

5.4.2. Can a failure to act amount to individual responsibility for an excludable act?

Both EUAA guidance and national case law recognise that a failure to act can lead to a finding of individual responsibility when an applicant had the opportunity to prevent an excludable act. However, the conditions under which the obligation to act arises and the consequences of failing to meet it differ across jurisdictions and across modes of participation.

For applicants in positions of command or authority, the clearest framework is provided by Article 28 of the Rome Statute on command responsibility, which establishes individual responsibility for crimes committed by subordinates on the basis of a failure to prevent or punish, provided that the requisite conditions of effective control and knowledge are met. The French CNDA applied this framework in both *M.N.* v *OFPRA* (15 November 2022) and *N.* v *OFPRA* (23 September 2021), finding that the failure of senior military commanders to investigate, prevent or take any action to stop crimes committed by forces under their command was sufficient to establish individual responsibility without any direct participation in the criminal acts themselves. In *N.*, the CNDA went further, finding that active denial and cover-up of the crimes of subordinates, a form of deliberate omission in the sense of a failure to report or refer the matter to the competent authorities, itself constituted participation in their commission.

The Danish Refugee Appeals Board's decision in Syri/2020/9/DH (2 June 2020) illustrates the converse; a Syrian army major who repeatedly refused orders to shoot at civilians, actively intervened to prevent attacks and was imprisoned as a direct consequence was found not to have contributed to the systematic crimes of the forces around him. The case confirms that when an applicant in a position of authority has taken active and personally costly measures to prevent crimes, the omission framework cannot be invoked against them and the inference of individual responsibility that seniority would otherwise support can be rebutted, thus representing a reversal of the burden of proof in such cases.

For applicants in subordinate positions, the picture is more complex. The Norwegian Supreme Court in *Applicant* v *Immigration Appeals Board* (12 December 2023) limited the obligation to act to persons who had both a duty to intervene and the capacity to make a difference, effectively confining it to those in positions of authority or with specific responsibility for preventing the relevant conduct. Based on this approach, a low-ranking applicant without influence over the criminal acts of those around them would not be expected to satisfy the omission standard, though they may still be found individually responsible on the basis of their

active contribution.

The Dutch legislative standard under paragraph C2/7.10.2.4 of the VC 2000 is broader, under which any applicant who had an opportunity to prevent a crime and did not use it may be found to have made a substantial contribution by omission, without the need to establish a specific duty to act. Based on the Dutch approach, continued participation in a role that contributed to criminal outcomes without making use of available opportunities to refuse or prevent can suffice for a substantial contribution, even for low-ranking applicants in subordinate operational roles.

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