HUMAN RIGHTS MEMORIAL

Hearing of the Senate Committee on Foreign Relations on whether the United States should ratify the International Covenant on Economic, Social and Cultural Rights

INSTRUCTIONS

In January 1989, the United States signed the Vienna Declaration, in which it recognized that “the promotion of economic, social and cultural rights … is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual” (noted in Philip Alston, “U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy”, 84 American Journal of International Law 365 (1990) at p. 365). In signing the declaration, Alston notes that the U.S. undertook, inter alia, to guarantee “the effective exercise” of economic, social and cultural rights and to consider acceding to the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”). Since President Carters’ signature of the Covenant, and since he sent it to the U.S. Senate in 1978 for its advice and consent, however, the ratification process has remained virtually dormant. The question thus still remains open: should the U.S. should ratify the ICESCR?

The following exercise will be a simulated hearing of the Senate Committee on Foreign Relations on the question of whether the U.S. should now ratify the Covenant. The Senate Committee has sought the views of various “expert” non-governmental groups and individuals to help it in its deliberations. Three of you will represent a fictitious NGO (with a name of your choosing!) which is widely regarded as a strong proponent of economic and social rights. Your task is to appear before the Senate Committee and to present the best case as to why the U.S. should now proceed to ratify the Covenant. The other three of you will represent another fictitious NGO (also with a name of your choosing) which is a strong opponent of economic and social rights and which will urge the Senate Committee not to ratify the Covenant. Both NGO’s been asked to prepare written statements (“Memorials”) on the three general issues set out below.

Once you have read the suggested arguments and issues below, please meet with your team-mates, and consider the ways in which you intend to approach the problem. Then, schedule a meeting with your Teaching Assistant (Alyson) as soon as possible to discuss the problem, and to raise any queries or concerns that you may have.

You are required to research both the issues raised by the question of U.S. ratification of the ICESCR (including factual issues, questions of domestic and international law, and any other relevant points) and the general jurisprudence and treaty bodies that operate under the Covenant to the extent required to write your Memorials in a pursuasive and comprehensive manner. This is a “team exercise” (and you should endeavour to work on it together), although each of you is solely responsible, and will be graded for, your section of the Memorial that you finally submit. You are encouraged to consult international human rights experts, NGOs, or any other resources.
The aim of the exercise is to familiarize you with how international human rights treaties and mechanisms may actually work in the domestic sphere of States Parties, and for you to gain some experience in preparing the kinds of arguments that arise when States Parties decide whether to ratify international conventions. While we have provided guidelines as to how we suggest that you approach the problem, you should see this as only the required minimum (i.e., feel free to include your own creative ideas or arguments and to move beyond the points we have set out). If you have any concerns, please email either your TA or Peter Danchin.

Your Memorial should be approximately 10-15 pages in length per student (that is, approximately 35-45 pages in total) including any footnotes. This assumes that you will use 11 or 12 point font (smaller for footnotes), and space-and-a-half in the main text. Do not exceed this word limit.

SUGGESTED MEMORIAL ISSUES

We suggest that you divide the topic in the following way (but please feel free to expand on these initial ideas):

(1) ECONOMIC AND SOCIAL RIGHTS IN THE UNITED STATES

Economic and social rights have been challenged on many grounds. In political terms, no group of states has consistently followed up its rhetorical support for these rights at the international level with practical and sustained programs of implementation. While “formal support” for economic, social and cultural rights has been widespread, the principal exception has been the United States whose attitude has varied considerably from one administration to another (see, Steiner & Alston at 267 and ff).

Does the history of fluctuating U.S. attitudes to economic, social and cultural rights provide more support for, or more wariness towards, signing the ICESCR today? What is the significance of Roosevelt’s “Four Freedom’s” speech and President Carter’s signature of the Covenant? What does history tell us on these questions? Both teams should look at some of the debates and arguments that have raged over the last 50 years in the United States on economic and social rights (in particular, the 1979 Senate hearings and proposed reservations, understandings and declarations to the Covenant), and use that research to propose arguments that have relevance to contemporary U.S. human rights policy.

Further, you should also address the argument that the U.S. is already a “welfare” state, and that it already provides better protection for economic and social rights than many other states who have ratified the Covenant. If this is true, why is it in the interests of the U.S. to ratify the ICESCR today?

(2) ARE ECONOMIC AND SOCIAL RIGHTS “RIGHTS”?
As we have already seen in this course, there has been much dispute in academic, legal and political circles as to whether economic, social and cultural rights are really “rights” (see, eg, the article by Maurice Cranston at p. 1 of the Course Packet). However, due to the fact that Articles 22-28 of the Universal Declaration contain such rights, some commentators have contended that they should now be considered part of customary international law. What should the U.S. position be on the philosophical and ideological dimensions of this debate, and what effect would the recognition of economic and social rights have on traditional individual rights theory in the U.S.? Would the U.S. need to fundamentally re-think its theory of rights (particularly of constitutional rights) if it ratifies the ICESCR? Is Alston correct when he claims that many Americans view the ICESCR more as a “Covenant on Uneconomic, Socialist and Collective Rights” (supra, at p. 366) or as a “holidays with pay treaty” (supra, at p. 368)? Would realizing the full array of rights in the ICESCR entail a loss of individual liberties which is unacceptable to a western liberal democracy like the United States? Is there a difference here between U.S. domestic and foreign policy and ideology?

(3) Effect on U.S. Law and Practice

Even if the U.S. wished to ratify the ICESCR, it has been argued that it would be impractical to do so. What changes would be required to be made to existing U.S. constitutional law and practice to properly implement the Covenant, and are these changes feasible? Would the U.S. have to create new methods of protecting rights other than statutory schemes and courts? Are there any areas of U.S. law that would be significantly improved either by statute or by judicial decisions if the U.S. were to ratify the Covenant? Given the ambiguity and uncertainty that surrounds the implementation of economic and social rights, would the U.S. be better advised simply to avoid such vague international obligations? What effect would proposals to add an “Optional Protocol” to the ICESCR have on the U.S. decision whether to ratify the Covenant?

Please address the following question in particular: if the U.S. were a party to the ICESCR, would it violate its obligations by (a) failing to provide adequate housing for the homeless, (b) reducing the distribution of food stamps, (c) reducing Medicare benefits for the elderly, or by (d) spending more on national defense and less on aid for families with dependent children? What is the difference between these different sub-questions?

Source Materials

You should conduct comprehensive searches in both the Law Library and Lehman library on “Economic, Social and Cultural Rights”, and obviously narrow those searches to the United States context.

See, the references listed in Steiner and Alston at pp. 327-8.
See Frank Newman and David Weissbrodt, International Human Rights (Anderson Publishing Co: 1990) at pp. 359-410 for an excellent overview of this issue. (I will endeavor to copy this chapter and distribute it to you). The references listed in this chapter should be very helpful.


Good Luck!!