

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

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8

9 **Abstract**

10 In his article titled: Divorcing sexual orientation from religion and politics: Utilizing the
11 Convention grounds of religion and political opinion in same-sex oriented asylum claims,
12 Braimah argues that of the two approaches in interpreting membership of a particular social
13 group, the *ejusdem generis* interpretation appears to be more suitable than the social
14 perception approach. This is because; the latter is based on the principles of
15 non-discrimination, which is in line with the object and purpose of the Convention.
16 Nonetheless, while the US courts in *Matter of Acosta* got it right that the interpretation of a
17 particular social group should be anchored to non-discrimination, what they got wrong is
18 what nondiscrimination was translated into. The US courts by translating non-discrimination
19 into innateness/ fundamental to identity deviated from the actual meaning of
20 nondiscrimination in international law. It is against this backdrop that this article focuses on
21 researching the meaning of nondiscrimination in international law to define a particular social
22 group. The contribution of this article to the field of international refugee law is of two folds.

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24 **Index terms—**

25 **1 Introduction**

26 Nonetheless, while the US courts in *Matter of Acosta* got it right that the interpretation of a particular social
27 group should be anchored to non-discrimination, what they got wrong is what non-discrimination was translated
28 into. The US courts by translating non-discrimination into innateness/fundamental to identity deviated from
29 the actual meaning of nondiscrimination in international law. It is against this backdrop that this article focuses
30 on researching the meaning of nondiscrimination in international law to define a particular social group. The
31 contribution of this article to the field of international refugee law is of two folds. First, it provides a definition
32 of a particular social group, based on the actual meaning of non-discrimination in international law. Second
33 and lastly, it provides how decision makers can use the definition in deciding asylum cases made on the basis of
34 orientation.

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

41 In an article, 3 Braimah asserted that of the two approaches in interpreting a particular social group, ejusdem
42 generis is more suitable because it is based on the principles on non-discrimination, because it is in line with the
43 object and purpose of the Convention. ?? However, while the US Court in Matter of Acosta 5 3 See Braimah
44 Tim S. Utilizing the Convention grounds of religion and political opinion in same-sex oriented asylum claims,
45 International Journal of Refugee Law ??Forthcoming) got it right that the interpretation of a particular social
46 group should be anchored to non-discrimination, what they got wrong is what they translated non-discrimination
47 into (innate/fundamental to identity). The major problem with the current interpretation of ejusdem generis is
48 the fact that no test can be developed from the definition. Thus refugee awarding countries have focused largely
49 on issues such as credibility in denying asylum claims. Therefore, the main objective of this article is to provide
50 a definition of a particular social group based on the principles of non-discrimination in International Human
51 Rights Law. Additionally, the article provides how the definition of a particular social group, can be utilized in
52 interpreting refugee claims based on sexual orientation.

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

60 Part i II.

61 **2 Terminology a) Talking about same-sex oriented refugees**

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

68 Many different terms are used to describe same-sex oriented persons, some with offensive associations. Using
69 terms properly is an important way of treating people with respect and advancing an informed debate on the
70 issue. Terminology is a difficult problem when dealing with the group discussed in this article. It is especially
71 challenging because people who are same-sex oriented do not agree on terminology, so it is possible to offend
72 people simply by using the wrong word. Here, I will attempt to set forth the terminology I use in this article.
73 Firstly, it is important to understand the meaning of the term sexual orientation as it is an integral part of this
74 article. At first glance, the term appears relatively straightforward, but it is a term which has no agreed upon
75 definition. According to Ragins, "the very definition of sexual orientation has changed considerably over the
76 past 50 years". ?? Sexual orientation is understood to refer to each person's capacity for profound emotional,
77 affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or
78 the same gender or more than one gender.

79 Ragins' statement reveals that there is an ongoing search to find a single agreed definition of sexual orientation
80 that scholars, scientists, policy-makers and others who have an interest in defining sexual orientation agree upon.
81 In this article, I adopt the definition of the Yogyakarta Principles: 7

82 The Yogyakarta Principles definition of sexual orientation was adopted because it contains a behavioral and
83 psychological aspect of sexual orientation. Hence, the definition does not focus solely The term 'homosexual' was
84 commonly found to be used more often by the judiciary and decisionmakers. Additionally, scholars such as Ghai,
85

86 In the refugee literature, different terms are used to refer to same-sex oriented refugees. The popular terms
87 found include: homosexuals, sexual minorities, queers and Lesbian Gay Bisexual Transgender (LGBT).

87 **3 11**

88 McGhee 12 and Rory 13 also refer to same-sex oriented persons fleeing persecution as 'homosexual refugees'.
89 I opt not to use the term homosexual in this article because it is a clinical term which has connotations of
90 perversion and sickness. Also, the term appears to be offensive and unacceptable to members of the samesex
91 oriented community. The term homosexual, first coined by Hungarian doctor, Karl Maria Benkert in the mid-
92 nineteenth century, was first used to express ignorance and intolerance towards same-sex relations between men.
93 ??4 Another term which was commonly found to be used in the refugee literature was 'sexual minorities'. 15
94 8 Lesbian: describes a woman whose personal identity is based on her primary orientation toward an enduring
95 sexual, affectional, or romantic attraction to other women 9 Gay: describes a man whose personal identity is
96 based on his primary orientation toward an enduring sexual, affectional, or romantic attraction to other men
97 (Although gay is sometimes used to refer to both same-sex oriented men and women, for this study gay is only
98 used as a reference to same-sex oriented men) Nicole Laviolette, 'The immutable refugees: Sexual orientation
99 in Canada (A.G.) v Ward' Toronto Faculty Law Review 1 (1997),pp.1-41 I choose not to use the term sexual
100 minorities for two main reasons. Firstly, the term sexual minority has a discriminatory tone to it. For many

101 individuals in the same-sex oriented community, the term 'minority' itself denotes that same-sex oriented persons
102 are not part of the society. Second, since the term sexual minorities has generally come to include transgendered
103 persons, it is unsuitable to the use the term in this article as this study focuses only on sexuality and not gender.

104 The term queer has also been used to refer to same-sex oriented persons in a variety of studies. ??6 Originating
105 in the 16th century, the term was used to refer to individuals who were strange, odd and were of questionable
106 character. 17 I choose not to use the term queer in this article for a number reasons. Firstly, some same-sex
107 oriented persons see the term as a derogatory slur which can incite violence. ??8 Another term that is commonly
108 found in refugee literature, used to address same-sex oriented persons is the acronym LGBT.

109 Secondly, depending on the generation to which a person belongs, the term can be viewed as faddish slang by
110 those who do not accept it. The acronym LGBT which stands for Lesbian, Gay, Bisexual and Transgender, is a
111 common term which many individuals of the same-sex oriented community use to refer to themselves. However, I
112 choose not to use the acronym LGBT in this article because of the presence of the word Bisexual and transgender.
113 I use the terms same-sex oriented, same-sex orientation, and lesbians and gay men, bearing in mind that they
114 may not be the term of choice for many people who regard themselves as attracted to those of the same sex.

115 **4 Part ii**

116 Eiusdem generis is a canon of construction which says that:

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

120 The interpretation of ejusdem generis was introduced to international refugee law in the US case of Matter
121 of Acosta. In interpreting the nebulous convention ground membership of a particular social group based on
122 ejusdem generis, the US Court in Matter of Acosta 21 looked at the relationship of the other convention grounds
123 namely, race, religion, nationality, and political opinion. Two of the four Convention ground, race and nationality,
124 are things that one cannot change. The other two Convention ground, religion and political opinion are both
125 changeable, but are so fundamental to identity that one not to change to be safe. So the US Courts in Matter
126 of Acosta 22 Lord Hope's statement above seems to place emphasis on basis that same-sex oriented persons are
127 a particular social group because same-sexuality is an innate or unchangeable characteristic. This has also been
128 the approach of courts in the USA and Canada. All concluded that:

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

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

144 The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a
145 characteristic that may be revealed, to a greater or lesser degree; by the way the members of the group behave.
146 In that sense, because it manifests itself in behavior, it is less immediately visible than a person's race. But,
147 unlike a person's religion or political opinion, it is incapable of being changed. three jurisdictions namely USA,
148 Canada and UK lay particular emphasis on the innateness of same-sexuality, thus not relying on the criterion that
149 same-sex oriented persons are a social group because same-sexuality is fundamental to their identity. While courts
150 in the USA, Canada and UK seem to grant same-sex oriented persons that same-sexuality is unchangeable, the
151 theories on sexual orientation seem to be of the contrary.

152 **5 Part III III.**

153 Non-Discrimination Under International Human Rights Law a) International Law Non-discrimination has been
154 and continues to be important in the advancement of international human rights. Its origins can be traced to
155 the system of minorities protection established after World War I under the umbrella of the League of Nations.
156 Before 1945, the United Nations predecessor, the League of Nations, emphasized the issue of non-discrimination
157 in the Minorities Treaties when it insisted that the State not only grant special rights to minorities in order to
158 preserve their ethnic religious or linguistic integrity, but also guarantee non-discrimination against minorities.
159 Although the Minorities was an important step in guaranteeing human rights, the treaties was useless when it
160 came to enforcement. The League Council, the body charged with enforcing the various minority treaties-failed

161 to act upon complaints from minorities accused of disloyalty towards their post-war government. The problems
162 with the Minorities Treaties became more evident with Hitler's rise to power in Germany, which led to the abuse
163 of protection mechanisms of the League of Nations by the Nazis. ??3 Apart from a lack of enforcement, the
164 Minorities Treaties was limited in scope in two ways. Firstly, it only dealt with non-discrimination in matters
165 concerning minorities, and secondly, only applied to certain countries. 24 23 Helen O'Nions, Minority Rights
166 Protection in International Law: The Roma of Europe (Ashgate, 2007), p.27 ??4 Such treaties with minority
167 treatment guarantees were signed between "the Victorious Principal Allied and Associated Powers" and Poland,
168 Czechoslovakia, the Serb Croat Slovene State (Yugoslavia), Romania, Greece, Austria, Bulgaria, Hungary and
169 Turkey. Similar obligations were assumed by Albania, Estonia, Latvia, Lithuania and Iraq upon their admission
170 to the League of Nations.

171 Despite the criticisms of the Minorities Treaties, and also that it only provided protection to people belonging
172 to a minority race, language or religion, Skogly maintains that the idea that non-discrimination was dealt with
173 by the League of Nations at an early stage should be appreciated, as it shows that scholars were dealing with the
174 issue of non-discrimination before the coming into being of the League of Nations successor, the United Nations.
175 25 b) United Nations Charter

176 The United Nations which replaced the League of Nations sought not to make the same mistakes as its
177 predecessor by having a wider scope of protection. In order to achieve this, the United Nations adopted
178 the concept of equality rather than the protection of minorities. ??6 A concept which in general guarantees
179 nondiscrimination and the equality of everyone. The United Nations foundational treaty 27 drawn up at San
180 Francisco emphasizes non-discrimination as one of its principal objective. The delegate from Chile, Hernan
181 Santa Cruz, in the Third Committee went so far as to say that the 'United Nations Organization' had been
182 founded principally to combat discrimination in the world. ??8 The Preamble of the UN Charter emphasizes
183 nondiscrimination when it speaks of equal rights of 'men and women and of nations large and small'. ??9
184 international co-operation in the economic, social, cultural, educational, and health fields and assisting in the
185 realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or
186 religion.

187 The emphasis of non-discrimination can also be found in the UN Charter under Articles 13(1)b, 55(c) and
188 76 (c). For example, Under Article 13(1)b the UN Charter speaks of the promotion of: 30 However, despite
189 the unambiguous nature of non-discrimination in the UN Charter, Zwitter maintains that the UN Charter
190 did not establish an immediate obligation of non-discrimination because the related terms 'human rights' and
191 'fundamental freedoms' had not been defined at that time.

192 Such statement under Article 13(1)b makes it clear that the concept of non-discrimination is unambiguous
193 and well enshrined in the UN Charter. ??1 Nonetheless, according to Zwitter the terms which were subsequently
194 defined by the Universal Declaration of Human Rights, 32 guaranteed that the principle of non-discrimination
195 evolved into a full legal obligation for on the basis of the UN Charter alone. 33 25 Sigrun Skogly, 'Article 2'
196 in Gudmundur Alfredsson, and Asbjorn Eide (eds), The Universal Declaration of Human Rights: A Common
197 Standard of Achievement ??Martinuss Nijhoff, 1999) The UDHR, despite not being a treaty and does not give rise
198 to international legal obligations, elaborates on the UN Charter's principle of nondiscrimination. The principle of
199 nondiscrimination in the UDHR is given a central place in Article 2 and 7. According to Article 2 of the UDHR:

200 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind,
201 such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or
202 other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international
203 status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing
204 or under any other limitation of sovereignty. ??6 All are equal before the law and are entitled without any
205 discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in
206 violation of this Declaration and against any incitement to such discrimination.

207 Article 7 of the UDHR states that: 37 Article 2 stipulates non-discrimination in general terms; Article 7
208 prohibits discrimination in specific situations. Like Article 7, several Article contained in the UDHR also contain
209 a prohibition of discrimination in specific situations.

210 Although Article 2 and 7 use non-discrimination in different ways, they are both intertwined in the sense
211 that both Articles rest on the bedrock of equality. However, the only difference is while ??rticles 4, 10, 16, 18,
212 21, 23 and 26 All persons are equal before the law and are entitled without any discrimination to the equal
213 protection of the law. In this respect, the law shall prohibit any discrimination to all persons equal and effective
214 protection against discrimination on any ground such as race, colour, sex, language, religion, political or other
215 opinion, national or social origin, property, birth or other status. ??9 To further restate the universality of
216 nondiscrimination, the Human Rights Committee, the body responsible for monitoring the implementation of
217 the ICCPR, in its General Comment No 15 40 stated that the principle of non-discrimination must be extended
218 to citizens and aliens. ??1 There shall be no discrimination between aliens and citizens in the application of
219 these rights.

220 The General Comment No 15, which is largely based on the principle of nondiscrimination emphasizes on
221 the equality of aliens and nationals in respect but not limited to the right to liberty of movement, choice of
222 residence, right of peaceful assembly and right to practice their own religion. Placing further emphasis on
223 non-discrimination, the Human Rights Committee stated that: 42 However, while the General Comment No

224 15 makes it clear that rights be extended aliens and citizens without discrimination, there is an exception to
225 the rule. Article 25 of the ICCPR which contains political rights does not apply to Aliens. Likewise, Article
226 13 of the ICCPR which stipulates the expulsion of aliens, only when a decision has been reached by law, does
227 not apply to citizens. Nevertheless, the General Comment No 15 maintains that even when the expulsion of
228 an alien arises, considerations should be given to whether there would be inhumane treatment in the aliens
229 homeland, and more importantly, if discrimination towards the alien would arise. ??3 The principle of non-
230 discrimination is made known to be of central importance in the ICCPR, inthat Article 3 obligates states party
231 to the convention, to ensure that there is an enjoyment of civil and political rights between both men and women
232 without discrimination. To further illuminate that the ICCPR was born on the bedrock of guaranteening non-
233 discrimination, numerous Articles under the ICCPR such as Article 20(2), ??4 Article 24(1), ??5 Article 26 ??6
234 contain specific reference to the term discrimination.

235 Likewise, the ICESCR also guarantees nondiscrimination, and contains general and specific clauses on the issue
236 of non-discrimination. Similar to Article 2(1) of the ICCPR, ??7 The 'or other status' wording in Article 2(2)
237 ICESR indicates that that the prevention of nondiscrimination is not restricted to protected statuses such as race
238 or sex, it is open ended as to the grounds of discrimination. Emphasis on non-discrimination and clarifications
239 of Article 2(2) ICESR are provided by the UN Committee on Economic, Social and Cultural Rights, a basic
240 obligation towards States parties to ensure and guarantee nondiscrimination towards is enshrined under Article
241 2(2) ICESR which states that:

242 States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present
243 Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political
244 or other opinion, national or social origin, property, birth or other status. ??8 in its General Comment No
245 20. ??9 The CESR maintains that not only is non-discrimination is a fundamental component of human rights
246 law, the rights recognition of everyone is expressly recognized by the ICESR. ??0 According to the CESR, these
247 human rights, and non-discrimination extends to same-sex oriented persons. This is because, the 'or other status'
248 enshrined in Article 2(2) ICESR, includes sexual orientation. ??1 Additionally, in other to place emphasis that
249 sexual orientation is a recognized right. The CESR not only obliges states to ensure that a person's sexual
250 orientation is not a barrier to realizing the ICESR, in two of its General Comments; 52 45 1. Every child shall
251 have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or
252 birth, the right to such measures of protection as are required by his status as a minor, on the part of his family,
253 society and the State. they explicitly include sexual orientation as a protected status. ??6 All persons are equal
254 before the law and are entitled without any discrimination to the equal protection of the law. In this respect,
255 the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against
256 discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or
257 social origin, property, birth or other status.

258 6 47

259 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory
260 and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind,
261 such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or
262 other status ??8 State parties condemn racial discrimination and undertake to pursue by all appropriate means
263 and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding
264 among all races? Article 2 of CEDAW encourages:

265 States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means
266 and without delay a policy of eliminating discrimination against women? From the Articles above, alongside the
267 UN Charter, UDHR, ICCPR and ICESR it is apparent that the principle of non-discrimination runs like through
268 international human rights treaties.

269 In specific refugee context, the principle of nondiscrimination is provided for in Article 3 of the 1951 Refugee
270 Convention, which states that: The Contracting States shall apply the provisions of this Convention to refugees
271 without discrimination as to race, religion or country of origin.

272 Compared to international human rights instruments such as ICCPR and ICESR, Article 3 of the 1951 Refugee
273 Convention, which appears to be pretty straightforward seems restrictive, as it appears to only guarantee non-
274 discrimination only on the basis of three grounds namely, race, religion and country of origin. Article 3's restriction
275 is also clearly highlighted by Hathaway in his work; The Rights of Refugees under International Law. According
276 to Hathaway, the exclusion of discrimination on the grounds of race, sex, language, or religion, appears to be
277 surprising because, the drafters of the 1951 Refugee Convention made a clear expression to conform to the UN
278 Charter. ??5 The Contracting States shall apply the provisions of the Refugee Convention to refugees without
279 discrimination as to any ground such as race, colour, sex, language, religion, political or other opinion, national
280 or social origin, property, birth or other status. Subsequently, Article 26 of the ICCPR has essentially ensured
281 that refugee protection is extended to groups such as same-sex oriented persons seeking asylum.

282 7 h) Meaning of Non-discrimination

283 According to Smith, today, discrimination is used as an unfair, unreasonable, unjustifiable, or arbitrary distinction
284 which applies to any act or conduct which denies to individuals equality of treatment with other individuals
285 because they belong to a particular groups in society. ??7 Should be understood to imply any distinction,
286 exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion,
287 political or other opinion, national or social Smith's definition of discrimination translates into the different
288 treatment of people who are the same. This concept of treating people in the same manner is a central component
289 of international human rights.

290 Although the principle of non-discrimination is at the heart of international human rights law, and virtually
291 every human right instrument includes a nondiscrimination clause, there is no universal definition of non-
292 discrimination in international human rights law. Even the UN Charter which lays down the general principles
293 of non-discrimination does not afford a definition as to what discrimination means. Similarly, discrimination is
294 left undefined in the ICCPR and ICESCR, but the definition is elucidated in Treaties in specific fields. Under
295 Article 1 of CERD, racial discrimination is described as: ?any distinction, exclusion, restriction or preference based
296 on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing
297 the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the
298 political, economic, social, cultural or any other field of public life.

299 CEDAW, which prohibits discrimination against women, under its Article 1, uses specific words such as
300 distinction, exclusion, restriction or preference, as contained under Article 1 of CERD. The Human Rights
301 Committee maintained that although the CERD and CEDAW deal with discrimination on specific grounds, the
302 Committee believes that discrimination: 57 Rhona Smith, 'International Human Rights' (OUP, 2003), p.185 origin,
303 property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition,
304 enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. 58 i) Difference in treatment
305 on the basis of sexual orientation

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

309 Based on the interpretation and definition of discrimination by the Human Right Committee and in CERD
310 and CEDAW, it indicates that for same-sex oriented persons to meet the 'distinction', 'exclusion' and 'restriction'
311 criteria, when it shows that there is: ? Difference in practice, law and policy that makes a difference between
312 heterosexuals and same-sex oriented persons.

313 Therefore, practices, laws and policies which fail to treat the interests of heterosexuals and lesbians and
314 gay men, and thereby creating a difference in treatment, creates a distinction between heterosexuals and
315 samesex oriented persons in violation of international human rights. For instance, countries such as Iran and
316 Zimbabwe which criminalize same-sexuality, creates a distinction between heterosexuals and lesbian and gay men,
317 particularly in relation to sexual conducts. Other distinctions in relation to heterosexuality and samesexuality
318 include the violation of rights of same-sex oriented persons in respect to: ? Right to life (States such as Iran apply
319 the death penalty to same-sexuality) ? Right to freedom of torture or cruel, inhuman or degrading treatment (In
320 States such as Zimbabwe, police practices infringe on rights of same-sex oriented persons during arrests and in
321 detentions)

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

324 We have seen that the UN Charter, UDHR, ICCPR and ICESCR all deal with human rights based on the
325 principles of non-discrimination. The UN Charter and all other international human rights instruments do not
326 speak of rights being innate/immutable and fundamental to identity, as stated in Matter of Acosta 59 and
327 Canada v Ward. ??0 Although non-discrimination is not defined in the UN Charter and the UDHR the specific
328 treaties such as CERD and CEDAW unpack discrimination to mean 58 See The Human ??ights Committee
329 General Comment No.18 59 19 I&N Dec.211, 232 (BIA 1985) 60 [1993] 2 SCR 689 'distinction', 'exclusion' and
330 'restriction.' Therefore, the principle of non-discrimination under international human rights law is simply based
331 on the non preferential treatment of people of persons and the need to protect and respect people's entitlement to
332 equality. Therefore, what non-discrimination is not, are the protected categories used in interpreting a particular
333 social group in Matter of Acosta 61 and Canada v Ward. ??2 The aspiration of civil rights has always been to
334 permit people to pursue their human flourishing without limitation based on bias. Focusing on law prevents us
335 from seeing the revolutionary breadth of that aspiration, as law has limited civil rights to particular groups?it is
336 only when we leave the law that civil rights suddenly stops being about particular groups and starts to become
337 a project of human flourishing in which we all have a stake.

338 The US and Canadian courts adopt a shallow understanding of nondiscrimination by translating it to mean
339 innate/immutable and fundamental to identity.

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

342 8 According to Yoshino 63

343 To reaffirm faith in the fundamental human rights in the dignity and worth of the human person, in the equal
344 rights of men and women.

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

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

354 To buttress this argument that nondiscrimination relates to the enjoyment of fundamental human rights, the
355 preamble of the UN Charter states that of its aim is: 64 Additionally, non-discrimination which is also reflected in
356 Article 1(3) of the UN Charter makes reference to fundamental freedoms, and treatment 61 19 I&N Dec.211, 232
357 (BIA 1985) 62 [1993] 2 SCR 689 63 Kenji Yoshino, 'Covering: The hidden assault on our civil rights' (Random
358 house, 2006),p.195 64 UN Charter, Preamble without distinctions. Similarly, the UDHR, which like the UN
359 Charter is referenced in the preamble of the Refugee Convention, does not pack discrimination into categories.
360 Instead, the UDHR, in Article 2 (1) and 7 of its provision, deals with the issue of non-discrimination in respect
361 to the enjoyment of fundamental human rights without distinction, and the equality of everyone before the law.
362 Therefore, it is evident that the UDHR and the UN Charter unpack non-discrimination to mean the ability to
363 enjoyment fundamental human rights without hindrance, so long it does not cause harm to others.

364 Hence, on the basis of the meaning of nondiscrimination in international human rights law, it is evident that
365 while the US, Canadian and UK courts got it right that the interpretation of membership of a particular social
366 group should be anchored to the principle of nondiscrimination, their translation of non-discrimination into the
367 categories of innateness and fundamental to identity, is not in accordance with the meaning of nondiscrimination
368 under international human rights law. Therefore, on the basis of this error by the US, Canadian and UK courts,
369 it can be argued that they had the right approach in interpreting a particular social group, but the result of their
370 approach was incorrect. Subsequently, the US, Canadian courts, while they think they got it right, have been
371 using the wrong interpretation of the principle of non-discrimination in adjudging refugee claims brought under
372 the Convention ground, membership of a particular social group Finally, in relation to refugee claims based on
373 sexual orientation, based on the true meaning of nondiscrimination in international human rights law, the correct
374 approach in interpreting membership of a particular social group ought not to be that same-sex oriented persons
375 are entitled to asylum because their sexuality is innate or fundamental to identity, but rather, they are entitled
376 to asylum because they are excluded, and restricted from enjoying their fundamental human rights guaranteed
377 under international human rights law. Therefore, interpreting a particular social group, based on the meaning
378 of non-discrimination under international human rights: Particular social groups are people or persons treated
379 as distinct, excluded and restricted from the enjoyment of their civil rights, which neither causes damage, nor a
380 significance nuisance to others.

381 9 Recommendations

382 The following recommendations are offered as possible ways in determining refugee claims based on sexual
383 orientation. a) Religion/Political opinion After soliciting stories regarding their ordeals from same-sex oriented
384 persons, the Convention grounds religion and political opinion should be considered first hand. This is because, in
385 most societies were same-sex oriented persons flee from, there is always a religious or political motive responsible
386 for their persecution. In relation to utilizing the Convention ground of religion and political opinion in same-sex
387 oriented asylum claims, the key is to examine the religious and political motivation of the persecutor. 66 b)
388 Membership of a Particular Social Group The next step is to consider whether same-sex oriented persons lodging
389 asylum claims are a particular social group. According to the definition of a particular social group presented
390 in this article, based on the meaning of non-discrimination in international human rights law: Particular social
391 groups are people or persons treated as distinct, excluded, restricted from the enjoyment of freedom, which
392 neither causes damage, nor a significant nuisance to others.

393 From this definition, the key to establishing same-sex oriented asylum seekers as a particular social group is to
394 consider the level same-sex oriented persons are restricted, excluded and treated as distinct from enjoying their
395 fundamental human rights. How this elements of non-discrimination (distinction, exclusion and restriction) can
396 be used to adjudged same-sex oriented asylum claims are explained below.

397 I. Distinction: (Difference in treatment) has the claimant been treated differently on several occasions because
398 of his/her behavior or identity. Difference in treatment alone would satisfy a particular social group, but would
399 not guarantee asylum. This is because differential treatment may not constitute serious harm. II. Restriction: has
400 the claimant been restricted through the implementation of unjust laws. Restriction would satisfy a particular
401 social group. However to be granted asylum, there has to be evidence of enforced restriction. I.e. the passage of
402 laws criminalizing same-sexuality would not guarantee asylum. However, if those laws are enforced in terms of
403 imprisonment and death penalty, then it may be enough to guarantee asylum.

404 66 Ibid III. Exclusion: which involves the total denial of freedom is the most severe of all three elements
405 of nondiscrimination. Exclusion may involve situations such as same-sex oriented persons not having access to
406 employment, housing and participation in society. Evidence of exclusion would both constitute a social group
407 and qualification for asylum.

408 10 c) Evidence

409 Finally, applicant's evidence of persecution should be checked whether there is that there is serious risk of harm
410 if returned home. Nonetheless, if there are issues regarding the evidence presented the level of distinction,
411 restriction and exclusion of same-sex oriented persons from where the same-sex oriented applicant flees from
should be accessed. ^{1 2 3}



Figure 1:

, 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,

Figure 2:

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:

g) Non-discrimination (Refugee context)

Figure 3:

Therefore, to not include grounds such as race, sex, language and religion in Article 3 of the 1951 Refugee Convention, 56 raises eyebrows.

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

Figure 4:

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

² 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 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

³ 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.

