



QUESTIONS & ANSWERS ON THE RATIFICATION AND INCORPORATION OF THE ROME STATUTE INTO US LAW FOR THE PURPOSE OF COMPLEMENTARITY AT THE ICC

How is a treaty ratified under US law?

Article II of the US Constitution lists the powers of the Executive Branch. Pursuant to Article II, the President has the power to negotiate treaties; however, before ratification the President must submit a treaty to the Senate whose advice and consent is required by a two-thirds majority. The Senate may approve the treaty as submitted or include amendments, interpretations, recommendations, or understandings and explanations to the President. In addition, the Senate also determines if the treaty comports with constitutional standards.

Article VI of the Constitution contains the supremacy clause that gives all treaties ratified in accordance with the Constitution the effect of federal law. However, a treaty does not become effective as US domestic law immediately upon entry into force; this happens only if the treaty is self-executing. The US Supreme Court in *Foster v. Neilson*, 27 U.S. 253, 314-315 (1829), explained that treaties are self-executing if accompanying legislation is not necessary for implementation. In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the US Supreme Court reaffirmed that a self-executing treaty is one that requires no further legislation for its implementation.

If a treaty is found to be self-executing it will preempt inconsistent state law and previous legislation. This issue was first addressed by the US Supreme Court in *Ware v. Hylton*, 3 U.S. 99 (1796). The US Supreme Court in *Ware* found the treaty at issue was self-executing and struck down an inconsistent state law. (*Id.* at 284).

Is the Rome Statute self-executing?

An analysis of the Rome Statute is necessary to determine if it is a self-executing treaty. The Rome Statute does not explicitly require that its States Parties implement this legislation; however, such legislation may be necessary for them to fully comply with their obligations under the Statute.

Part 9 of the Rome Statute addresses the obligations of state parties to cooperate with the Court. Article 89 provides that cooperation requires that States Parties provide for the delivery of citizens to the Court for prosecution. Current US extradition law (Public Law 105-323) does not permit extradition of US citizens to foreign courts unless treaties are in effect. At this time, the US has extradition treaties in effect with 61 member states to the ICC.

As a UN member, the US modified its extradition law (Public Law 104-106) to comply with its obligations under the UN Charter. This modification permitted the extradition of US citizens to the tribunals for the former Yugoslavia and Rwanda. The US participated in these tribunals pursuant to an executive agreement which does not require the advice and consent of the Senate. The US was able to use an executive agreement because it simply enabled the US to carry out existing obligations to the UN.

The ICC requires its member states to comply fully with the requests of the Court to enforce arrest warrants and deliver suspects. In order to comply, the US needs to modify the language in its extradition laws to permit transfer of US citizens to the Court. In addition, the US will need procedures in place to handle requests for





information from the Court. However, these are provisions for practical compliance and cooperation. The US would not be required to import the exact crimes in the Rome Statute into domestic law, even in order to take advantage of complementarity.

Does complementarity require the US to adopt the crimes within the Rome Statute?

Complementarity, provided for in Articles 17 and 18 of the Rome Statute, is the obligation of the ICC to defer to states that are investigating and prosecuting crimes on their own. The ICC will only interfere if the state is unwilling or unable to provide a fair, adequate, and unbiased trial for the defendant. The current US criminal justice system is capable of protecting the due process rights of defendants while protecting the rights of witnesses and victims.

In addition, complementarity does not require states to bring into their own laws the exact crimes listed in the Rome Statute. The ICC's early decisions indicate that the Court will not try persons who have already been tried for the same conduct, even if the crime does not have the same name. The US could import ICC crimes at a later time, but is not required to do so prior to becoming a State Party. However, the US has made progress incorporating crimes found in the Rome Statute into domestic law. The US has implemented variations of war crimes and crimes against humanity within its military courts (Public Law 18 USC § 2441(b)). The military courts have jurisdiction over military servicemembers and civilians that accompany the military abroad. The US has proscribed the crimes of genocide (Public Law 18 USC § 1091(d)) and conscription of child soldiers (Public Law 110-340) within US domestic law as well.

*Researched and drafted by Lucia DiCicco
Updated April 24, 2009*

