

NOTES

HOW THE UNITED STATES' TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM VIOLATES ITS CUSTOMARY INTERNATIONAL LAW OBLIGATIONS FOUNDED IN THE CONVENTION ON THE RIGHTS OF THE CHILD

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I. INTRODUCTION

United States' citizens often think of international child law as only affecting the developing world because the plight of children is so great in developing states that it requires international assistance to cure it. In the United States, however, millions of children are in need of assistance, with one in five living in poverty.¹ Of the thirty-five advanced economic countries in 2011, the United Nations Emergency Children's Fund (UNICEF) listed the United States as the second worst for child poverty.² Not only is the number of children in poverty substantial, but that number is growing; from 15% in 2000 to 21% in 2013, which is the highest percentage of children in poverty in two decades.³ These numbers are in steep contrast with the economic power of the United States with a gross domestic product per capita of \$57,045.46, the U.S. economy ranks ninth in the world.⁴ These statistics illustrate a unique problem for the United States: it possesses the resources to improve child poverty, yet has been unsuccessful in its attempts to do so.

Treaties have been utilized to increase protection for vulnerable groups of people where states' laws do not provide such protection, creating international obligations to hold countries accountable.⁵ International law is frequently used to improve the conditions of children across the globe, as they are a vulnerable group which requires such safeguarding.⁶ Applying international law, which protects and gives rights of children to the U.S. welfare program, gives us standards to structure and judge the effectiveness of this welfare program. This Note will analyze the applicable international standard for the protection of children in the United States and demonstrate how international obligations could affect child welfare policy.

This Note will also address the 1989 Convention on the Rights of the Child⁷ and how it creates obligations, which the current welfare reform legislation violates.⁸ Importantly, this Note will identify a framework that

¹ Yang Jiang, Mercedes Ekono & Curtis Skinner, *Basic Facts About Low-Income Children: Children Under 18 Years, 2013*, NATIONAL CENTER FOR CHILDREN IN POVERTY (Jan. 2015), http://www.nccp.org/publications/pub_1100.html.

² Peter Adamson, *Measuring Child Poverty: New League Tables of Child Poverty in the World's Rich Countries*, UNICEF 1, 3 (May 2012).

³ Grace Kena et al., *The Condition of Education 2015*, 50 (2015), <https://nces.ed.gov/pubs2015/2015144.pdf>.

⁴ Jonathan Gregson, *The Richest Countries in the World*, GLOBAL FIN. MAG. (Feb. 13, 2017), <https://www.gfmag.com/global-data/economic-data/richest-countries-in-the-world>.

⁵ ELISABETH REICHERT, *UNDERSTANDING HUMAN RIGHTS* 77–78 (2006).

⁶ *Id.* at 82–84.

⁷ Convention on the Rights of the Child, GA Res. 44/25 U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

⁸ 42 U.S.C. § 609 (2012).

can be applied to all legislation that adversely affects children, with the ultimate goal of improving the quality of life for U.S. children and the United States fulfilling its international obligations.

To that end, this Note will first identify the history and present state of child welfare law, both in the context of the United States and under international law. Second, this Note will address how international law obligations arise through express and implied consents, in an effort to illustrate how a state is bound to international law. Third, this Note will identify relevant provisions of the Children's Convention, including those covering child care and basic assistance and identify if they are customary international law. Finally, this Note will address whether the United States is bound by these provisions of customary international law and whether the current Temporary Assistance to Needy Families legislation violates these obligations.

II. CHILD WELFARE IN THE CONTEXT OF U.S. AND INTERNATIONAL LAW

A. *Child Welfare Law in the United States*

The history of child welfare law in the United States and internationally helps to paint a backdrop to understand what the current requirements the Personal Responsibility and Work Opportunity Act of 1996 (1996 Act) creates for both children and for the United States' international obligations. The 1996 Act creating the Temporary Assistance to Needy Families program is a reform that states have enacted over time which draws on the history of child welfare programs in the U.S.⁹

1. *Background*

While the current child welfare policy in the U.S. has become expansive, both at the federal and state levels, its origins are rather small. Child welfare policy began with the New York Society for the Prevention of Cruelty to Children in 1875, which was the first organization to be devoted to the protection of children.¹⁰ Before 1875, the only protection for children from extreme abuse came in criminal prosecution or judicial removal of parents in dire situations, but this was limited.¹¹ The New York Society for the Prevention of Cruelty to Children was created after awareness of abuse grew

⁹ GENE FALK, CONG. RESEARCH SERV., R42768, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): WELFARE-TO-WORK REVISITED 2-5 (Oct. 2, 2012).

¹⁰ John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008).

¹¹ *Id.* at 449-51.

out of animal protection advocates and resulted in 300 the creation of nongovernmental child protection societies in America.¹²

The first steps toward governmental child welfare policy began with moral reform at the outset of the Twentieth Century with the Mothers' Pensions, the start of government aid to needy families. The Mothers' Pensions were state social-justice laws which gave cash to children whose fathers could not find jobs.¹³ Mothers' Pensions were more popular than other contemporaneous moral legislation, but the Great Depression called for stronger support.¹⁴

As with other progressive federal legislation, much of the modern public-private structure emerged out of the New Deal in the Social Security Act of 1935.¹⁵ The Social Security Act created the Aid to Dependent Children, which was a federal welfare program to provide short-term income support to mothers who had no way to provide for their children. However, it had a restriction requiring mothers be "deserving"¹⁶ of assistance,¹⁷ requirement was tied to morality requiring confirmation to the ideals of the time, and the program evolved into the Aid to Families with Dependent Children program after the social service amendments in 1962.¹⁸ The Aid to Families with Dependent Children's basic purpose was to guarantee cash assistance to families with needy children, where the parents were unable to provide for their child.¹⁹ However, this amount of cash guarantee was minimal, only providing \$366 per month to families of three with no income in 1994, and limited the program's ability to raise children out of poverty.²⁰

2. *Personal Responsibility and Work Opportunity Act of 1996*

While these programs were modified with amendments and additional acts to attempt to make them more beneficial to the needy, issues arose concerning the Aid to Families with Dependent Children program, both in terms of the support it provided to children and struggling families and the political aspects of the legislation. A stigma developed surrounding the concept of supporting

¹² *Id.* at 451–52.

¹³ Mark H. Leff, *Consensus for Reform: The Mothers' Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 397 (1973).

¹⁴ *Id.*

¹⁵ LAURA CURRAN, *THE MIXED ECONOMY OF 'FOSTER CARE': PUBLIC AND PRIVATE CHILD WELFARE IN THE NEW DEAL 2* (2013).

¹⁶ Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 392 (2002).

¹⁷ *Id.*

¹⁸ *Id.* at 393.

¹⁹ Stephen B. Page & Mary B. Lamer, *Introduction to the AFDC Program*, 7 WELFARE TO WORK 20, 21–24 (1997).

²⁰ *Id.* at 21.

needy families and children, with terms such as “welfare” and “handouts” having negative connotations. This stigma has continued to be a problem since the New Deal, with politicians in the 1990s trying to overturn programs which had lasted since the 1930s. The Temporary Assistance for Needy Families Act was the solution to the growing child welfare issue in the United States and, as President Bill Clinton said when signing the Temporary Assistance for Needy Families Act into law, the goal was to “end welfare as we know it.”²¹ The 1996 Act was a joint program by Democrats and Republicans to develop a replacement for the Aid to Families with Dependent Children legislation.²² This reform resulted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.²³ The 1996 Act focused on requirements to help struggling American families find work, a different approach than the widow’s or poor mother’s pensions which had based aid on the morals of the women who required help.²⁴

3. *Temporary Assistance for Needy Families Program*

The 1996 Act’s largest program is the Temporary Assistance for Needy Families, often referred to as TANF. This program offers a new perspective based on the principle that parents need to work in order to support their children. The Temporary Assistance for Needy Families program has four stated purposes for which its funding can be used:

1. To provide assistance to needy families;
2. To end dependence of needy parents by promoting job preparation, work and marriage;
3. To prevent and reduce out-of-wedlock pregnancies; and
4. To encourage the formation and maintenance of two-parent families.²⁵

These four purposes are used to determine how spending is allowed under the statute.

²¹ Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 PUB. PAPERS 1325, 1327 (Aug. 22, 1996).

²² ROSEMARY CHAPIN, SOCIAL POLICY FOR EFFECTIVE PRACTICE: A STRENGTHS APPROACH, 101 (2014).

²³ 42 U.S.C. § 601 (2012).

²⁴ Robert Doar, *TANF Has Been a Success – Let’s Make It Better*, AM. ENTERPRISE INST. (Sept. 29, 2015, 3:01 PM), <https://www.aei.org/publication/tanf-has-been-a-success-lets-make-it-better/>.

²⁵ 42 U.S.C. § 601(a) (2012).

The Temporary Assistance for Needy Families program's basic goal is to provide the parents of needy children with the skills necessary to acquire and keep employment.²⁶ This results in two central benefits for children. First, the program provides parents with jobs that will allow them to be able to immediately support their children. The Temporary Assistance for Needy Families gives parents the resources to look for jobs and gain skills which will lead to long-term employment, while providing a limited cash benefit to allow them to support their family.²⁷ Second, by facilitating parents' ability to work, it is believed that children will acquire a strong work ethic, thereby breaking intergenerational poverty and further reducing long-term welfare need.²⁸ These two conclusions focus the Temporary Assistance for Needy Families program at both the present and future of the child. And while these are noble ends, the means have been questioned.²⁹ This has resulted in the Temporary Assistance for Needy Families program being reauthorized with much resistance and reluctance since the turn of the century.³⁰

The Temporary Assistance for Needy Families program utilizes block grants, where the federal government gives a specific amount of funds to states for specific purposes and programs, to achieve its goals.³¹ The idea is that states know best how to get people to work within their state, and they can best use resources at the state level.³² State block grants are also a political compromise, as welfare programs tend to be a liberal idea, but allowing the funds to be administered by the states is a conservative principle.³³

However, a state's discretion is not unlimited, and the restrictions that apply often result in conflict between the Temporary Assistance for Needy Families program and the Children's Convention. The two major requirements of the Temporary Assistance for Needy Families program at

²⁶ *Id.*

²⁷ Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1131–32 (2006).

²⁸ Sanford F. Schram & Joe Soss, *Success Stories: Welfare Reform, Policy Discourse, and the Politics of Research*, 577 ANNALS 49, 55 (2001).

²⁹ See Michael D. Tanner, *The Work vs. Welfare Trade-Off: A Response to Critics*, CATO INST. (Aug. 27, 2013, 10:45 AM), <https://www.cato.org/blog/work-vs-welfare-trade-response-critics>; Jeff Guo, *Why Temporary Assistance May Not Be Enough for the Neediest of Families*, WASH. POST (Sept. 15, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/09/15/why-temporary-assistance-may-not-be-enough-for-the-neediest-of-families/?utm0term=.fc7b9fef1d11>.

³⁰ Ife Floyd et al., *TANF Continues to Weaken as a Safety Net*, CTR. ON BUDGET AND POLICY PRIORITIES (Oct. 27, 2015), <http://www.cbpp.org/research/family-income-support/tanf-continues-to-weaken-as-a-safety-net>.

³¹ *Policy Basics: An Introduction to TANF*, CTR. ON BUDGET AND POLICY PRIORITIES (June 15, 2015), <http://www.cbpp.org/research/policy-basics-an-introduction-to-tanf>.

³² Liz Schott, *TANF Reauthorization: The Congressional Divide over TANF Reauthorization*, 1 SEATTLE J. SOC. JUST. 427, 429–30 (2002).

³³ *Id.* at 434.

issue here are the work requirements of eligible families and the restrictions and requirements for cash assistance.³⁴

a. Child Care and Parents Work Participation

First, the TANF program requires that people must work to receive the benefits available through the program.³⁵ Unfortunately, this requirement overlooks one significant reason parents may not be able to work: a lack of child care. All of the families receiving benefits from the Temporary Assistance for Needy Families program have children and are unemployed.³⁶ Parents or guardians of the children must participate in work activities, and if they refuse to participate, the whole family loses the benefits. The parents are required to work at the state level as the federal Temporary Assistance for Needy Families funds are tied to state's Work Participation Rate, which means half of the total families receiving Temporary Assistance for Needy Families assistance must be involved in work activities for thirty hours a week.³⁷ The nine core activities which can make up all of a participant's work activity hours include both unsubsidized employment and subsidized private-sector employment.³⁸ These activities show the time a parent must spend away from their child, and the 1996 Act does not provide adequate child care for these hours away.

However, that is not to say the 1996 Act does not acknowledge the need for child care; the 1996 Act does take steps to improve child care, but it provides an insufficient amount of time and gives too much discretion to the states. First, the 1996 Act ended many child care entitlements to create the Child Care and Development Fund. This Fund combines the Child Care and Development Block Grant and the Social Security Act, streamlining the process by creating state run distribution.³⁹ The 1996 Act, by ending other child care programs, ended the individual child care entitlement, which previously guaranteed eligible families child care support through other programs.⁴⁰ The Temporary Assistance for Needy Families funds allowed for 30% of the block grant to be transferred to the Child Care and Development

³⁴ GENE FALK, CONG. RESEARCH SERV., RL32740, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 12–21 (2013).

³⁵ 42 U.S.C. § 602(a)(1) (2012).

³⁶ *Id.* § 602(a).

³⁷ *Id.* § 607(a)–(c).

³⁸ *Id.* § 607(d).

³⁹ *Id.* §§ 601–615; *see also* KAREN E. LYNCH, CONG. RESEARCH SERV., RL30785, THE CHILD CARE AND DEVELOPMENT BLOCK GRANT: BACKGROUND AND FUNDING 1–2 (2014).

⁴⁰ LYNCH, *supra* note 39, at 2.

Fund,⁴¹ or the state may spend the grant on child care directly.⁴² While the flexibility for states to use this federal funding for child care could be beneficial, states decreased their spending of block grant funds to \$2.5 billion in 2013, a fifteen year low, and only eight states are transferring the entire 30% of funds to the Child Care and Development Fund.⁴³ While the amount of child care funds utilized by the states under the Temporary Assistance for Needy Families program has declined, states can remove child care assistance if recipients do not meet their hours.⁴⁴ The lone exception to removal is for single parents with children under the age of six, in which case the state determines the criteria of when it is acceptable to deny child care.⁴⁵

b. Basic Assistance

The other big issue the Temporary Assistance for Needy Families program raises at the federal level is the limitation on the cash assistance that states can provide to needy families. The basic cash assistance in the Temporary Assistance for Needy Families program is the monthly monetary funds the state provides to needy families to buy food and other necessities. However, there are many issues with cash assistance.⁴⁶ First, states can choose the amount of monthly funds given to families, and in some cases the amount is as low as under \$200 a month for a family of three.⁴⁷ Second, there is a limitation on the time during which states can provide cash assistance; the limit is sixty months, although that can be extended by 20% if there is hardship. These limits are for families with both parents and kids receiving benefits.⁴⁸ Third, the Temporary Assistance for Needy Families program bars the use of federal funds for persons who came to the United States fewer than five years ago.⁴⁹ Besides the restrictions the Temporary Assistance of Needy Families program has at the federal level to control what states can do with basic assistance when providing it to families, the

⁴¹ 42 U.S.C. § 604(d) (2012).

⁴² *Id.* § 609(a)(7)(B)(i)(I)(bb).

⁴³ Rhiannon Reeves & Stephanie Schmit, *Child Care Assistance in 2013*, CLASP, (2015), <https://www.clasp.org/resources-and-publications/publication-1/Spending-and-Participation-Final.pdf>.

⁴⁴ 42 U.S.C. § 607(e) (2012).

⁴⁵ *Id.* § 607(e)(2).

⁴⁶ *Id.* § 609(a)(7)(B)(i)(I)(aa).

⁴⁷ National Center for Children in Poverty, *Temporary Assistance for Needy Families (TANF) Cash Assistance* (2007).

⁴⁸ 42 U.S.C. § 608(a)(7)(C)(2) (2012).

⁴⁹ *Id.* § 608(b)(7)(f)(3).

legislation creates incentives and ways for states to provide less basic assistance than is helpful to needy families and children with block grants.

The current Temporary Assistance for Needy Families program provides for a federal block grant which provides states with a total of \$16.5 billion dollars a year, an amount which has been fixed since 1996.⁵⁰ Since its inception in 1996, this \$16.5 billion has not been adjusted for inflation, thus states only have 72% of the original spending power in 2013 as it did in 1996.⁵¹

The 2008 Recession has resulted in more families and children in need of help, but the funding has not increased to correspond with this increase.⁵² The 2008 Recession similarly caused states to cut their budgets, which in turn has caused them to use the federal Temporary Assistance for Needy Families block grants for other purposes, like adoption services or governmental organization services.⁵³ The current regime does not have a back-up policy to combat this issue of limited funds. All of which has led to the basic assistance not being enough cash benefits to support families and children.⁵⁴

B. International Child Welfare Law

1. Background

Appreciating the foundation of child welfare law in the international context assists with understanding the framework of international obligations that states have for child welfare. International child welfare law for the purpose of this paper has been divided into two periods before the 1989 Children's Convention: the pre- and post-World War II periods.

⁵⁰ R. Kent Weaver, *The Structure of the TANF Block Grant*, BROOKINGS (Apr. 2002), <http://www.brookings.edu/research/papers/2002/04/welfare-weaver>; Liz Schott & Ladonna Pavetti, *Many States Cutting TANF Benefits Harshly Despite High Unemployment and Unprecedented Need*, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 3, 2011), <http://www.cbpp.org/research/many-states-cutting-tanf-benefits-harshly-despite-high-unemployment-and-unprecedented-need>.

⁵¹ Schott & Pavetti, *supra* note 50.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ For examples of the shortage of the basic assistance see, Jeff Guo, *Why temporary assistance may not be enough for the neediest of families*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/09/15/why-temporary-assistance-may-not-be-enough-for-the-neediest-of-families/?utm_term=.d8bb1f6ea50b; Bryce Covert, *Virtually All Welfare Benefits Are Now Worth Less Than In 1996*, THINK PROGRESS (Oct. 22, 2013), <https://thinkprogress.org/virtually-all-welfare-benefits-are-now-worth-less-than-in-1996-9488f0de5a71>.

a. Pre-World War II

The international law origins of child welfare law are important to appreciate the context of the 1924 Declaration of the Rights of the Child, “the first human rights Declaration adopted by any inter-governmental organization.”⁵⁵

The road to the 1924 Declaration of the Rights of the Child began in Great Britain with their ban of the slave trade in 1806 through the Foreign Slave Trade Act, stopping British subjects from participating in the slave trade with France.⁵⁶ However, this proved ineffective in peacetime, so Great Britain looked towards international law. After the Napoleonic Wars, the Congress of Vienna put forth a nonbinding declaration condemning the slave trade.⁵⁷ Perhaps the best example of an early treaty with states supporting antislavery is the Quintuple Treaty of 1841 where Russia, Prussia, Austria, and France removed limits and restrictions on the ability of warships to stop the slave trade.⁵⁸ Often, articles like the 1926 League of Nations Slavery Convention did not prohibit all forms of child slavery, thus international antislavery treaties would not provide a sufficient mechanism to protect child welfare existed.⁵⁹

One method to protect child welfare from harms other than slavery arose from the issues surrounding industrial labor conditions and the accompanying health concerns.⁶⁰ The first child labor convention passed the Minimum Age Industry Convention No. 5, which set the minimum age for a child working in industry at fourteen-years-old in 1919.⁶¹ A majority of the anti-child labor international legislation comes from the International Labour Organization, which was created in 1919 at the Paris Peace Conference.⁶² Perhaps illustrating how intertwined the antislavery and anti-child labor laws were, the first majority International Labour Organization initiative, known

⁵⁵ GERALDINE VAN BUREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD*, 6 (1996).

⁵⁶ Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Laws*, 117 *YALE L.J.* 550, 562–63 (2008).

⁵⁷ *Id.* at 569–75.

⁵⁸ KEITH HAMILTON & FAIRDA SHAIKH, *SLAVERY, DIPLOMACY AND EMPIRE: BRITAIN AND THE SUPPRESSION OF THE SLAVE TRADE* 10 (2009).

⁵⁹ Slavery Convention art. 1, Sept. 25, 1926; HOLLY CULLEN, *THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF CHILD LABOR* 14–15 (2007).

⁶⁰ CULLEN, *supra* note 59, at 13.

⁶¹ SANDY HOBBS ET AL., *CHILD LABOR: A WORLD HISTORY COMPANION* 142 (1999).

⁶² John Collins, *Fifty Years of the International Labour Organisation*, 23 *PAK. HORIZON* 51, 51 (1970).

as the Forced Labor Convention No. 29, aimed to outlaw all forms of compulsory labor.⁶³

World War I brought renewed attention to children's rights issues. As states were shocked by the destruction and suffering of youths during the first World War, the League of Nations, a precursory international body to the United Nations, worked to draft the Declaration of the Rights of the Child or the Geneva Declaration of the Rights of the Child, to address the needs of children.⁶⁴ The Declaration of the Rights of the Child focuses on material needs of the child: "[t]he child must be given the means requisite for its normal development . . . materially . . ."⁶⁵ Material aspects, as used in the Declaration of the Rights of the Children mean those which affect the whole life of the child; from immediate needs, like feeding hungry children and nursing the sick, to the long term needs, like putting the child "in a position to earn a livelihood."⁶⁶ The Declaration of the Rights of the Child recognized the connection between full development and material rights and was "[t]he first attempt to frame the norms later codified in the [Children's Convention]."⁶⁷

2. 1989 Children's Convention

Emerging from the Declaration of the Rights of the Child, the Convention on the Rights of the Child of 1989 is a groundbreaking treaty which includes incredible political support for the rights of children.⁶⁸ While the 1989 Children's Convention provides unprecedented support, it still has not been adopted by the United States.⁶⁹ The provisions of the 1989 Children's Convention explain the popularity of the treaty as well as United States nonparticipation.⁷⁰

While many treaties for human rights are divided into a civil rights or criminal rights context, the convention "protect[s] not only the child's civil

⁶³ HOBBS ET AL., *supra* note 61, at 142.

⁶⁴ *Briefings in Medical Ethics*, 17 J. MED. ETHICS (U.K.), 1, 1 (1991).

⁶⁵ Geneva Declaration of the Rights of the Child, League of Nations 1 (Sept. 26, 1924).

⁶⁶ *Id.* at 4.

⁶⁷ MARK ENSALACO & LINDA C. MAJKA, CHILDREN'S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 10 (2005).

⁶⁸ Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, 139 (1998).

⁶⁹ Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis*, 19 MICH. J. INT'L L. 633, 634-35 (1998).

⁷⁰ LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 5, 6 (2013); Cleveland Ferguson III, *Of Politics and Policy: Can the U.S. Maintain its Credibility Abroad while Ignoring the Needs of its Children at Home?*, 14 TULSA J. COMP. & INT'L L. 191, 229-30 (2007).

and political rights, but it also extends protection to the child's economic, social and cultural rights and humanitarian rights."⁷¹

The history and ratification of the 1989 Children's Convention shows the interesting stance of the United States in this process. After the 1959 Declaration on the Rights of the Child, the United Nations created a statement of additional children's rights.⁷² In the 1970s, Poland and a group of states began petitioning to introduce a binding agreement for the protection of children's rights.⁷³ This work culminated in 1978, when Poland submitted a draft of a children's rights convention to the U.N. Commission on Human Rights, a committee established by the Economic and Social Council pursuant to Article 68 to promote human rights.⁷⁴ The next year, the U.N. Commission created the Open-Ended Working Group of the Commission on Human Rights to draft the convention.⁷⁵ In 1988, the draft of the Children's Convention was finished, and was then adopted by the U.N. General Assembly by Resolution 44/25 on November 20, 1989.⁷⁶ Soon after the twentieth country ratified the Convention on September 2, 1990, the Convention came into effect.⁷⁷ As of this writing, it enjoys 196 parties, including all U.N. member states except the U.S., along with two nonmembers states, the Holy See and the State of Palestine.⁷⁸

The United States "played a pivotal role in the drafting of the Convention,"⁷⁹ despite not being a member to the Convention. U.S. drafters proposed the most articles in the Open-Ended Working Group, with seven articles total. Further, the United States edited the text of thirty-eight of the forty other articles.⁸⁰ Cynthia Price Cohen, a respected scholar in the field,

⁷¹ Kurtis A. Kemper, Annotation, *Construction and Application of the United Nations Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989) -- *Global Cases and Administrative Decisions*, 20 A.L.R. FED. 2d 95, § 2.

⁷² U.N. High Comm'r for Human Rights, *Legislative History on the Convention on the Rights of the Child* vol. 1, 4 (2007).

⁷³ Natasha Parassram Concepcion, *The Convention on the Rights of the Child After Ten Years: Success or Failure?*, 7 HUM. RTS. BRIEF 1, 1 (2000).

⁷⁴ U.N. High Comm'r for Human Rights, *supra* note 72, at 31; U.N. Charter art. 68.

⁷⁵ Concepcion, *supra* note 73, at 1, 2.

⁷⁶ *Id.*; Chapter IV: *Human Rights 11. Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION (Nov. 20, 1989).

⁷⁷ *Convention on the Rights of the Child: Forthcoming*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://legal.un.org/avl/ha/crc/crc.html> (last visited Apr. 14, 2017).

⁷⁸ United Nations Treaty Collection, *Convention on the Rights of the Child* (Dec. 17, 2015).

⁷⁹ Cynthia Price Cohen, *The Role of The United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185-86 (2006).

⁸⁰ Cris R. Revaz, *An Introduction to the U.N. Convention on The Rights of the Child*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 13 (Jonathan Todres ed., 2006).

stated that the “U.S. influence was so strong that some people referred to the Convention as the ‘U.S. child rights treaty.’”⁸¹ Despite the United States’ role in the drafting process, the U.S. is not a party to the 1989 Children’s Convention.

In 1995, the U.S. Representative to the United Nations, Madeleine Albright, on behalf of President Bill Clinton, signed the 1989 Children’s Convention, but it was never submitted to the Senate as there was strong opposition.⁸² Multiple explanations for why the United States still has not ratified the treaty exist. One scholar states a general “anti-internationalist opposition to *all international law*”⁸³ has caused a distrust of all human rights treaties, the 1989 Children’s Convention being no exception. Another concern of the Convention’s opponents is that the Convention will possibly infringe on a parent’s privacy, freedom of expression, freedom of religion, education, corporal punishment, and the parent’s ability to choose with whom their children associate.⁸⁴ One of the largest debates about the U.S. becoming a party to the Convention is whether it guarantees minors the ability to receive an abortion without parental approval.⁸⁵ The listed concerns in part have prevented the U.S. from becoming a party to the 1989 Children’s Convention, but in 2009 President Barack Obama asked for a legal review of the Convention.⁸⁶ The legal review indicates interest in becoming a party to the Convention, but as no more recent progress has occurred, it most likely has been delayed.

a. Structure

The 1989 Children’s Convention is divided into three parts: first, the rights of the child and the state’s obligations; second, the implementation process and reporting requirements; and third, the process of ratification.⁸⁷ Part 2 of the Convention contains the articles describing how to set up the Committee on the Rights of the Child, which is a body of eighteen independent experts to oversee the Convention.⁸⁸ State parties must send reports to the Committee on how they are working to conform to the

⁸¹ Cohen, *supra* note 79, at 190.

⁸² BLANCHFIELD, *supra* note 70, at 1.

⁸³ Howard Davidson, *Does the U.N. Convention on the Rights of the Child Make a Difference?*, 22 MICH. ST. INT’L L. REV. 497, 505 (2014).

⁸⁴ BLANCHFIELD, *supra* note 70, at 9–11.

⁸⁵ *Id.* at 13.

⁸⁶ Davidson, *supra* note 83, at 506.

⁸⁷ Convention on the Rights of the Child, *supra* note 7, arts. 2, 43, 49.

⁸⁸ *Id.* art. 43.

Convention on the Rights of the Child.⁸⁹ From these reports, the Committee produces comments on each state's reports specifically, in order to improve the state's compliance with the Convention.⁹⁰ The Committee will also use the state reports to create general comments to the Convention and the correct ways to interpret the Children's Convention.⁹¹ Both the comments on a state's report and the general comments can be used as a form of jurisprudence for interpreting the broad provisions of the Convention, to help the state parties' governance.⁹²

Under Part Three, the way to accede the Convention is a fairly routine process. To become a party to the Convention, a state party signs and consents, which will go into force thirty days after acceding.⁹³ The Convention allows for reservations, a declaration that a state excludes the legal effect of a provision.⁹⁴ State parties may also amend the Convention.⁹⁵

b. Key Provisions

Child care is one of the key provisions in the Children's Convention. Article 18 of the Convention relates directly to child care and the states' obligation to provide it. Article 18(2) requires that the state give appropriate assistance to parents in the raising of their child, including the facilities and services for their child's care.⁹⁶ This subsection clearly requires some assistance to the parents, and it seems to go beyond the basic cash assistance, given that it specifically mentions facilities and services. The Convention requires some formalized program of providing child care for all parents who have children. Article 18(3) ensures that "children of working parents have the right to benefit from child-care services and facilities for which they are eligible."⁹⁷ Subsection 3 clearly requires child care for working parents, the group that is affected by the 1996 Act. The Convention recognizes the need for working parents to receive care for their children while at work and also clarifies that it is the state who must provide these services.

Article 3, although less directly relevant to child care, contains a provision which has incredible potential for binding states to provide child

⁸⁹ *Id.* arts. 44, 45.

⁹⁰ *Id.* art. 45.

⁹¹ *Id.*

⁹² Cynthia Price Cohen, *The Developing Jurisprudence on the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 6, 7 (1993).

⁹³ Convention on the Rights of the Child, *supra* note 7, arts. 46–49.

⁹⁴ *Id.* art. 51.

⁹⁵ *Id.* art. 50.

⁹⁶ *Id.* art. 18(2).

⁹⁷ *Id.* art. 18(3).

care. The provision in Article 3(1), which states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁹⁸ This language could implicate a child care requirement. The Committee on the Rights of the Child's general comments provide legal analysis of Article 3(1).⁹⁹ The Committee states that Article 3(1) concerns activities which affect the care, health, and education of children in a "very broad sense."¹⁰⁰ These comments also include the right to access education, especially early childhood education, which should be free of charge and in a child friendly environment; this further demonstrates that the state should provide formal child care for children.¹⁰¹ While the Committee's general comments never address "child care" directly, it is clear that it falls within the Committee's intent for the best interest of the child. The Committee similarly finds support for adolescent child care in its released general comments on adolescent health and development.¹⁰² The Committee stated the importance of "the concepts of 'health and development' more broadly than being strictly limited to the provisions defined in articles 6 (right to life, survival and development) and 24 (right to health) of the Convention."¹⁰³ In these general comments, support is provided for the broad protection of child care under the Children's Convention.

Additionally, the 1989 Children's Convention and its jurisprudence also illustrate that families with children must be provided with basic assistance to afford food, shelter, and water. The most direct support in the Convention is contained in Article 27(3):

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and

⁹⁸ *Id.* art. 3(1).

⁹⁹ U.N., Committee on the Rights of the Child, CRC General Comment No. 14 on the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration, U.N. Doc. CRC/GC/2013/14, ¶ 17 (2013).

¹⁰⁰ *Id.* ¶ 19.

¹⁰¹ *Id.* ¶ 79.

¹⁰² U.N., Committee on the Rights of the Child, CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (2003).

¹⁰³ *Id.* ¶ 11.

support programmes, particularly with regard to nutrition, clothing and housing.¹⁰⁴

Article 27(3) requires the state to provide temporary assistance to the parents whenever the parents are not financially able to provide a child an adequate standard of living.¹⁰⁵ When the entitlement system of providing basic assistance to needy families ended, the U.S. appeared to violate Article 27(3) obligations, as the U.S. was not guaranteeing material assistance to children.¹⁰⁶ Article 18(2) provides similar grounds for the requirement of basic assistance, requiring that a state must provide appropriate assistance to needy children's families to ensure development.¹⁰⁷

The Committee also addressed the requirements of states to provide resources at large. Article 4 requires: "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources."¹⁰⁸ As economics are so tied the welfare of the child, the Committee focuses so much on economics. The Comment states: "[w]hatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups."¹⁰⁹ This language addresses families in poor economic situations, and requires that the state do the most possible to provide for the needy children.¹¹⁰ General Comment No. 5 indicates that states are required to ensure children have adequate care, regardless of their parents' income. A way to achieve this end is through basic assistance.

The Committee of the Rights of the Child in their General Comment No. 15 discusses the right that children have to the highest standard of health.¹¹¹ A passage in General Comment No. 15 states: "Barriers to children's access to health services, including financial, institutional and

¹⁰⁴ Convention on the Rights of the Child, *supra* note 7, art. 27(3).

¹⁰⁵ NANCY E. WALKER ET AL., CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF NATIONAL POLICY 106, 138 (1999).

¹⁰⁶ Virginia Murphy-Berman, *A Cross-cultural Examination of Article 27 of the U.N. Convention on the Rights of the Child*, in IMPLEMENTING THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STANDARD 159, 174 (Ariene Bowers Andres ed., 1999).

¹⁰⁷ Convention on the Rights of the Child, *supra* note 7, art. 18(2).

¹⁰⁸ *Id.* art. 4.

¹⁰⁹ U.N., Committee on the Rights of the Child, CRC General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (2003).

¹¹⁰ *Id.*

¹¹¹ U.N., Committee on the Rights of the Child, CRC General Comment No. 15: On the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), U.N. Doc. CRC/GC/2013/4 (Apr. 17, 2013).

cultural barriers, should be identified and eliminated . . . social protection interventions, including social security such as child grant or subsidies, cash transfers and paid parent leave, should be implemented and seen as complementary investments."¹¹² This comment demonstrates two things: First, financial barriers to health care must be eliminated; second, the state must provide grants or subsidies to parents who are raising children to help improve access to children's health services.

III. WHETHER CHILD WELFARE PROVISIONS CODIFIED IN THE CHILDREN'S CONVENTION MAY BE USED TO COMPEL REFORM OF THE U.S. TEMPORARY AID PROGRAM

As the United States is not yet a party to the Children's Convention, the United States has not given express consent to follow the Convention's obligations. Despite the United States not ratifying, some of the provisions of the Convention have become customary international law creating binding universal obligations.¹¹³ Some legal scholars have argued that because of the high number of countries which have become parties to the Children's Convention, the whole Convention should be seen as customary international law.¹¹⁴ As customary law is determined provision creating customary obligations, the obligations of the Children's Convention must be found to be customary to apply to the United States.¹¹⁵

A. Provisions Relating to Child Care

Finding a state's belief that they have an obligation to follow the provisions of the Children's Convention relevant to child care to constitute *opinio juris* is clear through the parties of the Convention.¹¹⁶ As the previous Declarations on the Rights of the Child did not address child care, the Children's Convention may not be customary international law, although it may help to provide a basis for it. The near-universal support for the Children's Convention, including the new provisions concerning child care, can be considered sufficient to show general and consistent belief of the

¹¹² *Id.* at 29.

¹¹³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 CMT. I (AM. LAW INST. 1987).

¹¹⁴ Cynthia Price Cohen, *International Protection of the Rights of the Indigenous Child*, 7 ST. THOMAS L. REV. 557, 565 (1995).

¹¹⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. d (AM. LAW INST. 1987).

¹¹⁶ *Id.* § 102 n.2.

obligations to provide adequate child care.¹¹⁷ Similar to the 1958 Convention on the Continental Shelf, where it quickly became a quick time period does not limit the Children's Convention's parties actions to be demonstrating sufficient *opinio juris*.¹¹⁸

As for the state practice, in addition to becoming a party to the Children's Convention as an act of state practice, additional evidence of state practice supporting the best interest provision of Article 3(1) in a United States Federal District Court decision, which stated that the "best interest" is customary law in the *Beharry v Reno* case.¹¹⁹ In *Beharry*, the petitioner wanted to avoid deportation and thought he was permitted a hearing to prevent deportation under the Children's Convention as a form of customary international law, because of the effect of Article 3(1).¹²⁰ The court held the "best interest" of the child should be read as customary international law since the Children's Convention was accepted overwhelmingly, and specifically for Article 3(1), "similar doctrines have long been part of our law."¹²¹ In *Beharry*, the court then distinguishes the Children's Convention's provisions which are not customary as ones that Congress has acted against; for example, Congress's regulation of the death penalty.¹²² Similarly, authors such as Geraldine Van Beuren and Rhona K.M. Smith have considered the best interest clause of Article 3(1) to be customary international law.¹²³

States practices exist supporting the obligations of Article 18 requiring states to provide adequate child care for working parents as well. In the United Kingdom, the Childcare Act 2006 lays the framework to provide families with child care services, and subsequent amendments have increased child care to older children, acting as an example of state practice for Article 18(3).¹²⁴ A broader example of state practice for increasing child care is found in the "Barcelona targets" of the 2002 Barcelona European Council to have more parents working by getting more young children into child care.¹²⁵ Not only have European Union Member States enacted policies to reach an increased number of working parent's children in child care, but they have reaffirmed their commitment to the Barcelona targets again by making it part

¹¹⁷ United Nations Treaty Collection, *supra* note 78.

¹¹⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE U.S. § 102 n.2 (AM. LAW INST. 1987).

¹¹⁹ *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002).

¹²⁰ *Id.* at 586, 596.

¹²¹ *Id.* at 600–01.

¹²² *Id.* at 601.

¹²³ RHONA K.M. SMITH, TEXT AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 15 (2013).

¹²⁴ JOINT COMMITTEE ON HUMAN RIGHTS, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: HOW LEGISLATION UNDERPINS IMPLEMENTATION IN ENGLAND 96, 97 (2010).

¹²⁵ EUROPEAN COMMISSION, BARCELONA OBJECTIVES 4 (2013).

of the Europe 2020 Strategy.¹²⁶ While these acts do not show universal state practice with regard to child care, they provide sufficient groundwork.¹²⁷

B. Provisions Relating to Basic Assistance

The customary international law effect of the provisions of the Children's Convention requires both state practice and *opinio juris* to become binding. For the provisions which affect the basic assistance requirements, *opinio juris*, the state subjective belief that an obligation is customary law, begins with the 1924 Declaration on the Rights of the Child, where a nearly universal body of states declared that children have a right to material provisions to development.¹²⁸ This belief of requiring the provision of material support to children is highlighted by the overwhelming support for the Children's Convention, in Articles 27(3), 18(2), and 4.¹²⁹

To prove customary international law, states must also commit acts to support the obligations contained in the provision. Author Trevor Buck interprets it as a prime example of the Children's Convention codifying a fundamental rule into actionable standards, as Article 27 gives the parents the primary responsibility for the child.¹³⁰ The state must provide material programs, giving detailed obligations, not just an aspiration.¹³¹ An example of state practice would be the requirement to provide monetary support, which is undertaken through the U.S.' Aid for Families with Dependent Children Act which guaranteed cash assistance to needy parents, and other such supports as required in Article 18(2).¹³²

Other state practices of providing guaranteed basic assistance to children include countries such as Germany, where Title Eight of the Social Code gives all young people assistance and benefits to overcome poverty and develop correctly.¹³³ Generally, European states consider the right of assistance for children to avoid poverty as a right of citizenship, if not a human right.¹³⁴ Most prosperous states have social policy which promotes

¹²⁶ *Id.*

¹²⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. b (AM. LAW INST. 1987).

¹²⁸ ENSALACO & MAJKA, *supra* note 67, at 10.

¹²⁹ *See supra* text accompanying notes 109–19.

¹³⁰ TREVOR BUCK, INTERNATIONAL CHILD LAW 17 (3d ed. 2005).

¹³¹ *Id.*

¹³² Doran & Roberts, *supra* note 16, at 391.

¹³³ THE LAW LIBRARY OF CONGRESS, CHILDREN'S RIGHTS: GERMANY (2015), <https://www.loc.gov/law/help/child-rights/germany.php>.

¹³⁴ LANSE MINKLER, THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 191 (2013).

income assistance to help poor families, as well as specific services provided to low income families.¹³⁵ These affluent states are juxtaposed to the U.S., which provides little entitlement, showing the general state practice of relevant nations is to provide basic assistance.¹³⁶

C. Customary International Law is Binding on the United States

Even though the relevant provisions of child care and basic assistance in the Children's Convention are customary international law, it still must be shown that the U.S. has not opted out of the obligations and that the U.S. signature on the Convention has a significant and meaningful effect.

1. U.S. History of Support for International Child Law

The fundamental way for a state to avoid being bound by customary law is through the persistent objector doctrine, where a country has consistently objected to the custom before it was codified.¹³⁷ If the U.S. wanted to avoid its obligations under customary international law it would have to demonstrate that it had consistently objected to these norms.¹³⁸ The U.S. has a long history of supporting international child welfare law, shown by its support of the 1959 Declaration of the Rights of the Child and its major role in the drafting of the Children's Convention text.¹³⁹ The U.S. has continued to support international child law as the U.S. has become a party to two optional protocols of the Children's Convention: the Optional Protocol to the U.N. Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.¹⁴⁰ This support of the optional protocols furthers the U.S.' acceptance to be bound by customary international law as the U.S. demonstrates continuing commitment to child welfare law.

¹³⁵ *Id.* at 190.

¹³⁶ *Id.*

¹³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. d (AM. LAW INST. 1987).

¹³⁸ *Id.*

¹³⁹ Cohen, *supra* note 79, at 186.

¹⁴⁰ Davidson, *supra* note 83, at 501.

2. U.S. Signature and Non-Objection to Relevant Provisions of the Children's Convention

Even though the United States has not become a party to the Children's Convention, its signature on the Convention can still be used to support the proposition that the United States has obligations under the Children's Convention. The Restatement provides that a state who signs a treaty is bound to not go against the spirit of the treaty's obligations; therefore, having signed the treaty, the United States is under such an obligation. While this is less binding than being a formal party to the treaty, having signed it may prevent the United States from actively violating it.¹⁴¹ The issue with the binding effects of a signature is if the signing states have clearly intended to not be a party to the treaty. Because President Obama recently inquired about the Children's Convention, it could easily be argued that the United States does not clearly intend to avoid being a party.¹⁴² Even without this effect, the fact the United States signed the treaty may support it as being customary international law by being an act of state practice, even without ratification.¹⁴³

Similarly, the U.S. politicians opposed to the United States becoming a party to the Children's Convention have not criticized the relevant provisions for child care and basic assistance.¹⁴⁴ The main policy areas which are objectionable are in juvenile justice, education, and the parents' right to raise their own children, as these policies are seen as issues for the states, not the federal government, to decide.¹⁴⁵ Since providing child care and basic assistance have been provided for by the federal government, the state sovereignty concerns in the relevant fields are not as great.¹⁴⁶ The most significant debate in the U.S. with regard to ratifying the Children's Convention is if it would guarantee abortion for minors, as it protects the right to privacy.¹⁴⁷ The right to privacy in the United States has been interpreted to protect the right for women to have abortions. The Children's Convention expressly guarantees the right to privacy for rights. As the U.S. has not objected to the relevant provisions for both child care and basic

¹⁴¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE U.S. § 312(3) (AM. LAW INST. 1987).

¹⁴² Davidson, *supra* note 83, at 506.

¹⁴³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE U.S. § 103 cmt. a (AM. LAW INST. 1987).

¹⁴⁴ BLANCHFIELD, *supra* note 70, at 6.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 7, 8.

¹⁴⁷ *Id.* at 12.

assistance, it can be seen as evidence of not being a persistent objector of state practice because inactions can be considered state practice.¹⁴⁸

D. Current Operations of the Temporary Aid Program Violate the Relevant Provisions of the Children's Convention

As the obligations presented in the relevant provisions of the Children's Convention are customary international law, two key areas of the 1996 Welfare Act violate these obligations, child care and basic assistance. Other areas of the Welfare Act violate customary international law, but these two areas of child care and basic assistance are at the core of how the Welfare Act will help children. When the Federal Government passed the Welfare Act its goal was to help children by getting their parents into jobs and providing short term assistance until their parents make livable wages.¹⁴⁹ These two concepts do not meet the international standard indicating the weakness of the 1996 Welfare Act.

1. Insufficient Child Care

Article 3(1) of the Children's Convention requires that the best interest of the child be considered in legislation, and unsupervised children is not acceptable.¹⁵⁰ Research consistently shows the importance of child care to the development of children, for physical, mental, and social abilities.¹⁵¹ Since it is in the children's best interest to have child care, by not guaranteeing child care or supervision to young children when their parents go to work, they are denied the right to development which the Children's Convention protects.¹⁵² The need for child care is increasingly important given that the amount of work hours required for a single parent is thirty hours; this is far too long for a child to be alone.¹⁵³

While an argument could be made for the legislature focusing on the long term effects of getting parents to work, which will allow them to provide child care later on, the obligations as articulated in the Children's Convention focus on the immediate best interests of the child. The Children's Convention supports the parents and their ability to provide for

¹⁴⁸ See *infra* text accompanying notes 160–62.

¹⁴⁹ See *supra* note 25 and accompanying text.

¹⁵⁰ Convention on the Rights of the Child, *supra* note 7, art. 3; National Institutes of Health, *The NICHD Study of Early Child Care and Youth Development* 12 (2002).

¹⁵¹ National Institutes of Health, *supra* note 150.

¹⁵² Convention on the Rights of the Child, *supra* note 7, art. 3.

¹⁵³ For a time when it is acceptable to leave a child alone, see 705 ILL. COMP. STAT. 405/2-3(1)(e).

their families financially, but requires the state to intervene and promote the best interest of the child, which requires a guarantee of immediate child care if a child's parents must work. The Committee on the Rights of the Child's interpretation of Article 3(1), which requires considering health, care, and education, indicates the legislature must consider these factors when determining if an act is in the best interest of a child.¹⁵⁴ As early childhood education and health is so greatly determined by a child receiving child care, it is hard to say the legislature acted in the best interest of the child when not guaranteeing child care.

The other violation of the obligation of the legislature to consider the best interests of the child relevant to child care is the flexibility of the federal Temporary Assistance for Needy Families funding. The states who receive the funding are allowed to choose the programs for which the federal funding is allocated.¹⁵⁵ The 1996 Welfare Act does not provide a spending minimum, or floor, on how much is required to be spent on child care, even though it has a maximum amount which can be transferred to the Child Care and Development fund.¹⁵⁶ To promote the best interest of the child, the states should be required to spend a minimum amount on child care and be required to spend an amount adequate to provide child care to parents who require it to allow them to go to work.

Article 18(3) of the Children's Convention requires states to provide the children of working parents child care if they are eligible.¹⁵⁷ As the 1996 Welfare Act requires parents who are receiving these benefits to work, the children who are covered by the Act should also be protected by Article 18(3)'s obligation for the state to provide child care to the children of working parents.¹⁵⁸ This creates a fairly straight-forward violation of Article 18(3), as some of the children of working parents, who are eligible to receive the benefits of the 1996 Welfare Act, should be provided child care. As no guarantee to child care exists under the 1996 Act, this must be in violation of the United States' obligations under Article 18(3) via customary international law.

¹⁵⁴ Committee on the Rights of the Child, CRC General Comment No. 14, *supra* note 102, ¶ 19.

¹⁵⁵ FALK, *supra* note 34, at 12.

¹⁵⁶ 42 U.S.C. § 604 (2012).

¹⁵⁷ Convention on the Rights of the Child, *supra* note 7, art. 18(3).

¹⁵⁸ 42 U.S.C. § 602(a)(1) (2012).

2. *Insufficient Basic Assistance*

Similarly, the lack of guaranteed basic assistance to recipients of the Temporary Assistance for Needy Families program is a violation of the customary international law obligations as presented in relevant provisions of the Children's Convention. First, the fixed amount of federal funding for the Temporary Assistance Program violates Article 4 of the Convention, which requires a state to provide economic care to the greatest extent possible to children.¹⁵⁹ The fixed funding denies states the resources to provide cash assistance to support needy children, as providing this assistance would help preserve the rights of the child to health or food. The United States has not even increased the funding to keep up with inflation.¹⁶⁰ As the 1996 Welfare Act is meant to support the most economically disadvantaged families, the Committee's interpretation of Article 4 to make the government economically assist the disadvantaged, capping the amount of aid prevents the United States from protecting these groups.¹⁶¹ As the amount of need changes and the Act contains no reauthorization for emergency funding, the 1996 Welfare Act cannot adjust to the growth of families in poverty, casting off many of the disadvantaged groups which should be protected under Article 4. The Committee's interpretation of Article 4 recognizes the importance of economics in preserving the rights of the children and how states can protect the welfare of the child by the state providing the best support it can to these children.¹⁶² Having a cap on the amount of federal funding to the Temporary Assistance for Needy Families Program denies states the amount of funding necessary to provide basic assistance to all families and creates incentives for states to spend as little of the funding as possible on basic assistance.

The other violation of the 1996 Welfare Act is the limitation determining to which basic assistance is provided. The Temporary Assistance for Needy Families program's limitations on funding are too great, violating the Children's Convention requirement of providing support for children.¹⁶³ Under the 1996 Welfare Act, the states are allowed to determine how much assistance to provide to a family, and states often set the amount of assistance very low.¹⁶⁴ This is a violation of the customary international law obligations in Article 27(3) which require the state to assist parents of needy children to

¹⁵⁹ Convention on the Rights of the Child, *supra* note 7, art. 4.

¹⁶⁰ Schott & Pavetti, *supra* note 50.

¹⁶¹ *Id.*

¹⁶² Committee on the Rights of the Child, General Comment No. 5, *supra* note 109, at 1.

¹⁶³ Schott & Pavetti, *supra* note 50.

¹⁶⁴ 42 U.S.C. § 604(a) (2012).

provide material assistance, as the state can choose to provide inadequate support.¹⁶⁵ Article 27(3) requires assistance for food, clothing, and housing for the children which cannot be provided on the \$200 that some states provide to a family of three.¹⁶⁶ Similarly, Article 18 requires adequate assistance to help the child develop, a level of assistance the states are not required to reach.¹⁶⁷ Another example is the time limit allowing families to receive funds for sixty months, which stops children from receiving funding even if the state could continue to provide basic assistance, violating Article 27(3).¹⁶⁸

The 1996 Welfare Act's limitations for providing adequate basic assistance also violates the need for access to health care for children, a customary law obligation of the Children's Convention. The Committee focuses on not only the ability of the child to receive care, but also the barriers which prevent children from receiving care, especially financial barriers.¹⁶⁹ In the General Comment, the Committee states that cash transfers and paid parent leave should be included, as a way to eliminate barriers to children's health care, none of which are provided in the 1996 Welfare Act.¹⁷⁰ By not providing adequate cash assistance to families with needy children, the 1996 Welfare Act violates the customary international law obligations to provide individual investments to families to allow them to improve the health of their children.

E. How These Violations May Be Used to Compel Appropriate Reform

After establishing that the United States violates the obligations of providing adequate child care and basic assistance to children, it must be determined what can be done about these violations. The United States' stance is that customary international law does not create actionable legal rights unless a law is passed or a federal court interprets a right.¹⁷¹ As neither the legislature nor the courts have created an actionable right, a person could not sue in domestic court to force U.S. compliance, and even if the Children's Convention was ratified by the United States doubt exists about the effect it would have.¹⁷² The primary way to seek remedy for

¹⁶⁵ Convention on the Rights of the Child, *supra* note 7, art. 27(3).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* art. 18.

¹⁶⁸ *Id.* art. 27(3).

¹⁶⁹ Committee on the Rights of the Child, General Comment No. 15, *supra* note 109, at 29.

¹⁷⁰ *Id.*

¹⁷¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111 cmt. d (AM. LAW INST. 1987).

¹⁷² John Quigley, *U.S. Ratification of the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 401, 409 (2003).

violations of the Children's Convention is through the Committee on the Rights of the Child. This Committee does not hear claims from either individuals or states, but it can review state reports or make comments of interpretation regarding the Children's Convention.¹⁷³ The Committee could issue a comment on how the United States is currently violating the Convention and allow pressure from other states to alter U.S. policy.¹⁷⁴ A final option is to utilize these violations in the domestic policy making context, as the 1996 Welfare Act is currently under reform. Utilizing the framework of the Children's Convention could provide a benchmark for creating policy, such as what is considered adequate child care.¹⁷⁵

IV. CONCLUSION

As the United States policymakers look to improve the 1996 Welfare Act and child welfare in the United States, it is common for them to look solely at domestic policy.¹⁷⁶ While probably not providing actionable rights for the violations committed by the 1996 Act, the customary international law provisions of the Convention on the Rights of the Child that are relevant to child care and basic assistance can be used to help shape the upcoming reform.¹⁷⁷ Members of the U.S. legislature can help shape their policies to reach the ideals which U.S. drafters helped to identify in the Children's Convention and thereby improve the lives of children in the United States.¹⁷⁸ The Children's Convention can act as a catalyst to help advance child welfare law in the United States, even if it is not ratified, so the United States can reap the benefits it sowed with its work in drafting the Children's Convention.

¹⁷³ Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 192 (1998).

¹⁷⁴ *Id.*

¹⁷⁵ Editorial Board, *Long-term Thinking for Welfare*, WASH. POST, Aug. 2, 2015, https://www.washingtonpost.com/opinions/long-term-thinking-for-welfare/2015/08/02/99890ac2-3558-11e5-94ce-834ad8f5c50e_story.html?utm_term=.86fb86c8f01a.

¹⁷⁶ *Id.*

¹⁷⁷ Todres, *supra* note 173, at 192–93.

¹⁷⁸ See *supra* text accompanying notes 85–86.

