

5.4.1. How direct must the link be between the substantial contribution and the excludable act?

A central question in the assessment of substantial contribution is how direct the connection between the applicant's conduct and the excludable act must be. Must the applicant's specific contribution have made a concrete difference to how the crime unfolded or is participation in a system that produces criminal outcomes sufficient? Belgian, Dutch, Norwegian and Swiss case law represent distinct positions on this question, and the divergence between them has direct consequences for applicants performing routine operational or supportive roles within criminal organisations and regimes.

The Norwegian Supreme Court addressed this directly in *Applicant* v *Immigration Appeals Board* (12 December 2023) concerning a Syrian conscript who participated in house searches in which opposition figures were arrested and subsequently subjected to torture and homicide. The court held that there is no requirement for active conduct to have resulted in a difference to the main act, rejecting as irrelevant both the applicant's lack of influence over which persons were arrested and the fact that he acted as part of a large group. That requirement, the court held, applies only to cases of pure omission when the question is whether the perpetrator had a duty and capacity to intervene. For active conduct, contributing to the arrest and surrender of persons at risk of torture and murder objectively constitutes complicity, regardless of whether the applicant's specific participation made any difference to the outcome. The court thus established a substantial contribution by reference to the nature and function of the applicant's role within the apparatus that produced the criminal outcome, rather than by reference to the direct causal impact of the applicant's individual acts.

This approach is reinforced and elaborated in the Belgian CALL's reasoning in *X* v *CGRS* (16 April 2024) concerning a Syrian army soldier based in Daraa who manned a checkpoint and participated in the transfer of prisoners. The applicant argued that his role was limited to ensuring the security of his superiors, he did not hold a rank and he did not personally participate in arrests. CALL rejected this argument directly, finding that it was precisely by providing protection to the persons conducting checks and arrests, and by participating in the transfer of prisoners to Damascus, that the applicant made a significant contribution to the murders and ill treatment that followed.

The case made it explicit that it is not necessary for the applicant to have been present at or involved in the moment of the criminal act itself. A purely supportive or protective function

within a criminal apparatus, including by ensuring the security of those conducting arrests and transporting prisoners, is sufficient, provided it forms part of the operational structure through which the crimes are carried out. CALL also rejected the argument that the applicant's contribution must have a "very significant consequence for the commission of the crime against humanity", confirming that the threshold is one of significant contribution, not decisive or irreplaceable contribution.

The Dutch approach introduces a degree of causal requirement that the Norwegian and Belgian approaches do not but frames it at the level of the role rather than the individual. Dutch national asylum law (para C2/7.10.2.4 of the VC 2000) requires that the contribution had an effect on the commission of the crime, and the crime would most likely not have taken place in the same way if no one had fulfilled the applicant's role, or if the applicant had made use of available opportunities to prevent the crime. This standard does not require proof of individual irreplaceability but introduces a generalised causal requirement absent from the Norwegian and Belgian approaches.

This was illustrated in practice in *Applicant* v *The Minister for Asylum and Migration* (18 May 2021) concerning a corporal in Gaddafi's army who guarded the Abu Salim prison and transported prisoners to interrogations. The court found that his role made him an indispensable link in the system that exposed detainees to torture and ill treatment, and the crimes would likely not have taken place in the same way without someone performing his role. The court rejected the applicant's defence of having a low rank, the dictatorial context and the risk of punishment for disobedience as incapable of negating his personal contribution.

The Swiss Federal Administrative Court has applied the most demanding standard, requiring a concrete and demonstrable link between the applicant's specific activities and specific reprehensible acts. In *Applicant* v *State Secretariat for Migration* (5 February 2020) concerning a Syrian army soldier who served for 3.5 years as a checkpoint guard and driver, the court held that it could only be speculated what effect his support activities would have had on specific criminal acts, and the mere possibility of contribution to the Syrian army's goals was insufficient. The court explicitly rejected the duration of service as a basis for inferring substantial contribution and declined to infer knowledge and intent from the general context of widespread violence established by COI. Through this approach, the court assessed substantial contribution by reference to the specific effect of the applicant's particular acts on particular criminal outcomes, not by reference to the systemic function of their role.

The Swiss Federal Administrative Court case law on applicant’s associated with the LTTE illustrates where this threshold leads in practice. Administrative and documentary roles, including archiving, training and forwarding intelligence, did not suffice even when membership was voluntary and sustained over years, as ruled by the court in D-2085/2018 (6 May 2021) and in D-6231/2019 (29 November 2022). Only when a senior intelligence officer in D-3711/2020 (31 August 2021) had actively collected information on identified targets with knowledge that it was used to authorise assassinations did the court find that the applicant encouraged a joint criminal enterprise. The decisive factor was not the nature of the organisation or the duration of membership, but whether a direct link existed between the applicant's activities and specific crimes.

The contrast between the different approaches to assess what constitutes a substantial contribution is particularly evident when comparing the Belgian and Swiss cases on Syrian army checkpoint roles. Both applicants performed supportive and logistical functions, including providing security, guarding and transporting of prisoners, within structures that were systematically committing crimes against civilians during the same period. The Belgian CALL found a significant contribution on the basis that the applicant's protective and logistical role was integral to the operations through which the crimes were carried out. The Swiss court found no significant contribution on the basis that the effect of comparable activities on specific criminal acts could only be speculated. This contrast is not adequately explained by differences in the underlying facts and reflects instead the fundamental divergence between the conceptions of substantial contribution.

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