

1.1. War crimes

1.1.1. International legal framework

The concept of war crimes for the purposes of exclusion is not autonomously defined by EU asylum legislation but derives from international criminal and humanitarian law. Courts must therefore rely on a complex interaction between international treaties, customary international law and judicial interpretation to characterise conduct as war crimes.

International law defining war crimes

- Article 8 of the Rome Statute of the International Criminal Court
- The ‘Grave Breaches’ provisions of the 1949 Geneva Conventions and Additional Protocol I
- Common Article 3 and relevant provisions of Additional Protocol II
- Article 6 of the Charter of the International Military Tribunal (IMT)
- The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY)
- The Statute of the International Criminal Tribunal for Rwanda (ICTR)

The Rome Statute of the International Criminal Court (ICC) provides the most comprehensive and contemporary definition of war crimes, including an exhaustive list of such crimes that fall under the jurisdiction of the ICC. Article 8 distinguishes between war crimes committed in international armed conflicts and those committed in non-international armed conflicts, covering grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws and customs in armed conflict, which are directed at protected persons and objects.

The EUAA Judicial Analysis on Exclusion: Articles 12 and 17 Qualification Directive (February 2020) cautions that, although the Rome Statute provides an exhaustive list of war crimes, it is not complete and therefore cannot be regarded as wholly determinative for the purposes of assessing war crimes under Article 12(2)(a) of the recast QD. A notable omission includes attacks against civilian objects in non-international armed conflicts, which the ICTY has recognised as war crimes, even though the Rome Statute limits this offence to international

armed conflicts. The Rome Statute also omits certain serious violations of Article 4(2) of the Additional Protocol II, such as collective punishment, acts of terrorism and threats to commit such acts, despite their recognition as war crimes in the statutes of the ICTR and the Special Court for Sierra Leone (SCSL). In addition, acts of terror against civilians in both international and non-international armed conflicts, as affirmed by the ICTY as war crimes, are not reflected in the Rome Statute's provisions.

The Elements of Crimes supplement the Rome Statute by clarifying the material and contextual elements required for a person's conduct to qualify as a war crime for each act enlisted under Article 8. According to the Elements of Crime, to establish a war crime it is necessary that the conduct took place in the context of and was associated with an armed conflict, and that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict, and of the protected status of the person or object.

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