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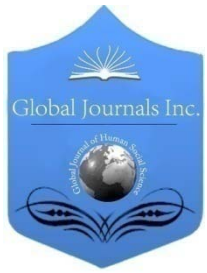

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Defining a Particular Social Group Based on the Meaning of Non-Discrimination in International Human Rights Law: Utilizing the Definition in Deciding Refugee Claims Based on Sexual Orientation

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Defining a Particular Social Group Based on the Meaning of Non-Discrimination in International Human Rights Law: Utilizing the Definition in Deciding Refugee Claims Based on Sexual Orientation

Tim Sahliu Braimah

Abstract- In his article titled: *Divorcing sexual orientation from religion and politics: Utilizing the Convention grounds of religion and political opinion in same-sex oriented asylum claims,* [1] Braimah argues that of the two approaches in interpreting membership of a particular social group, the *ejusdem generis* interpretation appears to be more suitable than the social perception approach. This is because; the latter is based on the principles of non-discrimination, which is in line with the object and purpose of the Convention. [2] Nonetheless, while the US courts in *Matter of Acosta* got it right that the interpretation of a particular social group should be anchored to non-discrimination, what they got wrong is what non-discrimination was translated into. The US courts by translating non-discrimination into innateness/fundamental to identity deviated from the actual meaning of non-discrimination in international law. It is against this backdrop that this article focuses on researching the meaning of non-discrimination in international law to define a particular social group. The contribution of this article to the field of international refugee law is of two folds. First, it provides a definition of a particular social group, based on the actual meaning of non-discrimination in international law. Second and lastly, it provides how decision makers can use the definition in deciding asylum cases made on the basis of orientation.

I. Introduction

The drafters of the 1951 Refugee Convention did not define the Convention ground Membership of a Particular Social Group. Nonetheless, countries such as the USA and Australia have offered differing definitions to it. The USA has adopted two tests in interpreting a particular social group, namely, *ejusdem generis* and social visibility; however the latter has been rejected by some US Courts. Australia adopts an entirely different approach known as the social perception approach. However, irrespective of the three approaches mentioned, the UNHCR has recognized only the *ejusdem generis* and social perception in interpreting membership of a particular social group.

In an article,[3] Braimah asserted that of the two approaches in interpreting a particular social group, *ejusdem generis* is more suitable because it is based on the principles on non-discrimination, because it is in line with the object and purpose of the Convention. [4] However, while the US Court in *Matter of Acosta*[5] got it right that the interpretation of a particular social group should be anchored to non-discrimination, what they got wrong is what they translated non-discrimination into (innate/fundamental to identity). The major problem with the current interpretation of *ejusdem generis* is the fact that no test can be developed from the definition. Thus refugee awarding countries have focused largely on issues such as credibility in denying asylum claims. Therefore, the main objective of this article is to provide a definition of a particular social group based on the principles of non-discrimination in International Human Rights Law. Additionally, the article provides how the definition of a particular social group, can be utilized in interpreting refugee claims based on sexual orientation.

Because part of this article deals with lesbian and gay men seeking asylum, *Part I* of this article provides an appropriate terminology in referring to lesbians and gay men. *Part II* provides the development of US interpretation of a particular social group. Part *III* undertakes a study on the meaning of non-discrimination in International Human Rights Law. The section also provides the definition of a particular social group based on the meaning of non-discrimination. Additionally, the section explains how same-sex oriented asylum seekers are a particular social group from the definition provided. Finally, *Part IV* provides recommendations on how refugee claims based on sexual orientation should be adjudged.

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[1] Braimah Tim S. Utilizing the Convention grounds of religion and political opinion in same-sex oriented asylum claims, *International Journal of Refugee Law* (Forthcoming)
[2] Ibid,pp.6-7
[3] *See* Braimah Tim S. Utilizing the Convention grounds of religion and political opinion in same-sex oriented asylum claims, *International Journal of Refugee Law* (Forthcoming)
[4] Ibid, pp.6-7
[5] 19 I&N December 211, 232 (Board of Immigration Appeal 1985)

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Part I

II. Terminology

a) Talking about same-sex oriented refugees

There is no precise term given to refugees who flee on the basis of their sexual orientation. Different terminologies have been used by scholars and those who have dealt with issues concerning those who flee persecution based on their sexual orientation. As such, I use the term same-sex oriented refugees throughout this article to describe those who flee their countries, owing to a well founded fear of persecution based on their sexual orientation. The reasons why I have not utilized terms such as homosexual, queer or sexual minorities, which have been used by several scholars to refer to same-sex oriented refugees, are identified below.

Many different terms are used to describe same-sex oriented persons, some with offensive associations. Using terms properly is an important way of treating people with respect and advancing an informed debate on the issue. Terminology is a difficult problem when dealing with the group discussed in this article. It is especially challenging because people who are same-sex oriented do not agree on terminology, so it is possible to offend people simply by using the wrong word. Here, I will attempt to set forth the terminology I use in this article. Firstly, it is important to understand the meaning of the term sexual orientation as it is an integral part of this article. At first glance, the term appears relatively straightforward, but it is a term which has no agreed upon definition. According to Ragins, "the very definition of sexual orientation has changed considerably over the past 50 years". [6] Ragins' statement reveals that there is an ongoing search to find a single agreed definition of sexual orientation that scholars, scientists, policy-makers and others who have an interest in defining sexual orientation agree upon. In this article, I adopt the definition of the *Yogyakarta Principles*:

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[7]

The *Yogyakarta Principles* definition of sexual orientation was adopted because it contains a behavioral and psychological aspect of sexual orientation. Hence, the definition does not focus solely on an individual's erotic desire, or on the sex of the individual's partners.

Other terms I often use in this article are: *same-sex oriented persons* and *lesbians*[8] *and gay men*.[9] I use the term same-sex oriented and lesbians and gay men interchangeably to denote persons with "profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of the same gender".[10] In the refugee literature, different terms are used to refer to same-sex oriented refugees. The popular terms found include: *homosexuals, sexual minorities, queers* and *Lesbian Gay Bisexual Transgender* (LGBT).

The term 'homosexual' was commonly found to be used more often by the judiciary and decision-makers. Additionally, scholars such as Ghai, [11] McGhee[12] and Rory[13] also refer to same-sex oriented persons fleeing persecution as 'homosexual refugees'. I opt not to use the term homosexual in this article because it is a clinical term which has connotations of perversion and sickness. Also, the term appears to be offensive and unacceptable to members of the same-sex oriented community. The term homosexual, first coined by Hungarian doctor, Karl Maria Benkert in the mid-nineteenth century, was first used to express ignorance and intolerance towards same-sex relations between men.[14]

Another term which was commonly found to be used in the refugee literature was 'sexual minorities'.[15]I choose not to use the term sexual minorities for two main reasons. Firstly, the term sexual minority has a discriminatory tone to it. For many individuals in the same-sex oriented community, the term 'minority' itself denotes that same-sex oriented persons are not part of the society. Second, since the term sexual minorities has generally come to include transgendered persons, it

[6] Belle Ragins, 'Sexual Orientation in the Workplace: The unique work and career experiences of gay, lesbian and bisexual workers', in Joseph Martocchio(ed), *Research in personnel and human resource management* (2004), p.37

[7] International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, p.6

[8] Lesbian: describes a woman whose personal identity is based on her primary orientation toward an enduring sexual, affectional, or romantic attraction to other women

[9] Gay: describes a man whose personal identity is based on his primary orientation toward an enduring sexual, affectional, or romantic attraction to other men (Although gay is sometimes used to refer to both same-sex oriented men and women, for this study gay is only used as a reference to same-sex oriented men)

[10] Ibid,p.6

[11] Ritu Ghai, 'Deciphering motive: Establishing sexual orientation as the "one central reason" for persecution in asylum claims' *Columbia Human Rights Law Review* 43 (2011-2012),pp.521-568

[12] Derek McGhee, 'Persecution and social group status: Homosexual refugees in the 1990s' *Journal of Refugee Studies* 14 (2001),pp.20-42

[13] Riley Rory, 'From closet to court room: Asylum as a judicial step towards full equality between sexual orientation' *Richmond Journal of Law and Public Interest* 15 (2011),pp.403-448

[14] Leslie Moran, *The homosexual(ity) of law* (Routledge 1996),p.3

[15] Sean Rehaag, 'Patrolling the borders of sexual orientation: Bisexual refugee claims in Canada' McGill Law Journal 53 (2008),pp.58-102
Jessica Young, 'The alternate refuge concept: A source of systematic disadvantage to sexual minority refugee claimants' *University of New Brunswick Law Journal* 60 (2010),pp.294-337
Nicole Laviolette, 'The immutable refugees: Sexual orientation in Canada (A.G.) v Ward' *Toronto Faculty Law Review* 1 (1997),pp.1-41

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is unsuitable to the use the term in this article as this study focuses only on sexuality and not gender.

The term queer has also been used to refer to same-sex oriented persons in a variety of studies.[16] Originating in the 16th century, the term was used to refer to individuals who were strange, odd and were of questionable character.[17]I choose not to use the term queer in this article for a number reasons. Firstly, some same-sex oriented persons see the term as a derogatory slur which can incite violence.[18]Secondly, depending on the generation to which a person belongs, the term can be viewed as faddish slang by those who do not accept it.

Another term that is commonly found in refugee literature, used to address same-sex oriented persons is the acronym LGBT.[19] The acronym LGBT which stands for Lesbian, Gay, Bisexual and Transgender, is a common term which many individuals of the same-sex oriented community use to refer to themselves. However, I choose not to use the acronym LGBT in this article because of the presence of the word Bisexual and transgender. I use the terms same-sex oriented, same-sex orientation, and lesbians and gay men, bearing in mind that they may not be the term of choice for many people who regard themselves as attracted to those of the same sex.

Part II

a) *Ejusdem generis*

Ejusdem generis is a canon of construction which says that:

Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

The interpretation of ejusdem generis was introduced to international refugee law in the US case of *Matter of Acosta*.[20] In interpreting the nebulous convention ground membership of a particular social group based on ejusdem generis, the US Court in *Matter of Acosta*[21] looked at the relationship of the other convention grounds namely, race, religion, nationality, and political opinion. Two of the four Convention ground, race and nationality, are things that one cannot change. The other two Convention ground, religion and political opinion are both changeable, but are so fundamental to identity that one not to change to be safe. So the US Courts *in Matter of Acosta*[22] concluded that:

"Applying the doctrine of ejusdem generis, we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color and kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership....However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change....".

For example, in the USA case of Matter of Marcelo Tenorio, Judge Philip Leadbetter granted asylum to Marcelo Tenorio, a Brazilian gay man, because his sexual orientation was an immutable characteristic, which he could not change. In handing the decision in Matter of Marcelo Tenorio, Judge Philip Leadbetter wrote: "sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change." Clearly, Judge Philip Leadbetter's decision in Matter of Marcelo Tenorio, indicated that same-sex oriented persons have no control over their sexual orientation, and even if they did, they should not be required to change because it is fundamental to their identity. Similarly, in the UK, in *HJ (Iran)* and *HT (Cameroon)* Lord Hope emphasized on the particular social group criterions in *Matter of Acosta* and *Canada v Ward* when he stated at paragraph 11 that:

The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a characteristic that may be revealed, to a greater or lesser degree; by the way the members of the group behave. In that sense, because it manifests itself in behavior, it is less immediately visible than a person's race. But, unlike a person's religion or political opinion, it is incapable of being changed.

Lord Hope's statement above seems to place emphasis on basis that same-sex oriented persons are a particular social group because same-sexuality is an innate or unchangeable characteristic. This has also been the approach of courts in the USA and Canada. All

[16] Douglas Janoff, *'Pink blood: Homophobic violence in Canada'* (University of Toronto, 2005)

[17] Yarma Vargas, 'The commodification of sexuality: A critical analysis of queer eye' (PhD thesis, Florida State University 2008)

[18] Ellen Greenblatt, 'Exploring LGBTQ online resources' in William Miller, Rita Pellen (eds), *Evolving Internet Reference Resources* (Haworth Information, 2006),p.87

[19] Aaron Ponce, 'Shoring up judicial awareness: LGBT refugees and the recognition of social categories' *New England Journal of International and Comparative law* 18 (2012),pp.185-204

Deborah Anker, Sabi Ardalan, 'Escalating persecution of gays and refugee protection: comment on queer cases make bad law' *New York University Journal of International Law and Politics* 44 (2011-2012),pp.531-557

Arwen Swink, 'Queer Refuge: A review of the role of country condition analysis in asylum adjudicators for members of sexual minorities' *Hastings International & Comparative Law Review* 29 (2005-2006),pp.251-266

[20] 19 I&N December 211, 232 (Board of Immigration Appeal 1985)

[21] 19 I&N December 211, 232 (Board of Immigration Appeal 1985)

[22] 19 I&N December 211, 232 (Board of Immigration Appeal 1985)

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three jurisdictions namely USA, Canada and UK lay particular emphasis on the innateness of same-sexuality, thus not relying on the criterion that same-sex oriented persons are a social group because same-sexuality is fundamental to their identity. While courts in the USA, Canada and UK seem to grant same-sex oriented persons that same-sexuality is unchangeable, the theories on sexual orientation seem to be of the contrary.

Part III

III. Non-Discrimination Under International Human Rights Law

a) International Law

Non-discrimination has been and continues to be important in the advancement of international human rights. Its origins can be traced to the system of minorities protection established after World War I under the umbrella of the League of Nations. Before 1945, the United Nations predecessor, the League of Nations, emphasized the issue of non-discrimination in the Minorities Treaties when it insisted that the State not only grant special rights to minorities in order to preserve their ethnic religious or linguistic integrity, but also guarantee non-discrimination against minorities. Although the Minorities was an important step in guaranteeing human rights, the treaties was useless when it came to enforcement. The League Council, the body charged with enforcing the various minority treaties- failed to act upon complaints from minorities accused of disloyalty towards their post-war government. The problems with the Minorities Treaties became more evident with Hitler's rise to power in Germany, which led to the abuse of protection mechanisms of the League of Nations by the Nazis.[23] Apart from a lack of enforcement, the Minorities Treaties was limited in scope in two ways. Firstly, it only dealt with non-discrimination in matters concerning minorities, and secondly, only applied to certain countries. [24] Despite the criticisms of the Minorities Treaties, and also that it only provided protection to people belonging to a minority race, language or religion, Skogly maintains that the idea that non-discrimination was dealt with by the League of Nations at an early stage should be appreciated, as it shows that scholars were dealing with the issue of non-discrimination before the coming into being of the League of Nations successor, the United Nations.[25]

b) United Nations Charter

The United Nations which replaced the League of Nations sought not to make the same mistakes as its predecessor by having a wider scope of protection. In order to achieve this, the United Nations adopted the concept of equality rather than the protection of minorities.[26]A concept which in general guarantees non-discrimination and the equality of everyone. The United Nations foundational treaty[27] drawn up at San Francisco emphasizes non-discrimination as one of its principal objective. The delegate from Chile, Hernan Santa Cruz, in the Third Committee went so far as to say that the 'United Nations Organization' had been founded principally to combat discrimination in the world.[28]The Preamble of the UN Charter emphasizes non-discrimination when it speaks of equal rights of 'men and women and of nations large and small'. [29] The emphasis of non-discrimination can also be found in the UN Charter under Articles 13(1)b, 55(c) and 76 (c). For example, Under Article 13(1)b the UN Charter speaks of the promotion of:

international co-operation in the economic, social, cultural, educational , and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[30]

Such statement under Article 13(1)b makes it clear that the concept of non-discrimination is unambiguous and well enshrined in the UN Charter.

However, despite the unambiguous nature of non-discrimination in the UN Charter, Zwitter maintains that the UN Charter did not establish an immediate obligation of non-discrimination because the related terms 'human rights' and 'fundamental freedoms' had not been defined at that time.[31] Nonetheless, according to Zwitter the terms which were subsequently defined by the Universal Declaration of Human Rights, [32] guaranteed that the principle of non-discrimination evolved into a full legal obligation for on the basis of the UN Charter alone.[33]

[23] Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate, 2007),p.27

[24] Such treaties with minority treatment guarantees were signed between "the Victorious Principal Allied and Associated Powers" and Poland, Czechoslovakia, the Serb Croat Slovene State (Yugoslavia), Romania, Greece, Austria, Bulgaria, Hungary and Turkey. Similar obligations were assumed by Albania, Estonia, Latvia, Lithuania and Iraq upon their admission to the League of Nations.

[25] Sigrun Skogly, 'Article 2' in Gudmundur Alfredsson, and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinuss Nijhoff, 1999), p.76

[26] Rhona Smith, '*International Human Rights'* (OUP, 2003),p.28

[27] Herafter, UN Charter

[28] Daniel Moeckli, '*Human Rights and Non-Discrimination in the War on Terror'* (OUP,2008),p.62

[29] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 23 September 2013]

[30] Ibid, Article 13(1)b UN Charter

[31] Andrej Zwitter, '*Human Security, Law and the Prevention of Terrorism'* (Routledge, 2011),p.93

[32] Hereafter UDHR

[33] Andrej Zwitter, 'Human Security, Law and the Prevention of Terrorism' (Routledge, 2011),p.93

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c) International human rights instruments

A cocktail of international human rights instruments dealing with the issue of non-discrimination exists under the auspices of the United Nations. These international instruments include the UDHR, International Covenant on Civil and Political Rights,[34], International Covenant on Economic, Social and Cultural Rights,[35]

d) Universal Declaration of Human Rights

The UDHR, despite not being a treaty and does not give rise to international legal obligations, elaborates on the UN Charter's principle of non-discrimination. The principle of non-discrimination in the UDHR is given a central place in Article 2 and 7. According to Article 2 of the UDHR:

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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.[36]

Article 7 of the UDHR states that:

All are equal before the law and are entitled without any discrimination to equal protection of the law.All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[37]

Although Article 2 and 7 use non-discrimination in different ways, they are both intertwined in the sense that both Articles rest on the bedrock of equality. However, the only difference is while Article 2 stipulates non-discrimination in general terms; Article 7 prohibits discrimination in specific situations. Like Article 7, several Article contained in the UDHR also contain a prohibition of discrimination in specific situations.[38]

e) International Covenants

Like the UN Charter and the UDHR, the principle of non-discrimination is embedded in two important international covenants namely the ICCPR and the ICESCR. The ICCPR contains a principal clause (Article 26) which provides the most extensive provision of non-discrimination. Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[39]

To further restate the universality of non-discrimination, the Human Rights Committee, the body responsible for monitoring the implementation of the ICCPR, in its *General Comment No 15*[40] stated that the principle of non-discrimination must be extended to citizens and aliens. [41]The *General Comment No 15*, which is largely based on the principle of non-discrimination emphasizes on the equality of aliens and nationals in respect but not limited to the right to liberty of movement, choice of residence, right of peaceful assembly and right to practice their own religion. Placing further emphasis on non-discrimination, the Human Rights Committee stated that:

There shall be no discrimination between aliens and citizens in the application of these rights.[42]

However, while the *General Comment No 15* makes it clear that rights be extended aliens and citizens without discrimination, there is an exception to the rule. Article 25 of the ICCPR which contains political rights does not apply to Aliens. Likewise, Article 13 of the ICCPR which stipulates the expulsion of aliens, only when a decision has been reached by law, does not apply to citizens. Nevertheless, the *General Comment No 15* maintains that even when the expulsion of an alien arises, considerations should be given to whether there would be inhumane treatment in the aliens homeland, and more importantly, if discrimination towards the alien would arise.[43]

The principle of non-discrimination is made known to be of central importance in the ICCPR, inthat Article 3 obligates states party to the convention, to ensure that there is an enjoyment of civil and political rights between both men and women without discrimination. To further illuminate that the ICCPR was born on the bedrock of guaranteeing non-discrimination, numerous Articles under the ICCPR such as Article 20(2), [44] Article 24(1), [45] Article 26 [46] contain specific reference to the term discrimination.

[34] Hereafter ICPPR
[35] Hereafter ICESCR
[36] Article 2, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
[37] Article 7, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
[38] *See*, UDHR , Articles 4, 10, 16, 18, 21, 23 and 26
[39] Article 26, International Covenant on Civil and Political Rights, 16 December 1966
[40] UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: http://www.refworld.org/docid/45139acfc.html [accessed 24 September 2013]
[41] Ibid,p.1
[42] Ibid,p.2
[43] Ibid,p.1
[44] 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

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Likewise, the ICESCR also guarantees non-discrimination, and contains general and specific clauses on the issue of non-discrimination. Similar to Article 2(1) of the ICCPR,[47]a basic obligation towards States parties to ensure and guarantee non-discrimination towards is enshrined under Article 2(2) ICESR which states that:

States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The 'or other status' wording in Article 2(2) ICESR indicates that that the prevention of non-discrimination is not restricted to protected statuses such as race or sex, it is open ended as to the grounds of discrimination. Emphasis on non-discrimination and clarifications of Article 2(2) ICESR are provided by the UN Committee on Economic, Social and Cultural Rights,[48]in its *General Comment No 20*.[49] The CESR maintains that not only is non-discrimination is a fundamental component of human rights law, the rights recognition of everyone is expressly recognized by the ICESR.[50] According to the CESR, these human rights, and non-discrimination extends to same-sex oriented persons. This is because, the 'or other status' enshrined in Article 2(2) ICESR, includes sexual orientation.[51]Additionally, in other to place emphasis that sexual orientation is a recognized right. The CESR not only obliges states to ensure that a person's sexual orientation is not a barrier to realizing the ICESR, in two of its *General Comments*;[52] they explicitly include sexual orientation as a protected status.

f) Treaties in Specific Field

Even though the UN Charter, UDHR, ICCPR and ICESR touch on the issue of non-discrimination, there exists treaties in specific field which places significance on non-discrimination. This specific treaties include but not limited to the International Convention on the Elimination of All Forms of Racial Discrimination, [53] and the International Convention on the Elimination of All Forms of Discrimination Against Women. [54] Both the ICERD and CEDAW place obligations on States to guarantee non-discrimination in respect to race and women respectively.

Article 2 of ICERD obliges:

State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races…

Article 2 of CEDAW encourages:

States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women…

From the Articles above, alongside the UN Charter, UDHR, ICCPR and ICESR it is apparent that the principle of non-discrimination runs like through international human rights treaties.

g) Non-discrimination (Refugee context)

In specific refugee context, the principle of non-discrimination is provided for in Article 3 of the 1951 Refugee Convention, which states that:

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

Compared to international human rights instruments such as ICCPR and ICESR, Article 3 of the 1951 Refugee Convention, which appears to be pretty straightforward seems restrictive, as it appears to only guarantee non-discrimination only on the basis of three grounds namely, race, religion and country of origin. Article 3's restriction is also clearly highlighted by Hathaway in his work; *The Rights of Refugees under International Law.* According to Hathaway, the exclusion of discrimination on the grounds of race, sex, language, or religion, appears to be surprising because, the drafters of the 1951 Refugee Convention made a clear expression to conform to the UN Charter.[55]Therefore, to not include grounds such as race, sex, language and religion in Article 3 of the 1951 Refugee Convention,[56] raises eyebrows.

[45] 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

[46] All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[47]Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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

[48] Hereafter CESR

[49] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: http://www.refworld.org/docid/4a60961f2.html [accessed 25 September 2013]

[50] Ibid, p.1

[51] Ibid, p.10

[52] *See* CESCR General Comments Nos. 14 and 15

[53]Hereafter, ICERD

[54] Hereafter, CEDAW

[55] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb.3, 1950, at 11

[56] James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005),pp254-255

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However, the restrictiveness of Article 3 of the 1951 Refugee Convention appears to not matter, given Article 26 of the ICCPR. As all persons are entitled to non-discrimination and equal protection of the law, when Article 26 of the ICCPR is taken together with Article 3 of the 1951 Refugee Convention;

The Contracting States shall apply the provisions of the Refugee Convention to refugees without discrimination as to any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Subsequently, Article 26 of the ICCPR has essentially ensured that refugee protection is extended to groups such as same-sex oriented persons seeking asylum.

h) Meaning of Non-discrimination

According to Smith, today, discrimination is used as an unfair, unreasonable, unjustifiable, or arbitrary distinction which applies to any act or conduct which denies to individuals equality of treatment with other individuals because they belong to a particular groups in society.[57] Smith's definition of discrimination translates into the different treatment of people who are the same. This concept of treating people in the same manner is a central component of international human rights.

Although the principle of non-discrimination is at the heart of international human rights law, and virtually every human right instrument includes a non-discrimination clause, there is no universal definition of non-discrimination in international human rights law. Even the UN Charter which lays down the general principles of non-discrimination does not afford a definition as to what discrimination means. Similarly, discrimination is left undefined in the ICCPR and ICESCR, but the definition is elucidated in Treaties in specific fields. Under Article 1of CERD, racial discrimination is described as:

…any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CEDAW, which prohibits discrimination against women, under its Article 1, uses specific words such as distinction, exclusion, restriction or preference, as contained under Article 1 of CERD. The Human Rights Committee maintained that although the CERD and CEDAW deal with discrimination on specific grounds, the Committee believes that discrimination:

Should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[58]

The Human Right Committee's statement above and the definition of discrimination in the CERD and CEDAW similar reference to 'distinction', 'exclusion' and 'restriction' appears to indication non-discrimination entails a prohibition of differential treatment.

i) Difference in treatment on the basis of sexual orientation

Based on the interpretation and definition of discrimination by the Human Right Committee and in CERD and CEDAW, it indicates that for same-sex oriented persons to meet the 'distinction', 'exclusion' and 'restriction' criteria, when it shows that there is:

- Difference in practice, law and policy that makes a difference between heterosexuals and same-sex oriented persons.

Therefore, practices, laws and policies which fail to treat the interests of heterosexuals and lesbians and gay men, and thereby creating a difference in treatment, creates a distinction between heterosexuals and same-sex oriented persons in violation of international human rights. For instance, countries such as Iran and Zimbabwe which criminalize same-sexuality, creates a distinction between heterosexuals and lesbian and gay men, particularly in relation to sexual conducts. Other distinctions in relation to heterosexuality and same-sexuality include the violation of rights of same-sex oriented persons in respect to:

- Right to life (States such as Iran apply the death penalty to same-sexuality)
- Right to freedom of torture or cruel, inhuman or degrading treatment (In States such as Zimbabwe, police practices infringe on rights of same-sex oriented persons during arrests and in detentions)

Other rights violations experienced and endured by same-sex oriented persons include but not limited to the right to form a family, right to work and education, which are all rights guaranteed to heterosexuals.

We have seen that the UN Charter, UDHR, ICCPR and ICESCR all deal with human rights based on the principles of non-discrimination. The UN Charter and all other international human rights instruments do not speak of rights being innate/immutable and fundamental to identity, as stated in *Matter of Acosta*[59] and *Canada v Ward.*[60]

Although non-discrimination is not defined in the UN Charter and the UDHR the specific treaties such as CERD and CEDAW unpack discrimination to mean

[57] Rhona Smith, *'International Human Rights'* (OUP, 2003),p.185

[58] *See* The Human Rights Committee General Comment No.18

[59] 19 I&N Dec.211, 232 (BIA 1985)

[60] [1993] 2 SCR 689

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'distinction', 'exclusion' and 'restriction.' Therefore, the principle of non-discrimination under international human rights law is simply based on the non preferential treatment of people of persons and the need to protect and respect people's entitlement to equality. Therefore, what non-discrimination is not, are the protected categories used in interpreting a particular social group in *Matter of Acosta*[61] and *Canada v Ward*.[62]The US and Canadian courts adopt a shallow understanding of non-discrimination by translating it to mean innate/immutable and fundamental to identity.

An interpretation of non-discrimination, which is bigger than that of the US and Canadian interpretation is offered by Yoshino in his book entitled *Covering*. According to Yoshino

The aspiration of civil rights has always been to permit people to pursue their human flourishing without limitation based on bias. Focusing on law prevents us from seeing the revolutionary breadth of that aspiration, as law has limited civil rights to particular groups…it is only when we leave the law that civil rights suddenly stops being about particular groups and starts to become a project of human flourishing in which we all have a stake.[63]

Apart from Yoshino's view that our traditional views of civil rights are too limiting, what Yoshino's statement above reveals is that, non-discrimination reconceived as an entitlement to equality should actually mean not just protected categories, but should be the right of anyone to define his life in a way that is most natural to him/her, so long as it doesn't hurt others. As previously mentioned, this is by far a bigger and most correct understanding of non-discrimination as the US and Canadian interpretation.

In agreement with Yoshino's view, both the UN Charter and the UDHR when dealing with non-discrimination, relate it to the enjoyment of fundamental human rights without distinction. What the drafters of both the UN Charter and the UDHR did not do is translate non-discrimination into protected categories as done by the US and Canadian courts in interpreting membership of a particular social group.

To buttress this argument that non-discrimination relates to the enjoyment of fundamental human rights, the preamble of the UN Charter states that of its aim is:

To reaffirm faith in the fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women.[64]

Additionally, non-discrimination which is also reflected in Article 1(3) of the UN Charter makes reference to fundamental freedoms, and treatment without distinctions. Similarly, the UDHR, which like the UN Charter is referenced in the preamble of the Refugee Convention, does not pack discrimination into categories. Instead, the UDHR, in Article 2 (1) and 7 of its provision, deals with the issue of non-discrimination in respect to the enjoyment of fundamental human rights without distinction, and the equality of everyone before the law. Therefore, it is evident that the UDHR and the UN Charter unpack non-discrimination to mean the ability to enjoyment fundamental human rights without hindrance, so long it does not cause harm to others.

Hence, on the basis of the meaning of non-discrimination in international human rights law, it is evident that while the US, Canadian and UK courts got it right that the interpretation of membership of a particular social group should be anchored to the principle of non-discrimination, their translation of non-discrimination into the categories of innateness and fundamental to identity, is not in accordance with the meaning of non-discrimination under international human rights law. Therefore, on the basis of this error by the US, Canadian and UK courts, it can be argued that they had the right approach in interpreting a particular social group, but the result of their approach was incorrect. Subsequently, the US, Canadian courts, while they think they got it right, have been using the wrong interpretation of the principle of non-discrimination in adjudging refugee claims brought under the Convention ground, membership of a particular social group

Finally, in relation to refugee claims based on sexual orientation, based on the true meaning of non-discrimination in international human rights law, the correct approach in interpreting membership of a particular social group ought not to be that same-sex oriented persons are entitled to asylum because their sexuality is innate or fundamental to identity, but rather, they are entitled to asylum because they are excluded, and restricted from enjoying their fundamental human rights guaranteed under international human rights law. Therefore, interpreting a particular social group, based on the meaning of non-discrimination under international human rights:

Particular social groups are people or persons treated as distinct, excluded and restricted from the enjoyment of their civil rights, which neither causes damage, nor a significance nuisance to others.[65]

This definition would ensure the protection of same-sex oriented persons when courts look into the extent to which same-sex oriented persons are excluded and restricted in any particular society.

[61] 19 I&N Dec.211, 232 (BIA 1985)
[62] [1993] 2 SCR 689
[63] Kenji Yoshino, '*Covering. The hidden assault on our civil rights*' (Random house, 2006),p.195
[64] UN Charter, Preamble
[65] *See* Braimah Tim S. (2014) Utilizing the Convention grounds of religion and political opinion in same-sex oriented asylum claims, *International Journal of Refugee Law,* p.7

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Part IV

IV. Recommendations

The following recommendations are offered as possible ways in determining refugee claims based on sexual orientation.

a) Religion/Political opinion

After soliciting stories regarding their ordeals from same-sex oriented persons, the Convention grounds religion and political opinion should be considered first hand. This is because, in most societies were same-sex oriented persons flee from, there is always a religious or political motive responsible for their persecution. In relation to utilizing the Convention ground of religion and political opinion in same-sex oriented asylum claims, the key is to examine the religious and political motivation of the persecutor.[66]

b) Membership of a Particular Social Group

The next step is to consider whether same-sex oriented persons lodging asylum claims are a particular social group. According to the definition of a particular social group presented in this article, based on the meaning of non-discrimination in international human rights law:

Particular social groups are people or persons treated as distinct, excluded, restricted from the enjoyment of freedom, which neither causes damage, nor a significant nuisance to others.

From this definition, the key to establishing same-sex oriented asylum seekers as a particular social group is to consider the level same-sex oriented persons are restricted, excluded and treated as distinct from enjoying their fundamental human rights.

How this elements of non-discrimination (distinction, exclusion and restriction) can be used to adjudged same-sex oriented asylum claims are explained below.

I. Distinction: (Difference in treatment) has the claimant been treated differently on several occasions because of his/her behavior or identity. Difference in treatment alone would satisfy a particular social group, but would not guarantee asylum. This is because differential treatment may not constitute serious harm.

II. Restriction: has the claimant been restricted through the implementation of unjust laws. Restriction would satisfy a particular social group. However to be granted asylum, there has to be evidence of enforced restriction. I.e. the passage of laws criminalizing same-sexuality would not guarantee asylum. However, if those laws are enforced in terms of imprisonment and death penalty, then it may be enough to guarantee asylum.

III. Exclusion: which involves the total denial of freedom is the most severe of all three elements of non-discrimination. Exclusion may involve situations such as same-sex oriented persons not having access to employment, housing and participation in society. Evidence of exclusion would both constitute a social group and qualification for asylum.

c) Evidence

Finally, applicant's evidence of persecution should be checked whether there is that there is serious risk of harm if returned home. Nonetheless, if there are issues regarding the evidence presented the level of distinction, restriction and exclusion of same-sex oriented persons from where the same-sex oriented applicant flees from should be accessed.

[66] Ibid

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