

TRANSFER OF CHILD OFFENDERS TO ADULT CRIMINAL
COURTS IN THE USA: AN UNNECESSARY EXERCISE,
UNCONSTITUTIONAL PRACTICE, INTERNATIONAL LAW
VIOLATION, OR ALL OF THE ABOVE?

Roger-Claude Liwanga and Patrick Ibe**

TABLE OF CONTENTS

I. ABSTRACT	101
II. INTRODUCTION.....	101
III. OVERVIEW OF THE CONCEPT OF JUDICIAL WAIVER	106
<i>A. Origin and Characteristics of the Transfer of Child Offenders</i>	106
<i>i. Who is a Child (Offender)?</i>	107
<i>ii. Variation Between How U.S. States Define Judicial</i> <i>Waiver</i>	109
<i>iii. Characteristics of Judicial Waiver</i>	109
1. <i>Age for Transfer</i>	109
2. <i>Types of Crimes</i>	110
<i>B. Category of Transfer of Juveniles Laws</i>	111
<i>i. Statutory Exclusion or Automatic Transfer Laws</i>	111
<i>ii. Judicial Discretion Laws or Judicially Controlled</i> <i>Transfer</i>	111
<i>iii. Prosecutorial Discretion Laws or Concurrent</i> <i>Jurisdiction Laws</i>	112
<i>iv. Once an Adult, Always an Adult Policies</i>	112

*Fellow with FXB Center for Health and Human Rights, Harvard University; Adjunct Professor of Child Protection and International Human Rights, Emory University Law School; Assistant Professor of Criminal Justice, Albany State University, Criminal Justice Department; formerly taught International Laws of War at Suffolk University Law School; and author of the book, *CHILD MINING IN AN ERA OF HIGH-TECHNOLOGY: UNDERSTANDING THE ROOTS, CONDITIONS, AND EFFECTS OF LABOR EXPLOITATION IN THE DEMOCRATIC REPUBLIC OF CONGO* (2017).

*Professor of Criminal Justice, Chair of the Criminal Justice Department, Albany State University.

IV. ANALYSIS OF THE CONSTITUTIONALITY OF THE TRANSFER LAWS IN THE UNITED STATES	113
A. Kent v. United States	113
i. Background.....	113
ii. <i>Conditions for the Constitutionality of Juvenile Transfer</i>	115
B. Breed v. Jones	116
C. <i>Observations on the U.S. Supreme Court Rulings on the Kent and Breed Cases</i>	117
D. <i>Is it Time for the Re-visitation of the Judicial Waiver Policies?: The Kent and Breed cases versus the Roper and Miller cases</i>	117
V. LEGALITY OF JUDICIAL WAIVER UNDER INTERNATIONAL LAW.....	118
A. <i>A Child's Right to Juvenile Justice</i>	119
B. <i>Juvenile Court as a Specialized and Rehabilitating Court</i> .	120
C. <i>Children's Right to Juvenile Justice as Part of Customary International Law</i>	121
VI. EFFECTIVENESS OF THE JUDICIAL WAIVER PRACTICE.....	124
A. <i>Deterrent Effect of Judicial Waiver</i>	124
i. <i>General Deterrence</i>	124
ii. <i>Specific Deterrence and Recidivism</i>	126
VII. CONCLUSION	127

I. ABSTRACT

There is an ongoing debate over the legality and effectiveness of the use of judicial waiver as a tool to fight violent crimes, including those committed by children in the United States. Judicial waiver or transfer of juveniles is a process by which child offenders are transferred from the juvenile court to adult criminal courts to be tried and sentenced as adult offenders. Despite the implicit recognition of the constitutionality of this practice by the United States Supreme Court, this paper contends that the transfer of child offenders to adult criminal courts violates key provisions of the Convention on the Rights of the Child (“CRC”). Article 40(2)(iii) of the CRC guarantees each child offender the right to have their case adjudicated by a competent and specialized court (such as a juvenile court), regardless of the gravity of their acts. The right to a competent court, which is one of the components of the right to a fair trial, is part of the customary international law that should be enforced by all nations, including those who have ratified the CRC and those who have not (like the United States). It also suggests that judicial waiver is an ineffective practice, as its deterrent virtue against youth recidivism and juvenile violent crimes is largely unproven. It correspondingly highlights that the recidivism rates are lower for child offenders tried in juvenile court than for those who are transferred to adult criminal courts. This paper consequently recommends the restoration of the full jurisdiction of juvenile courts over all child offenses and proposes the reversal of the judicial waiver laws because of their failure to ensure children’s right to a competent and specialized system.

II. INTRODUCTION

Numerous international and domestic legal instruments protecting children’s rights acknowledge the separation between adult and children tribunals.¹ Article

¹ See Convention on the Rights of the Child art. 40(2)(b)(iii), Nov. 20, 1989, 1577 U.N.T.S. 333 [hereinafter CRC]; see also International Covenant on Civil and Political Rights art. 14, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that “[i]n the determination of any criminal charge . . . or . . . rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”) [hereinafter ICCPR]; see generally American Convention on Human Rights art. 8, ¶1, Nov. 22, 1969, 1144 U.N.T.S. 123 (noting that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent . . . tribunal, previously established by law”); European Convention for the Protection of Human Rights and Fundamental

40(2)(b)(iii) of the 1989 Convention on the Rights of the Child (“CRC”) provides, for instance, that: “[e]very child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . to have the matter determined without delay by a competent . . . authority or judicial body in a fair hearing according to law.”²

Unquestionably, the term “competent . . . judicial body[,]” which the CRC uses in Article 40, should be read as referring a juvenile court established and specialized to handle all cases of delinquency committed by children under the age of eighteen.³ Unlike adult courts, juvenile courts should place more emphasis on treatment and rehabilitation, rather than punishment of child offenders.⁴ In other words, due to their immaturity and underdeveloped sense of responsibility, child offenders should not be tried in the same courts that deal with adult criminals nor be sentenced as adult criminals, regardless of the nature and gravity of their criminal offenses.⁵

Recognizing the importance of instituting different treatments between child offenders and adult criminals, the United States Supreme Court adopted a strong stance in *Roper v. Simmons*, and *Miller v. Alabama*.⁶ In these cases, the Supreme Court was respectively requested to assess the questions of whether (1) the execution of a child offender; and (2) the imposition of a life-without-parole sentence on a child offender violate the constitutional prohibition on cruel and unusual punishment as articulated in the Eighth Amendment and applied to the states through the Fourteenth Amendment.⁷ While responding affirmatively to those

Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; African Charter on the Rights and Welfare of the Child art. 17, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49.

² Convention on the Rights of the Child, *supra* note 1, art. 40(2)(b)(iii).

³ *Id.*

⁴ Benjamin Steiner, Craig Hemmens & Valerie Bell, *Legislative Waiver Reconsidered: General Deterrent Effects of Statutory Exclusion Laws Enacted Post-1979*, 23 JUST. Q. 34, 35 (2006).

⁵ Carmen Daugherty, “No One Younger Than 18 Should Be Tried as an Adult,” N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/roomfordebate/2015/12/14/what-age-should-young-criminals-be-tried-as-adults/no-one-younger-than-18-should-be-tried-as-an-adult>.

⁶ In *Miller v. Alabama*, the U.S. Supreme Court was asked to answer whether the imposition of a life-without-parole sentence on a fourteen-year-old child violates the Eighth and Fourteenth Amendments’ prohibition against cruel and unusual punishment. The Supreme Court held that life without the possibility of parole is an unconstitutional punishment for juvenile offenders. *Miller v. Alabama*, 567 U.S. 460 (2012). In *Roper v. Simmons*, the U.S. Supreme Court was asked to answer whether the execution of minors violates the prohibition of “cruel and unusual punishment” found in the Eighth Amendment and applied to the states through the incorporation doctrine of the Fourteenth Amendment. The U.S. Supreme Court ruled that it is unconstitutional to impose the death penalty for a crime committed by a child under 18. *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷ See *Miller*, 567 U.S. at 460; *Roper*, 543 U.S. at 551.

questions, the Supreme Court highlighted the psychological difference between child offenders and adult criminals by emphasizing that the former should not be classified among the worst offenders.⁸ Such a distinction should be reflected in the handling of child offenders by the juvenile justice system, irrespective of the seriousness of the offenses that the juvenile is accused of committing. Furthermore, the Supreme Court underlined that child offenders are less morally inexcusable than adults for an array of reasons: their immaturity and irresponsibility, their own vulnerability and lack of control that make it far more difficult for them to escape negative societal influences when compared with adult offenders, and their struggle in defining their own identity.⁹

The premise is that if a child offender who committed a murder cannot be sentenced to death—a sanction that could be imposed on adult offenders who committed a similar crime—owing to their underdeveloped sense of responsibility, then it is obvious that the same child offender should not be tried in an adult criminal court. This is because a child offender’s immaturity would prevent them from understanding the complexity of the adult criminal justice system. The requirement of exclusive adjudication of child offenders’ cases in juvenile courts also constitutes one of the “fundamental principles of a fair trial,” and is part of customary international law, meaning that the right should be globally enforced.¹⁰

Each of the fifty states in the United States has a juvenile justice system within its jurisdiction and established juvenile courts competent to adjudicate criminal offenses committed by children.¹¹ Yet despite the existence of these juvenile courts, each state in the United States has also approved domestic provisions consecrating the practice of “judicial waiver.”¹² Judicial waiver, or transfer of juveniles, is a process through which child offenders are transferred from the juvenile court to the adult criminal court to be tried and eventually sentenced as an adult offender for their misconduct.¹³ With the practice of judicial waiver, juvenile courts effectively abandon their role as competent and specialized tribunals for children in exchange for an inexperienced tribunal, the adult criminal court.

Among the U.S. states implementing judicial waiver policies, the application of this practice is far from uniform. In most U.S. states, judicial waiver commonly applies to child offenders of a certain age, particularly those ranging from

⁸ See *Miller*, 567 U.S. at 471–72; *Roper*, 543 U.S. at 569.

⁹ See *Roper*, 543 U.S. at 553.

¹⁰ See U.N. Human Rights Committee, General Comment No. 29: Article 4 (International Covenant on Civil and Political Rights) adopted on July 24, 2001, CCPR/C/21/Rev.1/Add.11.

¹¹ PATRICK GRIFFIN ET AL., U.S. DEP’T OF JUST., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1 (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>.

¹² *Id.* at 8.

¹³ LARRY SIEGEL & BRANDON WELSH, JUVENILE DELINQUENCY: THEORY, PRACTICE AND LAW 550 (11th ed. 2012).

fourteen to seventeen years old.¹⁴ Other state laws only authorize the transfer of minors who have committed serious crimes (including vehicle theft, burglary, robbery, murder, and rape) or those who have demonstrated a certain degree of maturity with regard to their criminal offenses.¹⁵ Certain local statutes permit the transfer of juveniles who have committed specified crimes regardless of their age.¹⁶

A recent report from the National Center for Juvenile Justice revealed that approximately 7,500 to 8,000 child offender cases were transferred from juvenile courts to adult criminal courts for adjudication between 2000 and 2009.¹⁷ The rationale behind favoring adult criminal courts over juvenile courts can be explained by the deterrent policy of aggressively fighting serious and violent crimes, including those committed by children,¹⁸ as adult courts traditionally impose more severe criminal punishments than juvenile courts.

This Article explores the legality and efficacy of the transfer of juveniles to adult courts in the United States. Section I will provide a general overview of the concept of judicial waiver. Section II will analyze the constitutionality of judicial waiver laws in the United States. It asks first whether the practice is constitutional as a matter of U.S. domestic law before analyzing the practice's legality under international legal instruments protecting children's rights. Beyond both of the above legal inquiries, the Article will also inquire into the efficacy of judicial waiver as a tool against youth recidivism and juvenile violent crimes.

Judicial waiver is implicitly recognized as a constitutional practice under the jurisprudence of the U.S. Supreme Court. On two occasions when the Supreme Court was approached with issues related to judicial waiver, the Court ruled on the constitutionality of procedures applicable during the implementation of judicial waiver rather than taking a clear position on the constitutionality of judicial waiver itself. In *Kent v. United States*, 383 U.S. 541 (1966), a case concerning the transfer of a sixteen-year-old boy who was convicted of charges of house-breaking, robbery, and rape,¹⁹ the Supreme Court ruled that the juvenile court's waiver was simply unconstitutional because the transfer procedure, in which no waiver hearing was held, violated Kent's constitutional right to due process and assistance of counsel.²⁰ Nine years later, in *Breed v. Jones*, 421 U.S. 519 (1975),

¹⁴ See GRIFFIN ET AL., *supra* note 11, at 4 (charting states and their minimum age requirements for judicial waiver).

¹⁵ *Id.* at 2.

¹⁶ HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 114 (2006), <https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>; SIEGEL & WELSH, *supra* note 13, at 550.

¹⁷ CHARLES PUZZANCHERA ET AL., NAT'L CENT. FOR JUV. JUST., JUVENILE COURT STATISTICS 40 (2009), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/239114.pdf>.

¹⁸ GRIFFIN ET AL., *supra* note 11, at 26.

¹⁹ *Kent v. United States*, 383 U.S. 541, 557–63 (1966).

²⁰ *Id.* at 561.

a case concerning a child offender whose case was successively adjudicated by the juvenile and adult courts for the same violation of criminal law,²¹ the Supreme Court concluded that child offenders who are tried by a juvenile court for their criminal offenses can no longer be transferred to and tried by an adult court for the same facts, as such a practice would clearly violate the constitutional prohibition of double jeopardy.²² In light of these cases, it is a widely accepted practice for U.S. states to try and sentence child offenders as adult criminals based on domestic laws, so long as those local laws respect other procedural and due process rights.

Yet, one may argue that there is an apparent philosophical inconsistency within the Supreme Court's jurisprudence on the matter. In *Kent v. United States*, the Supreme Court held that a violent child offender is mature enough to face a trial before an adult criminal court if the constitutional guarantees of due process are respected.²³ Whereas, in its 2005 ruling in *Roper v. Simmons*, the Supreme Court ruled that a violent child offender is not mature enough to face capital punishment—a sentence reserved for adult offenders.²⁴ This raises the question of how a child offender, who is not mature enough to understand the severity of the punishment inflicted upon adult criminals, could be sufficiently mature to handle the intricacies of a judicial process that is pre-established to apply to adult criminals? Is it not time for a comprehensive re-visitation of the constitutionality of juvenile waiver in U.S. jurisprudence?

Section V will address the legality of judicial waiver under international law. This Article contends that the practice of judicial waiver violates international law, particularly Article 40(2)(b)(iii) of the CRC, guaranteeing a child offender's right to a competent and specialized court.²⁵ The Article also posits that the right to a competent and specialized court, which is one of the components of the right to a fair trial, is part of customary international law;²⁶ and the obligation to protect the right to a fair trial (as one of the basic rights of the human being) has

²¹ *Breed v. Jones*, 421 U.S. 519 (1975).

²² *Id.* at 537.

²³ *Kent*, 383 U.S. at 557–63.

²⁴ *Roper*, 543 U.S. at 573.

²⁵ Convention on the Rights of the Child, *supra* note 1, art. 40.; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS (2011), <http://www.oas.org/en/iachr/children/docs/pdf/juvenilejustice.pdf>.

²⁶ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 104 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); *see also* *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, ¶ 164 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELY J.L. INT'L L. PUBLICIST 1, 8 (2010); U.N. Human Rights Committee, *supra* note 10.

erga omnes effects, which should be enforced by all nations including those who have ratified the CRC and those who have not (like the United States).²⁷

Section VI will examine the efficacy of judicial waiver in practice. This Article argues that the transfer of juveniles to adult courts is an ineffective practice, as its deterrent effect against youth recidivism and juvenile violent crimes is unproven.²⁸ There is no unquestionable evidence showing that child offenders who were transferred to adult criminal courts are less likely to recidivate than those whose cases were tried by juvenile courts.²⁹ Nor is there any evidence suggesting that the transfer to adult courts decreases juvenile violent crime rates.³⁰ To the contrary, recent research on the connection between judicial waiver and recidivism rates of child offenders tried at both juvenile and adult criminal courts in the United States demonstrates that recidivism rates are lower for child offenders retained in juvenile court than for those transferred to adult criminal court.³¹ The Article concludes by recommending the restoration of the full jurisdiction of juvenile courts over all criminal conduct committed by children and the reversal of judicial waiver laws because they fail to ensure a child's fundamental right to a competent and specialized court.

III. OVERVIEW OF THE CONCEPT OF JUDICIAL WAIVER

A. Origin and Characteristics of the Transfer of Child Offenders

In the 1970s, there was a rise in the rate of juvenile violent crimes in the U.S.³² That rate escalated considerably in the 1980s before declining moderately in the

²⁷ In the Barcelona Traction case, the ICJ upheld that the obligations *erga omnes* also comprise those emanating "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." By using both the term "basic rights of human person" and the preposition "including," the ICJ did not exclude any other fundamental rights of individuals from having the *erga omnes* status nor did it establish a conclusive list in this jurisprudence. See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5). See also BRIAN LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 261–69 (Mortimer N.S. Seller & Elizabeth Anderson eds., 2010).

²⁸ SIEGEL & WELSH, *supra* note 13, at 548.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Lonan Lanza-Kaduce et al., *Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer*, 28 J. OF CRIME AND JUST. 59, 59–77 (2005); Jeffrey Fagan, *The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, 18 LAW AND POL'Y 77, 77–113 (1996); Richard Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, at 4.

³² Steiner, Hemmens & Bell, *supra* note 4, at 35.

1990s.³³ In search of a solution for this difficult problem, most states adopted the “get tough” approach vis-à-vis child offenders.³⁴ One of the aspects of this “get tough” approach was the implementation of the practice of transferring child offenders to adult criminal courts.³⁵ Thus, judicial waiver was born.³⁶

Before 1970, the transfer of juveniles in most states was ordered by the courts on a case-by-case basis.³⁷ Only eight states had laws authorizing judicial waiver, including Florida, Georgia, Mississippi, Louisiana, Vermont, Pennsylvania, District of Columbia, and Delaware.³⁸ During the same period, only two states, Florida and Georgia, had legislation giving prosecutors the option to charge certain juvenile offenders in criminal court.³⁹ At the end of the 1970s and into the early 1980s, a majority of states enacted laws permitting the transfer of juveniles.⁴⁰ Today, all states within the United States have laws authorizing the transfer of violent child offenders to adult criminal courts regardless of their age.⁴¹

i. Who is a Child (Offender)?

Being a child or juvenile implies many things:

In terms of human development, a juvenile is an individual who is physiologically, emotionally and intellectually immature. This developmental immaturity dictates a sociolegal status for juveniles that is bound by numerous requirements and restrictions—for example, educational laws require juveniles to attend school to a certain age, the labor laws restrict when and where juveniles

³³ *Id.*

³⁴ Redding *supra* note 31, at 1; *see also* Steiner, Hemmens & Bell, *supra* note 4, at 35 (explaining that conservative denigration and liberal disenchantment, along with juveniles receiving the same due process rights as adult defendants, prompted a more formalized juvenile justice system, referred to as “just desserts” or the “get tough” trend).

³⁵ Redding *supra* note 31, at 1; *see also* Liz Ryan, *Should State Laws that Facilitate Prosecuting Juveniles in Adult Court be Changed?*, 18 CQ RESEARCHER 929 (2008) (answering yes and explaining that the effect of state officials passing laws to make it easier to try juveniles as adults was a higher likelihood that juvenile will re-offend).

³⁶ *See* IND. CODE § 31-30-3-1 (“Waiver of jurisdiction refers to an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult. Waiver is for the offense charged and all included offenses.”); *see also* SIEGEL & WELSH, *supra* note 13, at 543–45 (explaining the decision, approach, and process for detaining children in adult jails).

³⁷ GRIFFIN ET AL., *supra* note 11, at 8.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> (last visited Nov. 19, 2020).

can work, driving laws dictate the age at which juveniles are allowed to obtain a driver's license . . . and juveniles are not permitted to enter into legal contracts, including marriage.⁴²

Under the U.S. legal system, each state is entitled to determine who is qualified for the status of "child" in the criminal justice system of that state.⁴³ Once a person is considered an adult by the laws of a particular state, that person is no longer acknowledged as a child, regardless of that person's age.⁴⁴ In some U.S. states, the age threshold for juvenile court jurisdiction has commonly been eighteen.⁴⁵ In other states, the common law sets the minimum age for criminal responsibility at seven years old, but many states statutorily specify the age of delinquency; usually falling between ages seven and fourteen.⁴⁶

International standards define a child as any person below eighteen years of age. For instance, Article 1 of the CRC solely defines a child based on his or her age by emphasizing that a "child means every human being below the age of eighteen years."⁴⁷ Protections of the CRC are extended to "every human being below the age of eighteen years."⁴⁸ Likewise, under the regional instruments protecting human rights, the same objective age-based criterion is used in defining a child as a person under the age of eighteen—these include the Inter-American Convention on Human Rights⁴⁹ and the African Charter on the Rights and Welfare of the Child.⁵⁰ From the perspective of human rights standards, a child offender is a person under the age of 18 who has been accused of, or is recognized as having committed, an act infringing the penal law.⁵¹

⁴² KAREN HESS ET AL., *JUVENILE JUSTICE* 3–4 (6th ed. 2013).

⁴³ Annex to the Press Release Issued at the Close of the 147th Session, Inter-Am. Comm'n on Human Rights (Apr. 5, 2013), https://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp. According to further information received by the Commission, the only U.S. federal law that defines adulthood as beginning at age 18 is the law concerning "emancipation to adulthood," which includes the right to vote. *Id.*

⁴⁴ *Id.*

⁴⁵ *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., <http://www.jjgps.org/jurisdictional-boundaries> (last visited Nov. 19, 2020). The following four states with upper ages below seventeen have recently amended statutes to conform with the majority of other states: South Carolina, Louisiana, New York, and North Carolina. *Id.*

⁴⁶ *Id.*; see also Lisbet Palme, UNICEF, *No Age of Innocence: Justice for Children*, in THE PROGRESS OF NATIONS 1997 56 (1997), <https://www.unicef.org/pon97/p56a.htm>.

⁴⁷ CRC, *supra* note 1, at art. 1; see also Inter-American Commission on Human Rights, *supra* note 43, at 19.

⁴⁸ CRC, *supra* note 1, at art. 1.

⁴⁹ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 42 (Aug. 8, 2002).

⁵⁰ African Charter on the Rights and Welfare of the Child, *supra* note 1, at art. 2.

⁵¹ CRC, *supra* note 1, at art. 40(2)(a).

ii. Variation Between How U.S. States Define Judicial Waiver

There is not a unanimously accepted definition of judicial waiver or transfer of juveniles among the U.S. states utilizing the practice. 18 U.S. Code § 5032, which governs the federal transfer provision, does not provide any definition of this concept.⁵² The 2018 Florida Statutes 985-55(1) define judicial waiver as the act of the judicial court to “transfer and certify a child’s criminal case for trial as an adult if the child is alleged to have committed a violation of law”⁵³ Likewise, the Georgia Code describes this practice as an act of the juvenile court to transfer “a juvenile that meets age/offense requirements” to an “adult court for prosecution if it finds, after a proper hearing, that there are reasonable grounds to believe that the juvenile committed the act alleged.”⁵⁴ Similarly, in Kansas, the statute provides that the transfer of a juvenile is the process in which the “court authorizes the prosecution of the juvenile as an adult under the applicable criminal statute.”⁵⁵

In other words, judicial waiver can be understood as a procedure through which a child offender is transferred from the juvenile court to the adult criminal court to be tried and eventually sentenced as an adult offender for their misconduct.⁵⁶

iii. Characteristics of Judicial Waiver

1. Age for Transfer

The age at which child offenders can be transferred to adult criminal court is not identical across all U.S. states. Commonly, most states transfer child offenders age fourteen and older.⁵⁷ In Kansas, § 38-2347(a)(1) provides that “[n]o juvenile less than fourteen years of age shall be prosecuted as an adult,”⁵⁸ unlike Georgia, where child offenders of any age (including those aged of thirteen years or younger), who commit any crime punishable by death or life imprisonment without parole, can be tried as adults.⁵⁹ The Georgia Code stipulates that “[t]he juvenile and superior courts have concurrent jurisdiction over cases involving

⁵² See 18 U.S.C. § 5032.

⁵³ FLA. STAT. § 985-556 (2018).

⁵⁴ GA. CODE ANN. § 15-11-39 (1981) (enacted 2013).

⁵⁵ KAN. STAT. ANN. § 38-2347(a)(1) (2006) (effective July 1, 2014), https://www.ksrevisor.org/statutes/chapters/ch38/038_023_0047.html.

⁵⁶ SIEGEL & WELSH, *supra* note 13, at 549–51.

⁵⁷ GRIFFIN ET AL., *supra* note 11, at 8.

⁵⁸ KAN. STAT. ANN. § 38-2347(a)(1) (2006) (effective July 1, 2014), https://www.ksrevisor.org/statutes/chapters/ch38/038_023_0047.html.

⁵⁹ GA. CODE ANN. § 15-11-39 (1981) (enacted 2013).

juveniles of any age accused of crimes punishable by death or life imprisonment⁶⁰

2. *Types of Crimes*

Typically, there are five categories of offenses for which juveniles of a certain age may be transferred.

First, any criminal offense: Some states have adopted laws allowing juvenile court judges to waive their jurisdiction over any criminal offenses committed by child offenders and transfer them to criminal court. These states include Alabama (if the juvenile is at least fourteen), California and Tennessee (if the juvenile is at least sixteen), and Georgia (if the juvenile is at least fifteen).⁶¹

Second, murder and capital crimes: Some states authorize judicial waiver if the juvenile commits murder or other crimes punishable by the death penalty.⁶²

Third, certain violent felonies: Violent crime or felony refers to violent behavior by a person against a person or their property, which intentionally threatens, attempts, or actually causes physical harm.⁶³ According to the Federal Bureau of Investigation, violent crime composes the following offenses: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft.⁶⁴

Fourth, certain drug offenses: This includes the possession, use, sale, or furnishing of any drug or intoxicating substance or drug paraphernalia.⁶⁵

Fifth, certain crimes committed by juveniles with prior records.⁶⁶

It should be noted that the vast majority of juvenile transfers involve felonies rather than misdemeanors. In Arizona, for instance, 98% of reported transfers in 2008 related to felonies.⁶⁷ During the same year, about 89% and 94% of judicial waivers in California and Florida, respectively, involved children who were accused of committing felonies.⁶⁸

⁶⁰ *Id.*

⁶¹ See GRIFFIN ET AL., *supra* note 11, at 4 (compiling the following examples of states adopting laws allowing juvenile court judges to waive jurisdiction under certain circumstances and subject to minimum age requirements: Alabama, California, Washington, D.C., Georgia, Idaho, Illinois, Indiana, Iowa, Maryland, Nevada, New Jersey, North Dakota, South Carolina, Tennessee, Wisconsin, and Wyoming).

⁶² *See Id.* at 5.

⁶³ *See* US Legal, *Violent Crimes Law and Legal Definition*, <https://definitions.uslegal.com/v/violent-crimes/> (last visited Oct. 13, 2020).

⁶⁴ *Id.*; *see* Federal Bureau of Investigation, *Violent Crime*, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime> (last visited Oct. 13, 2020).

⁶⁵ *See* GRIFFIN ET AL., *supra* note 11, at 4–6.

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 18.

⁶⁸ *Id.*

B. Category of Transfer of Juveniles Laws

The laws on transfer of juveniles in the United States can be categorized into four groups: automatic transfer laws, judicial discretion laws, prosecutorial discretion laws, and the once an adult, always an adult policy.⁶⁹

i. Statutory exclusion or automatic transfer laws

The first group of judicial waiver laws are characterized as statutory exclusion or automatic transfer laws. In statutory exclusion laws, some offenses committed by children are automatically excluded from the jurisdiction of juvenile courts.⁷⁰ For instance, in Alabama and Indiana, child offenders over sixteen years old who are involved in violent criminal offenses are excluded from trial before the juvenile courts.⁷¹

Likewise, a Pennsylvania law also requires child offenders charged with murder to be tried as adult offenders, regardless of their age.⁷² This means that adult criminal courts have automatic jurisdiction over those types of offenses.

ii. Judicial discretion laws or judicially controlled transfer

The second category of state laws consists of the “judicially controlled transfer” or judicial discretion laws. In this type of transfer, the juvenile courts have discretion to determine the appropriate court for a particular juvenile defendant, retaining the option of transfer but being free to keep the matter before their own court.⁷³ The juvenile courts usually make this determination after the prosecutors’ filing of transfer motions.⁷⁴ For example, in New Jersey, the law obliges the juvenile courts to hold judicial hearings before transferring juveniles age fifteen years old and older who are charged with murder, sexual offenses, aggravated property offenses, and drug trafficking.⁷⁵ The transfer of juveniles is therefore based on the discretion of the juvenile judges rather than being automatically dictated by statutory provisions. The states of Maine, Missouri, North Carolina,

⁶⁹ Teigen, *supra* note 41.

⁷⁰ See GRIFFIN ET AL., *supra* note 11, at 2.

⁷¹ ALA. CODE § 12-15-204 (2009) (explaining juveniles of at least 16 years of age will be tried as an adult if charged with various violent criminal offenses); see PATRICK GRIFFIN ET AL., *supra* note 11, at 5; see also IND. CODE § 31-30-1-4 (2016).

⁷² 42 PA. CONS. STAT. § 6302 (2018); see also PATRICK GRIFFIN ET AL., *supra* note 11, at 5.

⁷³ Redding, *supra* note 31, at 2; see also SIEGEL & WELSH, *supra* note 13, at 545; Teigen, *supra* note 41, at 2.

⁷⁴ Redding, *supra* note 31, at 2.

⁷⁵ N.J. STAT. ANN. § 2A:4A-26.1(a)–(c).

North Dakota, Tennessee, and Texas are among the states that have adopted judicial discretion laws.⁷⁶

iii. Prosecutorial discretion laws or concurrent jurisdiction laws

The third group of transfer laws is prosecutorial discretion laws or concurrent jurisdiction laws, where the prosecutor has the option of filing the charges against child offenders before the juvenile court or the adult criminal court.⁷⁷ Under Colorado law, the prosecutor has discretion to directly file in adult courts for the charges of murder and certain felonies against child offenders age sixteen years or older.⁷⁸ In Georgia, the prosecutor has the choice of directly approaching the adult courts for any crime punishable by death or life imprisonment without parole when committed child offenders, regardless of their age (including those aged thirteen years or younger).⁷⁹ In other words, some specified criminal offenses fall under the concurrent jurisdiction of both juvenile and adult courts.⁸⁰ The following jurisdictions apply prosecutorial discretion laws: Arkansas, California, Florida, Louisiana, the District of Columbia, Michigan, New York, Virginia, and Wyoming.⁸¹

iv. Once an adult, always an adult policies

The fourth group of transfer laws concerns states that have adopted “[o]nce an adult, always an adult” policies.⁸² Indiana law, for instance, stipulates that “the juvenile court shall waive [its] jurisdiction if . . . the child has previously been convicted of a felony or a nontraffic misdemeanor.”⁸³ In this category of transfer laws, the laws compel that a child offender who was tried in an adult criminal court in the past be considered an adult offender if they recidivate, regardless of the seriousness of the present criminal offense.⁸⁴

Once an adult, always an adult policies constitute another form of automatic exclusion of child offenders from the juvenile justice system.⁸⁵ These policies only focus on the question of whether the child offender was previously tried as

⁷⁶ Teigen, *supra* note 41.

⁷⁷ *Id.*; see also Redding, *supra* note 31, at 2.

⁷⁸ COLO. REV. STAT. § 19-2-517.

⁷⁹ GA. CODE ANN. § 15-11-560.

⁸⁰ Redding, *supra* note 31, at 2. See also Teigen, *supra* note 41.

⁸¹ Teigen, *supra* note 41; see also SNYDER & SICKMUND, *supra* note 16, at 113.

⁸² Teigen, *supra* note 41.

⁸³ IND. CODE § 31-30-3-6.

⁸⁴ Teigen, *supra* note 41.

⁸⁵ INTER-AM. COMM’N ON HUMAN RIGHTS, CHILDREN AND ADOLESCENTS IN THE UNITED STATES’ ADULT CRIMINAL JUSTICE SYSTEM 54 (2018), <http://www.oas.org/en/iachr/reports/pdfs/Children-USA.pdf>.

an adult.⁸⁶ They do not consider if the child offender was convicted or not in the previous instance in adult criminal court.⁸⁷ Under these policies, it appears that the legal situation of the child offender is determined by past proceedings alone.

IV. ANALYSIS OF THE CONSTITUTIONALITY OF THE TRANSFER LAWS IN THE UNITED STATES

As discussed above, almost all U.S. states and the District of Columbia have laws allowing some form of judicial waiver.⁸⁸ This section addresses the question of the constitutionality of those domestic transfer laws under the U.S. Constitution. It explores the extent to which the jurisprudence of the U.S. Supreme Court recognized the constitutionality of judicial waiver and seeks to understand the conditions that must be present for judicial waiver to be found constitutional.

A. Kent v. United States

The debate surrounding the constitutionality of judicial waiver laws in the United States dates back to the 1960s, when both federal and state courts first attempted to address certain aspects of the issue. As earlier referenced, one such instance was the 1966 case *Kent v. United States*, where the Supreme Court was approached for the first time to rule on juvenile transfer.⁸⁹

i. Background

The *Kent* case concerned sixteen-year-old Morris Kent, a D.C. resident who was indicted and detained for his involvement in a burglary, robbery, and rape.⁹⁰ As a juvenile, Kent was subject to the exclusive jurisdiction of the D.C. Juvenile Court, unless the court could waive its jurisdiction and transfer him to the D.C. District Court for trial. Kent's counsel filed a motion in the D.C. Juvenile Court requesting a hearing on the question of waiver and access to the Juvenile Court's Social Service file that had been accumulated on Kent during his probation for a prior offense.⁹¹ However, the Juvenile Court did not rule on these motions and instead waived its jurisdiction, remitting Kent's case to the D.C. District Court

⁸⁶ See GRIFFIN ET AL., *supra* note 11, at 7.

⁸⁷ See Robert J. Sewell, *It's Time to Have an Adult Discussion about Alabama's Juvenile Transfer Laws*, 50 CUMB. L. REV. 10–11 (2019).

⁸⁸ GRIFFIN ET AL., *supra* note 11, at 8.

⁸⁹ *Kent v. United States*, 383 U.S. 541, 543 (1966).

⁹⁰ *Id.* at 544.

⁹¹ *Id.* at 546.

to be tried as an adult.⁹² Kent was convicted of six counts of burglary and robbery, but he was acquitted on two rape counts by reason of insanity.⁹³ He was sentenced to between thirty and ninety years imprisonment.⁹⁴ Kent appealed his case, alleging the invalidity of the Juvenile Court's waiver of jurisdiction, but the D.C. Circuit Court of Appeals affirmed the lower court's decision.⁹⁵ The Supreme Court granted certiorari and was called to determine if the Juvenile Court's waiver of jurisdiction, without giving Kent's counsel a hearing or access to Kent's file, was constitutionally valid.⁹⁶

In its ruling, the Supreme Court noted:

[w]e do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony, without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults with respect to a similar issue would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.⁹⁷

In other words, the Supreme Court concluded that the D.C. Juvenile Court's judicial waiver was invalid as a procedural matter because the court failed to ensure Kent's constitutionally guaranteed right to due process.⁹⁸ The juvenile court should have properly investigated by holding a waiver hearing to determine whether Kent's case should be retained by the juvenile court or transferred to adult criminal court.⁹⁹ Additionally, Kent was denied access to the assistance of counsel during the hearing, as well as access to the evidence used against him, both of which are required for the satisfaction of due process.¹⁰⁰ Beyond these issues, the Court seized Kent as an opportunity to establish criteria to ascertain the constitutionality of a juvenile transfer's process.

⁹² *Id.*

⁹³ *Id.* at 550.

⁹⁴ *Id.*

⁹⁵ *See Kent*, 383 U.S. at 550.

⁹⁶ *Id.*

⁹⁷ *Id.* at 554.

⁹⁸ *Id.* at 556–57.

⁹⁹ *Id.* at 557.

¹⁰⁰ *Id.*

ii. Conditions for the Constitutionality of Juvenile Transfer

Per the Court's analysis in *Kent*, the following factors should be taken into consideration when a juvenile court assesses its jurisdiction and considers transferring a child offender to an adult court.

The seriousness of the criminal offense to the community: The juvenile court can only waive its jurisdiction if the alleged criminal offense has a certain degree of gravity vis-à-vis the community. This may include murder, drug trafficking, sexual offenses, and other felonies punishable by death and life imprisonment. This criterion implies that the juvenile court should retain its jurisdiction if the child offender commits an offense of minor severity.¹⁰¹

If the criminal offense was committed in an aggressive, violent, premeditated or willful manner: The adult criminal court could have jurisdiction over a child offender if he or she has committed the alleged criminal offense by using a deadly weapon or a dangerous instrument causing death or severe injury to another person. This includes armed robbery, assassination, kidnapping, and burglary.¹⁰²

If the alleged offense was committed against persons or against property: Juvenile courts should give greater weight to criminal offenses against individuals, particularly if there is personal injury.¹⁰³

The prosecutive merit of the complaint: The juvenile court can transfer a child offender if there is, for instance, evidence upon which a grand jury may be expected to return an indictment.¹⁰⁴

Sophistication and maturity of the child offender: The juvenile court can assess child offender's environmental situation, emotional attitude, and pattern of living, including at home.¹⁰⁵

Record and previous history of delinquency: A juvenile court could transfer a child offender if the child offender was previously known by the law enforcement agencies or was in contact with juvenile courts and institutions in the past or was on periods of probations.¹⁰⁶

¹⁰¹ *Kent*, 383 U.S. at 566 app.

¹⁰² *Id.* at 567 app.

¹⁰³ *Id.* The U.S. Supreme Court did not provide any rationale as to why the lower courts should give greater consideration to transferring child offenders when the offense has caused a personal injury compared to when there is only property damage. Of course, one can assume that the reasoning behind considering transfer when there is a "personal injury" versus a "property damage" is that the former can negatively impact the victim physically and pecuniarily, whereas the latter has only a pecuniary impact on the victim.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Kent*, 383 U.S. at 567 app.

Prospects for adequate protection of the public and the likelihood of reasonable rehabilitation.¹⁰⁷ The juvenile court could transfer a child offender if, after the court's assessment, it appears that the child offender would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court.¹⁰⁸

When discussing these criteria, the U.S. Supreme Court implicitly declared that a state law, which allows for automatic juvenile transfer without an initial judicial waiver hearing, is unconstitutional.¹⁰⁹

B. Breed v. Jones

Breed v. Jones is another case involving the application of judicial waiver where the U.S. Supreme Court reviewed the lower court's decision to transfer the juvenile defendant.

In 1971, Gary Jones, a seventeen-year-old, first appeared in a Juvenile Court in California for committing an act that, if committed by an adult, would constitute the crime of robbery in violation of California Penal Code § 211 (1970).¹¹⁰ After a hearing, the Juvenile Court determined that Jones should be tried as an adult in California Superior Court.¹¹¹ Jones filed a writ of habeas corpus and argued that the adult criminal trial was an exercise of double jeopardy in violation of his due process rights under the Fifth Amendment, applied to the states through the Fourteenth Amendment.¹¹² Jones's writ was successively denied by the Superior Court, the Court of Appeals, and the California Supreme Court.¹¹³ Jones was tried as an adult and found guilty of first-degree robbery.¹¹⁴

The U.S. Supreme Court granted certiorari and was called to decide whether a trial in adult criminal court following an adjudication in juvenile court for the same offense constitutes a violation of the double jeopardy clause.¹¹⁵ In its ruling, the Court held that, "the prosecution of respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment."¹¹⁶ Thus, child offenders who are tried by juvenile courts for their criminal

¹⁰⁷ *Id.*

¹⁰⁸ *See* *Breed v. Jones*, 421 U.S. 519, 523 (1975) (discussing in a positive manner the lower juvenile court that weighed factors of care available in the juvenile court facilities in deciding whether to transfer a child offender out of juvenile court).

¹⁰⁹ *Kent*, 388 U.S. at 567–68 app.

¹¹⁰ *Breed*, 421 U.S. at 521–24.

¹¹¹ *Id.* at 524.

¹¹² *Id.* at 525.

¹¹³ *Id.* at 524.

¹¹⁴ *Id.* at 525.

¹¹⁵ *Breed*, 421 U.S. at 520.

¹¹⁶ *Id.* at 541.

offenses can no longer be transferred or tried in adult courts for the same acts; doing so violates the constitutional principle prohibiting double jeopardy.¹¹⁷

C. Observations on the U.S. Supreme Court Rulings on the Kent and Breed Cases

Several observations can be formulated after reviewing the rulings in the Kent and Breed cases.

In both cases, the U.S. Supreme Court solely ruled on the unconstitutionality of the procedure applied in judicial waiver rather than adjudicating the constitutionality of the practice of judicial waiver itself.

In *Breed*, the Court reiterated the prohibition of the application of double jeopardy; whereas in *Kent*, the Court set up criteria to ascertain the constitutionality of the judicial waiver's process. Yet, while establishing these conditions for the constitutionality of judicial waiver, the Court did not clarify if those conditions must be cumulatively met before the juvenile courts could waive their jurisdiction.

In focusing its rulings only on the applicable procedure rather than on the constitutionality of judicial waiver itself, the Court implicitly recognized that the transfer of child offenders from juvenile courts to adult criminal courts is a practice that is constitutional in the United States if pre-established conditions are followed.

D. Is it Time for the Re-visitation of the Judicial Waiver Policies?: The Kent and Breed cases versus the Roper and Miller cases

As elaborated earlier, the Supreme Court concluded in *Roper v. Simmons* that applying the death penalty to a minor amounts to cruel and unusual punishment and violates the Eighth Amendment.¹¹⁸ The Court also confirmed that capital punishment is disproportionate punishment for child offenders by recognizing that the nation was then “the only country in the world that continues to give official sanction to the juvenile death penalty.”¹¹⁹ In its 2012 decision in *Miller v. Alabama*, the Court also abolished mandatory life sentences without the possibility of parole in the context of child offenders.¹²⁰ According to the Court, even if the punishment of life without parole was still permissible, such a punishment could only be imposed against a child offender after judicial consideration of their individual circumstances and level of maturity.¹²¹

¹¹⁷ *See Id.*

¹¹⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹¹⁹ *Id.* at 575.

¹²⁰ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

¹²¹ Anne Teigen, *Miller v. Alabama and Juvenile Life Without Parole Laws*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 20, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/>

Through the *Roper* and *Miller* cases, the Court underlined the difference between child offenders and adult criminals, recognizing that the former should not be categorized among the worst offenders.¹²² The Court emphasized that such a difference should undoubtedly be reflected in the treatment of child offenders by the juvenile justice system, regardless of the seriousness of the offenses that the juveniles might have committed.¹²³ The Court reasoned that juveniles are less morally inexcusable than adults due to: (1) their immaturity and irresponsibility; (2) their own vulnerability and lack of control that make them defenseless to escape the negative influences of society compared to adult offenders; and (3) their struggle in defining their own identity.¹²⁴

It should be noted that there is an apparent philosophical inconsistency within the jurisprudence of the Court when one comparatively analyzes the Court's opinions in the *Kent* and *Breed* cases and its positions in the *Roper* and *Miller* cases. In *Kent v. United States*, the Court appeared to support that a violent child offender is mature enough to be tried at adult criminal court if the child offender's constitutional guarantees of due process are respected.¹²⁵ Whereas, in its ruling in *Roper v. Simmons*, the Court opined that a violent child offender is not mature enough to receive a severe criminal punishment that is normally inflicted against an adult offender who has committed the same criminal offense.¹²⁶ One may argue that the U.S. Supreme Court should adopt an unequivocal posture on the constitutionality or not of the use of judicial waiver in the U.S. Presently, the U.S. Supreme Court lacks a consistent posture on the constitutionality of judicial waiver. As the law stands, a child offender possesses the maturity to understand the complexities of adult court, but not the most severe of adult sentences.

So, the next question is: What is the position of the international standards protecting children on the issue of judicial waiver?

V. LEGALITY OF JUDICIAL WAIVER UNDER INTERNATIONAL LAW

This Section analyzes the legality of judicial waiver under the international law by addressing the questions of whether international human rights instruments guarantee child offenders the right to be tried by a juvenile court.

[miller-v-alabama-and-juvenile-life-without-parole-laws.aspx](#).

¹²² *Roper*, 543 U.S. at 570.

¹²³ *Id.* at 573.

¹²⁴ *Id.*

¹²⁵ *See Kent*, 383 U.S. at 557–63.

¹²⁶ *Roper*, 543 U.S. at 578.

A. A Child's Right to Juvenile Justice

Under international law, child offenders are granted the right to have their cases adjudicated by competent tribunals, meaning juvenile courts. Article 40(2)(b)(iii) of the CRC provides that: “Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [T]o have the matter determined without delay by a competent . . . authority or judicial body in a fair hearing according to law”¹²⁷

Likewise, the International Covenant on Civil and Political Rights (ICCPR) reinforces the individual's right “to a . . . competent . . . tribunal established by law.”¹²⁸ The ICCPR also emphasizes that, in the case of a child offender, the judicial procedure should take into account the child's age and the desirability of promoting the rehabilitation of the child.¹²⁹ Similarly, under regional human rights instruments protecting children, drafters included provisions recognizing a child's right to a competent tribunal. These instruments include: Article 8 of the 1969 American Convention on Human Rights,¹³⁰ Article 6 of the 1959 European Convention on Human Rights,¹³¹ and Article 17 of the 1990 African Charter on the Rights and Welfare of the Child.¹³²

The CRC uses the term “competent . . . judicial body” to refer to a juvenile court that is established and specialized to handle offenses committed by persons under the age of eighteen years.¹³³ A juvenile court that is considered competent should fulfil the following jurisdictional requirements: *ratione loci*, *ratione materiae*, and *ratione personae*.¹³⁴ A juvenile court has competence *ratione personae* to the extent that it is the only tribunal entitled to adjudicate any cases involving persons under the age of eighteen to the exclusion of adult criminal tribunals. The *ratione materiae* and *ratione loci* jurisdictions of the juvenile courts concern the nature of the alleged illegal conduct committed by the child offenders and the place where the acts are committed, respectively.¹³⁵ In the context of the United

¹²⁷ CRC, *supra* note 1, at art. 40(2)(b)(iii).

¹²⁸ ICCPR, *supra* note 1, at art. 14 ¶ 1.

¹²⁹ *Id.*

¹³⁰ American Convention on Human Rights, *supra* note 1. The U.S. signed the American Convention on Human Rights on June 1, 1977.

¹³¹ European Convention, *supra* note 1.

¹³² African Charter on the Rights and Welfare of the Child, *supra* note 1.

¹³³ CRC, *supra* note 1, at art. 40; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 25.

¹³⁴ *An Independent, Impartial and Competent Tribunal*, ICELANDIC HUMAN RIGHTS CTR., <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/an-independent-impartial-and-competent-tribunal> (last visited Nov. 20, 2020).

¹³⁵ *See* Conseil Départemental d'Accès au Droit des Landes, “*Tribunal Pour Enfants*,” <https://www.cdad-landes.justice.fr/La-justice-en-France/Les-Juridictions/Les-Juridictions-pour-mineurs/Les-Juridictions-competentes/Tribunal-Pour-Enfants>.

States, each state has its own statute or common law defining criminal acts committed within its territory.¹³⁶

B. Juvenile Court as a Specialized and Rehabilitating Court

The CRC compels State parties to establish specialized courts dealing with child offenders and to develop and implement a comprehensive juvenile justice policy.¹³⁷ Article 40(3) of the CRC provides that “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.”

In the United States, the Supreme Court recognized the juvenile court as a specialized and rehabilitating court, as it is vested with “original and exclusive jurisdiction” over a child.¹³⁸ In *Kent v. United States*, the Supreme Court noted that:

The theory of the District’s Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.¹³⁹

As a specialized court to handle juvenile delinquency, the juvenile court must also guarantee a child offender due process rights, including the right to be presumed innocent until proven guilty, the right to legal assistance, the right to a trial, and freedom from being compelled to testify or enter a guilty plea.¹⁴⁰ Prison sentences should only be imposed if a child is convicted of a most serious offense.¹⁴¹ There are a variety of other dispositions that juvenile courts can use, such as: care, guidance and supervision orders; counselling; probation; foster

¹³⁶ See Criminal Law, *Federalism*, UNIVERSITY OF MINNESOTA LIBRARIES, <https://open.lib.umn.edu/criminallaw/chapter/1-1-federalism/> (last visited Feb. 15, 2021).

¹³⁷ U.N. Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, ¶ 4, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

¹³⁸ *Kent*, 383 U.S. at 556.

¹³⁹ *Id.* at 554.

¹⁴⁰ *Id.*

¹⁴¹ CRC, *supra* note 1, at art. 40(4) (“A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”).

care; and education and vocational training programs, all of which ensure that child offenders are treated in a manner that is appropriate to their well-being and proportionate to their circumstances and the offenses committed.¹⁴²

In other words, the juvenile justice system should have two objectives: First, to promote the well-being of child offenders by emphasizing their rehabilitation rather than seeking merely punitive sanctions,¹⁴³ and second, applying “the principle of proportionality,” where the response to the child offenders’ actions should be based on the consideration of the seriousness of their offenses as well as the individual circumstances of the offenders.¹⁴⁴ These circumstances include their socio-economic status, family situation, harm caused by the offenses, and other factors affecting the personal circumstances of the child offenders.¹⁴⁵

Regardless of the gravity of a juvenile’s offenses, the juvenile justice system must not subject a child offender to torture or other cruel, inhuman, or degrading treatment or punishment considering their age.¹⁴⁶ Nor should juvenile courts impose capital punishment or life imprisonment without the possibility of release against child offenders.¹⁴⁷

C. Children’s Right to Juvenile Justice as Part of Customary International Law

Customary international law can be understood as rules and international obligations resulting “from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁴⁸ One’s right to have their case adjudicated by a competent tribunal is a fundamental component of a fair trial.¹⁴⁹ In order to be perceived as a part of customary international law, the right to a fair trial must be supported by state practice and *opinio juris*.¹⁵⁰

First, concerning the state practice, numerous countries have adopted constitutional provisions at the domestic level that guarantee the right to a fair trial or

¹⁴² *Id.*

¹⁴³ See United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules”), G.A. Res. 40/33, annex, U.N. GAOR, 40th Sess., UN Doc. A/40/53, 3, (1985) <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

¹⁴⁶ CRC, *supra* note 1, at art. 37.

¹⁴⁷ *Id.*

¹⁴⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM LAW INST. 1987); see also SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

¹⁴⁹ ICCPR, *supra* note 1, at art. 14 (“Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

¹⁵⁰ See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 933; see also *North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.)*, 1969 I.C.J. 3, ¶¶ 60–61, 74–77, 85 (Feb. 20) (discussing state practice’s and *opinio juris*’s impact on the case).

hearing to all individuals involved in the judicial proceedings.¹⁵¹ At the international and regional levels, many states have ratified various international and regional human rights instruments safeguarding the right to a fair trial, including the International Covenant on Civil and Political Rights,¹⁵² the European Convention on Human Rights (article 6),¹⁵³ the American Convention on Human Rights (article 8),¹⁵⁴ and the African Charter on Human and Peoples' Rights (article 7).¹⁵⁵ This undeniably demonstrates that the protection of the right to a fair trial is part of the state practice at the global scheme. Second, the right to a fair trial is equally evidenced by *opinio juris*, that is, a state's subjective belief that it is bound by legal obligation to ensure the right to a fair trial.¹⁵⁶ For instance, the ICCPR, which is a binding international treaty, protects the right to a fair trial, thereby imposing some legal obligation for the nations that ratified the ICCPR.¹⁵⁷

In *Prosecutor v. Aleksovski*, the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that the right to a fair trial, as guaranteed by Article 14 of the ICCPR, was required by customary international law.¹⁵⁸ The

¹⁵¹ Julia Sherman, *The Right to an Interpreter Under Customary International Law*, 48 COLUM. HUM. RTS. L. REV. 257, 261–68 (2017) (detailing how almost a hundred governments explicitly guarantee the right to a fair trial in their constitutions, eleven other countries guarantee due process rights, five other countries guarantee subsidiary rights to a fair trial such as "the right to a speedy and public trial[.]" twelve countries guarantee "the right to all the procedural safeguards necessary for the defense[.]" Australia protects fair trials through common law, and Slovakia states that "[e]veryone may claim by the established legal procedure his right to an independent and impartial court hearing.").

¹⁵² *Id.* at 260–61 (further noting that the right to a fair trial is also protected by international agreements including but not limited to "Article 6 of the European Convention on Human Rights, the 1951 NATO Status of Forces Agreement, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and Peoples' Rights, Article 21 of the statute of the International Criminal Tribunal for the former Yugoslavia, Article 20 of the statute of the International Criminal Tribunal for Rwanda, Article 17 of the statute for the Special Court for Sierra Leone, [and] Article 67 of the Rome Statute of the International Criminal Court."); *see also* ICCPR, *supra* note 1, at art. 14.

¹⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, art. 6, E.T.S. No. 5, 213 U.N.T.S. 221, 228 (entered into force Sept. 3, 1953) [hereinafter ECHR].

¹⁵⁴ American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 8, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter ACHR].

¹⁵⁵ African Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 7, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter].

¹⁵⁶ Sherman, *supra* note 151, at 268–70.

¹⁵⁷ *Id.* at 271–72.

¹⁵⁸ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 104 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (concerning the unlawful treatment of prisoners allegedly committed by the defendant during the Bosnian War); *see also* *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, ¶¶ 164, 177 n.239 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (noting, in the context of an appeal based upon the alleged bias of a judge, that the right to be tried before an independent and impartial tribunal was generally recognized as being an integral component of the requirement that an accused should have a

particularity of customary international law is that it should be enforceable by all countries that are part of the international community.¹⁵⁹ In its ruling in *Belgium v. Spain*, the International Court of Justice held that obligations erga omnes also comprise those emanating “from the principles and rules concerning the basic rights of the human person”¹⁶⁰ (which may include the right to fair trial).

In other words, as an element of a fair trial, a child’s right to a juvenile court is part of customary international law.¹⁶¹ Countries must abide by their obligation to have juvenile courts handle the cases of persons under eighteen years old, which must be fully observed at all stages of the litigation.¹⁶² For instance, in accordance with the spirit of the CRC,¹⁶³ Germany and Croatia adopted domestic policies that permit child offenders to be kept in the juvenile justice system irrespective of the gravity of the criminal conduct that they committed.¹⁶⁴

As such, the practice of judicial waiver amounts to a violation of customary international law. Therefore, all nations, including those who have ratified the CRC and the ICCPR and those who have not, such as the United States, are compelled to respect and enforce a child offender’s right to a competent and specialized tribunal under any circumstances.

It is in this context that the Inter-American Commission on Human Rights urged the United States government to restore the full jurisdiction of the juvenile

fair trial, citing both Article 21(2) of the ICTY Statute and Article 14 of the ICCPR); Robinson, *supra* note 26, at 8.

¹⁵⁹ LEPARD, *supra* note 27, at 261; see also Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT’L STUD. Q. 209, 209 (2015).

¹⁶⁰ Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

¹⁶¹ See Convention on the Rights of the Child, *supra* note 1, art. 40.; see also INTER-AM. COMM’N ON HUMAN RIGHTS, JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS (2011), <http://www.oas.org/en/iachr/children/docs/pdf/juvenilejustice.pdf>.; Prosecutor v. Aleksovski, *supra* note 26, ¶ 104.

¹⁶² As earlier addressed, article 40(2)(b)(iii) of the CRC, guarantees a child offender’s right to a competent and specialized court. Therefore, countries have the obligation to respect, protect and fulfil child offenders’ rights as safeguarded by the CRC. See also 2.3.1 *State Obligations Stemming from International Law*, INTERNATIONAL COMMISSION OF JURISTS, <https://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-judicial-and-quasi-judicial-bodies-2/2-3-identifying-breaches-of-international-obligations-of-states-pertaining-to-esc-rights/2-3-1-state-obligation-s-stemming-from-international-law/> (last visited Apr. 15, 2021).

¹⁶³ See CRC, *supra* note 1, at art. 37 (requiring States Parties to protect the rights of every child offender).

¹⁶⁴ See Vincent Schiraldi, *In Germany, It’s Hard to Find a Young Adult in Prison*, THE CRIME REPORT (Apr. 10, 2018), <https://thecrimereport.org/2018/04/10/in-germany-its-hard-to-find-a-young-adult-in-prison/>; see also Vincent Schiraldi, “Croatia’s Response to Offending by Emerging Adults”, COLUM. JUST. LAB (Apr. 1, 2018), <https://justicelab.columbia.edu/content/croatias-response-offending-emerging-adults>.

system and its authority to review every stage of the judicial proceedings involving children accused of crime.¹⁶⁵ The Commission also recommended the United States reverse their waiver laws because they do not fully ensure the right of children to a specialized system.¹⁶⁶

VI. EFFECTIVENESS OF THE JUDICIAL WAIVER PRACTICE

This section will address the question of whether the judicial waiver practice is an effective deterrent tool against juvenile delinquency.

A. Deterrent Effect of Judicial Waiver

The search for a response to the difficult problem of the increasing proportion of juvenile crimes has led most U.S. states to adopt the “get tough” approach vis-à-vis child offenders. One of the aspects of this approach was the practice of transferring child offenders to adult criminal courts for prosecution and sentencing.¹⁶⁷ A recent report from the National Center for Juvenile Justice revealed that approximately 7,500–8,000 cases involving child offenders were transferred from the juvenile courts to adult criminal courts for adjudication from 2000 to 2009.

There was an assumption that more punitive, adult criminal sanctions would serve as a deterrent to juvenile delinquency.¹⁶⁸ The proponents of the judicial waiver assumed that the practice would have specific and general deterrent effects to current and future child offenders.¹⁶⁹

i. General Deterrence

Concerning general deterrence, the postulation is that, by trying and severely sanctioning a child offender as an adult, the severity of that sentence would dissuade other children from violating the criminal law.¹⁷⁰ Yet, how effective is the application of judicial waiver? Answering this question requires an evaluation of the arrest rate for some violent crimes committed by persons under eighteen-years-old in states that adopted policies authorizing the transfer of child offenders from the juvenile court to adult criminal court. Based on the states' position, the percent of child offenders involved in criminal activity should be lower

¹⁶⁵ INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 85, at 60.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 34.

¹⁶⁸ Redding, *supra* note 31, at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

annually in the states that utilize judicial waiver, such as Georgia, Arizona, and Idaho.

Table 1: Percentage of All Arrests Involving Persons Under Eighteen in the State of Georgia: 2011-2014.

Type of Crime	2011	2012	2013	2014
Robbery	19%	20.2%	22.2%	23%
Motor Vehicle Theft	22.1%	24%	25.9%	28.4%
Stolen Property	11.7%	13.2%	13.3%	12.9%

Source: Adapted from Puzanchera & Kang, *Easy Access to FBI Arrest Statistics 1994–2014*.

Table 1 represents the percentage of arrests involving persons under eighteen in the state of Georgia from 2011 to 2014. The graph indicates that the percentage of arrests of child offenders accused of robbery increased from 19% in 2011 to 23% in 2014. The Table also shows that the percentage of arrests of children accused of motor vehicle theft increased from 22.1% in 2011 to 28.4% in 2014, and the arrest rate for stolen property crime increased from 11.7% in 2011 to 12.9% in 2014.

Table 2: Percentage of All Arrests Involving Persons Under Eighteen in the State of Idaho: 2011–2014.

Type of Crime	2011	2012	2013	2014
Robbery	12.6%	17%	11.9%	11%
Motor Vehicle Theft	38.2%	36.7%	42.2%	39.5%
Stolen Property	19.4%	21%	12.5%	15.2%

Source: Adapted from Puzanchera & Kang, *Easy Access to FBI Arrest Statistics 1994–2014*.

Table 2 indicates the percentage of arrests involving persons under eighteen in Idaho from 2011 to 2014. Like in Georgia, the existence of judicial waiver policies in Idaho seems to have no deterrent impact on juvenile delinquency. The chart shows that the percentage of arrests of child offenders accused of robbery and possession of stolen property in Idaho increased from 12.6% (for robbery) and 19.4% (for stolen property) in 2011 to 17% and 21% in 2012 before decreasing to 11% and 15.2% in 2014 respectively. In regard to the motor vehicle theft crime, the arrest rate increased from 38.2% in 2011 to 42.2% in 2013 before decreasing to 39.5% in 2014.

Table 3: Percentage of All Arrests Involving Persons Under Eighteen in the State of Arizona: 2011–2014.

Type of Crime	2011	2012	2013	2014
Robbery	15.1%	15.2%	14.8%	13.8%
Motor Vehicle Theft	20.8%	18.5%	18.8%	17.7%
Stolen Property	9.9%	7.9%	7.2%	7%

Source: Adapted from Puzzanchera & Kang, Easy Access to FBI Arrest Statistics 1994–2014.

Unlike Georgia and Idaho, the state of Arizona experienced a decrease in child offenses between 2011 and 2014, as displayed by Table 3. The Table shows that the arrest rate of youths accused of robbery declined from 15.1% in 2011 to 13.8% in 2014. The percentage of arrest for motor vehicle theft decreased from 20.8% in 2011 to 17.7% in 2014, and the percentage of arrest for stolen property decreased from 9.9% in 2011 to 7% in 2014.

Of course, if the decrease in the arrest of child offenders in Arizona from 2011 to 2014 is attributed to the state's use of judicial waiver, then one could conclude that this practice has "slightly deterred" children from being involved in criminal activities. Yet, this reasoning is too simplistic considering the fact that the state of Arizona has been implementing the transfer of juveniles to adult criminal court for decades.¹⁷¹ Therefore, the deterrent effect of the Arizona's transfer law should have a bigger impact in the 2010s for child offenders rather than a mere decrease of one percent in child delinquency.

ii. Specific Deterrence and Recidivism

With respect to specific deterrence, some have hypothesized that if a child offender is tried and sentenced as an adult, then the child offender will be unlikely to reoffend or recidivate.

In 2005, Lonn Lanza-Kaduce and colleagues published research findings where they examined the recidivism rates of child offenders who were transferred to the adult criminal court and recidivism rates of child offenders whose cases were adjudicated at the juvenile court.¹⁷² The study concerned 950 child offenders in Florida, of whom 475 were transferred to the criminal court in 1995 and 1996.¹⁷³ The other 475 remained in the juvenile system. The study revealed that child offenders who were transferred to adult criminal court were significantly more likely to reoffend.¹⁷⁴ Approximately 49% of the transferred child offenders reoffended, compared with 35% of child offenders retained by the juvenile court.¹⁷⁵ Regarding the commission of violent offenses, the survey showed that 24% of the transferred child offenders reoffended, compared with 16% of

¹⁷¹ See PATRICIA TORBET AND LINDA SZYMANSKI, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE, JUVENILE JUSTICE BULLETIN (1998): at 5, https://pdfs.semanticscholar.org/0819/1ac1091b590f99711c1cd7eabc364a8c6d4a.pdf?_ga=2.69327446.735141335.1614029035-1186514995.1614029035.

¹⁷² See Lonn Lanza-Kaduce et al., *supra* note 31, at 59–77.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 71–72.

¹⁷⁵ *Id.*

child offenders retained by the juvenile court.¹⁷⁶ The rate of recidivism for drug offenses was 11% for the transferred child offenders and 9% for child offenders retained by the juvenile court.¹⁷⁷ For property offenses, the rates were 14% for transferred child offenders versus 10% for retained child offenders.¹⁷⁸

Unsurprisingly, the results of Lanza-Kaduce's study are consistent with previously conducted research on the connection between waiver and recidivism rates of juvenile offenders in both juvenile and criminal court.¹⁷⁹ Other research also demonstrated that recidivism rates were lower for child offenders retained in juvenile court than for those who were transferred to criminal court.¹⁸⁰

VII. CONCLUSION

The purpose of this article is to explore the legality and effectiveness of the practice of transferring child offenders from juvenile courts to adult criminal courts where they are tried and sentenced as adult criminals. Despite its acceptability by many states and the implicit recognition of its constitutionality by the United States Supreme Court, the practice of transferring juveniles amounts to a violation of international human rights standards protecting children's rights and guaranteeing child offenders' rights to a competent and specialized court. The right to a competent court is one of the components of the right to a fair trial, which is part of the customary international law that should be enforced by all nations, including those who have ratified the CRC and those who have not (such as the United States). The transfer of juveniles is an ineffective tool against juvenile delinquency, as its deterrent justification against youth recidivism and

¹⁷⁶ *Id.* at 69–70.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 68; *see also* Redding, *supra* note 31, at 5.

¹⁷⁹ *See* Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 L. AND POL. 77 (1996) (examining the recidivism rates of 800 randomly selected fifteen and sixteen year olds and concluding that a higher percentage of juvenile offenders tried in criminal court were rearrested compared with those tried in juvenile court); *see also* Donna Bishop et al, *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME AND DELINQ. 171 (1996) (comparing the one-year recidivism rate of 2,738 offenders transferred to adult criminal court with 2,738 offenders not transferred and concluding that, among the transferred offenders, re-arrest rates were higher and average time to reoffending was shorter); David Myers, *The Recidivism of Violent Youths in Juvenile and Adult Court: A Consideration of Selection Bias*, 1 YOUTH VIOLENCE AND JUV. JUST. 79 (2003) (examining the eighteen-month recidivism rates of 494 juvenile offenders charged with robbery or aggravated assault and concluding that transferred offenders were twice as likely to be rearrested compared with offenders retained in juvenile court.); Redding, *supra* note 31, at 4.

¹⁸⁰ Steiner, Hemmens & Bell, *supra* note 4, at 37.

juvenile violent crimes remains unproven. Some researchers demonstrated that recidivism rates are lower for child offenders tried in juvenile court than for those who are transferred to adult criminal court. Therefore, it is important for states implementing the transfer of juveniles to take effective actions regarding the restoration of the full jurisdiction of the juvenile court over all child offenders and the reversal of the judicial waiver laws because of their failure of ensuring children's right to a competent and specialized system.