

1.1.2. Assessing war crimes

The CJEU has not issued a ruling interpreting the application of Articles 12(2)(a) and 17(1)(a) of the recast QD. However, the EUAA Practical Guide on Exclusion from International Protection (September 2026) prescribes an assessment framework which takes into account several elements, including the act, the context, the actor, the object and the specific mental element. The assessment should establish the existence and nature of the armed conflict, a sufficient nexus between the act and the conflict, whether the specific requirements established for that crime were met (such as a finding that the crime was directed against protected persons or object, through the use of unlawful weapons or means of warfare, or harmed persons or objects in a manner which breached international humanitarian law), and whether the perpetrator possessed the required knowledge of the factual circumstances or the protected status of the person or object

As concerns the applicable standard of proof, although the definition of war crimes is grounded in international criminal law, courts apply a lower standard of proof. As highlighted by the French National Court of Asylum (CNDA) on 27 January 2021 in *M.M. v French Office for the Protection of Refugees and Stateless Persons (OFPRA)*, the standard of proof for applying this exclusion ground, which requires 'serious reasons to believe', does not necessitate proof or a belief beyond a reasonable doubt. Furthermore, the CNDA held that while responsibility for the crime cannot be inferred solely from contextual elements, it is not necessary for specific facts to be established characterising the individual's involvement in those crimes.

Sections 1.1.2.1-1.1.2.5 examine how national courts apply this assessment framework in practice, including how they establish the nature of an armed conflict, the reliance on country of origin information to establish war crimes, the establishment of a nexus and the assessment of the legal status of combatants and the rejection of arguments justifying war crimes. It concludes with additional case law examples which can be found in the EUAA Case Law Database.

1.1.2.1. Establishing the nature of an armed conflict

The majority of case law in Europe concerns war crimes committed in the context of a non-international armed conflict. When determining whether the conflict is of a non-international character, courts often rely on the definitions provided by international jurisprudence. In particular, the decision of the ICTY in *Prosecutor v Tadić* is commonly cited as it provides a broad definition of non-international armed conflict, encompassing protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.

For example, the CNDA in *MM v OFPRA* (17 January 2022) referred to this judgment to characterise the conflict in the Democratic Republic of the Congo (DRC) between 1992 and 1997

as a non-international armed conflict. In another case concerning the DRC, in *X v Commissioner General for Refugees and Stateless Persons (CGRS)* (16 March 2021) the Belgian Council for Alien Law Litigation (CALL) referred to the same ICTY judgment, yet noted that the ICC had provided a more precise definition of a non-international armed conflict in *Prosecutor v Jean-Pierre Bemba Gombo*.1 Based on this definition, it held that the Congolese state was facing a non-international armed conflict in South Kivu, during the relevant period 2000-2003, which included clashes between different organised armed groups which reached a certain intensity to be awarded this classification.

1.1.2.2. Reliance on country of origin information

These French and Belgian cases also demonstrate how courts routinely rely on country of origin information (COI) and international reports, not only to establish the existence of an armed conflict during the relevant period but also to determine whether war crimes were committed. As applicants often downplay their role, in such cases courts have afforded more weight to what is reported by COI.

In the former case, the CNDA noted that "all public sources noted that serious abuses against civilian populations were committed both by the auxiliary forces of President Lissouba's regime and by militias supporting Mr Sassou-Nguesso or Mr Kolélas, the main protagonists of the Congolese conflict, between 1993 and 1997". It therefore excluded a senior army officer of the Congolese Armed Forces from international protection. Although the applicant downplayed his role, the court gave more weight to COI than the applicant's statements, in order to establish that war crimes were committed.

In the latter case, CALL held that one of the armed groups of which the applicant was a founding leader, the Mudundu 40, perpetrated war crimes within the meaning of Article 8 of the Rome Statute, including murder and acts of torture, as well as humiliating and degrading treatment, based on COI reports. The court linked these crimes to the armed conflict ongoing at that time and held that the applicant, as a founding member of the group and local chief of his village, could not have been unaware of the existence of the armed conflict, nor of the link between the crimes and the conflict.

Similarly, in *N. v OFPRA* (23 September 2021) the CNDA excluded a former senior member of the Rwandan Armed Forces from international protection as he was involved in the genocide perpetrated in Rwanda in 1994. Despite the fact that the applicant denied his involvement, the CNDA noted that public sources confirmed numerous war crimes committed by Democratic Liberation Forces of Rwanda (FDLR) in Eastern DRC, including killings of civilians, child abductions and recruitment of child soldiers, sexual violence including gang rapes, and forced pregnancies in order to increase the proportion of Rwandophones in the region.

1.1.2.3. Establishing a nexus

As noted above, one of the requirements stated in the Elements of Crimes is that to establish a war crime it is necessary that the conduct took place in the context of and was associated with an armed conflict. Additional guidance on the establishment of such a nexus has been provided by the ICC in several case law. In *Prosecutor v Ali Muhammad Ali Abd Al-Rahman*, pronounced on

6 October 2025, the ICC ruled that:

“684. Acts of war crimes are required to have been committed ‘in the context of’ and be ‘associated with’ a non-international armed conflict.

685. What is required is that the perpetrator’s conduct must have a sufficiently close link to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of the battle. Nonetheless, the armed conflict must play a major part in the perpetrator’s decision, in his/her ability to commit the crime or the manner in which the crime was ultimately committed.

686. In determining whether the nexus is established, the Chamber may consider, amongst other factors: i) the status of the perpetrator and the victim; ii) whether the act may be said to serve the ultimate goal of a military campaign; and iii) whether the crime is committed as part of, or in the context of, the perpetrator’s official duties.”

1.1.2.4. Legal status of combatants

A combatant who unlawfully takes part in an armed conflict or a civilian can also be responsible for war crimes, as long as their act took place in the context of and was associated with an armed conflict. This reasoning was upheld in *Applicant* v *Directorate of Immigration* (6 February 2026) by the Norwegian Immigration Appeals Board (UNE), which ruled that anyone who participates in an armed conflict may be guilty of war crimes, whether they are a lawful combatant in one of the armed forces of the parties or participating in the war as a civilian. The decisive element is the act itself, which must be committed with a nexus to the armed conflict at the time. However, the UNE underlined that, within the context of an international armed conflict, it must be assessed if the applicant was a ‘privileged combatant’, which is a concept set out in Article 4 of the 1949 Geneva Convention and the Additional Protocol to the 1977 Geneva Convention that entitles people with this status to immunity from national criminal laws for lawful acts of war.2 Indeed, the EUAA Practical Guide on Exclusion from International Protection (September 2026) notes that not all acts of war are war crimes as long as combatants follow the rules provided by international humanitarian law.

As the Norwegian case demonstrates, it may not be so straightforward to determine whether the applicant had the status of a privileged combatant in an international armed conflict. The case concerned the Russian war of aggression on Ukraine, which broke out in 2022. The UNE assessed whether the members of the Wagner Group could be considered a part of the ordinary Russian armed forces, which would provide them privileged combatant status to fire on lawful Ukrainian military targets.

Based on jurisprudence from the International Court of Justice in the Hague, the Grand Board of the UNE found that responsibility may be attributed to the state only when there is total dependence between the group and the state. While there were close ties between the Wagner Group and the Russian armed forces, the Wagner Group still held a degree of autonomy on how they implemented their assigned missions. Hence, the UNE concluded that the Wagner Group was not part of the Russian armed forces before 4 November 2022, after which Russia confirmed

their inclusion in their armed forces. This led to the finding that the applicant was to be regarded as a civilian and, therefore, engaged in the armed conflict unlawfully, even if firing at lawful military targets. The UNE also noted that according to COI war crimes were committed by Russian forces in Ukraine (including the Wagner Group). This included the murder, torture, sexual abuse and imprisonment under inhumane detention conditions of Ukrainian prisoners of war, without allowing them to contact their families.

The applicant was therefore excluded from international protection for committing a war crime and a serious, non-political crime, as the UNE noted that war crimes are automatically considered to fulfil the conditions of the latter ground for exclusion. It therefore emerged from this case that special attention must be paid to the legal status of combatants within the context of an international conflict, and participation in private military groups can provide grounds for exclusion.

1.1.2.5. Rejection of arguments justifying war crimes

Military necessity and proportionality must be taken into account when determining if an act qualifies as a war crime. However, as national case law reinforces, once a war crime is established, unless there are mitigating circumstances that negate the applicant's individual responsibility for the crime (as demonstrated in Section 7), war crimes are not justifiable.

In particular, courts have held that the perpetrator's purpose for committing war crimes cannot justify the acts and is irrelevant to the assessment. This reasoning was upheld in *OFPRA* v *Applicants* (14 May 2024), in which the French Council of State considered that the lower court had improperly assessed this exclusion ground by taking into account the alleged legitimacy or purpose of the violence carried out by a Russian national who was involved in the Chechen wars.

This was illustrated further by CALL in Belgium in *X* v *CGRS* (6 May 2020). The council excluded the applicant from international protection mainly because there were serious reasons to believe that he was guilty of war crimes in the exercise of his duties in the Algerian army in the 1990s and, in particular, at the *Centre Territorial de Recherche et d'Investigation* (CTRI) in Blida, where torture and murder were systematic, according to available information. The council ruled that, while the acts of which the applicant was accused are part of the fight against terrorism, they do not justify murder and the torture of people, whether proven terrorists or not.

Additional case law examples

Applicant v *Finnish Immigration Service* (7 April 2025)	The Finnish Supreme Administrative Court found that the applicant, who was a member of the Taliban forces in Afghanistan, had committed war crimes given that he participated in the **execution of seven people**, linking the acts to the armed conflict in Afghanistan. This case, which concerns crimes committed when the applicant was still a minor and addresses the question of duress, is explored in more detail in Section 6.3.
M.N. v *OFPRA* (15 November 2022)	The CNDA held that **attacks on the life and physical integrity of civilians, as well as the forced displacement of civilians carried out by the Burundi Armed forces**, constituted serious violations of international humanitarian law, linking them to the Burundi civil war which it established on the basis of COI. It characterised the acts as war crimes under Article 8 of the Rome Statute and Article 6 of the IMT and excluded a former member of the Burundi armed forces who held a high military ranking.

Additional case law examples

Applicant v *CGRS* (20 May 2022)	CALL remitted a case to the Belgium determining authority to assess whether the applicant, who was a member of the PKK and assisted in the groups financing, had committed war crimes. CALL placed emphasis on the fact that in the context of the actions carried out by the PKK, there were **civilian victims and acts committed against civilians**, noting also that the allegations against the applicant took place in a specific and well-known context.
M.M. v *OFPRA* (27 January 2021)	The CNDA noted that the **military conscription of children** under the age of 15 in armed conflict is a war crime, both under Article 8 of the Rome Statute and under Article 4(3)(c) of the Additional Protocol II to the Geneva Conventions of 12 August 1949. On this basis, it excluded an applicant from international protection for being involved in the recruitment of minors into the LTTE in Sri Lanka.

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  “Therefore, for the purposes of interpreting the concept of ‘armed conflict not of an international character’ as enshrined in the Statute, the Chamber concludes that such a conflict is characterised by the outbreak of armed hostilities reaching a certain intensity, which must be greater than that of situations of internal unrest and tension such as riots, isolated and sporadic acts of violence or acts of a similar nature, and taking place on the territory of a State. These hostilities may break out between i) the authorities of the government of that State and organised dissident armed groups or ii) organised armed groups among themselves.”

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  In such a case, the relevant exclusion clause may be Article 12(2)(b) concerning a serious, non-political crime rather than 12(2)(a). The question of the privilege of the combatant is relevant for exclusion when a state or non-state combatant commits an act that is in conformity with International Humanitarian Law (IHL). If the act is contrary to IHL and constitutes a war crime, the privilege of the combatant is irrelevant since Article 12(2)(a) would apply in any case.

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