out that ‘in reality, detention is often used as the first response to perceived problems’ (UN Doc. A/HRC/28/68, paras. 39–41). According to multiple UN agencies, non-governmental organizations and scholars, such high reliance on pre-trial detention in many youth justice systems across the globe is reason for concern; not only because this is not in line with the states’ legal obligations under the CRC, but also because of the potentially negative impact of pre-trial detention on the lives of children (c.f. Defence for Children International, 2010; Liefwaard, 2008; UN CRC Committee, 2019). Research shows that pre-trial detention causes feelings of stress, fear and insecurity, places youth outside their communities (including school) and family environments, might expose them to violence inside the institution and can have detrimental consequences for their well-being and future life chances (Freeman, 2008; Freeman and Seymour, 2010; Goldson, 2009; Van den Brink and Lubow, 2019). Despite these concerns, very little research has been done on the underlying explanations of the high reliance on pre-trial detention of children.

This article aims to explore the underlying explanations of the high reliance on pre-trial detention³ of children across contemporary Western⁴ youth justice systems, with a particular focus on the Netherlands. Based on a case study of pre-trial detention decision-making in the Dutch youth justice system, combined with a review of international empirical literature on pre-trial detention decision-making for youth, this article aims to identify patterns in the judicial decision-making process and in the functions of pre-trial detention in the administration of youth justice. The patterns and functions of pre-trial detention will be used to identify possible driving forces underlying the use of pre-trial detention of children and to reflect on the penological underpinnings of youth justice and youth crime control – that is the ‘*penal cultures*’⁵ – in contemporary Western societies and their compatibility with international children’s rights standards. Ultimately, the article aims to address the central question to what extent, and if so how, international children’s rights standards have the potential of effectively protecting child suspects from unlawful and arbitrary pre-trial detention.

The central research question shall be answered through a combination of normative, empirical and penological analyses. The normative international children’s rights framework of this article will be established in the next section, which is followed by a section that presents empirical research findings on the use of pre-trial detention of children in practice, providing insights in pre-trial detention decision-making processes ‘in action’. Subsequently, two driving forces behind these pre-trial detention decision-making practices will be explored by scrutinizing the penological underpinnings of youth justice and youth crime control in Western societies, followed by a thorough reflection on this article’s central research question and some concluding remarks.

Pre-Trial Detention of Youth: A Children's Rights Issue

Youth justice is a children's rights issue. Over the past decades, a large body of international children's rights standards has been developed to protect the rights of children in the youth justice system (Liefwaard, 2015). Under the international children's rights framework, children in conflict with the law shall be treated in a child-appropriate manner (c.f. Art. 40(3) CRC) and shall have their interests taken into account in all youth justice decisions (c.f. Art. 3 CRC). Furthermore, children in the youth justice system are entitled to a fair trial (c.f. Art. 40(2) CRC) and shall be treated without discrimination (c.f. Art. 2 CRC). Moreover, youth justice interventions shall be proportionate to the severity of the offence and the particular circumstances of the child (c.f. Art. 40(4) CRC) and aim at 'the child's reintegration and the child's assuming a constructive role in society' (Art. 40(1) CRC). According to the UN CRC Committee (2013: para. 28), the protection of the child's best interests in youth justice means that 'the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders', which can be done without disregarding public safety (UN CRC Committee, 2019: para. 3).

In this context, the international children's rights framework demands that pre-trial detention of children should be used in a lawful and non-arbitrary manner and only as a measure of last resort and for the shortest appropriate period of time. This core principle is well-established in international children's rights standards, including Article 37(b) CRC, the UN 'Beijing Rules' (1985, rules 13.1 and 13.2), the UN 'Havana Rules' (1990, rule 17) and the UN CRC Committee's (2019: paras. 85–88) *General Comment No. 24*, which recently replaced *General Comment No. 10* (UN CRC Committee, 2007: c.f. paras. 80–83). Moreover, this principle also found its way to the UN Human Rights Committee's (2014: paras. 37–38) *General Comment No. 35* on Art. 9 International Covenant on Civil and Political Rights (ICCPR, 1966) and the European Court of Human Rights (ECtHR) case law regarding Art. 5(1)(c) jo. (3) European Convention on Human Rights (ECHR, 1950; see inter alia: ECtHR, *Nart v. Turkey*, 2008: paras. 31 and 33; ECtHR, *Korneykova v. Ukraine*, 2012: para. 44; ECtHR, *Agit Demir v. Turkey*, 2018: para. 32). Regional standards, including the European Rules for juvenile offenders subject to sanctions and measures (2008, rule 10), European Guidelines on Child-Friendly Justice (2010, rule 19) and EU Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (Articles 10 and 11), also require that pre-trial detention of children shall be used with utmost restraint. Finally, the importance of respect for the principle that children awaiting trial should not be detained in custody unnecessarily has also been acknowledged in the UN Sustainable Development Goals (Goal 16, indicator 16.3.2).

According to the UN CRC Committee (2019, para. 83), states have the responsibility to develop adequate legislation, policies and practices to reduce the use of pre-trial detention of children to a minimum. In this regard, the UN CRC Committee (2019: para. 86) emphasizes that 'pre-trial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered'. Moreover, pre-trial detention can only be justified on the basis of limited and narrowly defined

grounds that should have a clear basis in the domestic law (UN CRC Committee, 2019: para. 87; UN Human Rights Committee, 2014: para. 38). According to ECtHR case-law (*Smirnova v. Russia*, 2003: paras. 58–59; *J.M. v. Denmark*, 2012: para. 54), the only basic acceptable grounds for pre-trial detention are the existence of a serious risk that the child suspect, if released, will abscond, tamper with evidence, reoffend or cause public disorder (c.f. UN CRC Committee, 2019: para. 87). Pre-trial detention should never be used as a punishment or to anticipate a custodial sentence, as this would violate the presumption of innocence (ECtHR, *J.M. v. Denmark*, 2012: para. 54; c.f. UN CRC Committee, 2007: para. 80).

Furthermore, the UN CRC Committee (2019: para. 90) urges states to implement strict time limits for pre-trial detention of children, ensuring that the pre-trial detention order is reviewed regularly with a view to ending it. Cases in which pre-trial release is not possible, children in pre-trial detention shall be brought as speedily as possible for adjudication (Art. 9(3) jo. 10(2)(b) ICCPR; see also UN Human Rights Committee, 2014: para. 37). The UN CRC Committee (2019: para. 90) recommends that states ensure that children in pre-trial detention are formally charged and brought before a court within 30 days, resulting in a final decision on the charges within 6 months.

The Beijing Rules (rule 13.2) and the UN CRC Committee (2019: para. 86) highlight that states should offer an effective package of non-custodial measures to avoid the use of pre-trial detention, such as supervision, intensive care or placement with a family or in an educational setting or home. These non-custodial measures must be carefully targeted to restrict the use of pre-trial detention (UN CRC Committee, 2019: para. 86), which also implies that these measures should not de facto ‘widen the net’ (c.f. UN CRC Committee, 2007: para. 80). Moreover, non-custodial alternatives to pre-trial detention, such as curfews or restraining orders, can impose severe restrictions on child suspects that infringe other fundamental rights, such as the freedom of movement (Art. 12 ICCPR, Art. 2 Fourth Protocol to the ECHR), and should therefore be used only in a lawful and proportionate manner (c.f. ECtHR, *Hajibeyli v. Azerbaijan*, 2008: paras. 59–63; UN Human Rights Committee, 1999).

Pre-Trial Detention Decision-Making for Youth: ‘Law in Action’

‘Law in the books’ does not always correspond with ‘law in action’. Many countries in the world have been criticized for poorly implementing the international children’s rights standards in their pre-trial detention practices (UN CRC Committee, 2019: para. 86). One of these countries is the Netherlands (UN CRC Committee, 2009, 2015). Against this background, two large-scale empirical studies have been conducted, providing detailed insights in the factors and processes shaping pre-trial detention decision-making in Dutch youth justice (Van den Brink, 2018; Van den Brink et al., 2017).

The Dutch case of pre-trial detention of children will be presented in this section, after a review of existing international empirical literature on pre-trial detention decision-making in Western – mainly Anglo-Saxon – youth justice jurisdictions. It becomes clear that several patterns in pre-trial detention decision-making have been identified

in multiple Western youth justice systems across continents, despite the fact that these patterns do not necessarily align with the normative international children's rights framework.

Empirical studies on pre-trial detention decision-making for youth

Research on pre-trial detention decision-making (or 'bail decision-making') in adult criminal cases has a rich tradition, particularly in Anglo-Saxon countries, but also in for example Belgium and the Netherlands.⁶ Compared to this huge body of empirical research, pre-trial detention decision-making for youth is still underexplored. As Allan et al. (2005: 323) argue, there is 'a lack of (. . .) bail studies that focus on young defendants internationally'.

In the United States, however, studies on pre-trial detention decisions concerning youth have been published regularly since at least the 1970s (c.f. Armstrong and Rodriguez, 2005; Bailey, 1981; Cohen and Kluegel, 1979; Feld, 2017; Frazier and Bishop, 1985; Guevara et al., 2006; Hodge and Greenleaf, 2005; Kramer and Steffensmeier, 1978; Maupin and Bond-Maupin, 1999; O'Neill, 2002; Pawlak, 1977; Webb, 2010; Wordes et al., 1994). In other countries, research on judicial decision-making regarding pre-trial detention of children has started to develop over the past two decades. In Canada, for example, Varma (2002: 144) signalled 'a noticeable lack of research in the area of pre-trial detention for youth'. Since then, several Canadian studies have been conducted on judicial decision-making regarding pre-trial detention of children and the conditions attached to their pre-trial release (Moyer and Basic, 2004; Myers and Dhillon, 2013; Sprott and Sutherland, 2015). A similar development of research is evident in Australia (c.f. Mather, 2008; Mazerolle and Sanderson, 2008; Richards and Renshaw, 2013; Stubbs, 2010).

Research on pre-trial detention decisions for youth in the United States and Canada mainly consist of quantitative studies aimed at identifying factors that significantly correlate with the outcomes of pre-trial detention decisions. Although the results of the studies differ, significant correlations have been demonstrated for 'legal' factors, such as the nature and severity of the offence (Armstrong and Rodriguez, 2005; O'Neill, 2002; Varma, 2002; Webb, 2010) and previous contacts with the justice system (Armstrong and Rodriguez, 2005; Moyer and Basic, 2004; Varma, 2002; Webb, 2010), but also for various 'extra-legal' factors, including age (Armstrong and Rodriguez, 2005; Feld, 2017; Moyer and Basic, 2004; O'Neill, 2002), gender (Armstrong and Rodriguez, 2005; Guevara et al., 2006; McGuire, 2001; O'Neill, 2002), race or ethnicity (Armstrong and Rodriguez, 2005; Feld, 2017; Hodge and Greenleaf, 2005; McGuire, 2001; Richards and Renshaw, 2013; Webb, 2010), and socio-economic status and living conditions (Moyer and Basic, 2004; Varma, 2002; Wordes et al., 1994), as well as the particular court that makes the decision (Armstrong and Rodriguez, 2005; Mazerolle and Sanderson, 2008; Wordes et al., 1994).

A small number of studies include a qualitative empirical research component, such as court observations and interviews with children and youth justice professionals. A recent qualitative study in New Zealand indicates that children's participation in pre-trial

detention decision-making in youth courts leaves to be desired (Subedi et al., 2018). In Australia, Richards and Renshaw (2013: 99) found that a lack of suitable alternatives to pre-trial detention contributes to a practice in which pre-trial detention of children is applied ‘for their own good’, based on considerations relating to the protection of the child’s well-being. They also found that the views of youth court judges about the function of pre-trial detention differ; while most interviewed judges argued that pre-trial detention of children should be applied with restraint, a number of judges shared the view that – despite the lack of a legal basis for such a usage – a short term pre-trial detention order can effectively function as a ‘short sharp shock’, preventing the child from exhibiting delinquent behaviour in the future (c.f. Kraus, 1978; Richards and Renshaw, 2013: 68). In the United States, Hodge and Greenleaf (2005: 40) indicate that pre-trial detention is used as a ‘reality check’, intending to teach the child the lesson that breaking the law will not remain without consequences. Based on interviews with youth justice professionals in England and Wales, Gibbs and Ratcliffe (2018) also conclude that pre-trial detention is sometimes used as a short custodial sentence. According to Gibbs and Ratcliffe (2018: 26), ‘risk aversion dominates the decision to remand, rather than the best interests of the child’.

Furthermore, there are a number of studies that aim to provide insights into judicial decisions on imposing conditions as requirements for the release of child suspects in the pre-trial phase of the criminal proceedings (‘bail conditions’). In a number of Canadian studies, it is observed that judges almost routinely attach a multitude of conditions to the release of a young suspect (Harris et al., 2004; Myers and Dhillon, 2013; Sprott and Sutherland, 2015). It is concluded that these conditions are often ambiguously and broadly formulated, excessively restrictive and hardly or not at all related to the legal grounds on which the pre-trial detention order is based, but rather to ‘pedagogical’ or ‘therapeutic’ objectives, such as positive behaviour modification and the idea of ‘teaching the young person a lesson’ (Harris et al., 2004: 374). Similar findings also follow from a number of Australian studies in different local jurisdictions, where it is observed that frequently intrusive and unrealistic conditions are attached to the release of child suspects (Mather, 2008; Richards and Renshaw, 2013; Stubbs, 2010). Mather (2008) concludes that ‘quasi-therapeutic’ conditions are used as a tool for rehabilitation to meet what the court believes is ‘needed’ for the positive development of the child suspect, while fundamental legal safeguards, such as the presumption of innocence, disappear into the background.

The studies provide insights into how a broad application of conditions for release of young suspects, aimed at control, behavioural change and rehabilitation, can lead to criminalization of behaviour that is usually not considered ‘criminal’ – such as the prohibition of entering certain public areas in the child’s home town (c.f. Myers and Dhillon, 2013) – and increases the likelihood that the child will fail to comply with the conditions (Mather, 2008; Myers and Dhillon, 2013; Sprott and Sutherland, 2015; Stubbs, 2010). The authors note that such practices lead to more child suspects being subject to forms of control and intervention by the authorities in the pre-trial stage of the criminal process (i.e. ‘net widening’), and increase the risk that child suspects will becoming more deeply involved in the justice system (i.e. ‘net-strengthening’). This latter process of ‘net-strengthening’ (also referred to as ‘mesh-thinning’) implies that once a child ends up in

the justice system and is released under conditions pre-trial, more of the child's conduct becomes labelled as 'criminal', while the supervision of the child gets intensified, in such a way that it becomes increasingly difficult for the child to live his life without breaking the law – that is, without breaching conditions – and to get out of the justice system (c.f. Austin and Krisberg, 1981; Mather, 2008; Richards and Renshaw, 2013; Roberts and Indermaur, 2006).

Finally, several studies have found a strong and significant correlation between the use of pre-trial detention and the final case disposition (Frazier and Bishop, 1985; Frazier and Cochran, 1986; McCarthy, 1987; Moyer and Basic, 2004; Rodriguez, 2010; Varma, 2000). In line with research findings regarding the relationship between pre-trial detention and case disposition in criminal cases of adults (c.f. Baumer, 2013; Dobbie et al., 2016; Edney, 2007; Sacks, 2011; Spohn, 2009; Williams, 2003), studies in several jurisdictions show that the use of pre-trial detention increases the likelihood that the child suspect makes a confessional statement, is found guilty and convicted to a custodial sentence (Frazier and Bishop, 1985; Frazier and Cochran, 1986; McCarthy, 1987; Moyer and Basic, 2004; Rodriguez, 2010; Varma, 2000). These findings indicate that pre-trial detention decisions made during the early stages of the youth justice procedure are not only relevant for the detention or release of the child suspect in the short term, but can also be strong predictors for the further course of the trial, including the sentence imposed after conviction (c.f. McCoy, 2007).

Case study: Pre-trial detention of children in the Netherlands

The Netherlands receives persistent international criticism on its use of pre-trial detention of children. Despite the substantial drop in pre-trial detention admissions in youth custodial institutions over the last decade (from 2.023 in 2008 to 1.165 in 2017; see DJI, 2018), concerns have been repeatedly expressed by inter alia the UN CRC Committee (2009, 2015) and UNICEF and Defence for Children International (2009, 2015, 2018). These concerns are primarily based on the consistently high proportion of pre-trial detainees among the total underaged population in youth custodial institutions (80% on 1 January 2018; see UNICEF and Defence for Children International, 2018). This section presents the Dutch case of pre-trial detention of children, which demonstrates how 'law in the books' can differ from 'law in action'.

Dutch youth justice and pre-trial detention: 'Law in the books'

The Netherlands has a distinct youth justice system, separate from the adult criminal justice system, with special rules for the prosecution, trial and punishment of children. The youth justice system applies in principle to children who have reached the age of 12, but not yet the age of 18 at the time of the offence (Arts. 486 and 488 Code of Criminal Procedure (CCP) and Art. 77a Criminal Code (CC)).⁷ The Dutch youth justice system can be characterized as a mixture between a 'justice-oriented' system and a 'welfare-oriented' system (Uit Beijerse and Van Swaaningen, 2006; Van den Brink, 2015; Weijers, 2014b). The youth justice system holds children criminally responsible for their actions, provides them with fair trial rights and is governed by traditional criminal justice principles, such

as legality, proportionality and the presumption of innocence. At the same time, the youth justice system strongly aims at education and reintegration of young offenders and prevention of recidivism, through child-specific procedural rules, tailored sentences and the involvement of child welfare professionals, such as professionals from the child protection agency (*Raad voor de Kinderbescherming*), youth probation (*jeugdreclassering*), and youth custodial institutions (*justitiële jeugdinrichtingen*).

Under Dutch law, pre-trial detention is defined as a measure of coercion that can be requested by the prosecutor and ordered by a judge to prevent a suspect from absconding, frustrating the process of truth-finding, reoffending or causing public disorder pending trial (Art. 67a CCP). Pre-trial detention is not allowed to be used for punitive purposes or to anticipate a custodial sentence. When a judge orders the pre-trial detention of a child suspect, Dutch law obliges the judge to consider whether the pre-trial detention order can be suspended under conditions (Art. 493 (1) CCP). A conditional suspension means that the child suspect is released from custody, but under strict conditions and youth probation supervision. Dutch law provides a wide range of possible suspension conditions, including a curfew, restraining order or an order to participate in a youth probation programme, which are meant to serve as less intrusive alternatives to pre-trial detention of children (Art. 493 (6) CCP). If the judge does not suspend the pre-trial detention order, children generally serve pre-trial detention in a youth custodial institution, designed for detaining children and young adults (Art. 8 Youth Custodial Institutions Act). Dutch law, however, enables the judge to order alternative forms of pre-trial detention of children, including house arrest, night detention and placement in a semi-open youth facility (Art. 493 (3) CCP). According to the Explanatory Memoranda to the CCP, the legislator embraces the principle that pre-trial detention of children shall be used only as a last resort and for the shortest possible period (EM 1989–1990, no. 3: 42; EM 2014–2015, 28741/29270, no. 25: 2).

Pre-trial detention decision-making in Dutch youth courts ‘in action’

Based on extensive qualitative empirical research – that is observations of pre-trial youth court hearings (N=225) and in-depth interviews with judges and other stakeholders (N=71) – and quantitative empirical research – that is systematic youth court case file analyses (N=250) – two recent studies provide detailed insights in the factors and processes shaping pre-trial detention decision-making processes in Dutch youth justice (Van den Brink, 2018; Van den Brink et al., 2017).⁸ Three key findings will be presented.

Pre-trial detention and custodial sentences. First, the findings show a strong correlation between the use of pre-trial detention and the imposition of a custodial sentence. Children who spent time in pre-trial detention are significantly more likely to receive a custodial sentence after conviction than children who are (conditionally) released at the first pre-trial court hearing, even when controlled for the severity of the offence, criminal records and several other relevant case characteristics. Moreover, the length of pre-trial detention correlates strongly with the length of the imposed custodial sentence. In fact, many children have de facto served their custodial sentence at the time of conviction, as the length of the imposed sentence often equals the length of their time spent

in pre-trial detention (a practice referred to in the literature as ‘backdating’ or ‘time served’).⁹ In essence, pre-trial detention is regularly used to anticipate custodial sentences. This practice seemingly emerged as a response to lengthy case processing and trial periods and seems to be grounded partially in the perception among youth justice professionals that society and victims expect an immediate response to severe offences, but primarily in a strong belief that using pre-trial detention as an early intervention and as a direct response to criminal behaviour of children is pedagogically effective and therefore justified. As one of the interviewed judges illustratively states,

I truly believe in the principle that it is better to detain children directly after they have committed an offence than to wait six months until the final conviction. That's not effective. The idea of early intervention is of particular importance when children are concerned. Therefore, using pre-trial detention for that purpose can be justified.

However, the quantitative data from the case file analyses indicate that approximately one in 10 children who spent time in pre-trial detention is eventually not found guilty by the trial judge and acquitted.

Pre-trial release decisions. Second, the findings show that several ‘extra-legal’ factors seem to play an important role in judges’ pre-trial release decisions (i.e. the conditional suspension of pre-trial detention). Controlled for 35 different offence-related, procedural and personal characteristics that were expected to be potentially relevant for pre-trial release decisions, the analyses show that *very young suspects* in the age of 12 to 14 are significantly more likely to be conditionally released than child suspects in the age of 15 to 17. Moreover, children with a *non-native Dutch background* appear to be significantly less likely to have their pre-trial detention suspended than their native Dutch counterparts under similar circumstances. Furthermore, children with a diagnosed *mental disability* (i.e. $IQ < 70$ or $70 < IQ < 85$ + limited social capabilities) appear to be significantly less likely to be pre-trial released by the judge compared to children without a diagnosed mental disability. In addition, children who are *not attending school* seem to be significantly less likely to be conditionally released than children who were – prior to the arrest – going to school and were performing well. Remarkably, most of the characteristics cited already seem to play a significant role at an earlier stage, namely in the *child protection agency’s advice* on the child’s pre-trial release, which subsequently seems to permeate the judge’s pre-trial release decision. In fact, the analyses show a very strong correlation between the child protection agency’s advice on pre-trial release and the outcomes of the judges’ pre-trial release decisions, meaning that a child protection worker advising pre-trial release of a child suspect significantly increases the likelihood of the judge ordering pre-trial release.¹⁰

Pre-trial release conditions. Third, the findings show a wide use of pre-trial release conditions (i.e. suspension conditions), such as curfews, restraining orders and/or orders to participate in youth probation programmes. While these release conditions were originally designed by the legislator to serve as alternatives to pre-trial detention of children, in practice pre-trial release conditions are widely imposed for divergent purposes. Some judges perceive the conditional suspension of pre-trial detention as an instrument

to impose early welfare-oriented interventions, such as placement in a child protection facility, educational supervision and treatment, even in relatively minor cases. As one of the interviewed judges argues,

I consider it a responsibility that we have, as judges, to use the conditional suspension to help the child and guide him in the right direction.

Guided by the advice of the child protection agency and youth probation, judges tend to impose a wide range of conditions when a child's pre-trial detention order is suspended, intending to serve child welfare purposes as well as supervision purposes, ultimately aiming at preventing the child from reoffending, both in the short and the long term. Some interviewed judges argue that suspension conditions can also serve as a quick and effective, punitive, yet pedagogical response to delinquent behaviour of children, teaching them the lesson that such behaviour will not be tolerated. Moreover, suspension conditions are used as tools for diagnoses, treatment and behaviour modification, for example through intensive probation programmes, behavioural treatment programmes, drug abuse rehabilitation interventions and other therapies. For those purposes, the suspended pre-trial detention order is broadly perceived as an effective enforcement instrument by judges, prosecutors and youth probation officers, since non-compliance with the imposed conditions allows them to revoke the suspension, meaning that the pre-trial detention order will be executed.

Functions of pre-trial detention in Dutch youth justice

The two empirical studies show that pre-trial detention and the suspension under conditions serve divergent functions in the Dutch youth justice system (Van den Brink, 2018; Van den Brink et al., 2017). In addition to the formal legal function of pre-trial detention and the conditional suspension as (1) measures of coercion serving urgent criminal procedural purposes listed in the CCP (Art. 67a), the findings indicate that, in practice, pre-trial detention and the conditional suspension perform other functions as well. Pre-trial detention also seems to serve as (2) a way of 'sending out a signal' to society and victims that crime will not remain unpunished, (3) a quick punitive, yet pedagogical response, (4) a framework for controlling high-risk youth, (5) an early intervention to protect the child's well-being, (6) a framework for diagnoses, treatment and behaviour modification and (7) a tool to 'set the tone' for the future course of the proceedings and the disposition of the case. Several of these alternative functions arise from a pedagogically oriented approach and have in common that pre-trial detention and the conditional suspension are used as instruments in favour of – what the judge and/or other professional actors consider(s) to be – the 'needs' of the child and his or her development, ultimately aiming to prevent reoffending, serving both the interests of the child and society.

Patterns and functions of pre-trial detention in Western youth justice jurisdictions: 'Law in the books' versus 'law in action'

The presented empirical evidence suggests that, in practice, pre-trial detention of children is not always used in compliance with international children's rights standards. This seems

not only true for the Netherlands but also for other Western jurisdictions. The Dutch case study reflects patterns in the judicial decision-making process on pre-trial detention of children which have also been identified in several other Western youth justice systems across continents.

As Australian, American and Dutch studies indicate, a first pattern that emerges is that some judicial decision-makers strongly believe in the ‘pedagogical’ notion that *pre-trial detention as an early intervention and a direct response to criminal behaviour committed by children* can be very effective and therefore justified. This seems to be an important explanation for the strong correlation between the use of pre-trial detention and the custodial sentence found in several jurisdictions. However, using pre-trial detention as an early ‘pedagogical’ intervention, for punitive purposes and/or to anticipate a custodial sentence contravenes the presumption of innocence and the right to a fair trial and has to be considered unlawful and arbitrary under international children’s rights law.

A second identified pattern concerns the *disparities in pre-trial release decisions*, as found in inter alia Australian, American, Canadian and Dutch studies. In several Western jurisdictions across continents, children from racial or ethnic minorities, with a low socio-economic status or with a mental disability are in comparable circumstances significantly less likely to be released from pre-trial detention than their peers who do not happen to have said characteristics. Such disparities in pre-trial detention decision-making contravene the core children’s rights principle of non-discrimination (Art. 2 CRC), also when these disparities do not result from overtly discriminatory decision-making. Consequently, pre-trial detention practices in which said disparities occur do not meet the requirements of lawfulness and non-arbitrariness under Art. 37(b) CRC, Art. 9(1) ICCPR and Art. 5(1) ECHR.

A third pattern concerns the *wide use of pre-trial release conditions*. Australian, Canadian and Dutch studies show that, when children are concerned, pre-trial release conditions appear to be broadly used for welfare, control and punitive purposes. This wide use of pre-trial release conditions seems to result in ‘net-widening’ as well as ‘net-strengthening’. These practices are not in line with international children’s rights standards, prescribing that alternatives should reduce the use of pre-trial detention rather than ‘widen the net’. Particularly, pre-trial release conditions that infringe the child’s personal liberty, freedom of movement, privacy or other fundamental children’s and human rights should be used only when strictly necessary, lawful and proportionate. Moreover, the wide use of pre-trial release conditions for welfare, supervision and punitive purposes can be on strained terms with the presumption of innocence and the legitimate objectives of pre-trial interventions under international human rights law.

Understanding Reliance on Pre-Trial Detention of Children

To gain a better understanding of the underlying rationale of the use of pre-trial detention and pre-trial release conditions in youth justice and to find answers to the question why effective implementation of children’s rights principles concerning pre-trial detention proves to be so challenging, this section tries to find explanations in the penological

underpinnings of youth justice and youth crime control – that is, the ‘penal cultures’ – in Western societies.

Before doing so, it is important to highlight that considerable differences exist among Western youth justice systems (Dünkel, 2015; Muncie and Goldson, 2006; Trépanier and Rousseaux, 2018). In the literature on the penological underpinnings of youth justice systems, traditionally a distinction is made between ‘welfare models’ and ‘justice models’ (Muncie, 2009). However, as Dünkel (2015: 16–18) emphasizes, youth justice systems are often multidimensional and generally contain a variety of – sometimes paradoxical – orientations that go beyond the welfare-justice paradigm. Many Western youth justice systems are mixed systems, combining elements of welfare and justice, and also include elements of restorative justice and informal justice as well as punitive and control-minded tendencies (Dünkel, 2015; Feld, 2018; Muncie and Goldson, 2006; O’Brien and Fitz-Gibbon, 2018; Trépanier and Rousseaux, 2018). As Dünkel (2015: 18) notes, differences between youth justice systems often essentially boil down to the degree of orientation towards certain elements.

Given the existing differences among systems and the lack of empirical data on pre-trial detention decision-making for youth in many jurisdictions, this section does not claim to find an overall explanation for the reliance on pre-trial detention applicable to each and every Western youth justice system. Instead, this section starts from the premise that, despite the differences between youth justice systems, similar patterns in the use of pre-trial detention of children have been identified in several jurisdictions across the Western world. The variety of systems in which these patterns have been found, indicates that exploring possible common underlying drivers might inform our understanding of the difficulties of effective implementation of children’s rights principles in pre-trial detention practices around the globe (c.f. Patton, 1990).¹¹ Therefore, rather than conducting an in-depth comparative study between two particular jurisdictions (c.f. Green, 2008; Wandall, 2006), this section aims to present a broader explorative analyses of potential drivers of the identified pre-trial detention practices across jurisdictions.

Based on the patterns identified in the empirical findings presented in the previous section, this section will explore two elements of Western penal cultures that appear to be driving forces behind the wide use of pre-trial detention and pre-trial release conditions for youth: (1) welfarist interventionism and (2) the culture of control. After scrutinizing these driving forces and their penological underpinnings, this section aims to disclose the fundamental tensions between penal orientations towards welfarism and control and the international children’s rights framework.

Penal-welfarism

Many contemporary youth justice systems in the Western world are essentially founded on what Garland (2001: 27) calls a ‘hybrid, penal-welfare structure’ (Dünkel, 2015; Feld, 2018; Muncie and Goldson, 2006; Trépanier and Rousseaux, 2018). Emerged during the rise of the welfare state in Western societies in the late 19th century, the modern ‘penal-welfarist’ approach to dealing with crime and criminals challenged the traditional objectives of criminal justice, such as punishment and retribution, as well as related sentencing

principles, such as consistency and proportionality (Garland, 2001). Instead, in the modernist view, the primary objective of criminal justice is to be found in the rehabilitative ideal: rehabilitating the maladjusted delinquent through individualized, ‘needs-based’ correctional treatment, guided by the expertise of psychologists, psychiatrists and social workers. This rehabilitative ideal is rooted in the belief that rehabilitation of offenders and addressing the root causes of crime serves the interests of both the offender and society, as this would ultimately lead to less crime, safer communities and better-integrated citizenry (Garland, 2001).

The modernist view on youth justice and youth crime control is characterized by a strong welfarist belief in rehabilitation and shaped by a rather paternalistic attitude towards children (Feld, 2018; Trépanier and Rousseaux, 2018). From a modernist perspective, children are seen as dependent, rather incompetent and vulnerable future citizens in need for special protection, care and guidance by responsible adults, such as their parents or, if necessary, the state’s welfare institutions (Feld, 2017: 475–476; c.f. Hanson, 2008). From this perspective, youth justice interventions primarily aim at ‘saving’ and rehabilitating troublesome children through educational and correctional treatment (Feld, 1999, 2017; c.f. Platt, 1969; Zimring and Langer, 2015).

Since the mid-20th century, however, children are more and more recognized as rights-holders (Feld, 2018; Weijers, 2014a). Paternalism slowly made way for what Hanson (2008: 16) calls an ‘emancipationist’ perspective on children. In this view, children are, in principle, considered capable of exercising their own rights, participating in procedures and sharing their own views and opinions, in accordance with their evolving capacities, yet are still deemed to require special protection and guidance. Translated to the youth justice system, this dual approach leads to a ‘hybrid, “penal-welfare” structure’ (Garland, 2001: 27), combining the penal framework of fair trial rights and proportionate sentencing with the welfarist commitment to rehabilitation, education and pedagogical expertise.

This combined ‘penal-welfare’ structure, however, is not free of contention, as prominent tensions lie between the welfarist commitment to ‘needs-based’ intervention and the penal principle of ‘deeds-based’ sentencing, including the notions of culpability and proportionality (Feld, 1995; Muncie, 2009; Van den Brink, 2018). Moreover, the welfarist ideal of early intervention in the lives of troublesome children can be on strained terms with the child’s right to a fair trial, including the presumption of innocence (Feld, 1995; Muncie, 2009; Van den Brink, 2018). These tensions come to the surface in contemporary pre-trial detention practices for youth.

The culture of control

In his ground-breaking work, *The Culture of Control*, Garland (2001) identified a shift in thinking and acting in criminal justice and crime control in late modern Western societies, culminating into a ‘new culture of crime control’. According to Garland (2001: 175), this new culture of crime control has redefined penal-welfarism in ways in which the ‘penal mode’ has become ‘more punitive, expressive and security-minded’ and the ‘welfarist mode’ has become ‘more conditional, offence-centred and risk conscious’.

The late modern culture of crime control embraces a distinctive view of ‘the offender’ and the function of criminal justice (Garland, 2001). In contrast to the modern penal-welfarist view of the offender as a deprived individual in need for support and treatment, the late modern culture of crime control portrays offenders rather as culpable and dangerous criminals who must be carefully controlled to protect public safety and prevent further offending; a view which (re-)opens the door for ‘adulteration’ of child offenders (c.f. Feld, 2018; Muncie and Goldson, 2006).

According to Garland (2001), the shift towards a new culture of crime control has profoundly changed the meaning of the welfarist rehabilitative ideal. Rehabilitation is no longer a welfarist end in itself, but rather a way of managing risk: the justification of correctional treatment is no longer to be found in the benefits for the offender, but first and foremost in the protection of society and future victims. Prisons and detention centres explicitly function as a mechanism of control, segregating criminals from society for the protection of public safety (c.f. Cunneen et al., 2016a). Moreover, the work of probation has become less directed to the individual client’s needs and more towards offender supervision and control, through intensive supervision orders, strict reporting requirements, drug-testing, electronic monitoring and restrictions on liberty, such as curfews and restraining orders (c.f. McNeill and Beyens, 2014; Robinson and McNeill, 2016). Furthermore, the dominant narrative of ‘the dangerous other’ in crime control *de facto* results in laws, policies and practices mainly targeting poor and minority communities (c.f. Alexander, 2012; Cunneen et al., 2016a; Stevenson, 2014).

Garland (2001) argues that the increased toughness towards offenders in the name of public safety boils down to a fundamental change in view of the society-offender relation and the victim-offender relation. From a modern penal-welfarist perspective, the offender’s interests and society’s interests are both served by the ideal of rehabilitation through correctional treatment. In the late modern culture of crime control, however, the interests of the offender and the interests of society are conceived as fundamentally opposed, as offenders are predominantly seen as threats to the safety of the public (c.f. O’Brien and Fitz-Gibbon, 2018). This emphasis on securing public safety results, according to Garland (2001), in judicial decision-makers more routinely resorting to the ‘safe option’ of subjecting offenders to detention or other restrictions rather than exposing society to increased risk. Ultimately, as Garland (2001) argues, in the new culture of control, ‘criminal’ individuals have very few interests, needs and rights that could ever outweigh the public’s and victim’s interests of protection, retribution and compensation of harm caused by the offence.

Several scholars have recognized the emergence of a culture of control – also referred to as a ‘punitive turn’ – in youth justice systems in the Western world, not only in the United States and the United Kingdom, but also in continental Western Europe and Australia (Dünkel, 2015; Edwards, 2017; Goldson, 2014; Muncie, 2008; O’Brien and Fitz-Gibbon, 2018; c.f. Snacken, 2012). At the same time, this assumption has also been contested, for example with regard to Scandinavian countries (Green, 2008; Lappi-Seppälä, 2015). Moreover, it has been argued that the recent drop in the youth crime rates in many Western societies, makes youth crime control a less prominent issue in politics,

media and culture (Berghuis and De Waard, 2017). Furthermore, according to some scholars, the increased attention for neuro-scientific insights on adolescent brain development in youth justice over the last decade, paves the way for a less punitive approach to youth delinquency in Western societies (Dünkel, 2015; Feld, 2018; Weijers and Grisso, 2009). Nevertheless, elements distinctive of the late modern culture of control still seem to shape the ways in which professional actors operate in many contemporary Western youth justice systems (Edwards, 2017; Goldson, 2014; O'Brien and Fitz-Gibbon, 2018), also when it comes to the use of pre-trial detention.

Pre-trial detention of children: Welfarist interventionism and the culture of control

Pre-trial detention practices concerning children in contemporary Western societies appear to reflect distinctive traits of a late modern culture of crime control. The use of pre-trial detention as a direct punitive response to criminal behaviour, perceived by judicial decision-makers as satisfying the wishes and expectations of victims and society, echoes the late modernist crime control perspective. Furthermore, controlling high-risk youth and protecting public safety appear to be important drivers behind the extensive use of pre-trial release conditions. Moreover, the late modern cultural tendency of risk avoidance when it comes to crime, may fuel the disparities in pre-trial release decisions, as certain groups of children may be – consciously or unconsciously – perceived and stereotypically framed as higher risk, such as children from racial or ethnic minorities, children from families with a low socio-economic status and school drop-outs (c.f. Cunneen et al., 2016a).¹²

Nevertheless, the transformation of 'modern penal-welfarism' into a 'late modern culture of crime control', as theorized by Garland (2001), is not completely supported by the empirical findings on pre-trial detention decision-making practices. As the empirical evidence suggests, modern welfarist ideals are – still – an important driving force behind several functions of pre-trial detention in multiple present-day Western youth justice systems across continents. The use of pre-trial detention as an early 'pedagogical' intervention and the wide use of pre-trial release conditions for welfare purposes seem to be driven by a contemporary form of 'modern welfarist interventionism'. Moreover, the important advisory role of the child welfare workers in some pre-trial detention practices, as illustrated by the Dutch case study, ties in neatly with the modern welfarists' strong faith in expert advices, required for a tailored, needs-based, correctionalist approach to dealing with child offenders. In this regard, modern welfarism may also be one of the drivers behind the disparities in pre-trial release decisions, as the Dutch case study demonstrates that the advices of child welfare workers are not necessarily free from bias and disparity.

Aside from local differences, both modern welfarist interventionism and late modernist views of crime control appear to be driving forces behind pre-trial detention decision-making practices in several Western youth justice systems, providing likely explanations for the high reliance on pre-trial detention of children, as criticized by international children's and human rights institutions. In essence, said welfarist and crime control cultures fuel a wider use of pre-trial detention of children than strictly

allowed for under international children's rights standards, making it difficult to effectively implement these standards in local decision-making practices.

Welfarism, control and international children's rights

Conceptually, both the 'modern welfarist ideal' and the 'late modern culture of control' are not easy to reconcile with the rights-based approach as prescribed by international children's rights law. Although the modern welfarist ideal and the children's rights framework share a 'child-centred' approach, their underlying rationales are fundamentally different. While international children's rights standards concerning pre-trial detention (i.e. the right to personal liberty and the right to a fair trial) are designed to protect the child suspect *from* state intervention, the modern welfarist aim is to protect (or 'save') the troublesome child suspect *by* state intervention. Moreover, the late modern crime control arrangements oppose the 'child-centred' approach of modern welfarism and international children's rights and call for state intervention to protect society and victims against the child suspect (c.f. Cunneen et al., 2016b; O'Brien and Fitz-Gibbon, 2018). Given the inherent tensions, it is not surprising that the assumptions underlying the international children's rights framework are not uniformly shared and adopted by practitioners who make pre-trial detention decisions on a daily basis in penal cultures in which modern welfarist ideals and/or late modern notions of crime control are dominant discourses.

Summarizing the earlier presented international children's rights framework on youth justice and pre-trial detention, it can be stated that five assumptions lie at the heart of the international children's rights standards regulating pre-trial detention of children, which are as follows: (1) child suspects are children and require a different treatment than adults, (2) child suspects are rights-holders and have the right to personal liberty and to a fair trial, (3) when child suspects are concerned, retributive objectives must give way to rehabilitative objectives, which can be done in accordance with effective public safety, (4) pre-trial detention has detrimental consequences for children and should be used only as a last resort and for the shortest possible period, and (5) non-custodial alternatives are meant to reduce the use of pre-trial detention of children and should not 'widen the net'.

From a modern welfarist perspective, assumptions (1) and (3) are generally accepted. Assumption (2), however, is less obvious when children are viewed as dependent, incompetent and in need of protection, care and guidance, if necessary, by state intervention. In a modern welfarist approach, the child's 'needs' ultimately trump conflicting (fair trial) rights. Moreover, the modern welfarist perspective does not necessarily share assumptions (4) and (5), as pre-trial detention in a youth custodial institution or alternative pre-trial measures can serve as instruments for early intervention, including correctional treatment and guidance and support by child welfare workers (e.g. pedagogically trained staff in institutions or youth probation officers), ultimately contributing to the welfarist rehabilitative ideal.

From a late modern crime control perspective, all of the abovementioned assumptions must yield to the primacy of securing public safety and the interests and rights of the victim. Contrary to the children's rights assumption (3), the late modern culture of crime

control holds little faith in the idea of reconciling these public safety objectives with serving the interests, needs and rights of the child suspect. In fact, from this point of view, public safety and victim's interests might be well served by a wide use of pre-trial detention and a broad use of pre-trial release conditions, imposing restrictions and close supervision of the child suspect (c.f. assumptions (4) and (5)).

These clashes of assumptions and priorities can be considered as an important explanation for pre-trial detention decision-making practices in which children's rights principles seem to be side-lined in favour of other interests and purposes. Judges who strongly believe in the modern welfarist idea that early, pre-trial intervention through correctional treatment in a youth custodial institution is an effective way of rehabilitating a troublesome child might well be willing to set aside a rights-based interpretation of the presumption of innocence that prohibits such an intervention. Judges who perceive protection of the public and victims as their main task and/or operate in a penal culture dominated by the late modern notion of crime control, might more routinely resort to pre-trial detention rather than exposing the public to increased risk by releasing the child suspect, despite the children's rights notion that pre-trial detention should be the absolute last resort. These examples give rise to the question: can international children's rights principles be effectively implemented and realized in pre-trial detention practices fuelled by penal cultures of modern welfarism and late modern crime control and if so, how?

Pre-Trial Detention of Children: Towards Effective Children's Rights Protection?

Efforts at the international level

Bridging the gap between international children's rights standards and local realities requires efforts at the local level, but also at the international level. Given the apparent driving forces behind the use of pre-trial detention of children in local practices, it can be argued that the current international children's rights framework lacks profound consideration for the public safety concerns and welfarist ideals which are widespread at the local level.

First, the UN CRC Committee pays very little attention to the issue of public safety in its General Comments on youth justice (Lynch, 2018: 220). In its previous General Comment No. 10 (2007), the Committee simply acknowledged that 'the preservation of public safety is a legitimate aim of the justice system' and stated that 'this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC' (para. 14). In its new *General Comment No. 24*, the UN CRC Committee (2019) upholds this position and adds, *inter alia*, that 'evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles' (para. 3). Moreover, the UN CRC Committee (2019) explicitly states that deprivation of liberty of children should not be used, 'unless there are genuine public safety or public health concerns' (para. 89), thereby implicitly acknowledging that deprivation of liberty of children is in some cases necessary to protect the public. Nevertheless, the Committee's attention for the issue of public safety

in *General Comment No. 24* remains rather limited (c.f. the four references to ‘public safety’ in the 115-paragraph document) and superficial, as little concrete guidance is provided as to how children’s rights standards can be upheld in the administration of youth justice without disregarding public safety concerns. This is a missed opportunity, since many youth justice professionals on the ground regard the protection of public safety as a key consideration in youth justice decision-making. Consequently, there is a need, internationally, for the development of concrete and evidence-based guidelines on how to align protecting children’s rights with preserving public safety in the administration of youth justice.

Second, the children’s rights premise that pre-trial detention has detrimental consequences for children’s well-being and development requires further substantiation, scientific evidence and awareness-raising (c.f. Van den Brink and Lubow, 2019), as local decision-makers do not necessarily agree, some even strongly believe in the effectiveness of pre-trial detention as an early ‘pedagogical’ intervention. The recently published *UN Global Study on Children Deprived of Liberty* (Nowak, 2019) presents an elaborate overview of scientific evidence on the consequences of deprivation of liberty on the well-being and development of children. The findings of this study offer a scientific empirical basis for further research and assessment of local pre-trial detention practices, but also for more fundamental reflections on the normative international children’s rights framework as such, including its underlying premises.

Efforts at the local level

At the local (or national) level, effective implementation of international children’s rights standards in youth justice requires efforts from the legislator, policy-makers, practitioners and other stakeholders. Implementing children’s principles in domestic pre-trial detention legislation is important, but, in and of itself, not a guarantee for effective children’s rights protection in pre-trial detention practices. When it comes to protecting rights of children, one should not overestimate the power of legislation, since – as we have seen – ‘law in the books’ does not necessarily correspond with ‘law in action’.

Another important requirement for implementation of children’s rights standards in pre-trial detention practices is the availability of non-custodial alternatives. Yet, the availability of alternatives as such is also not enough to safeguard a pre-trial detention practice that is in compliance with children’s rights. As we have seen, in penal cultures characterized by modern welfarist ideals and/or late modern crime control arrangements, the expansion of available alternatives might instigate a ‘net-widening effect’ rather than a reduction of the use of pre-trial detention of children.

Ultimately, effective children’s rights protection comes down to the youth justice actors on the ground, who are involved in pre-trial detention decision-making ‘in action’ (c.f. Goldson and Kilkelly, 2013). Judges and other decision-makers have to be convinced and willing to incorporate a children’s rights approach in their day-to-day pre-trial detention decision-making practices; a willingness that will be largely shaped by the penal culture in which these decision-makers operate. Yet, as Garland (2001), Goldson (2015) and Cunneen et al. (2016a) clearly demonstrate, penal cultures are multidimensional, dynamic in nature and therefore not unchangeable.

Establishing a children's rights-respecting penal culture, however, does not tend to happen overnight, but can be gradually achieved through collaborative efforts from the international community, domestic legislators, policymakers, practitioners and civil society, as, paradoxically, their thoughts and actions are not only *shaped* by the culture in which they operate, but, in their turn, also *shape* the culture in which they operate (c.f. Garland, 2001: 194). In the end, penal cultures are not only constructed by broad political, societal and economical dynamics, but also by proximal processes, including legislative changes, the leadership of key criminal justice and youth justice institutions and the day-to-day decision-making by youth justice actors on the ground (Garland, 2013). Capacity building at the local level is therefore vital, to ensure that pre-trial detention decisions of youth justice actors are made based on thorough knowledge and understanding of the fundamental rights of child suspects and the evidence-based principles for effective youth justice interventions (c.f. Van den Brink and Lubow, 2019).

Concluding Reflections

The CRC is the most ratified treaty in the world, yet its implementation still leaves to be desired (Goldson and Kilkelly, 2013; Muncie and Goldson, 2006), also when it comes to the protection of children against unlawful and arbitrary pre-trial detention in contemporary Western societies. Nevertheless, the CRC and other international children's rights standards have the potential of providing a legally binding instrument for pre-trial detention reform at the national or local level, offering guidance to legislators, policymakers and practitioners. More generally, the CRC promotes the view of child suspects being rights-holders, which counterbalances an overly welfarist approach to dealing with children in conflict with the law. At the same time, the CRC promotes the view of child suspects being children, capable of participating in the procedure, yet vulnerable and still in development towards adulthood; a view that counterbalances the 'adulteration' of child suspects and related punitive practices of crime control. Indeed, as O'Brien and Fitz-Gibbon (2018: 199) highlight international children's standards on youth justice offer

a unifying discourse that is not susceptible to the vagaries of public opinion (. . .), providing a common language through which academics, children's rights advocates and legal practitioners can resist the most excessive manifestations of punitive youth justice policy and practice.

Nevertheless, the existing gap between the international children's rights standards and local pre-trial detention practices also calls for critical reflections on the children's rights discourse. The apparent lack of support for effective implementation of children's rights standards on pre-trial detention among youth justice actors cannot be ignored. Therefore, academics, children's rights advocates and practitioners have an important role to play in strengthening the mutual understanding between the international children's rights discourse and the perceptions and realities of youth justice decision-makers on the ground, inter alia through (empirical) research, capacity building and dialogue. The international children's rights community of scholars and advocates has to invest in understanding and acknowledging the complexities and conflicts of interests in youth

justice decision-making, based on solid empirical evidence. Youth justice actors, in turn, have to invest in understanding and appreciating the significance of children's rights in youth justice decision-making. Only then, the CRC and other children's rights standards can effectively contribute to realizing local penal cultures in which the fundamental rights of children are taken seriously and children are sufficiently protected against unlawful and arbitrary pre-trial detention.

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Notes

1. In this article, 'children' and 'youth' refer to individuals who are below the age of 18 years at the time of (allegedly) committing a criminal offence.
2. This number does not include an estimated 1 million children held every year in police custody (UN Doc. A/74/136, para. 40).
3. For the purpose of this article, pre-trial detention is defined as court-ordered detention of children who are suspected or accused of having committed a criminal offence. It refers to detention throughout the trial, from the first moment the child suspect is brought before a judge or court to the stage of disposition or sentencing. Police custody falls outside the scope of this article.
4. In this article, 'Western' refers to jurisdictions across Western Europe and Northern Europe (as defined by the United Nations geoscheme for Europe), the United States, Canada, Australia and New Zealand. However, given the differences among youth justice systems and the lack of empirical data on pre-trial detention in many jurisdictions, this article does not claim to find an overall explanation for reliance on pre-trial detention applicable to each and every Western youth justice system.
5. For the purpose of this article, 'penal culture' refers to the broad complex of law, policy and practice which frames the functioning of the youth justice system, including the use of detention, and the broader system of meanings, beliefs, ideas and perceptions through which people understand and make sense of youth justice and detention (c.f. Cunneen et al., 2016a: 1–2).
6. See for a comprehensive overview of studies: Van den Brink, 2018.
7. N.B. The Dutch youth justice system has a flexible upper age limit, which means that the law makes it possible to sanction children who are 16 or 17 years old at the time of the offence under the adult criminal law, while young adults who are younger than the age 23 at the time of the offence can be sentenced as children. See: Arts. 77b and 77c CC.
8. For the methodological justification of these studies (see Van den Brink, 2018: 20–25 and 237–271; Van den Brink et al., 2017: 29–35).
9. For the statistics underlying the findings on pre-trial detention and custodial sentences, see Van den Brink et al., 2017: 93–102.
10. For the statistics underlying the findings on pre-trial release decisions, see Van den Brink et al., 2017: 56–62.
11. C.f. Patton's (1990: 172) notion of 'maximum variation sampling', which is based on the logic that 'any common patterns that emerge from great variation are of particular interest and value in capturing the core experiences and central, shared aspects or impacts of a [phenomenon]'.

12. The underlying causes of disparities in criminal justice decision-making and overrepresentation of certain groups in detention are, however, fiercely debated in academic literature and can differ per jurisdiction. See for example Kelly and Tubex (2015: 3–4), who argue – with references to other literature – that applying Garland’s conception of the late modern ‘punitive turn’ as a theory for understanding the overrepresentation of Aboriginal youth in Australian detention centres fails to recognize the legacy of Australia’s colonial history of dispossession of Aboriginal communities and ‘the historical role of the criminal justice system as being the enforcement arm of colonial authority’.

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