



CAT 71 Session

Country name: Botswana

Areas of Concern:

The Committee Against Torture (CAT), in General Comment 2, elaborated that there is no clear definitional threshold between other cruel, inhuman or degrading treatment or punishment (hereinafter “ill-treatment”) and torture, but each State party obliges to take actions and measures that will prevent torture and to apply them to prevent ill-treatment as well because conditions that give rise to ill-treatment facilitate torture.¹ The CAT strongly reinforces *jus cogens* norm in absolute and non-derogable prohibition against torture.

International law strictly limits the circumstances in which children can be placed in detention while awaiting trial or while under investigation pre-charge. Pretrial detention should only be used in exceptional circumstances, where it is necessary to ensure the child’s appearance at the court proceedings, or where the child is an immediate danger to himself/herself or others.² Pretrial detention is only permitted as a measure of last resort and for “*the shortest appropriate period of time.*”³ However, there is no clarity around what is meant by an “*appropriate period of time.*” The Committee on the Rights of the Child (CRC), in General Comment 10, recommended that children who are detained should be formally charged within 30 days and once charged, that a final decision should be made by the court within six months.⁴ The CRC additionally recommended that any such detention should be reviewed regularly by a competent body⁵ These recommendations can and should be strengthened.

Defendants in pretrial detention are more likely to be abused, mistreated and tortured,⁶ and children are particularly vulnerable. In many countries, the lack of adequate facilities, food and sanitation, insufficient access to education and training, and compromised contact with family and friends makes even short periods of time in pretrial detention traumatic for children. Detention has been shown to significantly increase the risk of

¹ Comm. Against Torture, General Comment 2: Implementation of article 2 by States parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT General Comment 2].

² Patrick Webb & William Allen Kritsonis, *Controlling those Kids: Social Control and the Use of Pretrial Detention among Youth in the United States of America: National Implications*, ERIC (Oct. 2006), <https://eric.ed.gov/?id=ED493565>.

³ G.A. Res. 44/25, Convention on the Rights of the Child, art. 37(b) (Nov. 20, 1989) [hereinafter CRC].

⁴ Comm. on the Rights of the Child, General Comment 10: Children's Rights in Juvenile Justice, § 80, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter CRC General Comment 10].

⁵ *Id.* ¶ 83 (specifying that regular review is “preferably every two weeks”).

⁶ Moritz Birk et. al., *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, 27, OPEN SOCIETY FOUND. (2011), <https://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-06222011.pdf>.

depression, suicide, school drop-out, and drug use among children.⁷ Unfortunately, in many countries the majority of children in detention are awaiting trial and may spend months or years behind bars before having their cases resolved. Even in jurisdictions that have successfully implemented alternatives to detention, children still spend months or years in pretrial detention, often longer than any sentence they might receive on conviction. It is reportedly common for children to receive conditional release or diversion after months of pretrial detention⁸. This means that the most significant time spent deprived of liberty is while awaiting trial, when children are ostensibly presumed innocent.

The 2018 report “Children in Pretrial Detention: Promoting Stronger International Time Limits” is the first study of how long countries allow children to be detained awaiting trial. Looking at the legal limits in 118 countries, the report found that 26% of countries have no time limit and 40% of countries allow exceptions to their time limit, risking indefinite detention. Nevertheless, the length of time that children actually spend in detention awaiting trial is data that countries have not been collecting or reporting.

The *Children in Pretrial Detention: Promoting Stronger International Time Limits* report serves as a baseline for the CRC to expand on country practices regarding times of pretrial detention of children.

Methodology:⁹

This alternative report is based on the *Children in Pretrial Detention* report on pretrial detention times of 119 CRC State parties.¹⁰ Such report was conducted by reviewing the respective current statutes or court rules in force at the time that the data was collected. In defining the statutory time period of pretrial detention, when possible, the report applied the statutory maximum for pretrial detention based on the time allowed in detention from arrest until a sentence was established. However, varying jurisdictions defined pretrial detention differently or set limits based on alternative procedural milestones. Where the statute did not provide a length of days or it was unclear, the number of days was based on the national law’s definition of pretrial detention.

Most jurisdictions did not indicate any time limit for children in pretrial detention pending appeals. For the sake of uniformity, only limits based on pretrial detention before the first adjudication were used. State practices are unclear when a case is appealed, and

⁷ Barry Holman & Jason Ziedenberg. *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 3–10, JUST. POL’Y INST. (Nov. 28, 2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

⁸ E.g., *Diagnóstico del Sistema de Justicia Para Adolescentes del Estado de Chihuahua: “Buenas Prácticas para las Alternativas a la Detención”*, 8–10, JUSTICIA JUVENIL INT’L (Sept. 2017) <https://jjimexico.org/projects/chihuahua> [hereinafter *Diagnóstico 2017*].

⁹ Additional methodological information available in *Children in Pretrial Detention: Promoting Stronger International Time Limits*, i, May, 2018 (available at <https://jjimexico.org/ptd-report/>)

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the child is in pretrial detention, such as if the clock is suspended or if the time limit still applies.

Botswana

Botswana has a generally applicable pretrial detention limit of 180 days for youth and adults. ¹¹	
Statutory Citations	<p>Criminal Procedure and Evidence Act</p> <p>Section 133. Persons committed to be brought to trial at the first session provided 31 days have elapsed from commitment</p> <p>(1) Except where otherwise expressly provided in this Act as to the adjournment of a court, every person committed for trial or sentence whom the Director of Public Prosecutions has decided to prosecute before the High Court shall be brought to trial at the first session of that Court for the trial of criminal cases held after the date of the commitment, or else <i>shall be admitted to bail, if 31 days have elapsed</i> between the date of commitment and the time of holding such session, unless- (a) the Court is satisfied that, in consequence of the absence of material evidence or for some other sufficient cause, the trial cannot then be proceeded with without defeating the ends of justice; or (b) before the close of such first session an order has been obtained from the Court under the provisions of section 134 for his removal for trial elsewhere.</p> <p>(2) If such person is not brought to trial at the first session of such Court held after the <i>expiry of six months from the date of his commitment</i>, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed.¹²</p>
Failure to comply with Convention	Under the laws of Botswana, a child can be detained awaiting trial for up to six months. ¹³ The Committee on the Rights of the Child, in General Comment 10, recommended that children who are detained should be formally charged <i>within 30 days</i> and, once charged, that a

¹¹ Criminal Procedure and Evidence Act, part XI, sec. 133 (Bots.).

¹² *Id.* (emphasis added).

¹³ *Id.*

	<p>final decision should be made by the court <i>within six months</i>.¹⁴ Pretrial detainees are extremely vulnerable to torture and abuses because they are entirely in the power of authorities, whose interests are often to gain information and a confession. Children are particularly vulnerable to coercive interrogation practices and susceptible to make false confessions.¹⁵</p>
<p>JJIA Recommendations</p>	<ul style="list-style-type: none"> ● JJIA recommends that Botswana invests efforts in promoting non-custodial measures for cases of children accused of criminal offenses and use detention only as a last resort and for the shortest possible period of time. ● JJIA recommends that Botswana works towards a statutory pretrial detention limit for children of no more than 30 days. The duration of pretrial detention should only be allowed to be extended once by a judge for up to 30 more days based upon the procedural needs of the case at hand, and upon (1) a request by the defense that justifies the extension; (2) a request by the prosecution and a showing that more time is absolutely essential to secure evidence that is necessary and cannot otherwise be obtained, or; (3) a showing of other exigent circumstances in the present case that justifies the extension. When extending the period of pretrial detention, the judge should limit it to the shortest time that is absolutely necessary, based on the procedural needs of the case and justified by the parties, rather than as a rule to extend the pretrial detention time by 30 days. ● JJIA recommends that Botswana ensures that children are separated from adults while in custody. ● Botswana should also ensure all fundamental legal safeguards to all children deprived of their liberty, including their rights to access an independent lawyer immediately after the arrest and to contact their families and relatives.
<p>Lines of Inquiry related to torture and ill-treatment</p>	<ul style="list-style-type: none"> ● Data on the actual times children spend in pretrial detention. ● Disaggregated statistical data by sex, age, and ethnicity of children in confinement, including in pretrial detention. ● Data on the number of children confined along with adults. ● Interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of children

¹⁴ CRC General Comment 10 at ¶ 83 (emphasis added).

¹⁵ Juvenile Justice Advocates, International Human Rights Clinic of American University Washington College of Law, University of Minnesota Human Rights Center, *Children in Pretrial Detention: Promoting Stronger International Limits*, 2018, at 14, <https://jjimexico.org/ptd-report/>

	<p>subjected to any form of arrest, detention or imprisonment with a view to preventing any cases of torture.</p> <ul style="list-style-type: none">● Data on the conditions of detention places for juveniles, including access to rehabilitation and education opportunities.● Annual number of juveniles that die in custody and causes of death.
Link to Global Study	<ul style="list-style-type: none">● https://jjimexico.org/ptd-report/