

Duress as a defence to crimes against humanity in refugee status determinations: A snapshot of international theory and practice

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Context

Convention relating to the Status of Refugees Article 1F(a)

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”

Therefore, anyone found to have committed a 1F(a) crime is *prima facie* excluded from refugee status.

The defence of duress

Refugee claimants who have committed 1F(a) crimes may raise defences to their *prima facie* exclusion. One such defence is duress, which has numerous legal definitions among different domestic and international jurisdictions, but generally involves the use of threats of violence to compel someone to act against his will.

Since 1F(a) crimes often occur in situations characterized by instability, power imbalance, and conflict, there is potential for duress to play a significant role in an individual’s involvement in such crimes. This is particularly so given that merely providing assistance to the primary perpetrators of 1F(a) crimes is often sufficient to establish *prima facie* culpability and exclusion.

Research motivation

The availability of the defence of duress is a relatively unexplored area of refugee exclusion law. In order to fill this gap, our project examines the theoretical frameworks used to assess claims of duress and the practical application of these frameworks in three common law jurisdictions: the United Kingdom, New Zealand, and Australia.

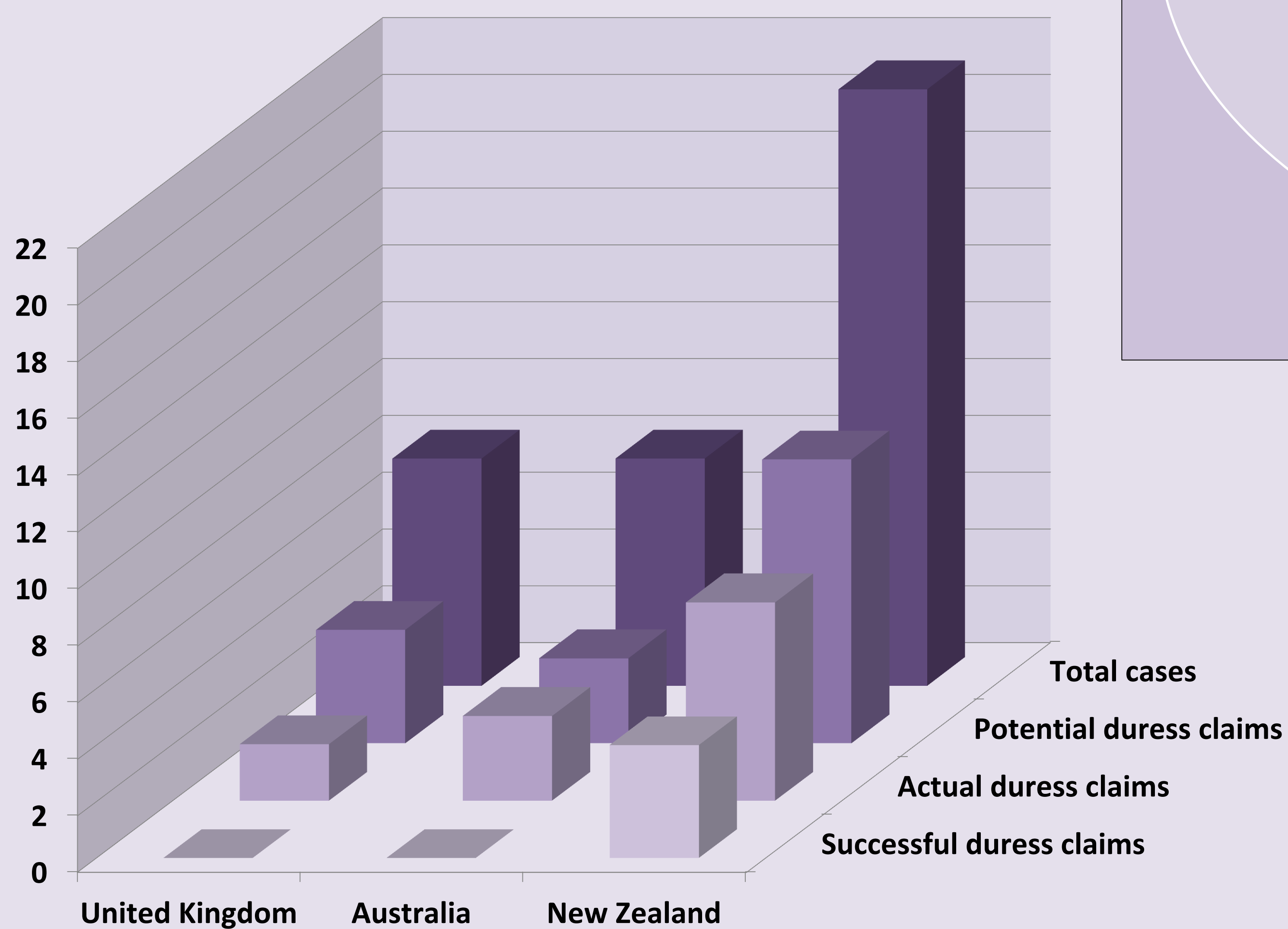
Our project will demonstrate:

- how often the defence of duress is raised;
- its success rate; and
- the elements critical to a successful claim of duress.

Methodology

- Identify all refugee status determination cases dealing with 1F(a) exclusion over the past ten years in each jurisdiction.
- Review cases and extract the following information:
 - Whether the defence of duress was raised
 - If yes: the definition of duress used
 - If no: whether the defence could have been raised
 - The factual basis for the defence
 - Whether the defence succeeded or failed
 - The court’s reasoning for the outcome
- Identify trends within and across jurisdictions.
- Record extracted information in charts and elaborate on trends in a written report.

The incidence of duress in 1F(a) exclusion cases



Results

The elements of duress

Based on the two most commonly used definitions of duress in the case law, duress theoretically requires the following elements to succeed as a defence to exclusion under Article 1F(a):

“...an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that a ‘reasonable man would apprehend that he is in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong’. Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke this exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging [duress].”

-James Hathaway,
The Law of Refugee Status

- Lack of control
- Reasonableness
- Imminence
- Grave physical threat
- Motivational nexus
- Proportionality

“The conduct which is alleged to constitute a crime...has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) made by other persons; or (ii) constituted by other circumstances beyond that person’s control.”

-Rome Statute
Article 31.1(d)

Rejection of the duress defence: illustrative examples

The following case summaries illustrate the way courts from each jurisdiction generally assess claims of duress as a defence to exclusion under Article 1F(a), and the elements on which the defence most commonly fails.

United Kingdom

MT [2012] UKUT 00015 (IAC)

MT had been a police officer in Zimbabwe and, under pressure from her superiors, she participated in violent acts against political opponents of Mugabe’s ZANU-PF. She was denied asylum because these acts were considered crimes against humanity under Article 1F(a). The court rejected her defence of duress because, although she may have faced consequences if she disobeyed orders and deserted the police force, these consequences were **not imminent**.

Australia

SHCB [2003] FCAFC 308

SHCB was denied refugee protection because he had been complicit in crimes against humanity as an officer of KHAD (Afghan intelligence agency). He claimed that he would have been branded disloyal and ill-treated if he left KHAD. The court rejected his defence, saying that he could not now rely on duress because such a claim was **contradictory to his previous statements** (in a lower court) that he was unaware of KHAD’s involvement in inhumane acts.

New Zealand

RSAA Appeal No 75634 (2006)

The claimant was excluded from refugee status because, as an officer in the Somali National Security Service, he provided his superiors with reports on political dissidents which led to their imprisonment, torture, and death. Although he may have faced serious harm if he had quit, the court rejected his defence of duress because he **continued to work for 11 years and completed hundreds of reports without any attempt to resign** or change jobs. He worked **voluntarily** because he needed employment.

Conclusions

- Success rates for duress are very low:** no claimants have succeeded with this defence in the UK or Australia and only 4 have succeeded in NZ
- Duress claims commonly fail on the avoidance/lack of control requirement (often because the claimant joined the organization voluntarily and failed to leave the organization early enough) or the imminence requirement.
- Courts often do not apply the full test for duress;** rather, they dispose of the defence on one requirement and end the discussion there. This means there has been little analysis of the defence across the 3 jurisdictions.

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