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Principles of International Refugee Law

4. Non-discrimination

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The principle of non-discrimination

- As a general principle of international law
- As a principle of international refugee protection
 - In application of the 1951 Convention
 - In defining the refugee
- Discrimination as an element of persecution
- Discrimination as a factor in States' responses to refugee and other movements of people

Non-discrimination as a general principle of international law

Universal Declaration of Human Rights 1948

- Article 2:
 - Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Article 7:
 - All are equal before the law and are entitled without any discrimination to equal protection of the law...

What is discrimination?

Judge Tanaka, *South West Africa Case* [1966] ICJ Reports

- ‘... different treatment comes into question only when and to the extent that it corresponds to the **nature of the difference**...’
- ‘... The issue is **whether the difference exists**...’
- ‘... 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

... which has the effect...

... of nullifying a particular right

The range of *permissible* differentiation

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

Non-discrimination as a principle of international refugee protection

1951 Convention relating to the Status of Refugees

■ Preamble

- ▶ ... 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

(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**.

EU Charter of Fundamental Rights

Article 20

Everyone is equal before the law

Article 21

1. 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.
2. 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.

Persecution and discrimination

Article 1(2), CSR51

- ... well-founded fear of **persecution**
- ... for **reasons** of ...
 - ▶ race
 - ▶ religion
 - ▶ nationality
 - ▶ membership of a particular social group
 - ▶ political opinion

The 2004 EU Qualification Directive

Article 9: Acts of persecution

- For example:
 - ▶ 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

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

- 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

Issues of interpretation

Persecution and laws of general application

- Conscription and conscientious objection to military service
 - Nature of the right – freedom of conscience
 - Nature of the ‘dispute’ – the individual and the State
- Discrimination by reason of a *failure* to make distinctions

Discrimination and responses to refugee and related movements

Discrimination and EU Citizens

1997 Protocol on Asylum for Nationals of Member States of the European Union

- All Member States *presumed* to be safe countries of origin
 - Possibility of rebuttal in exceptional cases
- Belgium: Individual assessments to be carried out nonetheless
- Cf. Articles 1, 3 CSR51

Procedural distinctions

2005 EU Directive on Procedures

- Safe third country/first country of asylum
- Safe country of origin

Interception and pre-entry clearance measures

- The *Roma Rights* Case
- Interdiction and interception at sea