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

Gregory W. Donaldson*

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 317

II. CHILD WELFARE IN THE CONTEXT OF U.S. AND INTERNATIONAL LAW ................................................................................................................................. 318
   A. Child Welfare Law in the United States ................................................................. 318
      1. Background ......................................................................................................... 318
   3. Temporary Assistance for Needy Families Program ........................................... 320
      a. Child Care and Parents Work Participation .................................................... 322
      b. Basic Assistance ............................................................................................... 323
   B. International Child Welfare Law ........................................................................... 324
      1. Background ....................................................................................................... 324
         a. Pre-World War II ............................................................................................. 325
      2. 1989 Children’s Convention ............................................................................. 326
         a. Structure .......................................................................................................... 328
         b. Key Provisions ............................................................................................... 329

III. WHETHER CHILD WELFARE PROVISIONS CODIFIED IN THE CHILDREN’S CONVENTION MAY BE USED TO COMPEL REFORM OF THE U.S. TEMPORARY AID PROGRAM ......................................................................................... 332
   A. Provisions Relating to Child Care ......................................................................... 332

* J.D., University of Georgia, 2017. I would like to thank the all the members of the Executive, Managing, and Editorial Boards of the GJICL, neither my Note or any issue could have been accomplished without you. I would also like to thank the wonderful faculty and staff members who help with each issue GJICL creates. Finally, I must thank my wonderful fiancé and family who have helped me throughout this process.
B. Provisions Relating to Basic Assistance ........................................ 334

C. Customary International Law is Binding on the United States
   1. U.S. History of Support for International Child Law ........ 335
   2. U.S. Signature and Non-Objection to Relevant Provisions of the Children's Convention ........ 336

D. Current Operations of the Temporary Aid Program Violate the Relevant Provisions of the Children's Convention ........................................ 337
   1. Insufficient Child Care ........................................ 337
   2. Insufficient Basic Assistance ................................ 339

E. How These Violations May Be Used to Compel Appropriate Reform ........................................ 340

IV. CONCLUSION ................................................................. 341
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

---


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

6 Id. at 82–84.


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

11 Id. at 449–51.
out of animal protection advocates and resulted in 300 the creation of nongovernmental child protection societies in America.  

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. Mothers' Pensions were more popular than other contemporaneous moral legislation, but the Great Depression called for stronger support.

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. 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" of assistance, 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. 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. 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.


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.
14 Id.
17 Id.
18 Id. at 393.
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." The 1996 Act was a joint program by Democrats and Republicans to develop a replacement for the Aid to Families with Dependent Children legislation. This reform resulted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. 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.

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.

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

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/.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{26} Id.
\textsuperscript{33} Id. at 434.
issue here are the work requirements of eligible families and the restrictions and requirements for cash assistance.\textsuperscript{34}

\textit{a. Child Care and Parents Work Participation}

First, the TANF program requires that people must work to receive the benefits available through the program.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{40} The Temporary Assistance for Needy Families funds allowed for 30% of the block grant to be transferred to the Child Care and Development

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{35} 42 U.S.C. § 602(a)(1) (2012).
\item \textsuperscript{36} \textit{Id.} § 602(a).
\item \textsuperscript{37} \textit{Id.} § 607(a)–(c).
\item \textsuperscript{38} \textit{Id.} § 607(d).
\item \textsuperscript{39} \textit{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).
\item \textsuperscript{40} LYNCH, \textit{supra} note 39, at 2.
\end{itemize}
\end{footnotesize}
Fund,\textsuperscript{41} or the state may spend the grant on child care directly.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item[41] 42 U.S.C. § 604(d) (2012).
\item[42] Id. § 609(a)(7)(B)(i)(I)(bb).
\item[45] Id. § 607(e)(2).
\item[46] Id. § 609(a)(7)(B)(i)(I)(aa).
\item[49] Id. § 608(b)(7)(f)(3).
\end{enumerate}
\end{footnotesize}
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. 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.

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. 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. 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.

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.

51 Schott & Pavetti, supra note 50.
52 Id.
53 Id.
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."  

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. 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. 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. 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.

One method to protect child welfare from harms other than slavery arose from the issues surrounding industrial labor conditions and the accompanying health concerns. 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. 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. Perhaps illustrating how intertwined the antislavery and anti-child labor laws were, the first majority International Labour Organization initiative, known

---

[57] Id. at 569–75.
as the Forced Labor Convention No. 29, aimed to outlaw all forms of compulsory labor.\textsuperscript{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.\textsuperscript{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 ..."\textsuperscript{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."\textsuperscript{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]."\textsuperscript{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.\textsuperscript{68} While the 1989 Children's Convention provides unprecedented support, it still has not been adopted by the United States.\textsuperscript{69} The provisions of the 1989 Children's Convention explain the popularity of the treaty as well as United States. nonparticipation.\textsuperscript{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

\textsuperscript{63} HOBBS ET AL., supra note 61, at 142.
\textsuperscript{64} Briefings in Medical Ethics, 17 J. MED. ETHICS (U.K.), 1, 1 (1991).
\textsuperscript{65} Geneva Declaration of the Rights of the Child, League of Nations 1 (Sept. 26, 1924).
\textsuperscript{66} Id. at 4.
\textsuperscript{67} MARK ENSALACO & LINDA C. MAJKA, CHILDREN'S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 10 (2005).
and political rights, but it also extends protection to the child’s economic, social and cultural rights and humanitarian rights.\textsuperscript{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.\textsuperscript{72} In the 1970s, Poland and a group of states began petitioning to introduce a binding agreement for the protection of children’s rights.\textsuperscript{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.\textsuperscript{74} The next year, the U.N. Commission created the Open-Ended Working Group of the Commission on Human Rights to draft the convention.\textsuperscript{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.\textsuperscript{76} Soon after the twentieth country ratified the Convention on September 2, 1990, the Convention came into effect.\textsuperscript{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.\textsuperscript{78}

The United States “played a pivotal role in the drafting of the Convention,”\textsuperscript{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.\textsuperscript{80} Cynthia Price Cohen, a respected scholar in the field,


\textsuperscript{73} Natasha Parassram Concepcion, \textit{The Convention on the Rights of the Child After Ten Years: Success or Failure?}, 7 Hum. RTS. BRIEF 1, 1 (2000).

\textsuperscript{74} U.N. High Comm’r for Human Rights, \textit{supra} note 72, at 31; U.N. Charter art. 68.

\textsuperscript{75} Concepcion, \textit{supra} note 73, at 1, 2.


stated that the “U.S. influence was so strong that some people referred to the Convention as the ‘U.S. child rights treaty.’”

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. 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” 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. 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. 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. The legal review indicates interest in becoming a party to 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. 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. 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.
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. From these reports, the Committee produces comments on each state’s reports specifically, in order to improve the state’s compliance with the Convention. 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. 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.

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. The Convention allows for reservations, a declaration that a state excludes the legal effect of a provision. State parties may also amend the Convention.

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. 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.” 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 care.
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.” 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). The Committee states that Article 3(1) concerns activities which affect the care, health, and education of children in a “very broad sense.” 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. 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. 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.” 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.
103 Id. ¶ 11.
support programmes, particularly with regard to nutrition, clothing and housing.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{109} This language addresses families in poor economic situations, and requires that the state do the most possible to provide for the needy children.\textsuperscript{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.\textsuperscript{111} A passage in General Comment No. 15 states: “Barriers to children’s access to health services, including financial, institutional and

\textsuperscript{104} Convention on the Rights of the Child, supra note 7, art. 27(3).
\textsuperscript{105} NANCY E. WALKER ET AL., CHILDREN’S RIGHTS IN THE UNITED STATES: IN SEARCH OF NATIONAL POLICY 106, 138 (1999).
\textsuperscript{107} Convention on the Rights of the Child, supra note 7, art. 18(2).
\textsuperscript{108} Id. art. 4.
\textsuperscript{110} Id.
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.
116 Id. § 102 n.2.
obligations to provide adequate child care. 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.

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. 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). 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.” 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. 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.

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). 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. 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.
120 Id. at 586, 596.
121 Id. at 600-01.
122 Id. at 601.
of the Europe 2020 Strategy. While these acts do not show universal state practice with regard to child care, they provide sufficient groundwork.

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. 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.

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. The state must provide material programs, giving detailed obligations, not just an aspiration. 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).

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. Generally, European states consider the right of assistance for children to avoid poverty as a right of citizenship, if not a human right. Most prosperous states have social policy which promotes

---

126 Id.
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.
income assistance to help poor families, as well as specific services provided to low income families. 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.

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. 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. 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. 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. 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.
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 ld. at 7, 8.
147 ld. 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.
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.
157 Convention on the Rights of the Child, supra note 7, art. 18(3).
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. 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. 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. 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. Having a cap on the amount of federal funding to the Temporary Assistance for Needy Families Program denies 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. 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. 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.
provide material assistance, as the state can choose to provide inadequate support. 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. Similarly, Article 18 requires adequate assistance to help the child develop, a level of assistance the states are not required to reach. 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).

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. 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. 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. 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. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} Members of the U.S. legislature can help shape their policies to reach the ideals which U.S. drafters helped to identity in the Children’s Convention and thereby improve the lives of children in the United States.\textsuperscript{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.


\textsuperscript{174} Id.


\textsuperscript{176} Id.

\textsuperscript{177} Todres, supra note 173, at 192–93.

\textsuperscript{178} See supra text accompanying notes 85–86.