

AMICC

Belgian Atrocity Law and the Rome Statute Compared

In the wake of charges raised in Belgium alleging that U.S. General Tommy Franks is responsible for war crimes in Iraq, critics of the International Criminal Court (ICC) are arguing that their longstanding concerns that the Court will be used for political purposes to target Americans have been proven justified. Because Belgium's "anti-atrocity" law¹ and the ICC's Rome Statute both give their respective courts potential jurisdiction over individuals accused of war crimes, crimes against humanity, or genocide, without regard to official military or government status, the Bush Administration and others conflate the two laws without comparing how they actually operate.

The Rome Statute is a treaty that entered into force on July 1, 2002 and now has 91 states parties. The ICC's prosecutor and 18 judges were elected in spring 2003 and as of June the Court's prosecutor has received around 500 communications. The first formal investigation is expected to begin by early 2004.

Belgium's law was enacted in 1993 and amended in 1999 and twice in 2003. In addition to General Franks, complaints have been brought against Ariel Sharon, George H.W. Bush, Yasser Arafat, Fidel Castro, Augusto Pinochet, Hissene Habre, and Saddam Hussein, among others. Before the 2003 amendments, the law allowed Belgian courts to investigate and try individuals accused of atrocities committed outside of Belgian territory even if no Belgian national was involved and the accused was not present in Belgium. The initial 2003 amendments responded to (1) an International Court of Justice (ICJ) ruling upholding the immunity of sitting heads of state, prime ministers, and foreign ministers in foreign (but not necessarily international) courts; (2) the entry into force of the Rome Statute; and (3) growing concern abroad about the potential for frivolous complaints against foreign state officials.

The chart below compares the requirements for bringing a case under the Belgian law as amended in 1999 and April 2003 with the Rome Statute. Note that as of August 2003, the Belgian law has essentially been repealed.²

	Belgian Law (as amended 1999)	Belgian Law (as amended 4/2003)	Rome Statute for the ICC
Competence: Preconditions to the exercise of jurisdiction	<u>Universal jurisdiction:</u> Belgian courts have competence irrespective of where the crime occurred.	<u>Universal jurisdiction:</u> Belgian courts have competence irrespective of where the crime occurred.	<u>Territorial or nationality based jurisdiction:</u> Unless referred by the Security Council, the crime must have been committed on the territory or by a citizen of a state that has either ratified the Court's Statute or has specially consented to its jurisdiction over the situation during which the crime occurred.
Exercise of Jurisdiction:	A case can be referred/filed	(1) Prosecutor can file directly;	A case can be referred by: (1) State party or

¹ Act Concerning the Punishment of Grave Breached of International Humanitarian Law, 10 February 1999, 38 Int'l Leg. Mat. 918. So far the law has been used only once to prosecute four Rwandans involved in the 1994 genocide.

² Now Belgian courts only have jurisdiction over international crimes if the accused or victim is Belgian or a resident of Belgium, or if Belgium is required by treaty to exercise jurisdiction over the case.

	Belgian Law (as amended 1999)	Belgian Law (as amended 4/2003)	Rome Statute for the ICC
Who can refer or file a case?	directly by: (1) Prosecutor or (2) Victim	(2) Victim can refer case to state prosecutor; (3) After July 1, 2002, a victim can file a case directly <i>only if</i> the case has a link to Belgium because: <ul style="list-style-type: none"> • the accused is Belgian or on Belgium soil, • the crime took place in Belgium, or • the victim is Belgian or has lived in Belgium for at least three years. 	(2) Security Council acting under Chapter VII of the UN Charter; or (3) initiated by the Prosecutor
Prosecutorial discretion regarding initiation of investigation	Prosecutor can choose which cases to prosecute.	Prosecutor alone can decide whether to proceed. However, when victim refers a case, the prosecutor must initiate an investigation unless it appears unfounded or an international court or a court where the crime took place offer a fair, independent and more effective venue.	(1) <u>Prosecutor initiation</u> : Investigation is subject to approval by a three-person pre-trial chamber that there is a reasonable basis to proceed. (2) <u>State or Security Council referral</u> : Initiation of investigation required unless there is no reasonable basis to proceed.
Admissibility	No admissibility limitations.	No admissibility limitations.	A case is inadmissible when: <ul style="list-style-type: none"> • it is being genuinely investigated or prosecuted by a state that has jurisdiction over it; • the state has genuinely investigated it and decided not to prosecute; • the person concerned has already been fairly tried for the same crime, or; • the case is not of sufficient gravity
Non-judicial oversight of decision to investigate	No non-judicial oversight.	If the victim is not Belgian, the government may intervene to send a complaint to the accused's home state if that state makes the charged conduct a crime and upholds the right of fair trial. ³	Security Council may request a 12-month deferral of investigation or prosecution in a Chapter VII resolution. Deferral request maybe renewed.
Immunity	No immunity for official capacity.	Immunity applies "within the limits established by international law."	No immunity for official capacity.

³ When the federal prosecutor's office filed a complaint against General Franks the Belgium government intervened in accordance with the amended law and the case was referred back to the US.