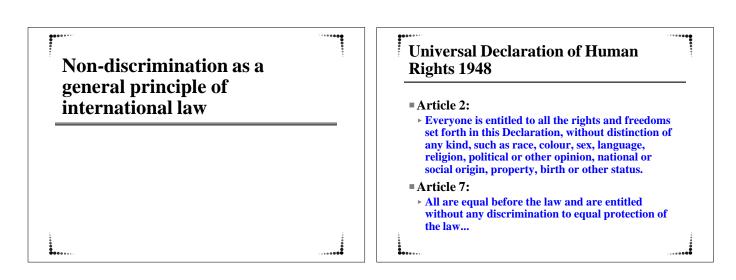


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# What is discrimination?

Judge Tanaka, South West Africa Case [1966] ICJ

Reports

 f... different treatment comes into question only when and to
the extent that it corresponds to the nature of the difference...?

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• '... The issue is whether the difference exists...'

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- '... different treatment is permitted when it can be justified by the criterion of justice... the concept of reasonableness
- '... Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness..
- '... Equality being a principle and different treatment an exception, those who refer to the different treatment must prove its *raison d'être* and its reasonableness...'

## **Unlawful discrimination**

... some exclusion or restriction, privilege, or preference

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... which has the effect...

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... of nullifying a particular right

# The range of *permissible* differentiation

- Relevant difference
- Authorised by law
- Legitimate aim
- Objective justification
- Reasonable

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Proportionate

# Non-discrimination as a principle of international refugee protection

# **1951** Convention relating to the Status of Refugees

Preamble

1.

 ... that human beings shall enjoy fundamental human rights and freedoms without discrimination...

#### Article 3 – Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

## 2004 EU Qualification Directive

#### Recital

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(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union...

(11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

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# EU Charter of Fundamental Rights

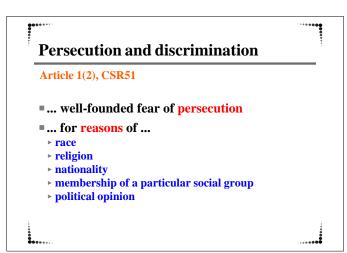
#### Article 20

**Everyone is equal before the law** 

#### Article 21

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 Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
 Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.



# The 2004 EU Qualification Directive

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**Article 9: Acts of persecution** 

#### For example:

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- Legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner
- Prosecution or punishment, which is disproportionate or discriminatory
- Denial of judicial redress resulting in a disproportionate or discriminatory punishment

## The 2004 EU Qualification Directive

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**Article 10: Reasons for persecution** 

- race : colour, descent, or membership of a particular ethnic group
- religion : theistic, non-theistic and atheistic beliefs
- nationality : also cultural, ethnic, or linguistic identity, etc.

# The 2004 EU Qualification Directive

#### Article 10 (continued)

**.**....

particular social group where in particular, members share:

- an innate characteristic, or a common background that cannot be changed, or a characteristic or belief so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society

#### **Issues of interpretation**

Women as claimants to refugee status

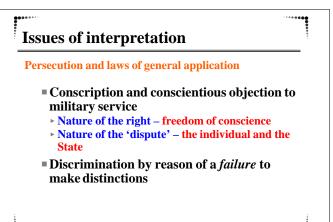
- Discrimination on the ground of gender
- Gender as 'link' in the context of social group
- Persecution for reasons of membership of a particular social group
- Identifying the group within the group the question of *risk Islam & Shah* [1999] 2 AC 629

## The 2004 EU Qualification Directive

Article 10

1.

- Political opinion
- ... includes holding an opinion or belief
- ... on a matter related to the potential actors of persecution and to their policies and methods
   ... whether or not that opinion, thought or belief has been acted upon by the applicant



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### **Procedural distinctions**

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2005 EU Directive on Procedures

Safe third country/first country of asylumSafe country of origin

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Interception and pre-entry clearance measures

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The *Roma Rights* CaseInterdiction and interception at sea