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WHEN WOMEN CAN'T ESCAPE: A GENDER-SENSITIVE APPROACH TO ARBITRARY DETENTION

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INTRODUCTION

Major international human rights organizations have vigorously rallied against human rights abuses committed by states during the War on Terror. In particular, these groups have decried the arbitrary detention of suspected terrorists by Western governments and their allies in Guantanamo Bay, Abu Ghraib, and Baghram. There was widespread agreement in the international

human rights community that the war on terror did not justify derogation from the prohibition on arbitrary detention and torture.¹

Some human rights advocates have expressed concern that, in exposing the grave human rights abuses committed by some states in the War on Terror, human rights organizations have extended uncritical support towards the victims.² The advocates' concerns stem from the fact that many of the victims of arbitrary detention and torture have been, and continue to be, affiliated with reactionary groups that actively promote human rights abuses.³ In defending these individuals from the abuses committed against them, human rights organizations have glossed over the fact that many of these individuals belong to groups that are, at their very core, antithetical to human rights and dignity.⁴

The fissures among international human rights advocates were highlighted in the public dispute between Amnesty International and the former head of its Gender Unit, Gita Sahgal, who left the organization in April 2010.⁵ For months prior to her departure in April 2010, Sahgal voiced her concerns regarding Amnesty International's partnership with Cageprisoners, an organization comprising former War on Terror detainees. Cageprisoners is led by Moazzam Begg, a British citizen, who was abducted in 2002 by American and Pakistani intelligence officers.⁶ Begg, who had lived in Afghanistan since 2001, fled to Pakistan soon after the US-led bombing of the country began in 2002.⁷ Begg was held first in Bagram detention facility in Afghanistan, then detained in Guantanamo Bay until he was released by the United States in 2005.⁸ He was never charged with any terrorist-related offense or put on trial during his detention at Guantanamo Bay and Bagram.⁹

1. See, e.g., AMNESTY INT'L, GUANTÁNAMO: A DECADE OF DAMAGE TO HUMAN RIGHTS AND 10 ANTI-HUMAN RIGHTS MESSAGES GUANTÁNAMO STILL SENDS 2-3 (2011), available at <https://www.amnesty.org/en/documents/AMR51/103/2011/en/>; see also *Guantanamo, Ten Years On*, HUMAN RIGHTS WATCH (Jan. 6, 2012), <http://www.hrw.org/news/2012/01/06/guantanamo-ten-years>.

2. See, e.g., Karima Bennouna, *Why I Spoke Out On Anwar al-Awlaki*, THE GUARDIAN (Nov. 19, 2010), <http://www.theguardian.com/commentisfree/cifamerica/2010/nov/19/human-rights-usa>.

3. See *id.*

4. See, e.g., Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT'L L., 1, 39-40 (2008).

5. See Gita Sahgal, *A Statement by Gita Sahgal on Leaving Amnesty International*, 57 N.Y. REV. OF BOOKS, May 13, 2010, at 68, available at <http://www.nybooks.com/articles/archives/2010/may/13/statement-gita-sahgal-leaving-amnesty-international/>.

6. See Mark Townsend, *Gita Sahgal's Dispute with Amnesty International Puts Human Rights Group in the Dock*, THE GUARDIAN (Apr. 25, 2010), <http://www.theguardian.com/world/2010/apr/25/gita-sahgal-amnesty-international>; Jonathan Owen, *Moazzam Begg: Guantanamo Detainee's 20 Year Link with Extremists*, THE INDEPENDENT (Dec. 11, 2014), <http://www.independent.co.uk/news/uk/home-news/moazzam-begg-guantanamo-detainees-20year-link-with-extremists-9919288.html>.

7. Owen, *supra* note 6.

8. *Id.*

9. *Id.*

Sahgal was concerned by Amnesty International's partnership with a group of people who associated with a brand of religious extremism that denies basic rights to women.¹⁰ Sahgal found it particularly worrisome that Cageprisoners and Begg publicly advocated for reconciliation between Western governments and the Taliban.¹¹ Sahgal repeatedly requested internal inquiries into Amnesty International's relationship with the organization, and asked for clarification regarding Cageprisoners' current affinities with the Taliban and its ideologies.¹² These differences were not resolved and eventually Amnesty International announced that Sahgal would leave the organization.¹³

The dispute between Sahgal and Amnesty International illustrates the schism between the "male-centered" conception of human rights and the feminist challenges to that view. In partnering with Cageprisoners, Amnesty International aimed to advocate against the detention of suspected terrorists, including members of the Taliban, without any due process of the law.¹⁴ Cageprisoners is an organization of individuals who represent the victims of arbitrary detention. Both organizations view arbitrary detention as a state-imposed human rights violation that takes place in the public context of state-run detention centers and is conducted by government agents.

However, there are other forms of detention, those inflicted disproportionately on women, which do not fit easily into the paradigm of state-imposed arbitrary detention, such as the detention imposed by the Taliban on women in Afghanistan. Upon seizing power, the Taliban regime implemented gender apartheid, effectively thrusting the women of Afghanistan into a state of virtual house arrest. As Amnesty International acknowledged in several reports, women in Taliban-controlled Afghanistan virtually disappeared into their homes, as the Taliban prevented women from seeking education or employment outside the home, or even venturing outside the house without a male relative.¹⁵ Women were brutally beaten, publicly flogged, and killed for violating Taliban decrees.¹⁶

Yet, for Amnesty International the paradigmatic victims of arbitrary detention were the current or former members of Taliban who were placed inside detention centers by Western states and their allies without any due process. Women who faced similar deprivations of liberty, but in the context of the home at the hands of non-state actors, were considered to be victims of human rights violations, but of a different kind. They were viewed, correctly, as

10. See Rahila Gupta, *Double Standards on Human Rights*, THE GUARDIAN (Feb. 9, 2010), <http://www.theguardian.com/commentisfree/2010/feb/09/amnesty-sahgal-rights-row>.

11. See *id.*

12. See Townsend, *supra* note 6.

13. See Sahgal, *supra* note 5.

14. See Gupta, *supra* note 10; see also Townsend, *supra* note 6.

15. *Afghanistan: Women's Rights Are Non-Negotiable*, AMNESTY INT'L, http://www.amnestyusa.org/pdfs/aiusa_afghantoolkit.pdf (last visited Mar. 22, 2015).

16. *Campaign for Afghan Women and Girls*, FEMINIST MAJORITY FOUND. (2014), http://www.feminist.org/afghan/taliban_women.asp (last visited Mar. 22, 2015).

victims of gender discrimination; but the fact that they suffered another core human rights violation – the arbitrary deprivation of their liberty – was ignored.

In light of the Taliban's abuses against women, Gita Sahgal's challenge to Amnesty International can be framed as follows: can a person be a champion of the rights of detainees if he does not oppose the deprivation of liberty of one-half of the world's population?

Sahgal and Amnesty International split over the way human rights organizations should view arbitrary detention. Amnesty International has adopted the mainstream approach to arbitrary detention, which ignores the forms of deprivation of liberty that are more likely to impact women. By prioritizing the detention of the suspected terrorists over the detention of these women, Amnesty International and other international human rights groups have endorsed a conception of arbitrary detention that takes the male victim to be the normative subject of human rights violations.

This disagreement between Gita Sahgal and Amnesty International highlights the need for a gender-sensitive approach to arbitrary detention – one that will condemn the detention of suspected members of Taliban without due process, while acknowledging that former members of the Taliban cannot be considered champions of liberty as they belonged to a group that was responsible for arbitrarily imprisoning hundreds of thousands of women by confining them in their homes.

This paper argues that the international laws against arbitrary detention should accommodate the forms of confinement imposed on women. While the jurisprudence on women's rights in international law has created conceptual space for understanding arbitrary detention as a gender crime, a gendered perspective on the prohibition against arbitrary detention has not been accepted in international human rights treaties and international human rights tribunals.

This paper will first discuss the forms of detention that women are most likely to face. Part Two will go on to outline the current legal framework for the prohibition against arbitrary detention in international law. Part Three describes the movement for "gender mainstreaming" in international law, which calls for a gender-inclusive approach to human rights laws and institutions. Part Four will then show how current interpretations of the prohibition against arbitrary detention in international law have not taken a gender-inclusive approach. Finally, Part Five offers suggestions on how international law and institutions may adopt such an approach.

I. DETENTION OF WOMEN AND THE FORMS IT TAKES

Arbitrary detention is considered a fundamental human rights violation and under international human rights law, it is illegal.¹⁷ From a human rights

17. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 9 (Dec. 10, 1948); see also International Covenant on Civil and Political Rights art. 9, adopted on Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf> [hereinafter ICCPR].

perspective, arbitrary detention represents a core violation of human liberty. Arbitrary detention has a recognized profile. The victim of arbitrary detention is abducted by state forces, denied the opportunity to challenge the detention through legal process, and often tortured, physically and psychologically.¹⁸

At the same time, gender-based discrimination is widely condemned. International law considers discrimination based on gender to be a human rights violation.¹⁹ It is also widely recognized that such discrimination contributes to women's political and economic disempowerment.²⁰

In spite of this, the classical picture of arbitrary detention as a human rights violation fails to capture one of its most widespread forms – that experienced by women as a result of sex inequality. Countless women across the globe are imprisoned by spouses, boyfriends, family members, militias, and laws that severely restrict their freedom of movement. In these scenarios, the age-old adage of a “woman's place being in the home” is taken to its extreme conclusion, so that the home becomes a virtual prison. These forms of confinement do not fit the widely recognized profile of arbitrary detention. However, as the examples discussed below will show, the confinement's impact on victims and the motivations of the perpetrators are the same. The deprivation of liberty in these settings is caused by discrete acts of detention, but is also rooted in structural and pervasive gender inequality.

A. Forced Marriages

Sameem Ali, born in the United Kingdom to Pakistani parents of Pakistani origin, was severely beaten and abused as a child.²¹ At the age of thirteen, her family took her to Pakistan and forced her to marry a man twice her age.²² Ali returned to the United Kingdom only after she became pregnant with her first child, as her husband believed that he was more likely to acquire British citizenship with a British-born baby.²³ She remained trapped in her family home in the United Kingdom until a family friend who had come to visit helped her to escape.²⁴ A few days after she escaped, the police came to her place of

18. See U.N. Office of the High Comm'r on Human Rights, Factsheet No. 6, Enforced or Involuntary Disappearances (Rev. 3) at 1 (July 2009), <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>; see also U.N. Office of the High Comm'r on Human Rights, Factsheet No. 26, The Working Group on Arbitrary Detention, at 4, <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

19. See ICCPR, *supra* note 17, at art. 3.

20. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, Preamble, *adopted on* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf> [hereinafter CEDAW].

21. *Forced Marriage: Sameem's Story of a Wedding at 13*, BBC NEWS (Sept. 10, 2010), http://news.bbc.co.uk/local/lancashire/hi/tv_and_radio/newsid_8984000/8984304.stm.

22. *Id.*

23. *Id.*

24. *Id.*

refuge and told her that they had arrested two men who had her address and weapons in their car.²⁵ The men confessed that Ali's brother hired them to kill her.²⁶

Ali, at the age of thirteen, was a victim of a forced marriage. A forced marriage is a human rights violation that often involves the detention of women by family members to force women to marry against their will.²⁷ As documented by human rights organizations, women who are victims of forced marriages experience a number of violations, including torture, cruel, degrading, and inhuman treatment, and arbitrary detention.²⁸ Women who face forced marriages are often treated by family members in much the same way as prisoners apprehended and detained by state authorities.²⁹

In some cases, a discrete act of detention is involved where women and girls are confined by their family members and spouses to prevent their escape.³⁰ Women and girls are also put under intense mental and emotional stress if they refuse to marry the spouses family members selected for them.³¹ They are also pressured by the cultural stigma they and their families would face if they refuse to marry the selected husband.³² They may also face threats of bodily injury or even death.³³ Therefore, their freedom to escape from their situation is severely restricted even though the possibility of escape may be objectively possible.

B. Discriminatory Laws

In some countries laws keep women confined in the home. Under Taliban-controlled Afghanistan women were not permitted to leave their homes unless accompanied by a male relative.³⁴ The Taliban carried out severe reprisals against women who left their homes for jobs or an education.³⁵ Further, the Taliban prohibited physicians from treating women who were unaccompanied by close male relatives, which caused severe problems for women who do not

25. *Id.*

26. *Id.*

27. See Sara Hossain & Suzanne Turner, *Abduction for Forced Marriage: Rights and Remedies in Bangladesh and Pakistan*, INT'L FAM. L. 15 (2001), available at <http://www.soas.ac.uk/honourcrimes/resources/file55687.pdf>.

28. *See id.*

29. *See id.*; see also Anu Anand, *India's Bride Trafficking Fuelled By Skewed Sex Ratio*, THE GUARDIAN (Dec. 17, 2014), <http://www.theguardian.com/society/forced-marriage>.

30. *See* Hosain & Turner, *supra* note 27.

31. *See id.*

32. *See id.*

33. *Id.*

34. *Women in Afghanistan: The Back Story*, AMNESTY INT'L (Oct. 25, 2013), <http://www.amnesty.org.uk/womens-rights-afghanistan-history>.

35. *Id.*

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have male relatives to play this role.³⁶ Women's fear of being publicly beaten or arrested by the Taliban for being on the street discouraged many of them from even attempting to seek health care.³⁷ Women who did not possess the burqa or did not have the money to purchase it could not venture out of the home at all. Consequently, under the Taliban rule women virtually vanished into their homes.³⁸

Even after Taliban rule in Afghanistan, women continue to be imprisoned for so-called "moral crimes."³⁹ The Afghan penal system criminalizes the act of "running away from home."⁴⁰ The Afghan Supreme Court has instructed that women who escape their homes without permission are to be treated as criminals and charged with attempted adultery, a crime punishable by up to fifteen years of imprisonment.⁴¹ Women usually charged with this offense have left their homes to escape domestic violence or forced marriages.⁴²

In Saudi Arabia, women are not permitted to leave the country without the permission of a male "guardian."⁴³ They are not allowed to drive and are prevented from accessing government agencies that have not established female sections unless they have a male representative.⁴⁴ One women's rights activist, 25-year-old Loujain al-Hathloul, was arrested and detained indefinitely in December 2014 for driving a car in defiance of Saudi Arabia's ban.⁴⁵

Such laws impact the freedom of all women who are subject to them, as their effect is to confine women in the home and make their freedom of movement dependent on a male guardian. The effect of these laws is to put women under virtual house arrest in the custody of their male relatives. While the international community largely condemns such laws for being discriminatory and oppressive, international human rights law does not recognize women who are confined in the home as a result of these laws to be victims of arbitrary detention.

36. VINCENT IACOPINO ET AL., *THE TALIBAN'S WAR ON WOMEN: A HEALTH AND HUMAN RIGHTS CRISIS IN AFGHANISTAN* 8 (1998), available at https://s3.amazonaws.com/PHR_Reports/afghanistan-taliban-war-on-women-1998.pdf.

37. *Id.*

38. See AMNESTY INT'L, *supra* note 34.

39. *Afghanistan: Surge in Women Jailed for 'Moral Crimes'*, HUMAN RIGHTS WATCH (May 21, 2013), <http://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes>.

40. *Id.*

41. *Id.*

42. *Id.*

43. HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EVENTS OF 2012* 603-609 (2013), available at <http://www.hrw.org/world-report/2013/country-chapters/saudi-arabia>.

44. *Id.*

45. Tracy McVeigh, *Fears For Female Activist As Detention For Driving A Car Is Extended*, THE GUARDIAN (Dec. 14, 2014), <http://www.theguardian.com/world/2014/dec/14/fears-saudi-female-activist-detained-driving-ban-loujain-al-hathloul>.

C. Sexual Slavery During Armed Conflict

Sexual slavery is a widespread wartime practice that impacts women because of their gender. For example, during the Bosnian conflict in the 1990s, hundreds of Bosnian women were enslaved by Serbian Commanders.⁴⁶ The Serbian Commanders set up rape houses where some women were raped almost nightly for months.⁴⁷ Women also experienced sexual slavery on a large scale during the Rwandan genocide.⁴⁸ Human Rights Watch reported that women were often “subjected to sexual slavery and held collectively by a militia group or were singled out by one militia man, at checkpoints or other sites where people were being maimed or slaughtered, and held for personal sexual service.”⁴⁹ The report went on to note that “these forced ‘marriages,’ as this form of sexual slavery is often called in Rwanda, lasted for anywhere from a few days to the duration of the genocide, and in some cases longer.”⁵⁰

The UN Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practice During Armed Conflict prepared a report in 1998 on the impacts on women of slavery-like practices during armed conflict.⁵¹ The Special Rapporteur noted that women are “exposed not only to the violence and devastation that accompany any war but also to forms of violence directed specifically at women on account of their gender.”⁵² One of these forms of violence is sexual slavery. The report enumerated examples of sexual slavery during armed conflict, including the “comfort” stations that the Japanese military maintained during the Second World War and the “rape camps” in the former Yugoslavia.⁵³ The report noted that sexual slavery also encompasses situations where women and girls are forced into “marriage,” domestic servitude, or other forced labor, such as in cases documented in Rwanda and the former Yugoslavia.⁵⁴

In many instances of sexual slavery during war, the physical restrictions on women’s freedom of movement may not be apparent and it may appear that the enslaved women have the ability to escape the situation. However, in the wider context of armed conflict and violent coercion, the women may be enslaved through intimidation and fear as well as physical controls. As the Special Rapporteur’s report states, “the mere ability to extricate oneself at

46. Ian Black, *Serbs ‘Enslaved Muslim Women at Rape Camps’*, THE GUARDIAN (Mar. 21, 2000), <http://www.theguardian.com/world/2000/mar/21/warcrimes.balkans>.

47. *Id.*

48. *See generally* BINAIFER NOWROJEE, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), *available at* <http://www.hrw.org/reports/1996/Rwanda.htm>.

49. *Id.* at 1.

50. *Id.*

51. Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflicts*, U.N. Doc. E/CN.4/SUB.2/1998/13 (June 22, 1998) (by Gay J. McDougall).

52. *Id.* ¶ 7.

53. *Id.* ¶ 30.

54. *Id.*

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substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery.”⁵⁵

D. A New Approach

The practices described above highlight the need for a more complex approach to the prohibition against arbitrary detention. If the right to be free from arbitrary detention is to be upheld universally by states and human rights advocates, it must be re-interpreted to cover the practices that disproportionately impact the freedom of women. This entails that the interpretation and application of the prohibition against arbitrary detention should not be restricted to acts that comprise direct governmental involvement or state action. Further, it should include discrete acts of detention as well as the more subtle and complex restrictions on women’s movement imposed by structural gender inequality. It should also be sensitive to the notion that the mere ability to extricate oneself from custody does not negate a claim of arbitrary detention, as pressures other than the most apparent physical ones restrict the freedom of women. Where states have enacted laws or non-state actors have imposed rules that restrict the freedom of movement of women, international human rights organizations must recognize the sexist basis of these laws and reject so-called “cultural” or “religious” defenses should be rejected.

Specialist international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as provisions in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), that condemn gender discrimination would prohibit the types of conduct described above. For example, Article 23(2) of the ICCPR states, “[t]he right of men and women of marriageable age to marry and found a family shall be recognized.”⁵⁶ Further, Article 26 of the ICCPR states, “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁷ Article 3 of the CEDAW also provides, “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”⁵⁸

Despite these provisions, there is a distinct value to reinterpreting a core, human rights violation such as the prohibition against arbitrary detention to cover the human rights violations faced by women. Arbitrary detention carries

55. *Id.* ¶ 29.

56. ICCPR, *supra* note 17, at art. 23(2).

57. *Id.* at art. 26.

58. CEDAW, *supra* note 20, at art. 3.

a greater stigma than the more general prohibitions against gender discrimination.⁵⁹ When understood as instances of arbitrary detention, states are more likely to be held accountable for such human rights abuses.⁶⁰ In order to address the forms of detention experienced by women, therefore, it is crucial to integrate their women's experiences of detention into an interpretation of the human rights violation of arbitrary detention.

However, the existing international human rights framework for the prohibition of arbitrary detention does not cover the forms of detention most likely to be imposed on women.

II. EXISTING FRAMEWORK FOR THE PROHIBITION AGAINST ARBITRARY DETENTION IN INTERNATIONAL LAW

Arbitrary detention is prohibited by a range of international treaties and standards. For example, Article 3 of the UDHR states, "Everyone has a right to life, liberty and security of persons."⁶¹ Additionally, Article 13 of the UDHR states, "Everyone has the right to freedom of movement within the borders of each state."⁶² Under Article 9 of the ICCPR, "No one shall be subject to arbitrary arrest, detention and exile."⁶³ Article 15 of the CEDAW states, "State parties shall accord to men and women the same rights with regard to law relating to the movement of persons and the freedom to choose their residence and domicile."⁶⁴

Arbitrary detention is also intertwined with a range of other human rights violations, such as enforced disappearances and torture. The International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance as:

*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place a person outside the protection of the law.*⁶⁵

The former Commission on Human Rights established the Working Group on Arbitrary Detention, a specialized body to monitor cases of arbitrary

59. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2004) (discussing the importance of integrating the human rights violations faced by women into "mainstream" international human rights laws and institutions).

60. *Id.* at 1-2.

61. Universal Declaration of Human Rights, *supra* note 17, at art. 3.

62. *Id.* at art. 13.

63. ICCPR, *supra* note 17, at art. 9.

64. CEDAW, *supra* note 20, at art. 15.

65. International Convention for the Protection of All Persons from Enforced Disappearance art. 2, Dec. 20, 2006, 2716 U.N.T.S. 3. (emphasis added).

detention.⁶⁶ The Working Group on Arbitrary Detention was created to “investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.”⁶⁷

The UN Working Group has three main functions under its charter. First, the UN Working Group enforces standards set forth in the UDHR, ICCPR, and the “Body of Principles for the Protection of Persons Under Any Form of Detention or Imprisonment.”⁶⁸ The Body of Principles defines a detained person as any person deprived of personal liberty except as a result of conviction for an offense.⁶⁹ Second, the Working Group investigates individual cases of arbitrary detention.⁷⁰ It acts on information submitted in communications sent to it by the individuals directly concerned, their families or their representatives.⁷¹ A communication received by the Working Group is forwarded to the Government with an invitation to respond to the allegations.⁷² If the Working Group decides that the deprivation of liberty was arbitrary after its investigation, it renders an opinion to that effect and makes recommendations to the government.⁷³ Third, the UN Working Group on Arbitrary Detention presents an annual report to the Human Rights Council concerning its activities, reports and missions.⁷⁴ According to the methods of the Working Group, it will find that the deprivation of liberty is arbitrary if it falls into one of the following five categories:

- A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him)(Category I);
- B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21

66. See U.N. Office of the High Comm’r for Human Rights, *Working Group on Arbitrary Detention*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx> (last visited Apr. 8, 2015).

67. *Id.*

68. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

69. *Id.* at 298.

70. See Office of the High Comm’r for Human Rights, *Individual Complaints and Appeals*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx> (last visited Apr. 8, 2015).

71. *Id.*

72. *Id.*

73. *Id.*

74. See Office of the High Comm’r for Human Rights, *Annual Reports*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx> (last visited Apr. 8, 2015).

of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);

C) When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).

D) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV); and

E) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).⁷⁵

III. GENDER “MAINSTREAMING”

The international laws and procedures related to arbitrary detention assume that the paradigmatic victim of arbitrary detention is male. These laws must be reinterpreted to accommodate the distinct experiences of women. A gendered reinterpretation has its precursor in the movement for “gender mainstreaming” in international law. Before discussing a gender-sensitive approach to the law against arbitrary detention, it is worthwhile to describe the state of “gender mainstreaming” in international human rights law in general.

As scholar Hilary Charlesworth has noted, in recent years the term “gender mainstreaming” has become a mantra in international institutions.⁷⁶ The idea behind gender mainstreaming is that gender issues must be taken seriously in mainstream laws and institutions “and not simply left in marginalized, peripheral backwater of specialist women’s institutions” and specialized legal norms.⁷⁷ Gender mainstreaming is also necessary in order to ensure that violations against women’s rights are taken as seriously as the core human rights violations. Human rights abuses framed in gender-neutral terms tend to carry greater stigma than violations that are pigeonholed in distinct categories as women’s rights violations.⁷⁸

States often attempt to justify gender discrimination by providing cultural or societal explanations and asserting that an evolution of societal norms is

75. See Office of the High Comm’r for Human Rights, *supra* note 70 (emphasis added).

76. Charlesworth, *supra* note 59, at 1.

77. *Id.*

78. See *id.*

required before gender equality can be achieved.⁷⁹ Attempts by states to evade responsibility for human rights violation against women on religious or cultural grounds can be seen in the Reservations made by many state parties to the CEDAW.⁸⁰ Article 29(2) of the CEDAW permits state parties to make reservations to certain provisions when ratifying the treaty.⁸¹ States have taken advantage of this provision to make reservations to certain requirements of the CEDAW on religious and cultural grounds.

For example, Bangladesh has made a reservation to Article 2 of the CEDAW, which provides that state parties “agree to pursue by all means and without delay a policy of eliminating discrimination against women” on the grounds that it conflicts with Islamic law.⁸² Additionally, India has declared that it will comply with Articles 5(a), which calls on states to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.”⁸³ However, India’s declaration is undercut by its determination that it will continue to act in “conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.”⁸⁴ Such reservations demonstrate that many states attempt to avoid or mitigate their responsibility to comply with human rights laws that are framed in gender-specific terms by evoking religious or cultural requirements.

A seminal analysis of the insensitivity of mainstream interpretations of human rights to women’s experiences and the limitations of gender-specific human rights laws is put forth in the 1991 paper “Feminist Approaches to International Law” authored by scholars Hilary Charlesworth, Christine Chinkin, and Shelly Wright.⁸⁵ The paper posits that the traditional canon of human rights law is “cast in terms of discrete violations of rights and offers little redress in cases where there is a pervasive, structural denial of rights.”⁸⁶ As a result, international human rights law “does not deal in categories that fit the experiences of women.”⁸⁷ The paper notes that modern international law is premised on a distinction between the public and private spheres, “and the

79. See, e.g., Shiana Grieff, *No Justice in Justifications: Violence Against Women in the Name of Culture, Religion, and Tradition*, VIOLENCE IS NOT OUR CULTURE: THE GLOBAL CAMPAIGN TO STOP KILLING AND STONING WOMEN (Mar. 2010), http://www.wluml.org/sites/wluml.org/files/SKSW%20Policy%20Briefing%20Series%201_No%20Justice%20in%20Justifications_Grieff.pdf.

80. See *Declarations, Reservations and Objections to CEDAW*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Apr. 8, 2015).

81. CEDAW, *supra* note 20, at art. 29(2).

82. UN Women, *supra* note 80.

83. *Id.*

84. *Id.*

85. Hilary Charlesworth, Christine Chinkin & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

86. *Id.* at 628.

87. *Id.*

‘public’ sphere is regarded as the province of international law.”⁸⁸ Since human rights abuses inflicted on women tend to take place in private spheres at the hands of non-state actors, the “normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined.”⁸⁹

Feminist Approaches to International Law discusses the prohibition against torture as an example of a law that does not “fit the experiences of women.”⁹⁰ Terror imposed on women in armed conflict or in the form of domestic abuse at home is “not clearly included in the international definition of torture” because it is inflicted “outside the most public context of the state.”⁹¹ One reason for the exclusion of forms of suffering most likely faced by women lies in the two-pronged definition of torture. As Charlesworth *et al.* noted, “[t]he international definition of torture requires not only the intention to inflict suffering, but also the secondary intention that the infliction of suffering will fulfill a purpose.”⁹² Society does not widely recognize that violence faced by women in the form of domestic abuse or rape serves to fulfill a purpose of intimidation and subjugation and that, like torture inflicted by state officials, violence against women is political in nature as it is based on, and seeks to perpetuate, structural sex inequality.⁹³ In the absence of this understanding of the complex nature of violence against women, it was not acknowledged that domestic violence or sexual abuse satisfied the second prong of the international definition of torture. Hence, the forms of violence most likely to be inflicted on women were not considered to rise to the level of torture as defined in international law.

Since “Feminist Approaches to International Law” was published in 1991, jurisprudence on international law has made some advances towards accommodating the forms of human rights violations experienced by women. This is reflected in the movement for “gender mainstreaming.”⁹⁴ Over time, United Nations structures have attempted to integrate a gender-inclusive perspective in central human rights treaties and institutions. The Human Rights Committee, which monitors the ICCPR, has adopted General Comments on articles of the treaty that relate to the rights of women. General Comments are authoritative interpretations of provisions in the ICCPR. The most noteworthy is General Comment 28 on Equality of Rights Between Men and Women, which interprets Article 3 of the ICCPR.⁹⁵ General Comment 28, adopted in

88. *Id.* at 625.

89. *Id.*

90. *Id.* at 627-28.

91. *Id.* at 628-629.

92. *Id.* at 628.

93. *Id.* at 628.

94. See U.N. Office of the Special Adviser on Gender Issues & the Advancement of Women, *Gender Mainstreaming: An Overview*, v-vi, 1, U.N. Doc. E/GMS/01 (Jan. 2002).

95. U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 179-185, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003).

2000, explains how each of the rights set forth in the ICCPR should be interpreted and applied to address the human rights violations faced by women. The General Comment states that “[i]n order to fulfill the obligation set forth in article 3 States parties should take account of the factors which impede the equal enjoyment by women and men of each right specified in the Covenant.”⁹⁶ The UN Office of the High Commissioner for Human Rights has also reported on efforts to integrate gender into its human rights activities.⁹⁷ In addition, the Commission on Human Rights passed a resolution which:

encourages the strengthening of cooperation and coordination among all human rights treaty bodies, special rapporteurs, special procedures and other human rights mechanisms of the Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and requests that they regularly and systematically take a gender perspective into account in the implementation of their mandates.⁹⁸

Gender mainstreaming has also influenced the activities of the International Criminal Court. The Rome Statute, which established the International Criminal Court, includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” within the definition of “crime against humanity.”⁹⁹

Calls for gender mainstreaming have impacted the way international human rights groups interpret certain core human rights violations. For example, the UN Special Rapporteur on Torture put forth a gender inclusive interpretation of torture under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) in 2008.¹⁰⁰ His proposed interpretation addressed the feminist criticisms of the international definition of torture. The Special Rapporteur noted that the central role of the State in Article 1 of the CAT, which restricts the definition of torture to pain or suffering inflicted by, or at the instigation of, or with the consent and

96. *Id.* at 180.

97. See U.N. Secretary-General, *The Question of Integrating the Human Rights of Women Throughout the United Nations System: Rep. of the Secretary-General*, ESCOR 54th Sess., U.N. Doc. E/CN.4/1998/49 (Mar. 25, 1998); see also U.N. Secretary-General, *Integration of the Human Rights of Women and the Gender Perspective: Rep. of the Secretary-General*, ESCOR 60th Sess., U.N. Doc. E/CN.4/2004/64 (Mar. 5, 2004).

98. Comm. on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission*, 3, U.N. Doc. E/CN.4/1997/L.75 (Apr. 9, 1997).

99. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3.

100. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 6, Human Rights Council, U.N. Doc. A/HRC/7/3, (Jan. 15 2008) (by Manfred Nowak).

acquiescence of a public official or other person acting in an official capacity, has been used to exclude violence against women outside direct state control.¹⁰¹ However, the UN Special Rapporteur noted that that the language concerning “consent and acquiescence” by a state official clearly extends a state’s obligation into the private sphere.¹⁰² Therefore the human rights violation should be interpreted to include a state’s failure to protect persons within its jurisdiction from torture and ill-treatment by private individuals. The UN Special Rapporteur’s statement thus extends the international definition of torture to fit the forms of violence most likely to be inflicted on women.

The measures various international bodies have taken toward mainstreaming have contributed to conceptual and practical changes in the way they implement international human rights. However, the approach to gender mainstreaming adopted by UN structures faces several limitations. Primarily, human rights bodies still do not fully integrate a gender-sensitive analysis in their assessments of human rights violations. Gender mainstreaming is not discussed regularly during the annual meetings of the chairpersons of the human rights treaty bodies.¹⁰³ Where it occurs, gender mainstreaming is restricted to simply providing information on cases in which women have suffered the human rights abuse in question, without discussing the larger context of women’s position in society as a whole. As Charlesworth noted, while there may be “attention to the position of women in particular contexts, mainly in statistical terms . . . there is no attempt to understand the way in which stereotypes about sex and gender roles can affect the human right in question.”¹⁰⁴ While there are instances of more meaningful and probing efforts towards gender mainstreaming, as reflected in the activities of the Special Rapporteur on Torture, many specialized human rights bodies do not regularly consider the relationship between sex inequality and the human rights violation at issue. For example, the reports of the Special Rapporteur on Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance do not contain regular and meaningful discussions of the experiences of women with respect to the relevant rights.¹⁰⁵

Considering the trajectory described above, the success of gender mainstreaming in the international human rights field has been mixed, at best.

101. *Id.* ¶ 31.

102. *Id.*

103. See, e.g., Chairs of the Human Rights Treaty Bodies, *Report of the Chairs of the Human Rights Treaty Bodies on Their Twenty-Fifth Meeting* (2013), transmitted by *Implementation of Human Rights Instruments: Note by the Secretary-General*, Gen. Assembly 68th Sess., U.N. Doc. A/68/334 (Aug. 19, 2013).

104. Charlesworth, *supra* note 59, at 10-11.

105. See U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Reports on the Rights to Freedom of Peaceful Assembly and of Association, <http://freeassembly.net/reports>; see also U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Annual Reports to the Human Rights Council, <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/ReportsHRC.aspx>.

The superficial understanding of gender mainstreaming adopted by international human rights institutions is reflected in the approach by human rights bodies towards the prohibition against arbitrary detention, as will be discussed below.

IV. ATTEMPTS TO DEVELOP A GENDER-SENSITIVE APPROACH TO ARBITRARY DETENTION

One attempt to “gender mainstream” the prohibition against arbitrary detention can be found in General Comment 28, in which the Human Rights Committee sought to shed a gender perspective on the rights guaranteed under the ICCPR.¹⁰⁶ With respect to Article 9 of the ICCPR (the prohibition against arbitrary detention), General Comment 28 states, “States parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house.”¹⁰⁷

By requiring state parties to provide such information, the Human Rights Committee appears to consider the confinement of women in the home as a result of “laws and practices” a form arbitrary detention. This General Comment acknowledges that the arbitrary detention of women can take place outside the public context of arrest and custody by state actors, and instead take the form of confinement within the house. Notably, this General Comment also asks state parties to provide information regarding *practices* as well as laws. The Human Rights Committee thus recognizes that states are responsible for protecting women from arbitrary detention that results not only from laws, but also from social and cultural practices such as forced marriages.

However, this brief, vaguely worded General Comment does not sufficiently flesh out a gender-sensitive approach to arbitrary detention, nor does it provide states with sufficient guidance regarding the forms of gender-based detention for which they will be held accountable. One of the General Comment’s defects is that it refers to laws and practices that lead to the deprivation of liberty on an arbitrary *or unequal* basis. This ambiguous wording implies that there are some forms of detention of women that are not arbitrary, but are unequal. It is unclear how this distinction would apply to specific cases. For example, would the confinement of women in the home as a result of violent conflict be considered unequal, arbitrary, or both?

Furthermore, the General Comment does not provide any specific guidance regarding the practices that would deprive women of their liberty. Does the General Comment include cultural and religious practices? Does it encompass criminal activities such as human trafficking, which involve the detention of women?

The General Comment also cross-references the first paragraph of the Human Rights Committee’s General Comment 8, which addresses the “Right

106. See General Comment No. 28, *supra* note 95.

107. *Id.* ¶ 14.

to Liberty and Security” under the ICCPR.¹⁰⁸ However, the reference to General Comment 8 does not help develop a gender-inclusive approach to arbitrary detention. The first paragraph of the General Comment 8 states that “Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information.”¹⁰⁹ The General Comment goes on to state that the first paragraph of Article 9 is “applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”¹¹⁰

On the one hand, the General Comment 8 helps to develop a gender-sensitive approach to arbitrary detention because it states that Article 9 of the ICCPR is not limited to “criminal cases.”¹¹¹ However, the effect of this statement is mitigated by the enumerated examples of the “other cases,” which appear to relate to some sort of discrete official action. The “other cases” do not refer to structural factors or social and cultural practices that deprive women of their freedom of movement. For this reason, the reference to the General Comment 8 on arbitrary detention does not contribute towards a gender-sensitive approach to the prohibition against arbitrary detention in the ICCPR.

The lack of gender-sensitivity in the prohibition against arbitrary detention is also reflected in the activities of the UN Working Group on Arbitrary Detention. As this paper discusses in Section II, *supra*, the Working Group adjudicates individual cases of arbitrary detention and classifies cases as falling under one of five categories. Although Category V covers deprivation of liberty for reasons of discrimination, including gender discrimination, to date the UN Working Group has not issued an opinion condemning a form of arbitrary detention on the grounds that it is rooted in gender discrimination.¹¹²

One of the reasons for the Working Group’s lack of gender sensitivity lies in its focus on arrests and detentions carried out by the state. The Working Group has explicitly stated that it does not have jurisdiction over arrests and detentions carried out by non-state actors.¹¹³ However, the Working Group did hold Nigeria responsible for a detention carried out by an armed group that allegedly was not an arm of the state.¹¹⁴ In a communication addressed to Nigeria, the UN Working Group on Arbitrary Detention noted that the non-

108. U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Note by the Secretariat*, 8-9, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

109. *Id.* at 8.

110. *Id.*

111. *Id.*

112. *See infra* Part V.

113. U.N. Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, ¶ 66, U.N. Doc. E/CN.4/2005/6, (Dec. 1, 2004) (by Leïla Zerrougui).

114. United Nations, Econ. & Soc. Council, Comm’n on Human Rights, Working Group on Arbitrary Detention, *Opinions Adopted by the Working Group on Arbitrary Detention*, 26-27, U.N. Doc. E/CN.4/2001/14/add.1 (Nov. 9, 2000).

state armed group's act of detention did not "absolve the government of its responsibilities, in that it has been established . . . that the authorities knowingly tolerate this illegal situation and, further, refuse to carry out the injunctions" to release the detained individuals.¹¹⁵

The Working Group's reasoning with regards to the case from Nigeria is similar to the Inter-American Court of Human Rights' approach in the seminal case of *Velasquez-Rodriguez*.¹¹⁶ *Velasquez-Rodriguez*, which concerned events that took place in Honduras from 1981 to 1984, established state responsibility for the actions of non-state actors.¹¹⁷ In this case, the Inter-American Court of Human Rights (IACHR) considered whether the Honduran government could be held responsible for the abduction and disappearance of Honduran citizens. The IACHR found that the government "supported or tolerated" a pattern of enforced disappearances.¹¹⁸ Even though the prosecution could not establish that state actors were directly involved in the citizens' abductions and disappearances, the IACHR concluded that the government could be held liable for human rights violations through its tolerance and support for the actions of non-state actors.¹¹⁹

The UN Working Group could apply the reasoning in *Velasquez-Rodriguez* to hold states accountable for their tolerance of non-state actors' arbitrary detention of women. Governments that do not act to curb forced marriages or punish individuals engaged in sexual slavery should be held responsible for the arbitrary detention of the victims of these practices. However, the UN Working Group has not yet applied this approach to forms of detention inflicted on women.

The UN Working Group has attempted to respond to the UN Commission on Human Rights' Resolution, "Integrating the Human Rights of Women Throughout the United Nations System," in its annual reports by applying a gender-sensitive approach to its investigations of arbitrary detention.¹²⁰ The UN Working Group compiles statistics on the number of communications it receives involving the detention of women in order to fulfill its obligation to shed light on the arbitrary detention of women. In some of its annual reports, the Working Group has documented cases of women who were tortured or mistreated while they were in detention.¹²¹ The Working Group has also addressed discriminatory laws that lead to the arbitrary detention of women. For instance, the Working Group discussed the cases of women in Yemen who

115. *Id.* at 26.

116. *Velasquez Rodriguez Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988).

117. *Id.*

118. *Id.* ¶ 124.

119. *Id.* ¶ 185-188.

120. Rep. of the Working Group on Arbitrary Detention, Comm'n on Human Rights, 58th Sess., March 18-Apr. 26, 2002, U.N. Doc. E/CN.4/2002/77 (Dec. 19, 2001).

121. *See e.g., id.*

were charged with “moral” crimes but subject to longer punishment than men in similar situations.¹²²

The Working Group’s efforts have been very limited in scope, however, and reflect a superficial understanding of the meaning of gender integration within a human rights framework. Consistent with its focus on direct state action, the Working Group’s reports on women affected by arbitrary detention is limited to cases in which women were arrested and detained by state forces. The Working Group has not paid any attention to the structural and pervasive forms of detention imposed on women as a result of entrenched gender inequality in the public and private spheres.

Additionally, the Working Group has not addressed the deprivations of liberty imposed on women as a result of actions by non-state actors, such as spouses or family members, or the disparate impact of war and other forms of conflict on women’s liberty. For example, the 2001 Report of the UN Working Group to the Commission on Human Rights expressed concern that government authorities often detain female victims of human trafficking.¹²³ The report emphasized that this detention “must be supervised by a judicial authority and must in any event only be used as a last resort and when the victims themselves desire it.”¹²⁴ However, the Working Group’s report did not explore the different ways a victim’s liberty is deprived during the crime of human trafficking itself through, for example, such as the coercion and confinement the human trafficker often imposes on the victim.¹²⁵ The Working Group’s 2013 annual report only referred to women once, when it stated that women comprised 56 of the 606 detainees that required urgent appeals. Although the 2013 report contained a detailed analysis on the “scope of arbitrary deprivation of liberty under customary international law,” it did not contain any discussion of whether and to what extent the interpretation of arbitrary detention accommodates the experiences of women.¹²⁶

Furthermore, the Working Group has not addressed the effects of cultural and religious practices that lead to women’s confinement within the home and restrict their movement in public spaces. Nor has the Working Group addressed the detention of women and girls coerced into forced marriages, or of women compelled to stay at home due to discriminatory laws that curtail their movement. By adopting an approach to arbitrary detention that assumes that the

122. Rep. of the Working Group on Arbitrary Detention, Comm’n on Human Rights, 56th Sess., July 26-Aug. 13, 2004, ¶ 61, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999).

123. Working Group on Arbitrary Detention, *supra* note 120, ¶ 46.

124. *Id.* at ¶ 47.

125. *See generally* G.A. Res. 55/25, Annex II, art. 3, U.N. Doc. A/RES/55/22 (Jan. 8, 2001) (explaining that “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, *by means of the threat or use of force or other forms of coercion*, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”) (emphasis added).

126. Rep. of the Working Group on Arbitrary Detention, Human Rights Council, 22nd Sess., Feb. 25–Mar. 22, 2013, U.N. Doc. A/HRC/22/44 (Dec. 24 2012).

normative victim of this human rights violation is male, the Working Group has ignored the deprivation of liberty faced by women on account of their gender.

V. MOVING FORWARD

The Working Group has a long way to go towards adopting a gender inclusive approach to arbitrary detention. To some extent, the groundwork has been laid for such an approach. For instance, as mentioned above, the UN Commission on Human Rights' 1997 resolution called for the integration of women in all aspects of the United Nations activities.¹²⁷ Additionally, the Human Rights Committee's General Comment 28 helps push toward a gender-inclusive interpretation of the ICCPR.¹²⁸ However, the Working Group still needs to move beyond a simplistic focus on the situation of women in typical cases of arbitrary detention. The Working Group should instead engage in a deeper investigation of the impact of gender discrimination on the deprivation of women's liberty. The Working Group should adopt a more gender-inclusive approach to its work in the following ways.

First, the Working Group should issue a gender-sensitive interpretation of arbitrary detention, similar to the statement the UN Special Rapporteur on Torture issued in 2008.¹²⁹ Such a statement would analyze the forms of confinement imposed on women and suggest ways in which the generally accepted scope of arbitrary detention in international law should be reinterpreted to cover the deprivation of liberty faced by women. The Working Group should consider ways in which it can activate Category V detention, which covers deprivation of liberty due to gender discrimination, when developing this gender-sensitive interpretation. A gender-sensitive interpretation of arbitrary detention would also be useful in holding state parties responsible for imposing discriminatory laws that deprive women of their liberty or for tolerating cultural practices that limit women's freedoms.

Second, the Working Group should impute responsibility for acts of arbitrary detention by non-state actors to states, at least in cases in which the state tolerated the conduct of the non-state actor. Since the deprivation of liberty faced by women is often caused by conduct of non-state actors, it is crucial that the Working Group develop a concept of arbitrary detention that covers such conduct. As the discussion in Section IV shows, the Working Group's position with respect to the actions of non-state actors is unclear. The Working Group should clarify its position in developing a gender-inclusive interpretation of arbitrary detention.

Finally, the UN Working Group on Arbitrary Detention should investigate laws, customs, and practices that restrict the freedom of movement of women and keep them confined in the home. The Working Group should then present

127. Comm'n on Human Rights, *supra* note 98, at 4-5.

128. U.N. Secretariat, *supra* note 95.

129. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 100, ¶ 25-33.

its findings in its annual reports. It is crucial that the Working Group investigate customs and practices, such as forced marriages and domestic violence, to address the forms of arbitrary detention that women face. The Working Group should then require states to respond to queries regarding the extent to which the state has taken measures to curb such practices.

VI. CONCLUSION

A gender-sensitive approach to the prohibition against arbitrary detention would help liberate women around the world. This approach would stigmatize discriminatory laws and practices that keep women confined in the home. A gender-sensitive approach would also help resolve the type of differences that arose between Gita Sahgal and Amnesty International. If, under the international definition of arbitrary detention, women who were not permitted to leave their homes in Taliban-run Afghanistan were also considered victims of arbitrary detention, it would become clear why persons with an affiliation to the Taliban should not be considered spokespersons for the freedom of movement. A gender-sensitive approach to arbitrary detention would, therefore, reflect a more sophisticated understanding of the deprivation of liberty, taking into account the different contexts in which it arises and its disparate impact on men and women.