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# ***Non – Refoulement, Exclusion Principle and Terrorism***

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## **Non – Refoulement, Exclusion Principle and Terrorism**

### **Executive Summary**

This policy brief focuses on terrorism concerning international refugee law, particularly the principle of *non-refoulement*. Though largely recognized as one of the most critical security threats in the contemporary era, no definition has been established regarding terrorism under international law. This vagueness causes difficulties in applying the principle of *non-refoulement* which guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. Moreover, even within refugee law, it is a controversial question whether terrorism is within the ambit of exclusion principle due to a person being convicted of a serious non-political crime. For this purpose, the brief examines UNHCR guidelines concerning the exclusion of persons from refugee status based on Article 1F of the 1951 Refugee Convention. It points out the legal intricacies of serious non-political crimes to analyze the relationship with the crime of terrorism. The brief asserts that terrorism can be treated as a serious non-political crime, based on the disproportionate violations of fundamental human rights legitimizing the exclusion from refugee status under UNHCR's documents and UNSC resolution.

Following are the brief recommendations:

- Pakistan must actively make a narrative in the international arena that terrorism in the domestic context of Pakistan includes serious non-political crimes within the definition of Article 1 – F of the Refugee Convention 1951.
- Pakistan needs to amend the terrorism laws to include the provision that “terrorism shall come within the ambit of serious non-political crimes of the Refugee Convention 1951.” Therefore, there should be an addition in section 6 of the Anti-Terrorism Act 1997. This shall ensure an increase in the likelihood that anyone convicted inside Pakistan for terrorism cannot take a refugee status outside Pakistan.
- Pakistan needs to provide within future agreements with UNHCR and Afghanistan that people convicted of terrorism under Pakistani laws shall be excluded from the protection of refugee status in the future and the corresponding rights of principle of *non – refoulement*.

## Introduction

Terrorism is considered one of the many security threats to a State. For a clear comprehension, it can be defined as any action taken by a specific politically motivated group of people that harms the citizens of the State. Terrorism has no agreed-upon definition in international law and political science. Levitt elucidates the definition of terrorism from a lens of international law and posits that the definition of terrorism does not need to be defined considering changing global dynamics and the anarchic system of the global order.<sup>1</sup> From a similar perspective, there is an extremely wide gap in the intricate interplay of international refugee law and terrorism. That gap can be seen from the perspective of the *non-refoulement* policy in international refugee law which prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations<sup>2</sup>. Although States can exercise the principle of *refoulement* on any given refugee if that refugee commits a serious non-political crime, speculations remain on whether the same principle would apply to a refugee convicted of terrorism outside the country of refuge.<sup>3</sup> Therefore, this policy brief shall elucidate whether exclusion to the principle of *non-refoulement* can apply under the pretext if a refugee commits a serious non-political crime if that crime is also considered terrorism.

## Definition of Terrorism

Particular features of terrorism make it different from other forms of political violence. The first among such is that terrorism acts more like a symbolic act. Unlike other forms of violence, the aim is to instill more and more fear rather than to inflict more damage. The targets selected and the tactics adopted are such that they send a message of fear to a broader audience. Secondly, the terrorists are involved in the targeting of civilians and there is no distinction among combatants and non-combatants unlike other forms of violence that usually target military and governmental organizations. Thirdly, there is a use of asymmetric warfare

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<sup>1</sup> G. Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 Ohio Northern University Law Review, 97, 98

<sup>2</sup> OHCHR, "The principle of non-refoulement under international human rights law"

<sup>3</sup> Hoffman, B. (2006). Inside Terrorism. Columbia University Press.

techniques as the terrorists usually have fewer resources and strength as compared to the mighty state.<sup>4</sup>

Attempts, however, were made by the United Nations to provide a clear definition of terrorism. Terrorism is defined in Article 2.1.b of the International Convention for the Suppression of the Financing of Terrorism, which was signed on December 9, 1999. It states: “any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.”<sup>5</sup> European Union has also attempted to define terrorism as an act that intends to seriously damage a country or an international organization. The purpose is to coerce the government or the organization to carry out their political or social agenda through kidnappings, threats, and destruction. This excludes the acts carried out by armed forces during an armed attack.<sup>6</sup>

### **Determination of Refugee Status**

Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (“UNHCR Guidelines”) states that ‘generally’ inclusion determination should take place before exclusion determination.<sup>7</sup> Article 1-A (2) of the 1951 Convention chalks out the main elements of the term ‘refugee’. A person must have a political opinion that is against an undemocratic government. One must have a well-founded fear of persecution due to such opinions and must be outside the country of his nationality. Well-founded fear of persecution includes that a person cannot take the protection of his nationality country due to the fear that the government ‘will execute him’.<sup>8</sup>

### **Standards of Exclusion of Refugee Status**

For the consideration of the issue of exclusion clauses due to terrorism, words such as ‘serious crime’, ‘non-political’, and ‘terrorism’ would have to be elucidated. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (‘UNHCR Note’) opines that a serious crime can be considered non-

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<sup>4</sup> Raul Caruso and Andrea Locatelli, ‘Understanding Terrorism, A Socio – economic perspective’ (2014) Emerald 300 p.

<sup>5</sup> ‘Terrorism - The Practical Guide of International Humanitarian Law’ (*Doctors without Borders*) < <https://guide-humanitarian-law.org/content/article/3/terrorism/> > accessed 9<sup>th</sup> August 2024

<sup>6</sup> ‘Terrorism - The Practical Guide of International Humanitarian Law’ (*Doctors without Borders*) < <https://guide-humanitarian-law.org/content/article/3/terrorism/> > accessed 9<sup>th</sup> August 2024

<sup>7</sup> Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, Para 31.

<sup>8</sup> *Ibid*

political if there is no clear link between the crime and its alleged political objective. It is also non-political if there is some personal motive, or the crime is disproportionate to the alleged political objective. The political objective should not destroy fundamental rights and should be consistent with human rights.<sup>9</sup> UNCHR Note considers the term ‘serious crime’ to be judged in the international context and its gravity to be measured *inter alia* about the actual harm inflicted and whether most jurisdictions would consider the act in question as a serious crime. The common examples of ‘serious’ crime include murder, rape, arson and armed robbery. UNHCR also considers that acts of terrorism can qualify as a ‘serious crime’, but the most compelling circumstances can justify non-exclusion. The threshold for the proportionality test for such a non-exclusion shall be extremely high.<sup>10</sup>

UNHCR Note observes that Article 1-F of the Refugee Convention requires the standard of proof to be “serious reasons for considering” whether an individual has committed a serious non-political crime. The threshold is higher than the “balance of probabilities” but has a threshold lower than “beyond reasonable doubt”. A ‘simple suspicion’ is not sufficient but a ‘substantial suspicion’ is required which will require clear and credible evidence of involvement.<sup>11</sup> In *Ezokola*, the August Supreme Court of Canada reasoned that “serious reasons for considering” can import a higher test for exclusion than “reasonable grounds for suspecting”.<sup>12</sup>

UNHCR further states that Article 1 - F (b) of the Refugee Convention requires that non-political crime be committed outside the country of refuge before the individual’s admission to that country as a refugee.<sup>13</sup> In the UNHCR’s view, this does not include the period in the country of refuge before recognition of the status of refugee as the status of refugee is declaratory and if the conditions for refugee determination are fulfilled, it starts at the entry of the country of refuge and just recognized later.

### **Terrorism and Exclusion Clause**

The crime of terrorism is certainly serious because of its universal applicability. *Prima facie*, is not non-political as a link can be established between the alleged political objective

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<sup>9</sup> Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, Para, 41,43

<sup>10</sup> Ibid Para 85, 86; Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 Para 27

<sup>11</sup> Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, Para 107, 109, 110

<sup>12</sup> *Ezokola v. Canada (Citizenship and Immigration)* 2013 SCC 40, 19 July 2013, Supreme Court of Canada

<sup>13</sup> Ibid (n.8) Para 44.45; Ibid (n.6) Para 11

and crime. However, a political objective shall certainly destroy the fundamental rights of the general public such as the right to freedom and life. Therefore, it can be considered that the crime of terrorism is disproportionate to the alleged political objective and not consistent with human rights. It can be deemed a serious non-political crime.

UNCHR Guidelines and UNCHR Note consider that acts ‘commonly’ considered to be acts of terrorism shall fall within the ambit of the exclusion clause of Article 1-F (b) of the 1951 Convention. These acts are simply egregious enough to fulfil any political objective. However, every case must require individual consideration. Generally, if an action is mentioned as terrorist within an international instrument, then it is considered terrorism although the definition of terrorism is itself very vague and unclear in international law.<sup>14</sup> Article 1(3) (e) of the Council Common Position 2001 even includes the seizure of aircraft as a terrorist act. However, the UNHCR guidelines also state that all terrorist acts cannot be deemed non-political, and they can be considered against the Article 1F (b) criteria of the Refugee Convention. UNCHR further opines that former members of a militant group shall not be considered excludable for crimes against peace; crimes against humanity and serious violations of international human rights law.<sup>15</sup>

United Nations Security Council (‘UNSC’) Resolution 1373 also affirms that States need to measure the national laws so that asylum seekers ‘has not planned, facilitated or participated in the commission of terrorist acts’.<sup>16</sup> Furthermore, UNSC Resolution 1373 further reiterates that refugee status must not be abused by those individuals who are ‘perpetrators, organizers or facilitators of terrorist acts’.<sup>17</sup>

### **Individual Responsibility of Serious Non–Political Crime**

UNCHR defines the commission of a crime as the physical perpetration of a crime with full knowledge of its effect. Aiding requires that an individual has provided substantial help which might have a causal effect on the commission of the crime and the physical presence is not required. A ‘joint criminal enterprise’ is defined as several persons joining together for a common plan and all participate in the execution of that plan.<sup>18</sup>

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<sup>14</sup> Ibid (n.8) para 80,81; Ibid (n.6) Para 25,26

<sup>15</sup> Ibid (n.8) para 63; Ibid (n.6) Para 19

<sup>16</sup> United Nations Security Council (‘UNSC’) Resolution 1373 (2001), Para 3(f)

<sup>17</sup> Ibid, Para 3(g)

<sup>18</sup> Ibid (n.8) para 18 and Ibid n.6 Para 51,52,53,54, and 64

For a non-political crime, individual responsibility must be established. Responsibility is triggered if the applicant has committed a substantial contribution to the commission of the criminal act. There is no need to physically commit the crime if the applicant is fully aware of the commission of the action and his role is about instigating, aiding, abetting, and participating in a joint criminal enterprise. Thus, material elements of the offence with intent and knowledge must be established as ignorance of a key fact i.e., absence of *mens rea* can result in the absence of criminal responsibility. Knowledge means that a particular event can occur in the ordinary course of events while intent can be defined as that a particular eventuality was anticipated.<sup>19</sup>

## **Recommendations**

- Pakistan must actively make a narrative in the international arena that terrorism in the domestic context of Pakistan includes serious non-political within the definition of Article 1 – F of the Refugee Convention 1951. Therefore, a conviction based on terrorism can be a reason for excluding someone from the refugee status and the protection of the principle of *non – refoulement*. This approach is in line with the UNSC Resolution 1373. Pakistan needs to be consistent in relation to the statements in the international organizations and the State practice so that the country has an input in the evolution of customary international law.
- Pakistan needs to provide within trilateral agreements with UNHCR and Afghanistan in the future that people convicted of terrorism under Pakistani laws shall be excluded from the protection of refugee status in the future and the corresponding rights of principle of *non – refoulement*. Terrorism shall be deemed to be included within the ambit of serious non-political crime. For that purpose, a consultation of a mutually agreed definition of terrorism can be drafted with Afghanistan and UNHCR under the guidance of UNHCR Note and UNHCR Guidelines as discussed in this brief.
- Pakistan needs to amend the terrorism laws to include the provision that terrorism shall come within the ambit of serious non-political crimes of the Refugee Convention 1951. Therefore, there can be an addition in section 6 of the Anti-terrorism Act 1997. This shall ensure conformity and increase in likelihood that anyone convicted inside Pakistan for terrorism cannot take a refugee status outside Pakistan. For that purpose, standards mentioned *supra* for individual responsibility, exclusion, and inclusion must be followed.

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<sup>19</sup> Ibid

<b>Recommendations and Action Matrix</b>				
<b>Legal Options for Government</b>				
<b>Recommendations</b>	<b>Pathway to solutions</b>	<b>Implementation of Solution</b>	<b>Actors Responsible</b>	<b>Implementation Timelines</b>
<b>Political solutions</b>	Advocacy for including terrorism within the realm of serious non-political crimes	Collaboration with international organizations especially UN and regional bodies to build consensus	<ol style="list-style-type: none"> <li>1. Ministry of the Foreign Affairs.</li> <li>2. Permanent Mission to the UN of Pakistan</li> </ol>	<p>1-2 years for diplomacy 1 year for the implementation</p>
<b>Research Measures and State Practice</b>	Conduct a thorough review of the implications of failure to consider terrorism in refugee protection and come up with a consistent State practice in line with the UNSC resolution 1373.	Publish papers, conduct seminars, publish official statements, and carry out public diplomacy for a consistent stand of Pakistan.	<ol style="list-style-type: none"> <li>1. State - Think tanks</li> <li>2. Ministry of Information and Broadcasting</li> <li>3. Ministry of the Foreign Affairs.</li> <li>4. Permanent Mission to the UN of Pakistan</li> <li>5. Ministry of Defence</li> </ol>	<p>3-4 Months for Research</p> <p>Streamlining State Practice for 12-18 months.</p>
<b>Legal Measures</b>	Amendments to change the anti-terrorism laws of Pakistan, so that terrorism should be included within serious non-political crime for the refugee determination status on behalf of Pakistan.	<p>Draft amendments to Section 6 of the Anti-Terrorism Act 1997</p> <p>Present and pass the amendments in Parliament.</p>	<ol style="list-style-type: none"> <li>1. Ministry of Law and Justice</li> <li>2. Ministry of Interior</li> </ol>	<p>Drafting and Consultation: 3-6 Months.</p> <p>6-8 Months for Legislative Process</p>



