

6.3. Duress

The threshold for establishing a situation of duress is high, as according to Article 31(1)(d) of the Rome Statute it must result “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”.

Courts have consistently applied this threshold strictly, and cases in which duress has successfully negated individual responsibility are comparatively rare. One such case is *Erit/2019/5KAA* (15 December 2020), in which the Danish Refugee Appeals Board established duress in the context of mandatory military service in Eritrea. The applicant had served as a guard with the rank of a private and had on three occasions guarded the transport of prisoners between a military base and a prison where he believed detainees had been and would be subjected to abuse. He also claimed that during his time in the army, he had witnessed physical punishment. He claimed never to have used violence personally against prisoners and reported that his annual leave and salary had been withdrawn when he failed to carry out an order to punish a detainee.

The board found that the applicant had been forced to perform military service and to act as a guard without any realistic possibility of refusing orders, and escape was rendered particularly difficult by the intensive surveillance and movement controls that characterise the Eritrean context. On the basis of those findings, the board concluded that the applicant's conduct had been performed under duress and that he could not be excluded on the ground of having committed a serious, non-political crime.

When country of origin information shows that a situation of duress may exist, including when forced membership may occur or that a person may face reprisals for refusing orders or leaving a group, courts have afforded primary weight to the applicant’s personal motivations, including their reasons for joining the group, their length of membership, attempts to leave, whether they were promoted throughout their membership and their reasons for leaving or wanting to leave. For example, in *The Minister for Asylum and Migration v Applicant* (7 July 2025) the Dutch Council of State considered that, even though COI showed forced recruitment into the Eiye cult in Nigeria occurred and cult members may face reprisals for leaving, in the applicant’s case it was established that he had joined the group with the intention to become more popular, gain respect and no longer have to fear anyone. It therefore could not be established that he was forced to join, remained a member under duress or tried to escape, especially considering that over the years he was entrusted with more powers and responsibilities within the group.

The same approach was applied by the Norwegian Court of Appeal in *Applicant* v *Immigration Appeals Board* (16 April 2024), wherein the court determined that the applicant should not be exempted from individual responsibility as his primary motivation to flee the Syrian army was not related to reasons of duress. The case concerned a former soldier in Syria who in the spring of 2011 had been ordered to participate in house searches in which opposition figures were arrested and handed over to security forces. He argued that he acted under coercion and therefore lacked guilt under Section 31(1)(b) of the Immigration Act. However, the court dismissed the argument of superior orders, as it found that the applicant knew detainees faced torture and murder and was not legally obliged to carry out manifestly unlawful acts.

On the other hand, the court accepted that, while on active service as a private in the Syrian army during the suppression of a rebellion, a refusal to obey orders would likely have exposed him to an immediate and serious risk of death or severe injury. Evidence indicated that soldiers who disobeyed orders were shot, and the court found this credible. Given his low rank and awareness of the regime's practices, a refusal appeared to carry extreme personal danger. The key issue became whether he had a realistic opportunity to desert and thereby avoid participation without facing imminent death. Although many soldiers deserted during that period, the court found that this was not a realistic option for him. As a Kurd serving in a non-Kurdish area and without a local support network, desertion would have been especially difficult and dangerous. Even during leave, checkpoints and controls made escape risky.

Despite acknowledging that desertion would have entailed a significant danger, the court ultimately concluded, though acknowledging with considerable doubt, that his decision not to desert was not primarily motivated by the need to avoid an imminent threat of death or serious harm. Instead, his explanations suggested that he followed his father's advice to complete the short remainder of his service. As he did not clearly frame his decision as one driven by an immediate fear for his life, the court found that the strict legal requirement for duress was not met and he was excluded from asylum. This case also demonstrates that when there is uncertainty, courts do not always apply the benefit of the doubt when assessing mitigating factors in favour of the applicant.

In the context of war crimes, courts have assessed duress against the concept of a 'state of emergency' drawn from international criminal law. The Finnish Supreme Administrative Court's decision in *Applicant* v *Finnish Immigration Service* (7 April 2025) concerning a former Taliban member is the most detailed application of this framework in the jurisprudence reviewed. The applicant had been forcibly recruited into the Taliban as a 15-year-old minor, subjected to serious rights violations and participated in the execution of seven people. He claimed that he had acted under the influence of drugs and out of fear of being killed if he refused, pointing to a separate incident in which another recruit was allegedly killed for refusing to shoot. The court did not resolve the case on the basis of age and capacity alone, but instead proceeded to assess duress by reference to Article 31(1)(d) of the Rome Statute and international criminal case law, including the ICC's decisions in *Prosecutor* v *Dominic Ongwen* and *Prosecutor* v *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag*. Drawing on these sources, the court affirmed that an abstract or persistent risk of danger is insufficient to establish a state of emergency; there must be a justified and explicit threat of immediate death or serious bodily harm that is ongoing or imminent at the time the offence is committed.

The court found that, despite being a minor, he was criminally responsible due to his age, mental maturity and health. The court held that, although his circumstances were aggravating and potentially threatening to his life and health, he was nevertheless individually responsible because he did not consistently resist orders or attempt to escape during his year with the organisation. His claims of drug use and the killing of a fellow recruit who had refused were raised for the first time at a late stage of proceedings and were assessed as lacking credibility. The court gave significant weight to the gravity of the crimes and the harm caused, which included repeated participation in executions resulting in seven deaths, and concluded that the circumstances did not establish an immediate and unavoidable threat sufficient to satisfy the legal threshold for duress. The applicant was accordingly excluded.

The case reinforced a principle which is visible across the jurisprudence on duress that the more serious the crime, the more demanding the evidentiary threshold that courts apply before accepting that a ground negates individual responsibility.

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