



THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A SELF-EXECUTING TREATY UNDER US LAW?

The United States' deepening and expanding relationship with the International Criminal Court (ICC) raises the possibility that America will someday ratify the governing treaty of the court, the Rome Statute. However, there is uncertainty over the effect of ratification on the incorporation of the Rome Statute into US law. This paper examines whether Congress would be required to pass legislation to implement the obligations within the Rome Statute. It first reviews US treaty law and the treatment of treaty obligations,¹ and then assesses how the Rome Statute would fit within that established scheme. It concludes that a US court would defer to the combined intent expressed by the Senate and the President when interpreting whether obligations in the Rome Statute will transfer directly into US law upon American ratification.

The Treaty Ratification Process

Under the US Constitution, the President may ratify a treaty only upon receiving the advice and consent of the US Senate by a two-thirds vote.² This threshold makes it virtually impossible for the US to enter a major international legal obligation that requires the advice and consent of the Senate without first establishing bipartisan political support. In order to join the ICC, the US will have to ratify the Rome Statute in accordance with this described process.

A Ratified Treaty's Entry into US law

Certain treaties, upon ratification, have some or all of the obligations they contain become immediately incorporated into US law. These treaty obligations are termed self-executing treaty obligations.³ If self-execution status is not intended (an instance of "non-self-execution" status), the obligations will pass into US law only if the government passes "implementing" legislation.⁴ The final determination as to whether US treaty obligations are self-executing or non-self-executing is ultimately the responsibility of the US judiciary.⁵

The distinction between self-executing and non-self-executing treaty obligations first arose in a legal interpretation of the US Constitution by Chief Justice John Marshall in the 1829 case of *Foster v. Neilson*.⁶ In

¹ One judge declared it to be the "most confounding" area in American treaty law. See Carlos Vasquez, *The Four Doctrines of Self-executing Treaties*, 89 Am. J. Int'l L. 695 n.3 (1995).

² Article II, Section 2.

³ US treaty law often refers to entire treaties as self-executing. However, what is meant is that all of a treaty's *obligations* – which are the provisions in the treaty that create rights or duties – are self-executing. Those provisions of a treaty which do not create obligations are inactive and merely provide help in contextual interpretation; they do not constitute "active" changes to US law and so inherently lack the ability to "self-execute." Likewise, the short-hand convention of referring to entire treaties as either self-executing or non-self-executing can be misleading since particular obligations within a treaty can be self-executing while other obligations are not depending, as explained below, on the intent of the treaty-makers. See Carlos Vasquez, *supra* note 1, at 722.

⁴ If a treaty obligation conflicts with the Constitution then it will never be self-executing regardless of the intention of the treaty-makers. See below section "Scenarios in Which the Courts Will Disregard Treaty-Maker Intent."

⁵ This will occur in legal cases that touch upon the status of a treaty provision.

⁶ 27 U.S. 253 (1829).





this case, the Supreme Court found a provision of a treaty between the US and Spain to be non-self-executing.⁷ Following that judgment, divergent judicial trends developed within the American judiciary, leading to a period of prolonged confusion.⁸ However, the Supreme Court recently clarified this important aspect of US treaty law in the 2008 case of *Medellín v. Texas*.⁹

In the *Medellín* case, the Supreme Court emphasized that, above all, the intent of the “treaty-makers”¹⁰ – i.e. the Senate and the President¹¹ – is the decisive factor in determining whether a treaty obligation is self-executing.¹² When the treaty-makers have forthrightly expressed a view on the matter, the courts will not, with the exception of a few instances examined below, disturb that determination.¹³ The primary means of assessing the intent of the treaty-makers is to analyze the treaty texts.¹⁴ However, there are occasions where clear statements of treaty-maker intent are absent.¹⁵ In cases of ambiguity, the US courts will look for intent within any relevant statements or actions by the treaty-makers during the treaty negotiations, ratification, and post-ratification.¹⁶ Since such a process risks the misinterpretation of the treaty-makers’ intent, in *Medellín* the Supreme Court urged future treaty-makers to adopt a practice of including clear statements of intent during the process of ratification.¹⁷ Finally, *Medellín* overturned a previously held presumption¹⁸ that treaty obligations are self-executing unless proven otherwise.¹⁹

In response to *Medellín*, the Senate Foreign Relations Committee announced that it would expressly state its intent when it proposes treaties for advice and consent to ratification.²⁰ Further, the Committee will not

⁷ Before this judgment it was assumed that treaty obligations were always self-executing. In the case, the obligation at issue was article VIII of the Adams-Onís Treaty of 1819.

⁸ Jordan Paust, *Self-Executing Treaties*, 82 Am. J. Int’l L. 760, 766-775 (1988).

⁹ 552 U.S. 491 (2008), available at <http://www.supremecourt.gov/opinions/07pdf/06-984.pdf>.

¹⁰ The term “treaty-maker” does not appear in *Medellín*; it is used in this paper as shorthand for the Senate and the President and, in some cases, for foreign treaty negotiators (“foreign treaty-makers”).

¹¹ This excludes foreign treaty-makers. While they are given cursory examination, it is clear from *Medellín* that the US courts will focus on the intent of the Senate and the President above all. See *Medellín* at 23, 25. See also *id.* at 14, 17-20, 22. However, the importance given to foreign treaty-makers constitutes a long-running dispute within US treaty law. See Carlos Vasquez, *supra* note 1, at n.35.

¹² *Medellín* at 23, 25. See also *id.* at 14, 17-20, 22.

¹³ This adheres to the argument that the power to create treaties is fundamentally political, and therefore not the domain of the courts. See *Foster v. Neilson*, 27 U.S. 253 (1829).

¹⁴ *Medellín* at 10.

¹⁵ The relevant standard is an explicit textual expression about self-execution. See *Medellín* at 18.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 30.

¹⁸ Jordan Paust, *supra* note 8, at 775.

¹⁹ Lucy Reed and Ilmi Granoff, *Treaties in US Domestic Law: Medellín v. Texas in Context*, Law & Prac. of Int’l Cts. & Tribunals 8, 18 (2009). In fact, a counter presumption might arguably have arisen regarding private rights or causes of action since the Supreme Court held that it is “presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.” See *Medellín* at 9-10 n.3. However, this is unlikely as the Supreme Court failed to take the opportunity to apply such a presumption within the case of *Medellín*.

²⁰ *Senate Foreign Relations Committee Documents Self-executing Character of New Extradition Treaties in Contemporary Practice of the United States Relating to International Law*, John Crook, ed., 104 Am. J. Int’l L. 100, 100-101 (2010). A statement of intent with respect to the Rome Statute would be seen as a controlling for US courts if it were then accepted by the President. See Michael





recommend a treaty for advice and consent if the treaty's obligations are thought to be incapable of incorporation into US law, either by self-execution or by further implementing legislation.²¹

Scenarios in Which Courts Will Disregard Treaty-Maker Intent

Despite the importance of treaty-maker intent in determining whether a treaty obligation is self-executing, it is nevertheless argued by the vast majority of theorists that there are distinct scenarios in which the US courts will refuse to accept that a treaty provision is self-executing, even if there is strongly expressed treaty-maker intent to that effect. This is because treaty obligations that conflict with the Constitution will always be non-self-executing. As the Supreme Court stated in *Reid v. Covert*, 354 U.S. 1 (1957):

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.²²

However, the Supreme Court has never ruled a treaty or treaty provision to be unconstitutional.²³ Therefore, it is difficult to fully evaluate the extent of this exception to the treaty-maker intent rule.²⁴

A majority of jurists believe that a treaty obligation which directs the expenditure of government funds would fall within the exception to the treaty-maker intent rule.²⁵ As the House of Representatives is the originator of all expenditure bills under the Constitution, a treaty obligation of this type is inherently non-self-executing because the House is not involved in the treaty-making process. Similarly, treaty provisions that declare war, which is the prerogative of the House and Senate combined, are thought to be non-self-executing.²⁶ More controversially, it is possible that the qualification of a new act as a crime²⁷ or the raising of revenue by imposing a tax or tariff would be non-self-executing.²⁸ Lastly, the violation of an article in the Bill of Rights might render a treaty obligation non-self-executing, as implied by the above excerpt from *Reid v. Covert*.²⁹

The Rome Statute and the Treaty-Maker Intent Exception

The Rome Statute binds countries that ratify it. The specific obligations are contained in Parts 9 and 10. These provisions require a State Party to cooperate with the ICC in its investigations, prosecutions, and general

Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 Chi.-Kent L. Rev. 533, 548 (1991).

²¹ 104 Am. J. Int'l L. at 100-101.

²² *Reid v. Covert*, 354 U.S. 1, 17 (1957).

²³ Carlos Vasquez, *supra* note 1, at 718.

²⁴ Jordan Paust, *supra* note 8, at 778.

²⁵ Restatement (Third) of the Foreign Relations Law of the United States 111.

²⁶ US Const., Article I, Section 8. See Lori Damrosch, *The Role of the United States Senate Concerning "Self-executing" and "Non-self-executing" Treaties*, 3 Chi.-Kent L. Rev. 67, 517 (1991).

²⁷ Jordan Paust, *supra* note 8, at 775, 780.

²⁸ *Id.* at 778.

²⁹ See also Carlos Vasquez, *supra* note 1, at 718.





functioning. They do not include the obligation to declare war, impose a tax, spend government funds,³⁰ or qualify a new act as a crime – although the latter may cause confusion and will be addressed in greater detail below. However, the provisions do raise the issue of whether self-executing status would violate the Bill of Rights in regards to certain treaty provisions, in particular, those that relate to the execution of ICC arrest warrants.

States Parties to the Rome Statute must, with certain exceptions,³¹ surrender to the Court all persons subject to an ICC arrest warrant.³² This obligation must be evaluated against the Bill of Rights provisions on due process, just punishment, and a trial by jury if it is to be capable of being self-executing.³³ In regard to the criteria of due process and just punishment, the Rome Statute easily fulfills the requirements. The treaty contains an extensive array of protections, which Ruth Wedgwood in her article *The Constitution and the ICC* describes as mirror-images of the protections in US constitutional law:³⁴

the right to have timely notice of the charges..., the presumption of innocence, the right against self-incrimination, also forbidding any adverse inference from the exercise of the right to silence, the right to the assistance of counsel and to the assistance of an interpreter, the right to bail, the right to a speedy trial, the right to conduct a defense in person or through the defendant's chosen counsel, the right to cross-examine the witnesses ... and to call witnesses, the right to disclosure of any exculpatory evidence, the right not bear any burden of proof but rather to require the prosecution to prove guilt "beyond a reasonable doubt," and the right not to be subjected to any form of duress or coercion, or any cruel, inhuman, or degrading punishment. In addition, the ICC Statute even guarantees a form of Miranda warnings....³⁵

The rights of a defendant at the ICC are equivalent to – and at times, such as with the ICC's "Miranda warning" counterpart, even stronger than – the protections in the Constitution.³⁶

The key criterion to examine resides in the Bill of Rights' trial by jury for criminal offenses. Legal scholars are in broad agreement that the lack of a trial by jury in the ICC is constitutional because of the US courts-martial and the nature of the ICC.³⁷ First, jury trials are not always required in the US as is demonstrated by US military trials.³⁸ The US Supreme Court has ruled that military trials without juries do not compromise the due process rights of such defendants. Secondly, the ICC is a non-US court similar to any other foreign court, and Americans have been extradited legally to foreign courts where they have stood trial before a court composed

³⁰ The provisions on the Court's financing in Part 12 of the Rome Statute do not impose direct obligations on ICC States Parties.

³¹ An exception is made for bilateral and multilateral extradition agreements under Article 98(2) of the treaty.

³² Rome Statute, Article 89.

³³ US Bill of Rights, Amendments 5, 6, and 8.

³⁴ American negotiators at the Rome Conference in 1998 and afterwards worked with other countries to ensure their inclusion in the ICC.

³⁵ Ruth Wedgwood, *The Constitution and the ICC*, in *The United States and the International Criminal Court* 123 (Sarah Sewall and Carl Kaysen eds., 2000).

³⁶ *Id.*

³⁷ David Scheffer and Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98(3) J. Crim. L. & Criminology 983, 1015-21 (1998). See also Wedgwood, *supra* note 35, at 126.

³⁸ 10 U.S.C. 825.





of a panel of judges instead of a jury.³⁹ With this constitutional precedent, a US court would undoubtedly allow the intent of the treaty-makers to decide the self-execution status of these obligations in the Rome Statute.

Finally, there is nothing in the Rome Statute that obligates a ratifying country to criminalize the crimes within the Court's jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression. The crimes as defined in the Rome Statute provide only the "statutory basis" for the Court and do not refer to the legal systems of countries. They are therefore fundamentally incapable of either self-executing or non-self-executing status. Nevertheless, incorporating these crimes in US law is an important political issue for the US, and would help the US to try its own nationals for such crimes. Besides ensuring that the US criminal code is up to date and does not allow impunity for those who commit atrocities, including ICC crimes in US law would help the US to claim "complementarity." Under the Court's principle of complementarity, the ICC must defer to all genuine state investigations or trials. This principle would allow the US to forestall ICC involvement in a case through investigating or trying crimes committed on its territory or by its nationals, provided that US law has previously criminalized atrocity crimes or equivalent conduct.

What Type of Treaty is the Rome Statute?

In light of American jurisprudence, and in particular the *Medellín* case, it is clear that the obligations in the Rome Statute would be self-executing only if the Senate and President intend for them to be self-executing. If the Senate and President made formal statements declaring the Rome Statute to be self-executing – which is the Senate Foreign Relations Committee's new stated practice⁴⁰ – then the courts will accept those statements as dispositive. However, there is no current indication whether there are plans for such statements. As noted above, without them, the US courts would determine the intent of the treaty-makers by an examination of both the treaty's text and its surrounding circumstances. In the case of the Rome Statute, however, these indicators are generally vague, reinforcing the desirability of clear statements about self-execution from the Senate and President.

A textual analysis to determine the intent of the Rome Statute treaty-makers (which included representatives of the US) indicates that at least one of the provisions in the Rome Statute could be read as non-self-executing.⁴¹ Article 88 suggests actions to be taken by countries that have ratified the Rome Statute:

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part 9].

³⁹ In *Wilson v. Giard*, 354 U.S. 524 (1957), the Supreme Court ruled that it is constitutional for the government to extradite an American to a foreign country to face criminal charges before a panel of judges for crimes committed in that country. The case involved an American service member who was facing extradition to Japan on charges relating to the death of a Japanese woman in Japan. Japan, at the time, did not conduct trials by jury.

⁴⁰ See *supra* note 19.

⁴¹ It should be noted that the Rome Statute is a multilateral treaty adopted at the Rome Diplomatic Conference by 120 countries. This necessitates the legal fiction that the text is considered by the courts to be solely – unless otherwise indicated – the product of the American treaty-makers and, therefore, receptive to interpretations of their intent from its language. This is explored further in the contextual analysis below.





The language used here is similar to the text of another multilateral treaty which a US court previously determined to be non-self-executing. In the case of *Mannington Mills v. Congoleum Corporation*, the following provisions from the Paris Convention for the Protection of Industrial Property were held by the Third Circuit US Court of Appeals to indicate that the treaty-makers intended the entire treaty to be non-self-executing:⁴²

Every country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention.

and

It is understood that at the time an instrument of ratification or accession is deposited on behalf of a country, such country will be in a position under its domestic law to give effect to the provisions of this Convention.

From the texts of the two Paris Convention articles, that convention's treaty-makers appear to have intended that countries would take further measures beyond ratification in order to covert these treaties' legal obligations into domestic law. Article 88 of the Rome Statute, on the other hand, is widely interpreted as requiring countries "to review their national law and where necessary, introduce through legislation, treaty implementation or administrative practice, procedures in their domestic regimes to meet the cooperation obligations."⁴³ In a potential future case, a US court could therefore distinguish the *Mannington Mills* precedent from a potential future case which would examine Article 88 of the Rome Statute as evidence of treaty-maker intent about self-execution.

Since it is unclear whether the Rome Statute's treaty-makers intended for it to be self-executing, it would be necessary, absent a statement by the Senate and President, for a US court to assess the legislative history of the treaty. Any contextual analysis by a US court would focus on the actions of the US treaty-makers on the question of self-execution.⁴⁴ Unfortunately, there is minimal available evidence regarding the actions of the US delegation during the debate on the adoption of the obligations of States Parties on judicial administration and enforcement found in Parts 9 and 10. However, it is difficult to separate the actions of the US treaty-makers from those of foreign treaty-makers.⁴⁵ Moreover, self-execution is a US concept which would not have been in the minds of other countries in Rome.

American Cooperation with the ICC upon Ratification

Upon ratification of the Rome Statute, US cooperation with the ICC will become mandatory. Parts 9 and 10 of the Rome Statute list the legal obligations of a State Party. However, a conflict might occur between the international legal obligations within the Rome Statute and the domestic legal or political capabilities of the US

⁴² 595 F.2d 1287 (1979), paras. 67-72.

⁴³ Kimberly Prost, *Article 88: Availability of procedures under national law*, in Commentary on the Rome Statute of the International Criminal Court 1070 (Otto Triffterer ed., 1999) (emphasis added).

⁴⁴ This could include clear statements of treaty-maker intent upon ratification, which would resolve the ambiguity for the US courts.

⁴⁵ In addition, the future ratification debates in the Senate will be of great importance for the contextual element of any judicial interpretation necessitated by a lack of clear statements of treaty-maker intent.





if the Rome Statute is not allowed to become part of US law. For example, a problem might arise in areas such as the surrender of persons wanted by the ICC. US law prevents the extradition or surrender of US citizens to the ICC without there being in place either an extradition treaty between the US and the ICC or a US domestic law which permits such actions;⁴⁶ neither exists at the moment.⁴⁷ Yet, the Rome Statute itself may act as an extradition treaty if its provisions are made self-executing. Currently, the US cooperates with the ICC in numerous cases across multiple situation countries.⁴⁸ This assistance is predicated on the need to bring to justice those who commit some of the most horrific of atrocities, and includes offers to provide information, transfer documents, and protect witnesses.⁴⁹ However, ratification of the Rome Statute without self-executing status would leave the US vulnerable to non-compliance in areas such as the extradition of individuals.

Conclusion

The Rome Statute imposes obligations upon the nations that ratify it. America will face a choice on how to fulfill these obligations if and when it joins the ICC. In order to do so, the Senate and the President must declare the treaty to be self-executing, or the government must pass legislation implementing the obligations into US law. The first option is preferable as the US would avoid potential failures to fulfill its international obligations; yet, further legislation might still be useful in establishing detailed procedures even if the treaty is self-executing. The power to determine whether the Rome Statute is self-executing lies with the American treaty-makers. If there is the necessary bipartisan support for ratification present in the Senate, then there is good reason to grant the treaty self-executing status.

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Updated July 16, 2010*

⁴⁶ Jorge Godinho, *The Surrender Agreements between the US and the ICTY and ICTR: A Critical View*, 1 J. Int'l Crim. Just. 507-509 (2003). See also *Valentine v. US*, 299 U.S. 5, 8-10 (1936) and *Ntakirutimana v. Reno*, 184 F.3d 419 at para. 18 (5th Cir. 1999). A congressional-executive agreement would also suffice, and was used for the surrender agreements between the US and the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda.

⁴⁷ See 18 U.S.C. 3184.

⁴⁸ US Ambassador-at-Large for War Crimes Issues Stephen Rapp, Statement at Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court, New York, March 23, 2010, available at <http://usun.state.gov/briefing/statements/2010/138999.htm>

⁴⁹ US Ambassador-at-Large for War Crimes Issues Stephen Rapp, Statement at Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, June 1, 2010, available at http://www.state.gov/s/wci/us_releases/remarks/142520.htm; Rosalia Opondo, US to give ICC info on poll suspects, Kenya Broadcasting Corporation, October 2009, available at <http://www.kbc.co.ke/story.asp?ID=60579>; Alan Boswell, US to Help Protect Kenyan Violence Witnesses, VOA News, February 2010, available at <http://www1.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>.

